2016 IL App (1st) 142264-U

FOURTH DIVISION
November 17, 2016

No. 1-14-2264

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. 12 CR 11084
	)	
MOHAMMAD GHASSEMIAN,	)	Honorable
	)	Larry G. Axelrood,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Ellis and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Judgment affirmed over defendant's challenges to the sufficiency of the evidence, and to the constitutionality of the harassment by telephone statute. Fines and fees order corrected.

¶ 2 Following a bench trial, defendant, Mohammad Ghassemian, was convicted of Class 4 felony Harassment by Telephone (720 ILCS 135/1–1 (West 2012); 720 ILCS 135/1–2 (West 2012)[1]), and sentenced to one year imprisonment. In this appeal, defendant contends that the

[1] In 2013, the offense of telephone harassment was recodified as 720 ILCS 5/26.5–2, and the corresponding sentencing statute was recodified as 720 ILCS 5/26.5–5.

evidence was insufficient to sustain that conviction, that the sentencing statute elevating the offense to a Class 4 felony based on threatening to kill the victim is facially unconstitutional, and that his fines and fees order must be corrected.

¶ 3 The record shows that defendant was initially charged with two counts of threatening a public official, and one count of harassment by telephone. On December 7, 2012, the State amended the complaint to remove language charging defendant with "threaten[ing] to kill" the victim during the course of the Harassment by Telephone offense, and defendant changed his plea from not guilty to guilty. Defendant was sentenced to one year probation. Thereafter, defendant successfully moved to withdraw his plea on March 5, 2013, and the prior charges were reinstated.

¶ 4 At defendant's subsequent trial, Agent John Scott Beith testified that in 2012, he was employed by the Department of Homeland Security in Washington D.C. as a Senior Special Agent. On January 25, 2012, Agent Beith became aware that defendant was "involved in a threat" to Shaun Donovan, the Department of Housing and Urban Development (HUD) Secretary of the United States Government, a cabinet official of the President. Agent Beith was assisting Officer David Mendez, a law enforcement officer with the Department of Homeland Security with an investigation into defendant's threat against Secretary Donovan.

¶ 5 At approximately 5:07 p.m., Agent Beith was sitting across from Officer Mendez in his office in Washington D.C. Agent Beith acquired defendant's telephone number and attempted to contact him five times using a "blocked number." When Agent Beith received no answer, he tried again from his government issued Blackberry, with a phone number beginning 202, and defendant answered immediately.

¶ 6 Defendant confirmed his name, date of birth, and last four digits of his social security number for Agent Beith. Agent Beith informed defendant of his position, and asked him about his attempts to contact Secretary Donovan. Defendant stated that he had spent two years consulting with Beverly Bishop, the Administrative Director of HUD in Chicago, for assistance with housing for his sister. Ms. Bishop told defendant that she could no longer assist him, and defendant was "upset" and considered her to be a "corrupt Government Official." Defendant said that the "solution to this was to contact the Secretary of HUD and have Ms. Bishop's actions corrected."

¶ 7 Defendant then told Agent Beith that he "intended to come to Washington D.C., wrap a leash around Shaun Donovan's neck and drag him to Chicago to answer for his crimes." Agent Beith asked defendant to what crimes he was referring, and defendant responded "not answering his phone." During the phone call, defendant stated, on three occasions, that he had a concealed carry permit. Agent Beith asked defendant what type of weapon he had. Defendant initially would not answer, then said that he did not have a weapon, but repeatedly advised that he had a concealed carry permit. The conversation lasted approximately two hours, and ended at 7:08 p.m.

¶ 8 At 8:47 p.m., Agent Beith answered an incoming call on his Blackberry while at home. Agent Beith recognized the voice on the other end of the call as belonging to defendant. Defendant told Agent Beith that he was "still mad at" Secretary Donovan and he was "going to report" Agent Beith to the Director of the FBI for harassing him. Defendant then told Agent Beith that he "intended to come to Washington, D.C. to kill [him]." This conversation lasted approximately five minutes.

