2012 IL App (4th) 110460-U

NO. 4-11-0460

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 10, 2012
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
CHARLES R. FLEMING,	)	No. 10CF289
Defendant-Appellant.	)	
	)	Honorable
	)	James E. Souk,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Turner and Justice McCullough concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's judgment but vacated the court's restitution order, concluding that (1) the State presented sufficient evidence that defendant intended to commit murder, and (2) the trial court could not order defendant to pay for damages that he did not proximately cause.

¶ 2 Following a February 2011 trial, a jury found defendant, Charles R. Fleming, guilty of (1) a violation of an order of protection, (720 ILCS 5/12-30(a)(1) (West 2010)), (2) criminal damage to property in excess of $10,000 (720 ILCS 5/21-1(1)(a) (West 2010)), and (3) attempt (first degree murder) (720 ILCS 5/8-4(a), 9-1(a)(2) (West 2010)). In May 2011, the trial court sentenced defendant to concurrent sentences of 3, 5, and 12 years in prison, respectively, and ordered defendant to pay $573.03 in restitution to the victim.

¶ 3 Defendant appeals, arguing that (1) the State failed to prove him guilty of attempt (first degree murder) beyond a reasonable doubt, and (2) the trial court erred by ordering him to

pay restitution. We affirm in part, vacate in part, and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 This case arose from an April 2010 incident in which defendant drove his Toyota Camry into the Normal, Illinois, home of his ex-wife, Karen Fleming, shortly before the couple finalized their divorce. Karen, who was home at the time of the incident, did not sustain any injuries, but defendant caused damage to the home's exterior by driving into it.

¶ 6 In April 2010, a grand jury indicted defendant on the charges of (1) criminal damage to property in excess of $300, a Class 4 felony (720 ILCS 5/21-1(1)(a), (2) (West 2010)) (count I), (2) a violation of an order of protection, in that defendant came within 1,000 feet of Karen's home, a Class 4 felony (720 ILCS 5/12-30(a)(1), (d) (West 2010)) (count II), (3) attempt (first degree murder), a Class X felony (720 ILCS 5/8-4(a), (c)(1)(A), 9-1(a)(2) (West 2010)) (count III), and (4) criminal damage to property between $10,000 and $100,000, a Class 3 felony (720 ILCS 5/21-1(1)(a), (2) (West 2010)) (count IV). The State proceeded to trial only on counts II through IV.

¶ 7 In February 2011, defendant's jury trial commenced, at which the parties presented the following evidence.

¶ 8 Bonnie Lucas testified that she met defendant through work and later became friends with both defendant and Karen. In May 2009, defendant and Karen separated. Thereafter, defendant began calling Lucas more frequently, expressing to Lucas that he was "very upset" about losing Karen and worried that he could lose his pension and assets. In October 2009, Lucas became worried about defendant because she did not hear from him for a weekend. She later learned that defendant had jumped from a bridge into oncoming traffic in an attempt to

commit suicide.

¶ 9 After defendant's suicide attempt, Lucas noticed defendant acting (1) "very depressed" and (2) as if "he was in a lot of pain." Around February 2010, defendant's depression began transforming into anger. Lucas testified that defendant began "lashing out more about Karen," stating, "well, maybe what I should do is just go ram my car through her house and kill her. If I'm not going to get anything out of the divorce, then why should she?" At first, Lucas did not take defendant's threats seriously because he would say things and then "kind of snicker." On March 5, 2010, however, defendant called Lucas and told her that "what he really should do is get in his car and go ram it through [Karen's] house and kill her, because she deserves to be dead." At that point, Lucas began taking defendant's statements very seriously.

¶ 10 The next day, defendant visited Lucas's home for dinner. According to Lucas, although defendant was in a "much calmer state of mind," he again made the statement about ramming his car through Karen's home and killing her. After defendant left, Lucas called defendant's brother and sister-in-law and told them about the statements. The next day, Lucas called Karen and told her that she should "be careful," and that she was concerned for Karen.

¶ 11 On cross-examination, Lucas testified that she made notes whenever defendant made comments about killing Karen, which she later submitted to the police. When defense counsel showed Lucas her notes, Lucas acknowledged that she "was mistaken" that defendant made a comment about killing Karen on the night he came over for dinner. She explained on rebuttal that on that night, defendant only said he would "ram the car through [Karen's] house," but did not specifically tell Lucas he wanted to kill Karen.

¶ 12 Karen Fleming testified that in May 2009, she and defendant got into an

argument, during which defendant "put his hands around [her] throat and shook [her]." The fight continued later that day when defendant threw her grandson's "potty chair" at her. Karen reported the incident to the police, and police arrested defendant that night. The next day, Karen hired an attorney and filed for an order of protection, which the trial court later granted. The order prohibited defendant from contacting Karen or coming within 1,000 feet of her residence.

¶ 13 In October 2009, defendant appeared at Karen's home, "crying and begging" and asking, "Why are you doing this to me?" Karen called 9-1-1, and defendant ran from her home. Later that day, Karen learned that defendant had jumped off a bridge.

¶ 14 Karen explained that she and defendant maintained a safety deposit box at a bank near their home in which they kept silver coins that either defendant had collected or that other family members had given to them. Karen said the coins "were very important to [defendant]." Sometime during the week prior to March 4, 2010, Karen accessed the safety deposit box to remove the coins that had been given to her son and grandson. She left the remainder of the coins in the box.

¶ 15 Officer Gregory Leipold testified that at approximately 6:30 a.m. on April 2, 2010, defendant came to the Normal police department and requested that an officer take him to Karen's house to retrieve the safety deposit box key. Upon learning that an order of protection prohibited defendant him from going to Karen's home, Leipold refused. At that point, defendant "stormed off." The trial court admitted into evidence a written copy of the April 2, 2010, order of protection.

¶ 16 Later that morning, Karen met with a client. