2018 IL App (2d) 151281-U
No. 2-15-1281
Order filed October 11, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of De Kalb County.
Plaintiff-Appellee,	)	
v.	)	No. 13-CM-1460
PATRICK W. STEGER,	)	Honorable Robert P. Pilmer,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The State failed to prove defendant guilty beyond a reasonable doubt of violating an order of protection, as it submitted no specific evidence, and the trial court took no judicial notice of any, that an order of protection was in effect at the pertinent time.

¶ 2 Defendant, Patrick W Steger, appeals from his conviction after a stipulated bench trial of violating an order of protection (720 ILCS 5/12-3.4(a) (West 2012)); he asserts that the State failed to provide evidence that an order of protection was in effect at the time of the incident prompting the charge. The State argues primarily that defendant forfeited the claim under the principles of *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984), by failing to cause the record of the

order-of-protection case to be included in the record on appeal, and secondarily that the existing record implies that an order of protection was in effect at the time of the incident. We hold that the record from the order-of-protection case could not be a proper part of the record in this appeal and that, therefore, no forfeiture occurred. We further hold that the documents before the court did not permit an inference that the order was in effect at the time of the incident. We therefore reverse the conviction.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with a count of violating an order of protection and a count of escape (730 ILCS 5/5-8A-4.1(b) (West 2012)). The escape count was based on an allegation that he had failed to comply with a condition of electronic home monitoring (EHM) that was a part of his conditional release "after being charged with *** violation of the order of protection in 2013CM1188." The escape conviction is not at issue in this appeal. After delays caused by, among other things, the appointment of a special prosecutor—appointed because defendant had directed written threats at personnel of the State's Attorney's office—and a fitness evaluation, defendant agreed to a stipulated bench trial on both charges.

¶ 5 At the start of the trial, the prosecutor outlined the documents that formed the whole of the State's case:

> "It's our understanding today that the defendant's *** going to be waiving his right to a jury trial in [this case] consenting to a bench trial, and further consenting to a stipulated bench trial, in that the State would be presenting police reports in connection with this incident, as well as a copy of the order of protection in 13 OP 110 which is at issue.

> We're further asking the Court to take judicial notice of 13 CM 1188, to which there's a transcript which the defendant will be entering as their part of the evidence [(that is, the transcript of the September 20, 2013, hearing detailed below)], *and further, judicial notice of 13 OP 110, if the Court needs to follow up at all with any additional information with regard to the order of protection in 13 OP 110.*" (Emphasis added.)

¶ 6 The paper record on which the parties agreed to try the case showed that, in case No. 13-OP-110, and on August 7, 2013, the circuit court of De Kalb County entered an emergency order of protection under the Illinois Domestic Violence Act of 1986 (Act) (750 ILCS 60/101 *et seq.* (West 2012)) against defendant. The order was to expire on August 26, 2013, at 5 p.m., and a hearing on a "Plenary/Interim Order of Protection" was set for the same day at 1:30 p.m. The petitioner was D.E., who had a child in common with defendant. D.E. was a rural mail carrier who worked out of the Sycamore post office at 104 E. State Street, so the order required defendant to stay at least 500 feet from that address.

¶ 7 The record does not contain an interim order of protection. If entered, the interim order could run for no more than 30 days, which would suggest an expiration date of no later than September 25, 2013. See 750 ILCS 60/220(a)(2) (West 2012). In any event, the court entered a plenary order of protection against defendant on October 22, 2013, which was in effect for two years. Thus, the exhibits tendered for the stipulated bench trial are unclear as to whether an order of protection was in effect from August 26, 2013, to October 22, 2013. That uncertainty is greatest for the period between September 25, 2013, and October 22, 2013, which was the period after the interim order of protection would have expired, but before the entry of the plenary order.