¶ 9 At 2:17 a.m. on January 26, 2012, Agent Beith received another incoming phone call on his Blackberry. Agent Beith recognized defendant's voice, and defendant told Agent Beith that he "was coming to Washington D.C. to get [him]." The conversation lasted approximately two minutes.

¶ 10 At 8:25 a.m., Agent Beith received a phone call on his Blackberry while in his office in Washington D.C. John Norman, a civilian contractor assisting the Federal Protective Service, was sitting next to Agent Beith at this time. Agent Beith recognized defendant's voice, and defendant said that he was "going to wrap chains around the secretary's neck." About two minutes after the call began, defendant ended the conversation by saying "I will get you" in a loud voice.

¶ 11 The next day, on January 27, 2012, at 10:17 a.m., Agent Beith received a phone call on his office phone, and when he picked up, he recognized defendant's voice. Defendant told Agent Beith that he was going to come to Washington D.C. to confront the Secretary of HUD. Agent Beith asked defendant about his schedule or flight numbers for when he would travel to Washington D.C., but defendant refused to provide that information. The conversation lasted approximately 10 minutes.

¶ 12 Agent Beith then contacted the joint terrorism task force agent in Washington D.C., who contacted the joint terrorism task force agent in Chicago. Agent Beith understood that Special Agent Charles Scoles, along with officers from the Chicago Police Department, went to talk to defendant at his apartment to determine the validity of the threat.

¶ 13 Thereafter, Agent Beith received two more phone calls from defendant, on January 28, 2012, at about 11:35 p.m., and January 30, 2012, at 1:10 a.m. Agent Beith testified that during the first call, he told defendant not to contact him anymore, and terminated the call. Agent Beith

described the second phone call as "basically the same thing that happened on January 28," and that defendant "wanted to know why officers had visited him."

¶ 14 Officer David Mendez testified that he is a law enforcement officer with the Department of Homeland Security, Federal Protective Service. On January 25, 2012, Officer Mendez was assigned to investigate a threat to the Secretary of HUD. Officer Mendez met with Agent Beith, and sat next to him as Agent Beith made a phone call to defendant. Officer Mendez was able to hear defendant say that he "wanted to find out why *** his case wasn't being heard with the Secretary of Housing and Urban Development." Officer Mendez then heard defendant say that he "wanted to tie a leash around the Secretary's neck and bring him to Chicago for not answering his case." Officer Mendez testified that he was able to hear "most of the call," which lasted about two hours.

¶ 15 John Norman testified that he is a contractor for the Federal Protective Service, and he sometimes works with Agent Beith. Mr. Norman testified that he was working with Agent Beith on January 26, 2012, at about 8:20 a.m., when Agent Beith's cellular phone rang. Agent Beith answered, and Mr. Norman, who was sitting about three feet away, was able to hear the caller on the other end of the line. Mr. Norman testified that the caller was "talking in a loud, loud tone." Mr. Norman stated that he went back to his work because he thought the call did not "pertain to [him]," but his attention was piqued when he heard the caller say "I will get you" to Agent Beith.

¶ 16 Retired federal Agent Charles Scoles testified that in January 2012, he was employed by the U.S. Department of Homeland Security, Federal Protective Service. On January 27, 2012, Agent Scoles was assigned to go and speak to defendant. Agent Scoles, a Chicago Police lieutenant, and five Chicago Police Officers went to defendant's apartment in Chicago at about 8:45 p.m. Agent Scoles knocked on the door and defendant answered. Defendant identified

himself, and Agent Scoles asked for permission to enter the apartment and to interview him "on some issues that had gone down in Washington." Defendant agreed.

¶ 17 Agent Scoles asked defendant if he made a telephone call to the Department of HUD, and if he attempted to talk to Secretary Donovan, and defendant responded that he did. Agent Scoles then asked defendant "if he had said to the Secretary *** that he was coming to Washington within a couple of days to place a dog collar around his neck and pull him back to Chicago." Defendant told Agent Scoles, "yes, that that was his right."

