

NOTICE

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2014 IL App (4th) 130257-U

NO. 4-13-0257

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

September 29, 2014
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
ALAN J. DRALLE,)	No. 11CF1041
Defendant-Appellant.)	
)	Honorable
)	Robert L. Freitag,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Appleton and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed in part, reversed in part, and remanded for a new sentencing hearing, holding the trial court (1) erred by finding defendant guilty of armed violence but (2) did not err by convicting defendant of stalking.

¶ 2 In November 2011, the State charged defendant, Alan J. Dralle, with (1) armed violence based on the predicate offense of stalking (720 ILCS 5/33A-2(a) (West 2010)), and (2) stalking (720 ILCS 5/12-7.3(a)(1) (West 2010)). Following a December 2012 bench trial, the trial court found defendant guilty of both charges.

¶ 3 Defendant appeals, asserting the trial court erred by convicting him of armed violence and stalking because the State failed to prove the requisite components of those offenses. For the following reasons, we affirm in part, reverse in part, and remand for a new sentencing hearing as to defendant's stalking conviction.

¶ 4

I. BACKGROUND

¶ 5 On November 20, 2011, the State charged defendant with the following offenses. Count I alleged defendant committed armed violence, a Class X felony, in violation of section 33A-2(a) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/33A-2(a) (West 2010)), asserting that while armed with a handgun, defendant committed the offense of stalking in that "defendant on two or more occasions knowingly placed [M.A.] under surveillance and approached [M.A.] while he pointed a handgun at her which transmitted a threat of immediate bodily harm." Count II alleged defendant committed the offense of stalking, a Class 4 felony, in violation of section 12-7.3(a-3)(2) of the Criminal Code (720 ILCS 5/12-7.3(a-3)(2) (West 2010)), "in that the defendant knowingly engaged in conduct directed at [M.A.] that he knew or should have known would cause fear for her safety in that he repeatedly communicated electronically until she had his communications blocked and then approached [M.A.] at a park with a handgun pointed at her placing her in reasonable apprehension of receiving immediate bodily harm."

¶ 6 In September 2012, defendant waived his right to a jury trial and requested a bench trial. In December 2012, the case proceeded to trial, at which time the State presented the following evidence.

¶ 7 M.A. testified that in November 2011, she belonged to a dating website, PlentyofFish.com. This website allowed users to connect with other users to form friendships or romantic relationships. M.A. explained she joined the website and created a user profile in hopes of meeting someone to form a romantic relationship. Though she did occasionally connect with individuals she wanted to date, on other occasions she received messages from individuals with whom she did not wish to form a romantic relationship. In those situations, M.A. stated she

would "usually just block them" by clicking a link that prevented them from contacting her further or by sending them a message indicating she was not interested in them. She recalled blocking at least five individuals, maybe more.

¶ 8 While utilizing the website, M.A. received a message from username adralle7. M.A. told him she was not interested in pursuing a relationship, at which time he became "irate," leading her to block his communications. At trial, she identified the picture used on adralle7's profile as depicting defendant. M.A. eventually deleted her profile when she entered into a brief relationship, but subsequently created a new profile. At that time, she received a message from username builttothemax. Builttothemax, who later identified himself to her as Andrew Dralle, indicated he had previously communicated with her, but she could not recall whether they had previously communicated. Builttothemax and M.A. began communicating regularly. The profile picture for builttothemax differed from the photograph of defendant as adralle7. During this time, M.A. also received another message from adralle7 and immediately blocked him.

¶ 9 On November 20, 2011, M.A. agreed to meet builttothemax at Miller Park in Bloomington, Illinois. M.A. sent him a text message with recent pictures and a description of her vehicle so he could identify her at the park.