¶ 8 On September 20, 2013, security personnel detained defendant in the courthouse. They concluded that, because defendant did not have a court date that day, his presence was a violation of the order of protection. (The courthouse is within 400 feet of the Sycamore post office.) At what seems to have been an impromptu hearing on whether defendant should be released, the court ruled that defendant had a right to visit the courthouse. It ruled that he would be permitted to do so if he notified the EHM deputy before his intended visit.

¶ 9 On October 4, 2013, at 2:56 p.m., defendant's EHM device signaled that defendant was on State Street and within 75 feet of the post office. Deputy Brad Sorenson of the De Kalb County sheriff's office questioned defendant about whether he had been in the "exclusion area"; defendant responded belligerently, but the gist of his response was that he had needed to go through the area to find courthouse parking. Sorenson's report of the conversation implied that Sorenson had given defendant a map that specified how he was to approach the courthouse. Defendant had entered areas barred to him by the map—"the exclusion zone." Additionally, officers from the Algonquin police spoke to defendant on October 8, 2013, when they executed a warrant for defendant's arrest. They reported that defendant told them that "all the streets that surround the courthouse are within the restricted zone for his GPS monitoring device due to an order of protection in which he is the respondent."

¶ 10 After taking a recess, the court described the evidence that it had considered:

> "I did have an opportunity to review the documents that have been tendered for the stipulated bench trial. That includes the police report *** involv[ing] an incident occurring on October 4th, 2013; additionally there was a supplemental report from the Algonquin Police Department that appears to be dated October 8, 2013; as well as the emergency order of protection issued on August 7, 2013; and a plenary order of

> protection issued October 22nd, 2013; and then I've also reviewed the transcript of the proceedings *** on September 20th, 2013, so I've reviewed all that, considered the agreements [*sic*] and representations of counsel in this matter."

The court did not mention using the record in the order-of-protection proceeding, case No. 13-OP-110. The court found the evidence to be sufficient to meet the State's burden of proof on both charges. Nothing in the record suggests that either party or the court believed that the existence of an order of protection on October 4, 2013, was at issue in the bench trial.

¶ 11 Defendant moved for a new trial, asserting primarily that the State had failed to show that defendant had not contacted the EHM deputy to provide advance notice that he was coming to the courthouse. The motion did contain the general claim that the "State failed to prove every material allegation of the information beyond a reasonable doubt." The court denied the motion and, after the court imposed a sentence of conditional discharge concurrent with another sentence, defendant filed a timely notice of appeal.

¶ 12 II. ANALYSIS

¶ 13 On appeal, defendant argues that the evidence tendered by the State failed to show that an order of protection was in effect on October 4, 2013. He contends that, because the court did not mention the record in case No. 13-OP-110, the order-of-protection proceeding, in an apparently exhaustive list of the evidence it considered, it did not take judicial notice of that record when it found defendant guilty in this case.

¶ 14 The State responds that it properly asked the court to take notice of the record in the order-of-protection proceeding " 'to follow up at all with any additional information with regard to the order of protection in 13 OP 110.' " It argues that, if defendant contends that *that* record

was insufficient, the rule in *Foutch* required him to have the record in case No. 13-OP-110 included in the record on appeal.

¶ 15 In reply, defendant argues that, although the State *invited* the court to take judicial notice of the record in case No. 13-OP-110, the court neither formally took notice of the record nor mentioned that it had considered it in what seemed to be a comprehensive list of the evidence it had reviewed. Noting that only documents that were before the trial court may be part of the record on appeal (*e.g.*, *Radosevich v. Industrial Comm'n*, 367 Ill. App. 3d 769, 772 (2006)), he argues not only that he did not need to supplement the record here with the record in case No. 13-OP-110, but that it would have been improper for us to allow him to do so.