¶ 18 Defendant also confirmed to Agent Scoles that he had made telephone calls to Agent Beith, but he denied making a threat to him "because he didn't believe he was an agent of the U.S. Department of Security."

¶ 19 Agent Scoles asked him where he placed the phone calls, and defendant showed him a cell phone that he identified as belonging to him, and said that he "made the telephone call here from his chair." Defendant then told Agent Scoles that he applied for a concealed weapon permit, and showed him a "target with bullet holes in it." Defendant walked Agent Scoles and the other officers around the apartment, and stated that he did not have any weapons there. Agent Scoles did not find any weapons in the apartment, but did not attempt to search anything that was not in plain view.

¶ 20 Before leaving, Agent Scoles gave defendant a letter from HUD, which informed him "not to proceed to Washington. And that if he showed up, he could be subject to arrest." Agent Scoles asked defendant if he was planning to go to Washington D.C., and defendant said that he "understood the *** letter" and he was not going to travel.

¶ 21 Agent Scoles testified that "a lot of people in Washington" were still "nervous" that defendant would come to Washington D.C. and "show[] up at HUD," so Agent Scoles went back

to defendant's apartment on January 31, 2012, with Agent Joseph Melon from the FBI Task Force. Agent Scoles knocked on the door and defendant answered. Agent Scoles asked for permission to enter and conduct an interview, and defendant agreed and invited them inside. During that interview, defendant stated that he "was not going to travel to Washington" and "that he only made so much money on social security a month, he could not afford it after he got done paying his rent."

¶ 22 After the State rested, defendant testified that in 2012, he was living in an apartment in Chicago. He, his sister, and other people, were having "housing problems." Defendant stated that HUD rented large properties from different owners, including "Section 8" properties. Defendant said that he applied for a one bedroom apartment, but did not get the apartment after waiting two years. Defendant said that he knew someone who paid $500 to a manager, and got an apartment in four months.

¶ 23 When he did not get the apartment, defendant went to the HUD offices in the "Federal Building" to speak to Beverly Bishop, the "head" of HUD in Illinois. Ms. Bishop told defendant that she could not do anything because "This guy who owns this building, he has 10 buildings, he has all his politicians in his pocket." Ms. Bishop told defendant that he could go to "Thompson Center Human Rights" or write or call Shaun Donovan at HUD in Washington D.C.

¶ 24 Defendant tried to call Secretary Donovan, but was told that he could not call him because he was a "President Obama member" and it was a "White House security phone line." Defendant attempted to call 15 times, but eventually got "tired" because he could not get a hold of Secretary Donovan, and "[t]here is so much corruption in this kind of government agency."

¶ 25 Defendant initially stated that he did not think he ever talked to someone by Agent Beith's name, but later said that he "had my telephone conversation with him. I tell him, I kill

him, whatever you said, I take it. I never tell him anything." Defendant then denied threatening to kill anyone on the phone.

¶ 26 Defendant testified that he had never purchased or owned a gun, and that he had never been to Washington D.C. Defendant never intended to go there to kill someone or put a leash around someone's neck.

¶ 27 On cross-examination, defendant said that he did not know if he talked to Agent Beith. When asked if he remembered calling him on January 25, at 8:47, p.m., defendant said "I don't know. Maybe I called him. But I don't remember now." Defendant also did not remember calling him on January 26 at 2:17 a.m. and 8:25 a.m., January 27 at 10:17 a.m., January 28 at 11:35 p.m., or January 30 at 1:10 a.m.

¶ 28 After the close of evidence and argument, the trial court found defendant not guilty of threatening a public official and guilty of Harassment by Telephone. The court found that Agent Beith was a "very strong witness" and that his testimony was corroborated by the other witnesses. The court further found that defendant had "no credibility," and that his testimony had to be "completely dismissed."

