FOURTH DIVISION
September 22, 2016

No. 1-14-1760

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 C5 50382
	)	
ALAN DUNCAN,	)	Honorable
	)	John Joseph Hynes,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Ellis and Justice McBride concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's conviction for aggravated domestic battery is affirmed where the evidence was sufficient to find that defendant impeded the breathing of the victim. Fines and fees order is corrected.

¶ 2 Following a bench trial, defendant Alan Duncan was convicted of aggravated domestic battery (720 ILCS 5/12-3.3(a-5) (West 2012)) and sentenced to 7 years' imprisonment. On appeal, defendant contends that his sentence should be reduced from aggravated domestic battery to domestic battery and challenges fees imposed by the trial court. We affirm as modified.

¶ 3 Defendant was charged with one count of aggravated domestic battery. The criminal information alleged that, on May 6, 2013, defendant "in committing a domestic battery, strangled Andrea Stigger, to wit: placed both hands around Andrea Stigger's neck and impeded or restricted her normal breathing, and Alan Duncan was a family or household member."

¶ 4 At trial, Andrea Stigger testified that, at approximately 8 p.m. on May 6, 2013, she was at home with her daughters Dajau and Jada, Jada's friend Mhaalij Thames, and defendant. Defendant was Dajau and Jada's father. They were eating and watching television when defendant got "upset because he was not getting respected." Defendant slapped Stigger on the right side of her face. "Everybody jumped up and in shock," at which time defendant punched Thames. Stigger, her daughters, and Thames then ran to the children's bedroom. Defendant remained outside the bedroom, where he was "still going off." Dajau ran for help. After a few minutes passed, Stigger left the bedroom to look for Dajau. She testified it was then that defendant grabbed her, pushed her onto a couch, and "was kind of choking and taking and shaking me up," with his hands around her neck. Stigger could not recall if defendant used one or both hands. She testified that she was unable to breathe normally during the altercation. Jada entered the room in which the assault was occurring and "kind of started going off." Defendant got off Stigger and ran back into the "kid's room." The police arrived thereafter. No visible marks were left on Stigger and she refused medical attention.

¶ 5 Jada Duncan testified that, on May 6, 2013, she was at home with her mother, father, sister, and friend. Defendant "got mad" because the others were "disrespecting" him. He walked over to Stigger and slapped her in the face. Jada and Thames walked towards defendant who then punched Thames in the face. Jada ordered everyone into her room. They complied. Her mother

subsequently left the room. Less than a minute after Stigger left the room, Jada left the room because she heard her mother "sound like she wasn't breathing or something," "like she couldn't really breath." She saw defendant choking Stigger. When Jada yelled, defendant got off Stigger. He left before the police arrived. Jada was unsure if defendant had one or both hands around Stigger's neck.

¶ 6 Dajau Duncan testified that, on May 6, 2013, she was watching television with her family when her father "got mad" and "hit" her mother in the face. Defendant then hit Thames. Dajau, Jada, Thames, and Stigger went to Dajau's room. Dajau then went to the neighbor's apartment for help, where she called the police. Dajau spoke to the police that evening and gave a written statement in which she indicated that she saw defendant choking Stigger. She rescinded that statement at trial, stating she did not see defendant choke her mother and she did not know why she told police that she did.

¶ 7 Officer Haak testified that, on May 6, 2013, he responded to a call indicating "domestic trouble in progress" at Stigger's residence. Once inside, he saw Stigger, Jada, Dajau, and Thames, who "were hysterical" but indicated that defendant had fled the scene. Stigger had no visible physical injuries. Haak received a call from Midlothian Police that defendant was in "Chauncey," went to that location, and placed defendant in custody.

¶ 8 The State rested and the defense made a motion for a directed verdict which the court denied.

¶ 9 Defendant testified that, on May 6, 2013, he brought food to the home where Stigger lived with his children, Jada and Dajau. Defendant did not live there. When he opened the door, he witnessed six people in a "[s]moky scene, drinking going on." He testified it was "[c]igarette

smoke with other smoke that I didn't know what kind it was. Just smoke assaulting me." He testified that while he saw no one drinking alcohol, there was "a bottle of alcohol that was half-way completed." Defendant said everybody was "giddy, happy, jolly *** in a happy, festival [sic] mood" and that he "was sad and disappointed by the conduct that was going on in my home."