¶ 16 The question here that must precede any other is whether the trial court considered the record in case No. 13-OP-110 when it found defendant guilty. This is so because, under the rule in cases such as *Radosevich*, only documents that were properly before the trial court can be a part of the record on appeal. Illinois Rule of Evidence 201 (eff. Jan. 1, 2011), concerning judicial notice, is helpful background on this point. Illinois Rule of Evidence 201(c) (eff. Jan. 1, 2011), provides that a "court *may* take judicial notice [of appropriate facts], whether [such notice is] requested or not." (Emphasis added.) By contrast, Illinois Rule of Evidence 201(d) (eff. Jan. 1, 2011) provides that a court "*shall* take judicial notice [of appropriate facts] if requested by a party *and supplied with the necessary information*." (Emphases added.) The State supplied two documents from case No. 13-OP-110: the emergency order of protection and the plenary order of protection. Thus, although the court could properly consider the full record in case No. 13-OP-110, the rules of evidence made such consideration discretionary. The court's comments on finding defendant guilty allow an extremely strong inference that it did not consider anything beyond the documents that the State directly provided; it mentioned considering all those

documents, but did not mention any other document from the record in case No. 13-OP-110. It defies common sense to suppose that the court would mention the readily available documents that it considered while neglecting to mention documents that it sought out itself. We must conclude that the court considered only the documents that the State directly made available and thus that no further documents could be included in the record on appeal.

¶ 17 The remaining issue is whether defendant's conviction may stand in the absence of specific evidence that an order of protection was in effect on October 4, 2013. The State argued this point only in oral argument, in violation of Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013). In any event, its argument fails.

¶ 18 Under the standard of *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), as adopted by *People v. Collins*, 106 Ill. 2d 237, 261 (1985), a reviewing court must reverse a conviction due to insufficient evidence when, viewing the evidence in the light most favorable to the prosecution, *no* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The reviewing court must draw all reasonable inferences from the evidence in favor of the prosecution. *People v. Hardman*, 2017 IL 121453, ¶ 37 (citing *People v. Martin*, 2011 IL 2d 109102, ¶ 15 (2009)). Nevertheless, the fact finder's decision is not conclusive. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004).

¶ 19 We cannot infer the existence of an order of protection in effect on October 4, 2013, from the existence of an emergency order of protection in effect from August 7, 2013, to August 26, 2013, and a plenary order that took effect on October 22, 2013. The Act provides for three classes of orders of protection: emergency, interim, and plenary. See 750 ILCS 60/220(a), (b) (West 2012). An emergency order can have a duration of no more than 21 days (750 ILCS 60/220(a)(1) (West 2012)), and an interim order can have a duration of no more than 30 days

(750 ILCS 60/220(a)(2) (2012)); the duration of a plenary order is the subject of more than one section and not relevant here. A court may extend an order of protection. 750 ILCS 60/220(a) (West 2012). We have no evidence of an interim order of protection entered on August 26, 2013, or on any other date, and, in any event, such an order, if entered on August 26, 2013, would have expired no later than September 25, 2013. Such an order could have been extended past that date, or a new order could have been entered on a later date. However, we have no basis to infer such a thing beyond the assumption that there were no mistakes in the management of the case. Oversights occur. One might have occurred in this prosecution when the State failed show that at order of protection was in effect; a similar oversight is no less likely in a related case.

¶ 20 The State suggested in oral argument that defendant's response to officers from the Algonquin police allows us to infer defendant's own knowledge that an order of protection was in effect. We do not deem that statement to be sufficient to support the suggested inference. The Algonquin officers reported that he told them that "all the streets that surround the courthouse are within the restricted zone for his GPS monitoring device due to an order of protection in which he is the respondent." But, according to the escape charge, the monitoring was imposed as a term of defendant's conditional release in an earlier case for violation of an order of protection. We do not know if the order of protection defendant was referring to was the same one at issue in this case. Also, defendant was certainly aware of the emergency order of protection that was issued on August 7, 2013. His statement to the police sheds no light on whether an interim order was in effect on October 4, 2013. Ultimately, the record here allows only speculation that an order was in effect, and speculation is insufficient to support a conviction.

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated, we reverse defendant's conviction.

¶ 23 Reversed.