¶ 29 In this court, defendant challenges the sufficiency of the evidence to sustain his conviction for Harassment by Telephone. When a criminal defendant challenges the evidence as insufficient to support his conviction, a reviewing court considers whether, 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. Wheeler*, 226 Ill. 2d 92, 114 (2007). A reviewing court may not substitute its judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of the witnesses (*People v. Young*, 128 Ill. 2d 1, 51 (1989)), and will not set aside a criminal conviction unless the evidence is so

improbable or unsatisfactory that it creates a reasonable doubt of a defendant's guilt (*People v. Collins*, 106 Ill. 2d 237, 261 (1985)).

¶ 30 Defendant specifically maintains that the State failed to prove (1) that the offense occurred wholly or partly in Illinois, as is required for Illinois to exercise jurisdiction (2) that defendant possessed the requisite intent to "abuse, threaten or harass" at the time he placed the phone calls, and (3) that he uttered a "true threat" supporting his elevated Class 4 felony conviction. We will consider each of defendant's contentions in turn.

¶ 31 Defendant first maintains that his conviction for Harassment by Telephone must be reversed because there was insufficient evidence to prove that the offense occurred wholly or partly in Illinois. See 720 ILCS 5/1-5 (West 2012) ("A person is subject to prosecution in this State for an offense which he commits, while either within or outside the State, by his own conduct or that of another for which he is legally accountable, if: (1) the offense is committed either wholly or partly within the State[.]"). Defendant contends that the record shows that he made the phone calls from a cellular phone, which "has no fixed location" and he "could have been anywhere when he called Agent Beith. Defendant acknowledges that there is evidence showing that he admitted to making a "phone call" from the chair in his apartment, but contends that there is no way to know whether the specific phone call at issue, namely, the January 25, 2012, 8:47 p.m. call in which he threatened to kill Agent Beith, was made in Illinois. We disagree.

¶ 32 The record shows that at the time of the offense, defendant was living in an apartment in Chicago. Defendant was at home both times Agent Scoles went to interview him, and there was no evidence to show that defendant had traveled to any other state at the time of the telephone calls. Indeed, defendant explained during the interview that he would not travel, and that he did

not have the money to travel after paying his rent. Moreover, in response to questions during that interview about from where he had made the telephone calls, he told Agent Scoles that he made them from his cellular phone, and made the "call" from his chair. We do not find the fact that defendant used the singular form of "call" in response to this question to raise reasonable doubt of defendant's guilt. A trier of fact is not required to disregard inferences that flow normally from the evidence, nor to seek all possible explanations consistent with innocence and elevate them to reasonable doubt. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. Viewing the evidence in a light most favorable to the State, we conclude that a rational trier of fact could have found that defendant committed the offense in whole or in part while in Illinois, supporting Illinois's exercise of jurisdiction in this case.

¶ 33 Defendant next contends that his conviction must be reversed because there was insufficient evidence to show that he intended to "abuse, threaten or harass" at the time he placed the phone calls to Agent Beith. He argues, instead, that the record shows he "called for the legitimate purpose of conferring with a federal government employee in regards to his unresolved housing issues."

¶ 34 A person commits harassment by telephone if he “[m]ak[es] a telephone call, whether or not conversation ensues, with intent to abuse, threaten or harass any person at the called number.” 720 ILCS 135/1–1(2) (West 2012). The intent element of section 1–1(2) is measured at the time the telephone call is placed. *People v. Jones*, 334 Ill. App. 3d 420, 424 (2002). A person acts intentionally when his conscious objective or purpose is to accomplish the result or engage in the conduct proscribed. *Id*. Intent may be inferred from surrounding circumstances and may be proved by circumstantial evidence. *Id*. For a call to be made with intent to abuse or harass, the caller must have had the intent to produce emotional distress akin to that of a threat. *People v.*

Taylor, 349 Ill. App. 3d 839, 843 (2004). The question of intent is one for the trier of fact and its ruling should not be reversed on appeal unless inherently impossible or unreasonable. *Id*.