¶ 10 While waiting for builttothemax at the park, M.A. was sitting in her car, which she had backed into a parking spot so she could see who entered the area. She then noticed a "gentleman" walking back and forth down the road wearing a coat and face mask. He caught her attention because he "just looked out of place" and "suspicious." She then lost sight of him. Shortly thereafter, a male walked up from behind the car and approached her partially open driver's side window. When the individual began speaking, M.A. rolled her window down to better hear him. The man then demanded she turn her car off because he had a gun and pressed

the gun through the vehicle's window. M.A. responded by shoving the gun back out of the window and driving away, immediately calling police for assistance. M.A. described the individual as a "portly" white male dressed in black and wearing a half-mask that disguised the bottom portion of his face. M.A. later identified the masked individual as matching the photograph on adralle7's profile. Moreover, the coat worn by adralle7 in his photograph matched the coat worn by the masked individual.

¶ 11 Susan Brown testified, on November 20, 2011, she and her son, Steven Brown, were at Miller Park, near the parking lot where M.A. sat in her car. She observed a man running toward a car in the parking lot, pulling on a black mask as he ran. She then observed the vehicle he approached drive away, at which time she observed the man run back toward the direction from which he came. She followed the man, who had removed his mask, which allowed her to later identify him as defendant. However, she was not completely certain the individual she chose from the photo lineup was the individual she encountered at Miller Park. Susan observed the man get into a vehicle, an orange Chevrolet Aveo, and wrote down the license plate number. Steven offered testimony similar to that provided by his mother. He, however, positively identified defendant as the individual he encountered at Miller Park.

¶ 12 Officer Todd Walcott of the Bloomington police department testified he ran the license plate number provided by the Browns through a database and determined the suspect vehicle was registered to defendant. Walcott and other officers were detailed to defendant's residence. Upon arrival, Walcott noticed the Chevrolet Aveo in the driveway and discovered the engine to be warm, indicating someone had recently driven it. After police knocked on the door several times, defendant eventually answered. He was sweating profusely. When asked about

his vehicle, defendant admitted he had driven the car earlier, but he had been asleep for the past 30 minutes.

¶ 13 After admitting he owned a handgun, defendant provided the gun, unloaded, to Officer Bradley Massey. The officers took defendant into custody. Walcott then searched defendant's residence pursuant to a consent search. During the search, he recovered (1) boxes of ammunition for a .45-caliber handgun, (2) a black leather jacket, (3) a phone, and (4) a computer.

¶ 14 Detective Matthew Dick interviewed defendant. Defendant admitted he created both the adralle7 and builttothemax profiles on PlentyofFish.com. He used pictures of a friend to represent his builttothemax profile rather than a personal photograph. When he contacted M.A. from his adralle7 profile, she rejected him; however, he was unaware she had blocked him. M.A. subsequently deactivated her account for a brief period of time due to being in a relationship. Upon reactivating her account, defendant contacted M.A. from the builttothemax profile and the two started corresponding electronically.

¶ 15 Defendant admitted he and M.A. discussed meeting at Miller Park on November 20, 2011. He told police he drove to Miller Park and noticed M.A. in her vehicle. He believed she would be angry and was "going to run" when she realized he had deceived her by using an alias profile depicting another individual. Although defendant admitted driving by M.A.'s vehicle multiple times while contemplating whether he should stop to meet her, he denied returning to her vehicle on foot and pulling a weapon. Rather, he told police he went home and went to sleep because he was tired from working third shift.

¶ 16 During closing arguments, defendant asserted the State failed to prove two separate incidences of surveillance to satisfy the elements of the armed-violence charge that was

predicated upon stalking. Defendant also asserted the State failed to show two occasions where he threatened M.A. or placed her in reasonable fear for her safety.

¶ 17 The trial court found defendant guilty of both counts. Preliminarily, the court determined the predicate stalking offense in the armed-violence charge differed from the stalking charge in count II. As to the armed-violence count, the court noted the body of the indictment did not clearly delineate which stalking offense was the predicate for the armed-violence charge, but determined the language matched section 12-7.3(a-3)(2) of the Criminal Code (720 ILCS 5/12-7.3(a-3)(2) (West 2010)). After determining it was a close call, the court said the State demonstrated two separate occasions of surveillance to satisfy count I—the first when defendant drove by the car at the park, and the second when he parked the car and approached M.A.'s vehicle.

