2019 IL App (2d) 180814-U
No. 2-18-0814
Order filed September 17, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DAVID HENRY McCARTHY, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 18-CF-453 Honorable George J. Bakalis, Judge, Presiding.

PRESIDING JUSTICE BIRKETT delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not commit plain error by failing to *sua sponte* order a fitness hearing: although defendant exhibited some odd behavior, it was insufficient to raise a *bona fide* doubt about his fitness for purposes of trial; (2) the trial court properly allowed defendant to proceed *pro se*: despite some poor choices, defendant was able to participate appropriately in the proceedings; (3) the State proved defendant guilty beyond a reasonable doubt of aggravated battery, specifically that he knew that the victim was 60 or older, as such knowledge was inferable from the victim's appearance and defendant's statements to him.

¶ 2 Following a jury trial, defendant, David Henry McCarthy, was convicted of four counts of aggravated battery (720 ILCS 5/12-3.05(c), (d)(1) (West 2018)). All of the counts merged

into a count of aggravated battery of a person 60 years old or older (see *id.* § 12-3.05(d)(1)), and defendant was sentenced to two years of probation. On appeal, defendant argues that (1) the trial court should have *sua sponte* ordered an evaluation to determine defendant's fitness to stand trial; (2) the court should not have permitted him to proceed *pro se*; and (3) he was not proved guilty beyond a reasonable doubt. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On the first court date, the court told defendant that it was going to appoint an attorney to represent him. Defendant asked the court not to do this. Defendant said that he had represented himself in the past and was successful. In advising the court about defendant's criminal history, the State said that defendant was found unfit to stand trial in a domestic battery case, he was found fit in August 2017, and he was subsequently found not guilty. After the State detailed defendant's criminal history, defendant alerted the court to an error in his criminal history; bragged about how he had won the last five cases the State had brought against him; and claimed that the State and the Public Action to Deliver Shelter (PADS) group were conspiring against him. After the court again said that it would appoint an attorney to represent him, and defendant again refused such an appointment, defendant made a speedy-trial demand.

¶ 5 On the next court date, the court admonished defendant about proceeding *pro se*. Defendant indicated that, even in light of those admonishments, he still wished to proceed *pro se*. Defendant then asked for a one-week status date.

¶ 6 Over one month later, the State tendered to the court a letter from defendant's mother. In this letter, which is not part of the record on appeal, defendant's mother allegedly expressed her concern for defendant's mental health and his fitness to proceed with a trial. The State told the court that it did not have a *bona fide* doubt about defendant's fitness to stand trial. Similarly,

defendant advised the court that he had no reservations about his fitness. Defendant also advised the court that he would prefer to wear his State-issued prison jumpsuit at trial.

¶ 7 When the jury was chosen, defendant asked questions of two potential jurors about biases toward the police. One question was based on a potential juror's statement that the police helped her a great deal when her social security number was stolen. The other was based on a potential juror's statement that her husband was a friend of a police officer. Defendant also told the court that he would like to "thank and excuse" a third potential juror, who had indicated that he would try to be fair and impartial and "hoped [he] could get through the trial." When asked if the fact that defendant was representing himself would cause the potential juror not to be fair and impartial, he responded, "That part, no." The court struck that potential juror.

¶ 8 Before trial began, defendant told the court that he wanted to play a video during the trial. In that video, Cheryl Scott, a weatherperson for ABC News, allegedly phoned the police department nine minutes after defendant was arrested. Defendant claimed that Scott was calling about him, a political scientist who was a target of the Du Page County State's Attorney. Defendant asserted that this video established that his arrest, along with three others, was a set-up. Defendant explained that the government was representing a gang that, along with the local police department, was falsely accusing defendant of committing crimes. Defendant claimed that the fact that he was asked to finalize his defense before trial, witnesses were fleeing the court's jurisdiction or eluding detection, and the jail changed laundry days to his court dates further supported his position. The court told defendant that he was making no sense and denied defendant's motion to play the video during trial.

¶ 9 At trial, Ronnie Gwin testified that he was 70 years old and working for PADS on February 27, 2018. On that night, PADS was setting up sleeping cots and preparing food for

homeless people who needed aid. Defendant, whom Gwin had seen every week for six months, was one of the people seeking PADS' services.