¶ 35 Here, taking the evidence in the light most favorable to the State, there were sufficient facts upon which the trier of fact could have found the requisite intent. The record shows that Agent Beith initially called defendant about his threat to Secretary Donovan, and during that phone call, defendant said that he "intended to come to Washington D.C., wrap a leash around Shaun Donovan's neck and drag him to Chicago to answer for his crimes." Defendant also told Agent Beith, on multiple occasions, that he had a concealed carry permit. After that phone call ended, defendant proceeded to make six phone calls to the agent over a period of a few days, sometimes at odd hours of the night (January 26, 2012, at 2:16 a.m.; January 28, 2012, at 11:35 p.m.; and January 30, 2012, at 1:10 a.m.). During those phone calls, all of which lasted ten minutes or less, defendant stated that he was going to come to Washington D.C. and "kill" or "get" Agent Beith. Two of these phone calls were heard by other witnesses, and defendant was described as speaking in a loud voice during the calls. On January 28, 2012, Agent Beith instructed defendant not to call him anymore, yet defendant called him again, two days later at 1:10 a.m.

¶ 36 Based upon the totality of the surrounding circumstances here, and the reasonable inferences that could be drawn therefrom, we cannot say that the evidence was so unsatisfactory as to create a reasonable doubt that defendant had the requisite intent to abuse, threaten, or harass Agent Beith at the time the calls were placed. The timing alone of defendant's phone calls to Agent Beith, most of which occurred far outside regular business hours, would cast serious doubt on defendant's claimed intent that he was merely calling for a legitimate purpose of discussing his housing issues with Agent Beith. Given the evidence established below, we do not find it so

improbable or unsatisfactory that it creates a reasonable doubt of a defendant's guilt. *Collins*, 106 Ill. 2d at 261.

¶ 37 Defendant next argues that there was no evidence that he "uttered a true threat to kill Agent Beith" and, as a result, his Class 4 felony conviction must be reduced to a Class B misdemeanor. He contends that, "even if [he] did utter the word 'kill' while on the phone, this was nothing more than empty rhetoric that cannot be criminalized" without violating the first amendment.

¶ 38 The offense of Harassment by Telephone is generally a Class B misdemeanor offense. 720 ILCS 135/1–2(a) (West 2012). However, the offense is enhanced to a Class 4 felony in certain circumstances, including when the defendant "threatened to kill the victim" during the course of the offense. 720 ILCS 135/2(b)(4) (West 2012). Because the offense criminalizes certain forms of speech, we interpret it within the confines of the first amendment. See, *e.g.*, *People v. Redwood,* 335 Ill. App. 3d 189, 192 (2002).

¶ 39 The first amendment (U.S. Const., amend. I), made applicable to the states by the fourteenth amendment (U.S. Const., amend. XIV), prevents the government from proscribing speech because of disapproval of the expressed ideas. *People v. Diomedes,* 2014 IL App (2d) 121080, ¶ 30 (citing *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992)). However, the first amendment permits restrictions on some forms of speech, including "true threats," which do not enjoy first amendment protection. *People v. Bailey,* 167 Ill. 2d 210, 227–28 (1995); *People v. Sucic,* 401 Ill. App. 3d 492, 502 (2010). The U.S. Supreme Court has explained that "true threats":

> "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of

> unlawful violence to a particular individual or group of individuals. [Citations.] The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." (Internal quotation marks omitted.) *Virginia v. Black*, 538 U.S. 343, 359–60 (2003).

¶ 40 Various Illinois statutes, including those set out above, criminalize the making of threats. This court has concluded that if the State charges a defendant with making a threat of violence, the threat must be a "true threat," or else the prosecution would violate the first amendment. *Sucic*, 401 Ill. App. 3d at 502–03 (citing *Watts v. United States*, 394 U.S. 705, 708, 89 S.Ct. 1399, 1401 (1969)); *Diomedes*, 2014 IL App (2d) 121080, ¶ 30. We review *de novo* whether a statement qualifies as protected speech under the first amendment. *Duncan v. Peterson*, 408 Ill. App. 3d 911, 918 (2010).