¶ 18 With respect to count II, the trial court noted that the language contained in the indictment did not match the stalking provision; however, the court concluded the lack of clarity was not a fatal defect in the indictment. In finding defendant guilty on count II, the court noted defendant deliberately deceived M.A. by communicating with her under the builttothemax profile when she had previously rejected his adrall7 profile. It went on to say that a reasonable person, M.A., would have had cause to fear defendant if she discovered he had used an alias to establish communication after being previously rejected. Defendant did not file a posttrial motion.

¶ 19 Following a February 2013 sentencing hearing, the trial court sentenced defendant to 17 years' imprisonment on count I. The court did not impose a sentence on count II. This appeal followed.

¶ 20

II. ANALYSIS

¶ 21 On appeal, defendant asserts the trial court erred by convicting him of armed violence and stalking because the State failed to prove the requisite components of those offenses.

¶ 22 Where the defendant challenges the sufficiency of the evidence, "the relevant inquiry is 'whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *People v. Nakajima*, 294 Ill. App. 3d 809, 818, 691 N.E.2d 153, 159 (1998) (quoting *People v. Brown*, 169 Ill. 2d 132, 152, 661 N.E.2d 287, 296 (1996)). A reviewing court will not overturn a defendant's conviction "unless the fact finder's verdict is so improbable, unreasonable, or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt." *Id.* at 818-19, 691 N.E.2d at 159. Where a defendant is convicted following a bench trial, this court "will respect the weight given by the trial judge to the witnesses' testimonies, their credibility and the reasonable inferences drawn from the evidence." *Id.* at 819, 691 N.E.2d at 159.

¶ 23 In this case, the facts are largely undisputed for the purposes of this appeal; however, the appeal challenges the statutory interpretation of terms contained within the stalking statute. In such an instance, this court looks to the statutory language to determine the legislature's intent. *People v. Holt*, 271 Ill. App. 3d 1016, 1020, 649 N.E.2d 571, 576 (1995). Where the statute fails to define a particular term, this court presumes the term carries its ordinary and popularly understood meaning. *Id.* We will consider the purpose of the law and apply rules of statutory construction only if we determine the statute to be ambiguous, that is, capable of two or more reasonable interpretations. *Id.*; see also *People v. Shanklin*, 329 Ill. App. 3d 1144, 1145, 769 N.E.2d 547, 548 (2002). Criminal statutes are to be strictly construed in

favor of the accused. *People v. Davis*, 199 Ill. 2d 130, 135, 766 N.E.2d 641, 644 (2002). With this standard in mind, we review defendant's convictions in turn.

¶ 24 A. Armed Violence (Count I)

¶ 25 First, defendant argues the trial court erred by finding him guilty of armed violence based on the predicate offense of stalking. Specifically, defendant asserts that the State failed to prove two separate acts of surveillance or, in the alternative, two occasions in which defendant placed M.A. in reasonable apprehension of bodily harm. Because the second inquiry resolves our analysis of this case, we will only address whether the State proved two occasions in which defendant placed M.A. in reasonable apprehension of bodily harm.

¶ 26 To prove the offense of armed violence in the present case, the State was required to show defendant, (1) while armed with a dangerous weapon, (2) committed the offense of stalking. 720 ILCS 5/33A-2(a) (West 2010). Defendant challenges only the second element; thus, we confine our analysis to whether the State proved defendant committed the predicate offense of stalking as charged in the armed-violence count.

¶ 27 In the armed-violence indictment, the State alleged defendant committed the offense of stalking "in that the defendant on two or more occasions knowingly placed [M.A.] under surveillance and approached [M.A.] while he pointed a handgun at her which transmitted a threat of immediate bodily harm." Although this count does not specify a subsection of the stalking statute, the language tracks section 12-7.3(a-3)(2) of the Criminal Code, which states,

"A person commits stalking when he or she, knowingly and without lawful justification, on at least 2 separate occasions follows another person or places the person under surveillance or any combination thereof and *** places that person in reasonable

apprehension of immediate or future bodily harm, sexual assault, confinement or restraint to or of that person or a family member of that person." 720 ILCS 5/12-7.3(a-3)(2) (West 2010).