¶ 10 One of Dajau's friends lit a cigarette. Defendant told him to "put that cigarette out in my home" and told the friend to leave. The friend, along with another friend of Dajau's, left. Stigger said that Thames did not have to leave. Thames then "jumped up in a defense stance" and defendant punched him because he "was scared and panicked." He and Thames were "fighting, clawing back and forth." Defendant testified that somebody else was "clawing at me, pulling at my clothes." That is when "the children, everybody" ran to the back bedroom. Defendant then "said some profanity" towards Stigger because he did not agree with the way she was raising his children. He stated that he did not hit Stigger, he did not place his hands around her neck or throat, and he ran because he thought the banging on the door was "Dajau's boyfriends" coming back. He claimed he did not know it was the police.

¶ 11 The State then called Mhaalij Thames as a rebuttal witness. Thames testified he was at his girlfriend Jada Duncan's house when he saw defendant slap Stigger. Thames "jumped up" and "took two or three steps" towards defendant. Defendant punched Thames. Thames "went unconscious for a second." He regained consciousness as he was being pushed into the back bedroom. Thames exited the bedroom and saw Jada pushing defendant to the side. He did not observe defendant have his hands around Stigger's throat. Thames gave police a handwritten statement that he did observe defendant choking Stigger but he explained at trial that he wrote

this because Jada's "mother said that is what happened and Jayda [sic] said that is what happened." Thames did not see anyone drinking alcohol that night. He did see Stigger smoking a cigarette.

¶ 12 Also in rebuttal, the State admitted defendant's prior certified conviction stemming from a second-degree murder conviction in Minnesota for impeachment purposes.

¶ 13 The court found defendant guilty of aggravated domestic battery and sentenced him to seven years' imprisonment. The court also imposed fees totaling $709.

¶ 14 On appeal, defendant first contends that the State failed to prove beyond a reasonable doubt that he impeded Stigger's breathing and, thus, his conviction should be reduced from aggravated domestic battery to domestic battery.

¶ 15 The standard of review on a challenge to the sufficiency of the evidence is whether, after reviewing 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. Brown*, 2013 IL 114196, ¶ 48. On review, all reasonable inferences from the evidence are drawn in favor of the State. *People v. Martin*, 2011 IL 109102, ¶ 15. The reviewing court will not retry the defendant or substitute its judgment for that of the trier of fact on questions involving the weight of the evidence, conflicts in the testimony, or the credibility of witnesses. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011); *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009). A defendant’s conviction will be reversed if the evidence is so improbable or unsatisfactory that there remains a reasonable doubt of the defendant’s guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009). "It follows that where the finding of guilt depends on eyewitness testimony, a reviewing court must decide whether, in view of the record, a fact finder could reasonably accept

the testimony as true beyond a reasonable doubt." *People v. Cunningham*, 212 Ill. 2d 274, 279 (2004).

¶ 16 To sustain the conviction for domestic battery, the State had to show that defendant knowingly and without legal justification caused bodily harm to or made physical contact of an insulting or provoking nature with any family or household member by any means. 720 ILCS 5/12-3.2(a) (West 2012); *People v. Martin*, 408 Ill. App. 3d 891, 894 (2011). Family or household members include persons who have or allegedly have a child in common. 725 ILCS 5/112A-3(3) (West 2012). Relevant here, domestic battery is elevated to aggravated domestic battery when the offender "strangles another individual." 720 ILCS 5/12-3.3 (a-5) (West 2012). The statute defines "strangle," in relevant part, as "intentionally impeding the normal breathing or circulation of the blood of an individual by applying pressure on the throat or neck of that individual." *Id.*

¶ 17 We find the evidence was sufficient to establish that defendant committed aggravated domestic battery beyond a reasonable doubt. Stigger testified that defendant choked her and that she was unable to breathe normally because of it. The testimony of a single witness, if positive and credible, is sufficient to sustain a conviction even if it is contradicted by the defendant. *Siguenza-Brito*, 235 Ill. 2d at 228. Further, Jada testified that she heard her mother sounding like she could not breathe and observed defendant choking Stigger, corroborating Stigger's testimony.

¶ 18 The trial court noted that it "had the opportunity to observe the credibility of the witnesses here." It noted that "Ms. Stigger testified that the defendant had his hand around her neck. And, that she couldn't breathe normally," concluding "that is impeding the normal breathing." It further noted that "defendant *** basically admitted everything that happened

***except that he denied choking and slapping [Stigger]." The court recognized that "[t]his really does become an issue of credibility of the witnesses." Having "watched the testimony" of the witnesses, it concluded, "based on the credibility of the witnesses, I find the State's witnesses to be more credible than the defendant." Credibility of the witnesses was for the trier of fact, here the trial court, to determine. *Siguenza-Brito,* 235 Ill. 2d at 228. The court could accept or reject all or part of a witness' testimony. *People v. McCarter,* 2011 IL App (1st) 092864, ¶ 22. Here, it rejected defendant's version of events.