¶ 10 Gwin heard defendant, who was sitting at a table with other people, yelling profanity. Because PADS was using the basement facilities of a church that night, Gwin asked defendant to refrain from using such language. Defendant became angry and starting yelling at Gwin, calling him, among other things, the "N" word. Defendant also yelled at Gwin to get his "Kareem Abdul-Jabbar-looking ass out of [t]here." When Gwin turned his back on defendant and began walking away from him, defendant, who was still cursing and calling Gwin names, came up behind Gwin, grabbed him by the neck, and pushed him into a folding table. The table collapsed, and Gwin fell to the floor.[1]

¶ 11 On cross-examination, defendant asked Gwin to admit that he orchestrated defendant's arrest. Gwin refused to do that. Defendant also asked Gwin about a prior incident where defendant was kicked out of the PADS group and whether Gwin whispered provocative things to PADS' clients. Gwin denied knowing anything about either of these things.

¶ 12 Heather Mesli, another PADS worker, was working the night Gwin was injured. Mesli, whose testimony was consistent with Gwin's, stated that defendant was very agitated, "almost foaming at the mouth."

¶ 13 On cross-examination, defendant asked Mesli about a tattooed man who restrained him after defendant pushed Gwin. Defendant also asked Mesli if she was paid to testify and if she saw Gwin make strange remarks to PADS' clients. Mesli denied both things.

[1] A photograph taken of Gwin after the incident was admitted at trial and is included in the record on appeal. The picture reveals that Gwin is a tall, thin, African-American man who is balding and has a gray mustache.

¶ 14 Officer Charles Brack, who arrived at the scene, testified that he heard defendant call Gwin an "Abdul Kareem Jabbar motherfucker" and refer to Gwin as the "N" word. On cross-examination, defendant asked Brack if he saw a person with gang tattoos restraining defendant when the police arrived. Brack said no. Defendant also asked Brack whether defendant allowed the police to handcuff him. Brack said yes.

¶ 15 Defendant called Officer Korbin Rome as his only witness. Defendant asked him whether he refused to question PADS' clients. Rome replied that he interviewed only people who told the police that they had seen what had happened.

¶ 16 During closing arguments, defendant attacked Gwin and Mesli's credibility by asking the jury to remember that Gwin was smiling during his testimony and Mesli glared at defendant. Defendant suggested that this showed that his arrest was not justified and that Gwin and Mesli knew that. Defendant argued that his arrest was part of a criminal conspiracy and that Gwin used his superior position with PADS to harass defendant. Defendant also asserted that the State failed to establish the "scienter requirement," meaning that defendant was "conscious of wrongdoing."

¶ 17 The jury found defendant guilty, and counsel was appointed to represent defendant. Counsel filed a motion for a new trial, arguing that the State failed to establish beyond a reasonable doubt that defendant knowingly committed the battery. The court denied the motion.

¶ 18 At sentencing, defendant told the court that no presentence investigation report was prepared, because defendant refused to be interviewed. In sentencing defendant to probation with the condition that he obtain mental health treatment, the court asserted that there was "no question in my mind that [defendant] has some mental health issues that have to be addressed and won't be addressed in the Department of Corrections."

¶ 19 At no time did defendant argue that the court should have considered his fitness to stand trial.

¶ 20 This timely appeal followed.

¶ 21 II. ANALYSIS

¶ 22 At issue in this appeal is whether (1) the trial court should have *sua sponte* ordered an evaluation to determine defendant's fitness to stand trial; (2) the court should not have permitted defendant to proceed *pro se*; and (3) defendant was proved guilty beyond a reasonable doubt. We consider each issue in turn.

¶ 23 The first issue we address is whether the court should have *sua sponte* ordered a fitness evaluation to determine defendant's fitness to stand trial. Before considering that issue, we note that defendant never challenged his fitness in the trial court, and thus the issue is forfeited on appeal. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Recognizing this, defendant argues that we may consider the issue under the second prong of the plain-error rule. We agree. See *People v. Cook*, 2014 IL App (2d) 130545, ¶ 13 ("While defendant here did not raise this issue in the trial court, the determination of fitness concerns a substantial right, making plain-error review appropriate.").

¶ 24 A defendant is presumed fit to stand trial. 725 ILCS 5/104-10 (West 2018). Fitness in this context refers to a defendant's ability to "understand the nature and purpose of the proceedings against him or to assist in his defense." *Id.* A trial court is required to *sua sponte* order an evaluation to assess a defendant's fitness to stand trial only if facts are brought to the court's attention that raise a *bona fide* doubt about the defendant's fitness to stand trial. *People v. Stephens*, 2012 IL App (1st) 110296, ¶ 90.