¶ 41 Defendant contends that he cannot be found to have made a "true threat" because his statements were "nothing more than emotionally charged rhetoric" and "empty posturing toward a federal agent during a time of pronounced frustration with the government."

¶ 42 Initially, we must address defendant's contention that there is a split of authority regarding the test used to determine whether a defendant's statement is a "true threat." Defendant contends that various courts have applied subjective or objective, and listener-based or recipient-based approaches when making this determination. See *Diomedes*, 2014 IL App (2d) 121080, ¶ 35 (applying a "reasonable-speaker" test); *U.S. v. Roberts*, 915 F.2d 889, 891 (4th Cir. 1990) (considering whether "an ordinary reasonable recipient who is familiar with the context of the

letter would interpret it as a threat of injury."); *United States v. Twine*, 853 F.2d 676, 681 (9th Cir. 1988) (determining that a statute's "intent to threaten" element "require[s] a showing of a subjective, specific intent to threaten.") Nevertheless, we conclude that we need not determine which test is correct, because regardless of what variation of the test is used, the statement defendant communicated to Agent Beith was a true threat.

¶ 43 As described above, the record shows that during defendant's initial phone call with Agent Beith, he threatened to "wrap a leash around Shaun Donovan's neck and drag him to Chicago to answer for his crimes," repeatedly referenced his concealed carry permit, and told Agent Beith that he was going to come to Washington D.C. Defendant then called Agent Beith less than an hour and a half later, and told him that he was going to come to Washington D.C. and kill him. During defendant's next two phone calls, one of which was placed at 2:17 a.m., defendant threatened to come to Washington D.C. and "get" Agent Beith. Based on the record of repeated phone calls, including those made at all hours of the night, and his statements that he would come to Washington D.C. and "kill" or "get" Agent Beith, the evidence shows that defendant made a "true threat" to kill Agent Beith, which supports his elevated Class 4 felony sentence.

¶ 44 Defendant, however, claims that we should disregard the occasions on which defendant threatened to "get" Agent Beith, claiming that the phrase could "imply many acts of nonviolent retribution, such as turning him over to his boss for disciplinary action." Defendant relies on *People v. Dye*, 2015 IL App (4th) 130799, ¶ 12, in which the court found that the defendant's statement of “I'm gonna get you,” to a public defender, was not a true threat which could support his conviction for threatening a public official. In that case, the court concluded that " 'Get' is just as apt a word for nonviolent punishment as violent punishment, and some additional facts,

beyond the mere utterance, would be necessary to infer, beyond a reasonable doubt, that 'I'm going to get you' was intended as a threat of violence." *Id*. After finding no such evidence in the record, the court reversed his conviction on the ground that it violated the first amendment. *Id*.

¶ 45 This case is clearly distinguishable from *Dye*, because defendant made an additional clear threat—to kill Agent Beith. Moreover, we have a plethora of evidence showing that defendant's threats to "get" Agent Beith were intended to suggest violence. Before defendant made threats to "get" Agent Beith, he had spoken with him on a number of occasions. During those phone calls, defendant made violent threats towards another government official, repeatedly referenced his concealed carry permit, and told Agent Beith that he was going to come to Washington D.C., and kill him. Given this context, it is clear that defendant's threats to "get" Agent Beith were not intended to refer to some form of nonviolent retribution, but instead were intended to convey threats of violence.

¶ 46 Defendant next challenges section 135/2(b)(4), the sentencing statute which enhances the Harassment by Telephone offense in circumstances where the defendant threatens to kill the complainant during the course of the offense, contending that it is facially unconstitutional because it "overbroadly criminalizes protected speech." Specifically, defendant argues that the plain language of the section "broadly criminalizes any statement that can be interpreted as a threat to kill, regardless of whether the alleged remark is merely careless talk, exaggeration, political hyperbole, or any other such expression that is protected by the First Amendment."