¶ 19 We reject defendant's contention that he testified more credibly than the State's witnesses. The trial court, as trier of fact, heard defendant testify and was best equipped to judge his credibility. *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007) (credibility determinations carry great weight and "due consideration must be given to the fact that it was the trial court *** that saw and heard the witnesses."). Although defendant contradicted Stigger's version of events, his testimony does not carry a presumption of veracity and the court was not obliged to grant his testimony greater deference than the victim's testimony. *People v. Barney*, 176 Ill. 2d 69, 74 (1997). The trier of fact is not required to accept explanations that are consistent with the defendant's innocence or to disregard inferences flowing from the evidence. *People v. Jones*, 2014 IL App (3d) 121016, ¶ 19.

¶ 20 The court heard all the evidence, including the fact that Stigger had no marks on her neck, neither she nor Jada could remember whether defendant used one or two hands, and Stigger stated defendant's actions did not hurt. The court judged how flaws in part of the witnesses' testimony affected the credibility of the whole (see *Cunningham,* 212 Ill. 2d at 283; *People v. Strother*, 53 Ill. 2d 95, 100-01 (1972)) and it found the State's witnesses more credible

than defendant. We will not disturb this credibility finding on review. *E.g.*, *People v. Harris*, 297 Ill. App. 3d 1073, 1083 (1998) (we defer to the trial court in credibility assessments because a court of review is not in a position to observe the witness as she testifies). Accordingly, as the evidence supported a finding that defendant impeded Stigger's normal breathing by applying pressure on her neck or throat, the State proved defendant guilty of aggravated domestic battery beyond a reasonable doubt.

¶ 21 Next, defendant contends that 10 assessments imposed against him are fines that should be offset by presentence custody credit. Although defendant did not challenge these assessments in the trial court, "a defendant may raise the issue of credit on appeal even if not raised in the trial court." *People v. Vasquez*, 368 Ill. App. 3d 241, 261 (2006) (citing *People v. Woodard*, 175 Ill. 2d 435, 457-58 (1997)).

¶ 22 A defendant incarcerated on a bailable offense who does not supply bail and against whom a fine is levied is allowed a credit of $5 for each day of presentence custody. 725 ILCS 5/110-14(a) (West 2014). A "fine" is punitive in nature and is imposed as part of a sentence for a criminal offense. *People v. Graves*, 235 Ill. 2d 244, 250 (2009). A fee, in contrast, seeks to recoup expenses incurred by the state, or to compensate the state for expenditures incurred in prosecuting the defendant. *Id*. The presentence custody credit applies only to reduce fines, not fees. *People v. Jones*, 223 Ill. 2d 569, 599 (2006).

¶ 23 Defendant contends, and the State correctly concedes, that the $10 Mental Health Court fee, the $5 Youth Diversion/Peer Court charge, the $5 Drug Court fee, and the $30 Children's Advocacy Center assessment imposed by the trial court are fines subject to offset by presentence custody credit. *People v, Price*, 375 Ill. App. 3d 684, 700-02 (2007) ("we hold that both the $10

mental health court fee and the $5 youth diversion/peer court fee are fines"); *People v. Unander*, 404 Ill. App. 3d 884, 886 (2010) ("the $5 drug-court "fee" is actually a fine"); *People v. Jones*, 397 Ill. App. 3d 651, 660-61 (2009) ("the Children's Advocacy Center charge is a fine rather than a fee"). Accordingly, all four charges should be offset by defendant's presentence custody credit.

¶ 24 Defendant argues that the $190 charge for "Felony Complaint Filed, (Clerk)" constitutes a fine that should be offset by presentence custody credit. According to defendant, the felony complaint charge recoups the clerk's expenses rather than reimburses the State for the cost of the prosecution. Even if the clerk could incur expenses in a prosecution, defendant submits that the $190 charge is an arbitrary amount that finances the clerk's activities "as a whole" instead of reimbursing costs "specifically incurred" in a particular prosecution. Defendant also observes that the felony complaint charge appears in a schedule of assessments that correlates the amount charged to the severity of the offense, and is only imposed following a conviction.

¶ 25 The State responds that defendant "mistakenly conflate[s] 'expenses of the prosecution' with 'expenses of the *prosecutor*.' " (Emphasis in original). It asserts that, even if the felony complaint charge is not specifically attributable to the office prosecuting defendant's case, the charge nonetheless reimburses the state for some of the cost of prosecution incurred by the clerk or court system and, therefore, is a fee. The State reasons that the $190 charge is not unrelated to the cost of prosecution as the actual expense of court proceedings is higher and, ultimately, the fee funds the court system in which defendant's prosecution occurred.