¶ 25 There is no universal test to be applied in cases where a defendant claims he was not fit to stand trial. *Id.* ¶ 91. Rather, each case must be evaluated based on its own unique facts and subtle nuances. *Id.* That said, courts have outlined relevant factors that a court may consider in determining whether a *bona fide* doubt about a defendant's fitness to stand trial existed. *Id.* These factors include a defendant's irrational behavior, his demeanor during trial, and prior medical opinions about the defendant's fitness to stand trial. *Id.*

¶ 26 Here, we cannot conclude that there was a *bona fide* doubt about defendant's fitness to stand trial. Although defendant exhibited some odd behavior both before and during trial, the record reflects that he was well aware of what to do during the various court proceedings. Specifically, he made a speedy-trial demand, asked for a status date, informed the court that the State made an error in reciting his criminal history, participated in *voir dire*, asked some pertinent questions during cross-examination, attacked the State's witnesses' credibility during closing argument, and argued in closing that the State failed to establish the proper mental state. All of that is paramount here. See *id.* ¶ 92 (fitness concerns a defendant's ability to function at trial and not his sanity or competence otherwise). Moreover, although the record suggests that defendant was found unfit during earlier proceedings, he was restored to fitness. Aside from that, a defendant's fitness to stand trial is fluid, meaning that a prior determination of unfitness does not mean that a defendant will be unfit in the future. *Id.* Thus, the court's prior determination that defendant was unfit to stand trial did not require the court to question his fitness to stand trial here.

¶ 27 Citing the letter from his mother and the fact that the court ordered mental health treatment as a condition of his probation, defendant argues that the court should have *sua sponte* ordered a fitness evaluation. We disagree.

¶ 28 First, the letter is not part of the record on appeal. Thus, we do not know what, if anything, defendant's mother's opinion about defendant's fitness was based upon and whether that opinion raised a *bona fide* doubt about defendant's fitness. Defendant, as the appellant, had the burden of presenting this court with a complete record. See *People v. Olsson*, 2014 IL App (2d) 131217, ¶ 14. In the absence of a complete record, we must presume that the trial court's decision not to order a fitness evaluation because of that letter was proper. See *id.*

¶ 29 Second, the mere fact that the court ordered defendant to undergo mental health treatment as part of his probation does not mean that defendant was unfit to stand trial. Indeed, a defendant can be fit to stand trial even though his mind is otherwise unsound. *People v. Washington*, 2016 IL App (1st) 131198, ¶ 76; see also *Stephens*, 2012 IL App (1st) 110296, ¶ 92.

¶ 30 Similarly, we find misplaced defendant's reliance on *Cook*. There, the trial court determined that there was a *bona fide* doubt about the defendant's fitness to stand trial and ordered the defendant to undergo a fitness evaluation. *Cook*, 2014 IL App (2d) 130545, ¶ 3. The problem in *Cook* was that, in finding the defendant fit to stand trial, the court merely accepted the parties' stipulation to the expert's ultimate conclusion about the defendant's fitness. *Id.* ¶ 20. Here, in contrast, the issue raised concerns the fact that the court never raised a *bona fide* doubt about defendant's fitness to stand trial, not the basis for an ultimate conclusion about his fitness. For these same reasons, defendant's reliance on *People v. Brandon*, 162 Ill. 2d 450, 454-55 (1994), *overruled on other grounds by People v. Mitchell*, 189 Ill. 2d 312 (2000), is also misplaced.

¶ 31 Defendant claims that *Cook* is controlling because here the parties agreed that there was no *bona fide* doubt about defendant's fitness to stand trial after the State tendered defendant's mother's letter to the court. To the extent that *Cook* applies despite procedural differences, it is

still distinguishable. Unlike in *Cook*, the court here did not essentially rubber-stamp a determination that defendant was fit. Rather, the court here considered contrary opinions about defendant's fitness and ultimately concluded that there was no *bona fide* doubt about defendant's fitness.

¶ 32 The next issue we consider is whether the court should not have allowed defendant to proceed *pro se*. In addressing this issue, we note that defendant does not take issue with the trial court's admonishments about his right to represent himself. See Ill. S. Ct. R. 401(a) (eff. July 1, 1984). Rather, relying on *Indiana v. Edwards*, 554 U.S. 164 (2008), defendant seems to argue that the fact that he, acting oddly and dressed in his State-issued prison uniform, wished to proceed *pro se* in this four-count felony case should have compelled the court to appoint counsel to represent him. We disagree.