¶ 47 Statutes are presumed constitutional, and the burden of rebutting that presumption is always on the party challenging the statute. *City of Chicago v. Pooh Bah Enterprises, Inc.*, 224 Ill. 2d 390, 406 (2006). If reasonably possible, this court must give the statute a construction that

maintains its validity, and we must resolve any doubt in favor of the statute. *People v. Hill*, 333 Ill. App. 3d 783, 785 (2002).

¶ 48 The doctrine of overbreadth is designed to protect first amendment freedom of expression from laws written so broadly the fear of punishment might discourage taking advantage of that freedom. *Bailey*, 167 Ill. 2d at 226; *People v. Anderson*, 148 Ill. 2d 15, 26 (1992); *Broadrick v. Oklahoma*, 413 U.S. 601, 611–12, 93 S.Ct. 2908, 2915–16 (1973). The doctrine should be used sparingly, and in order for a statute to be invalidated for overbreadth, its overbreadth "must not only be real, but substantial as well." (*Broadrick*, 413 U.S. at 615, 93 S.Ct. at 2918.) Moreover, one may challenge a statute as overbroad only if the statute is one that may inhibit the exercise of rights of expression or association protected by the first amendment. *Broadrick*, 413 U.S. at 611–12, 93 S.Ct. at 2915–16; *People v. Haywood*, 118 Ill. 2d 263, 275 (1987). We review constitutional challenges to a statute *de novo*. *People v. Greco*, 204 Ill. 2d 400, 407 (2003).

¶ 49 In addressing a facial overbreadth challenge, the first task is to determine whether the statute reaches constitutionally protected conduct, in this case, constitutionally protected speech. In viewing the statute at issue, it is clear that defendant's facial overbreadth argument fails. As we previously determined that the statute applies only to "true threats," for which there is no first amendment protection (see *Bailey*, 167 Ill. 2d at 227–28; *Sucic*, 401 Ill. App. 3d at 502–03), the statute does not impinge on any constitutionally protected right of free speech or any other fundamental constitutional right. *People v. Russell*, 158 Ill. 2d 23, 25–26 (1994). Accordingly, we do not find that the statute at issue is so overbroad that fear of punishment might discourage people from taking advantage of their first amendment rights. See *Bailey*, 167 Ill. 2d at 226.

¶ 50 Finally, defendant contends that two fees were erroneously imposed against him and that he should be awarded credit toward several fines for time spent in custody prior to his

sentencing. Although defendant has forfeited review of his fines and fees claim because he did not challenge the order in a "contemporaneous objection and a written postsentencing motion" *(People v. Hillier*, 237 Ill. 2d 539, 544 (2010)), on appeal a reviewing court may modify the fines and fees order without remanding the case back to the trial court (Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999)). Consequently, we need not consider defendant's alternate theories of plain error or ineffective assistance of counsel. The propriety of court-ordered fines and fees raises a question of statutory interpretation, which this court reviews *de novo*. *People v. Ackerman*, 2014 IL App (3d) 120585,

¶ 51 Defendant first asserts, and the State correctly agrees, that he should not have been assessed the $5 Electronic Citation fee (705 ILCS 105/27.3e (West 2012)) because that charge applies only to traffic, misdemeanor, municipal ordinance and conservation cases and does not apply to felony convictions. See *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 115; *People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 46. Therefore, the $5 Electronic Citation fee is vacated.

¶ 52 Defendant also contends, and the State concedes, that the circuit court improperly imposed against him the $5 Court System Fee. The fee applies to defendants found guilty of violating "the Illinois Vehicle Code other than Section 11-501." 55 ILCS 5/5-1101(a) (West 2012). Defendant's harassment by telephone conviction is not related to the Illinois Vehicle Code, and therefore, the $5 court system fee did not apply to him.