¶ 26 In relevant part, the Clerks of Courts Act provides that "[t]he clerk shall be entitled to costs in all criminal and quasi-criminal cases from each person convicted or sentenced to supervision," including "a minimum of $125 and a maximum of $190" for "[f]elony complaints."

705 ILCS 105/27.2a(w)(1)(A) (West 2014). The Clerk of Courts Act also entitles the clerk to lesser costs for, *inter alia*, convictions on misdemeanor complaints, business offense complaints, petty offense complaints, and minor traffic or ordinance violations, as well costs for appearances and a variety of motions. 705 ILCS 105/27.2a(w)(1)(B)-(K) (West 2014).

¶ 27 Defendant's argument has been previously disposed of in *People v. Tolliver*, 363 Ill. App. 3d 94 (2006), which determined that the felony complaint assessment is a fee rather than a fine. *Tolliver*, 363 Ill. App. 3d at 97 (2006) (felony complaint charge is a fee); see also *People v. Despenza*, 318 Ill. App. 3d 1155, 1157 (2001) (filing fees represented "court costs" and "were not imposed upon the defendant as a pecuniary punishment"). Defendant argues that *Tolliver* predates our supreme court's decision in *Graves* and fails to acknowledge that, for an assessment to be a fee, it must be intended to reimburse the state for some cost from defendant's prosecution. See *Graves*, 235 Ill. 2d at 250. This argument lacks merit. In *Tolliver*, we held the charge for filing a felony complaint is a fee because it is "compensatory" and a "collateral consequence of defendant's conviction." *Tolliver*, 363 Ill. App. 3d at 97. Thus, although *Tolliver* was decided before *Graves*, it nonetheless considered what *Graves* termed "the most important factor" in determining whether an assessment is a fee: whether the felony complaint charge was intended as reimbursement for defendant's prosecution. *Graves*, 235 Ill. 2d at 250. Further, decisions issued after *Graves* have found the felony complaint charge to be a fee. *People v. Larue*, 2014 IL App (4th) 120595, ¶¶ 62–68; *People v. Martino*, 2012 IL App (2d) 101244, ¶¶ 28–38; *People v. Smith*, 2014 IL App (4th) 121118, ¶26. Accordingly, the charge is not offset by defendant's presentence custody credit.

¶ 28 Defendant next contends that the $15 clerk automation fee (705 ILCS 105/27.3a(1) (West 2014)) imposed by the trial court is a fine subject to offset by presentence custody credit. We again find *Tolliver* controls for the same reasoning above, as the court held the clerk's automation fee to be "compensatory and a collateral consequence of defendant's conviction," and as such, is considered a fee rather than a fine. *Tolliver*, 363 Ill. App. 3d at 97.

¶ 29 Defendant contends, and the State correctly concedes, that the $15 state police operations fee (705 ILCS 105/27.3a(1.5) (West Supp. 2013)) and $50 court system fee (55 ILCS 5/5-1101(c)(1) (West 2014)) imposed by the trial court are fines subject to offset by presentence custody credit. *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31 ("the State Police operations assistance fee is also a fine"); *People v. Blanchard*, 2015 IL App (1st) 132281, ¶ 22 ("the $50 Court System fee *** is a fine"). Accordingly, both charges should be offset by defendant's presentence custody credit.

¶ 30 Contrary to defendant's argument, neither the $2 State's Attorney records automation fee (55 ILCS 5/4-2002.1(c) (West 2014)) nor the $2 Public Defender records automation fee (55 ILCS 5/3-4012 (West 2014)) constitutes a fine. *People v. Warren*, 2016 IL App (4th) 120721-B, ¶¶114-116 (State's attorney records automation assessment is not punitive and is, therefore, a fee); *Bowen*, 2015 IL App (1st) 132046, ¶¶ 63-65 ("both charges constitute fees"); *People v. Green*, 2016 IL App (1st) 134011, ¶ 46; see *contra People v. Camacho*, 2016 IL App (1st) 140604, ¶¶ 47-56 (the assessments do not compensate the state for the costs associated in prosecuting a particular defendant and, therefore, cannot be considered fees). Accordingly, neither records automation fee is offset by defendant's presentence custody credit.

¶ 31 For the foregoing reasons, we find that the $10 Mental Health Court fee, $5 Youth Diversion/Peer Court charge, $5 Drug Court fee, $30 Children's Advocacy Center assessment, $50 court system fee, and $15 state police operations fee are offset by presentence custody credit. Additionally, the $190 felony complaint fee, $15 clerk automation fee, $2 State's Attorney records automation fee, and $2 Public Defender records automation fee are not offset by presentence custody credit. Pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court to correct the fines and fees order accordingly. The judgment of the trial court is affirmed in all other respects.

¶ 32 Affirmed as modified.