¶ 28 The parties concede defendant's act of pointing a gun at M.A. constituted one occasion in which he placed M.A. in reasonable apprehension of immediate bodily harm. Defendant, however, asserts the statute requires at least two occasions of reasonable apprehension to support a stalking conviction under subsection (a-3)(2). In support, defendant relies upon *Nakajima*, 294 Ill. App. 3d 809, 691 N.E.2d 153, a case from this district. In *Nakajima*, this court concluded the phrase "2 separate occasions" applied not only to two occasions of following or surveillance, but also required two occasions in which the accused placed the victim in reasonable apprehension of immediate or future bodily harm. *Id.* at 819, 691 N.E.2d at 159.

¶ 29 The State asks us to reconsider our holding *Nakajima*. In so arguing, the State asserts we should afford the statute its plain and ordinary meaning, which requires only a single occasion of apprehension. We disagree.

¶ 30 In reaching its holding, the *Nakajima* court examined the differences between two subsections in the stalking statute. In now-subsection (a-3)(1), the statute requires two occasions in which the accused follows or places the victim under surveillance and "*at any time* transmits a threat of immediate or future bodily harm." (Emphasis added.) 720 ILCS 5/5/12-7.3(a-3)(1) (West 2010)). As the *Nakajima* court noted, that temporal language is absent from now-subsection (a-3)(2). "Consequently, the accused's conduct, at a minimum, must twice place the victim in reasonable apprehension" of immediate or future bodily harm. *Id.* at 819, 691 N.E.2d at 159. The court took the legislative intent into consideration in reaching its decision, focusing

not only on the wording of the statute, but also "on the 'reason and necessity for the law, the evils sought to be remedied, and the purpose to be achieved.' " *Id.* (quoting *People v. Frieberg*, 147 Ill. 2d 326, 345, 589 N.E.2d 508, 517 (1992)). We see no reason to overturn our decision in *Nakajima*. Since this court's 1998 decision in *Nakajima*, the legislature has made no substantive amendments to the statute, nor has another district contradicted this court's holding.

Accordingly, we reaffirm our decision in *Nakajima*, requiring the State to prove two occasions in which the defendant placed the victim in reasonable apprehension, as consistent with the legislature's intent.

¶ 31 In the alternative, the State asserts it proved two other occasions in which defendant placed M.A. in reasonable apprehension of bodily harm—first, when defendant engaged in electronic communications with M.A., and, second, when defendant paced behind M.A.'s car shortly before approaching her.

¶ 32 With respect to defendant's electronic communications with M.A., the State asserts defendant's actions under his adrall7 profile placed M.A. in reasonable apprehension. When M.A. first rejected defendant, she described his reaction as "irate," but provided no further details regarding the conversation. Defendant told police he accused her of basing her rejection on his looks alone and agreed she might have been offended by this statement. Following that message, M.A. blocked defendant from future communication, which meant it would appear as if her profile was simply deleted. Shortly thereafter, M.A. deactivated her account while she entered into a brief relationship. Upon reactivating her account, M.A. received additional communications from defendant, through both his builttothemax and adrall7 profiles. M.A. immediately blocked the adrall7 profile.