¶ 53 Defendant further argues that seven additional charges imposed against him are fines and should be offset by monetary credit for the time he spent in custody prior to sentencing. A defendant is entitled to a $5-per-day credit against his fines for time spent in presentencing custody. 725 ILCS 5/110-14(a) (West 2012). The parties agree that defendant has accumulated 362 days of presentencing incarceration credit and therefore can apply up to $1,810 to offset the

fines imposed against him. See *People v. Jones*, 397 Ill. App. 3d 651, 663 (2009) (presentencing credit applies only to fines and not to those charges that are considered fees).

¶ 54 Despite being labeled as fees, certain assessments imposed pursuant to a conviction are actually fines. *People v. Graves*, 235 Ill. 2d 244, 250 (2009). A charge is considered a "fine" if it is pecuniary and part of the punishment imposed as part of a sentence. *People v. Jones*, 223 Ill. 2d 569, 581 (2006). In contrast, a "fee" reimburses the State for expenses related to the defendant's prosecution. *Id*. at 600.

¶ 55 Of the seven fees challenged by defendant, the State correctly agrees that two of the charges, despite being labeled fees, are in fact fines subject to offset by defendant's presentence credit—namely the $15 State Police Operations charge (705 ILCS 105/27.3a (1.5) (West 2012)) and the $50 Court System charge (55 ILCS 5/5-1101(c) (West 2012)). See *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31; *People v. Smith*, 2014 IL App (4th) 121118, ¶ 54. Accordingly, those fines, which equal $65, can be offset by a portion of defendant's presentencing credit.

¶ 56 Defendant next challenges the $15 Automation fee (705 ILCS 105/27.3a(1) (West 2012)), the $15 Document Storage fee (705 ILCS 105/27.3c (West 2012)), and the $25 Court Services Sheriff fee (55 ILCS 5/5-1103 (West 2012)), as being fines rather than fees. The State disagrees, and contends that they are fees, for which defendant is not entitled to credit. Our court has previously considered such challenges and has determined that all three of these charges constitute fees, not fines. See *People v. Tolliver*, 363 Ill. App. 3d 94, 97 (2006). The defendant has not presented us with any convincing reason why we should depart from that holding, and we decline to do so.

¶ 57 The parties also disagree as to the classification of the $2 Public Defender records automation fee (55 ILCS 5/3-4012 (West 2012)) and the State's Attorney records automation fee

(55 ILCS 5/4-2002.1(c) (West 2012)). Although defendant contends those charges are fines because they do not compensate the state for costs incurred in a prosecution, this court has repeatedly considered and rejected these arguments, holding that both of these charges constitute fees rather than fines. See *People v. Bowen*, 2015 IL App (1st) 132046, ¶¶ 62-65. As to the latter charge, this court found it "is intended to reimburse the State's Attorneys for their expenses related to automated record-keeping systems." *People v. Rogers*, 2014 IL App (4th) 121088, ¶ 30; see also *Bowen*, 2015 IL App (1st) 132046, ¶¶ 62-64; *People v. Mister*, 2015 IL App (4th) 130180, ¶ 111 (and cases cited therein). Using the same reasoning, we find that the Public Defender records automation charge is a fee. See *Bowen*, 2015 IL App (1st) 132046, ¶¶ 62-64. Therefore, each of those $2 charges will stand and because they are fees, they are not offset by defendant's presentencing credit. See *Jones*, 397 Ill. App. 3d at 663.

¶ 58 In so holding, we recognize that another division of this court has recently come to the opposite conclusion, and has determined that the State's Attorney and public defender records automation fees, are actually fines (*People v. Camacho*, 2016 IL App (1st) 140604, ¶ 52), however, we respectfully disagree with that court's conclusion.

¶ 59 In sum, the $5 Electronic Citation fee and the $5 Court System Fee, which were assessed against defendant, are vacated. In addition, defendant is awarded $65 in presentencing custody credit to offset the $15 State Police Operations charge (705 ILCS 105/27.3a (1.5) (West 2012)) and the $50 Court System charge (55 ILCS 5/5-1101(c) (West 2012)), which are fines, rather than fees. 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.

¶ 60 Judgment affirmed; fines and fees order corrected.