¶ 33 At issue in *Edwards* was whether there was a mental-illness-related limitation on the scope of a defendant's right to proceed *pro se*. *Id.* at 171. In finding that it was constitutional to limit the right to represent oneself, the Court noted that a "gray-area" defendant might be fit to stand trial but unable to carry out the basic tasks needed to present his own defense without the help of counsel. *Id.* at 172, 175-76. The Court in no way mandated that a court must appoint counsel to represent a " 'gray-area' defendant" or that such a defendant must establish a higher standard of competence before he may represent himself. See *People v. Tatum*, 389 Ill. App. 3d 656, 669-70 (2009).

¶ 34 The facts defendant cites did not mandate the court to appoint counsel to represent him. As noted above, defendant appropriately participated in the court proceedings. The fact that he made poor choices in presenting his defense was simply not a basis for the court to appoint counsel to represent him. *Id.* at 671; see also *People v. Allen*, 401 Ill. App. 3d 840, 853 (2010).

¶ 35 The last issue we address is whether defendant was proved guilty beyond a reasonable doubt. When reviewing whether the State presented sufficient evidence to sustain a conviction, we must decide whether, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). A reviewing court will not retry a defendant (*id.* at 279), and it will greatly defer to the credibility determinations of the trier of fact (*People v. Ortiz*, 196 Ill. 2d 236, 259 (2001)). A guilty finding may be supported not only by the evidence but also by any reasonable inferences that may be drawn from the evidence. *Cunningham*, 212 Ill. 2d at 279-80.

¶ 36 Defendant claims that the State failed to establish beyond a reasonable doubt that he knew that Gwin was 60 years old or older. See 720 ILCS 5/12-3.05(d)(1) (West 2018). Knowledge is usually proved by circumstantial, rather than direct, evidence. *Ortiz*, 196 Ill. 2d at 260. Thus, a defendant's admission to a fact is not necessary to establish that the defendant had knowledge of that fact. See *People v. Jasoni*, 2012 IL App (2d) 110217, ¶ 20. Instead, knowledge may be established by inferences drawn from evidence of the defendant's acts, statements, or conduct, as well as the surrounding circumstances. See *People v. Trajano*, 2018 IL App (2d) 160322, ¶ 24.

¶ 37 Here, viewing the evidence in the light most favorable to the State, we must conclude that the State proved beyond a reasonable doubt that defendant knew that Gwin was 60 years old or older. Specifically, although no evidence indicated how familiar defendant was with Gwin, Gwin testified that he had worked with PADS for six months, and during that time he saw defendant once per week, or approximately 25 times.[2] On the night Gwin was injured, Gwin had

[2] 4.2 weeks multiplied by 6 months equals 25.2.

a gray mustache. Defendant likened Gwin to Abdul-Jabbar, a famous former professional basketball player who is 72 years old.[3] Like the State, we believe that the inference to draw is that defendant compared Gwin to Abdul-Jabbar and not a younger basketball player of similar appearance, like, for example, Michael Jordan, because defendant knew that Gwin was much older.[4] The jury, which had the opportunity to observe Gwin, concluded that the State proved beyond a reasonable doubt that defendant knew that Gwin was 60 years old or older. We cannot conclude that no rational trier of fact could have reached that conclusion.

¶ 38 Defendant argues that the jury found him guilty based only on the fact that he was yelling horrible things. He claims that this inflamed the jury so much that it overlooked the fact that it had to consider whether the State proved beyond a reasonable doubt that he knew that Gwin was 60 years old or older. We cannot agree. Even if the jury was angered by defendant's use of profanity, the jury was instructed that it had to consider the elements of the charges. The record contains nothing to defeat the presumption that the jury followed that instruction. See *In re Detention of* Lieberman, 379 Ill. App. 3d 585, 605 (2007).

---

[3] This court may take judicial notice of Abdul-Jabbar's age, as we can readily confirm it. See *Bank of America, NA v. Kulesza*, 2014 IL App (1st) 132075, ¶ 21; https://www.britannica.com/biography/Kareem-Abdul-Jabbar (last visited Sept. 10, 2019) [https://perma.cc/6YGB-UZH9] (Abdul-Jabbar was born on April 16, 1947, making him 72 years old today).

[4] We may take judicial notice of the fact that Jordan is 56 years old. See *Kulesza*, 2014 IL App (1st) 132075, ¶ 21; https://www.britannica.com/biography/Michael-Jordan (last visited Sept. 10, 2019) [https://perma.cc/52RC-F47L] (Jordan was born on February 17, 1963, making him 56 years old today).

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 41 Affirmed.