¶ 33 The State asserts that M.A.'s act of immediately blocking defendant's adralle7 profile demonstrates she was "distressed enough" that she acted without hesitation in blocking him again, relying on *People v. Douglas*, 2014 IL App (5th) 120155, ¶ 33, 6 N.E.3d 876. In *Douglas*, the appellate court concluded that even though 11 months elapsed between the defendant's threats to the victim, nothing in the statute required the threatening acts to occur within a set period of time. *Id.* The court held the victim was "distressed enough" to raise both threats to the police, despite the lapse in time, which was sufficient to form the basis for a stalking charge. *Id.* Contrary to the State's assertion, nothing in the record indicates M.A. was placed in reasonable apprehension of bodily harm. M.A. testified that she regularly blocked contact from individuals on PlentyofFish.com when she found them undesirable. Nothing in the record indicates defendant knew M.A.'s actual name, her address, her phone number, her e-mail address, or any other identifying information which would allow him to contact her outside of PlentyofFish.com. While she had no interest in pursuing a possible relationship with defendant, the State failed to provide evidence that would allow the trier of fact to draw the reasonable inference that defendant's contact with M.A. from his adralle7 profile gave rise to reasonable apprehension of bodily harm.

¶ 34 With respect to the State's alternative argument as to defendant pacing behind M.A.'s car, the State contends defendant's actions placed M.A. in reasonable apprehension of bodily harm. The State goes on to define "apprehension" as (1) "fear" or "anxiety" (citing Black's Law Dictionary 110 (8th ed. 2004)) and (2) "suspicion or fear" of future harm or misfortune (citing Merriam-Webster's Collegiate Dictionary 57 (10th ed. 2000)). Even applying this definition, the State fails to demonstrate defendant's pacing placed M.A. in "suspicion or fear" of future harm or misfortune or caused her anxiety.

¶ 35 M.A. testified that she noticed a masked man pacing nearby and said she found him "suspicious" and that the situation made her "aware of my surroundings." However, the evidence adduced at trial refutes the State's assertion that this conduct caused M.A. reasonable apprehension of bodily harm. Here, upon seeing a masked man nearby in the cold November weather, M.A. remained in her car, continued reading her book, and readily rolled down her window when an unknown male approached her vehicle from behind. While we understand different people react to situations and display fear or apprehension in different ways, the question is whether the trier of fact could reasonably infer M.A. experienced reasonable apprehension of bodily harm based on the evidence presented. Though M.A. believed defendant's behavior to be "weird" and "suspicious," which caused her to be more "aware of [her] surroundings," her testimony and actions demonstrate defendant's pacing did not place her in reasonable apprehension of bodily harm.

¶ 36 Because the State presented evidence of only one occasion in which defendant placed M.A. in reasonable apprehension of bodily harm —pointing the gun at her—we conclude the State failed to prove defendant committed the offense of stalking as the predicate felony for defendant's armed-violence conviction. Thus, we reverse defendant's conviction for armed violence.

¶ 37 B. Stalking (Count II)

¶ 38 Defendant next asserts the trial court erred by finding him guilty of stalking as outlined in count II of the indictment.

¶ 39 We initially note the stalking offense charged as the predicate felony for defendant's armed-violence charge in count I differs from the stalking offense alleged in count II. In count II, the State alleged defendant committed the offense of stalking under section 12-7.3(a-

3)(2) of the Criminal Code (720 ILCS 5/12-7.3(a-3)(2) (West 2010)), in that he "knowingly engaged in conduct directed at [M.A.] that he knew or should have known would cause fear for her safety in that he repeatedly communicated electronically until she had his communications blocked and then approached [M.A.] at a park with a handgun pointed at her placing her in reasonable apprehension of receiving immediate bodily harm." However, the trial court determined the language contained in count II more closely reflects subsection (a)(1), which states, "[a] person commits stalking when he or she knowingly engages in a course of conduct directed at a specific person, and he or she knows or should know that this course of conduct would cause a reasonable person to *** fear for his or her safety." 720 ILCS 5/12-7.3(a)(1) (West 2010). Applying subsection (a)(1), the court found defendant guilty of stalking. The parties agree the court applied the appropriate section, so we will not address it further.

¶ 40 To sustain a conviction under subsection (a)(1), the State must prove defendant engaged in a particular course of conduct. The stalking statute defines "course of conduct" as:

"[two] or more acts, including but not limited to acts in which a defendant directly, indirectly, or through third parties, by any action, method, device, or means follows, monitors, observes, surveils, threatens, or communicates to or about, a person, engages in other non-consensual contact, or interferes with or damages a person's property or pet. A course of conduct may include contact via electronic communications." 720 ILCS 5/12-7.3(c)(1) (West 2010).

¶ 41 In finding defendant guilty of this charge, the trial court determined a reasonable victim, such as M.A., would have had cause to fear for her safety had she known defendant used

an alias to establish communication after she previously rejected him. Thus, according to the court's ruling, defendant should have known his electronic communications with M.A. and his approaching the vehicle with a gun would have caused M.A. reasonable fear for her safety. We agree.

¶ 42 Again, the parties concede M.A. reasonably feared for her safety when defendant pointed a gun at her, which comprises one of the two acts required to constitute a "course of conduct" that caused M.A. reasonable fear for her safety under the stalking statute. The issue turns on whether defendant's electronic communications with M.A. comprised the second act that would have caused M.A. to reasonably fear for her safety.

¶ 43 Defendant argues it would be "illogical to conclude that something of which one is oblivious could be capable of causing that person fear." However, the statute only requires the State to demonstrate that defendant knew or should have known his course of conduct—*i.e.*, his deception in pretending to be someone else—would cause a reasonable person to fear for her safety. Whereas the stalking offense in count I centered on *M.A.*'s reasonable apprehension of bodily harm, the stalking provision alleged in count II turns on behavior *defendant* knew or should have known would cause M.A. to fear for her safety.

¶ 44 In this case, defendant admitted he engaged in consensual electronic communications with M.A., first through their interaction on PlentyofFish.com and later through text messages. As builttothemax, a profile which utilized the photograph of an ostensibly more handsome man, defendant told M.A. he had previously communicated with her; nevertheless, he failed to inform her that she previously rejected him on his adralle7 profile. Even after defendant and M.A. connected through his builttothemax profile, defendant again attempted to establish communication with M.A. through his adralle7 profile, at which time she immediately rejected

him for a second time. At that point, defendant knew or should have known M.A. did not wish to seek a relationship with him. He acknowledged he deceived her, in part, to determine whether she would pursue a relationship with him if he depicted himself as ostensibly more handsome.

¶ 45 Further, when questioned by police, defendant admitted he was uncertain about whether to meet M.A. because he believed she would be angry and with him and was "going to run" due to his deception. Based on this statement, defendant knew M.A. would be upset and potentially afraid when she realized he had deceived her by creating an alias account to establish contact after she had previously blocked communications with him. Moreover, M.A. recalled adralle7 was "irate" at her refusal. The fact that defendant accused M.A. of rejecting him based on his appearance, accompanied by the lengths to which he went to establish an alias account and eventually arrange a meeting with M.A., could cause a reasonable person to question defendant's motives. Defendant was aware of the deceptive nature of his conduct. Given we must consider what defendant knew or should have known, the evidence was sufficient to find defendant engaged in a course of conduct he knew or should have known would cause M.A. reasonable fear for her safety. See *Nakajima*, 294 Ill. App. 3d at 820, 691 N.E.2d at 160 (The victim "need not testify explicitly about his or her apprehension[;] [r]ather, the trier of fact may reasonably infer such apprehension from the facts and circumstances of the case."). Thus, defendant's electronic communications with M.A. constituted a second act sufficient to comprise a "course of conduct" under the stalking statute.

¶ 46 We therefore conclude the State sustained its burden in proving defendant guilty of stalking as alleged in count II. Because the trial court sentenced defendant as to count I only, which we have now reversed, we remand this case for sentencing as to count II.

¶ 47

III. CONCLUSION

¶ 48 For the foregoing reasons, we affirm in part, reverse in part, and remand the case for sentencing as to count II. As part of our judgment, because the State successfully defended a portion of this appeal, we award the State its \$75 statutory assessment against defendant as costs of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 620, 479 N.E.2d 328, 333 (1985) (citing *People v. Nicholls*, 71 Ill. 2d 166, 178, 374 N.E.2d 194, 199 (1978)).

¶ 49 Affirmed in part and reversed in part; cause remanded with directions.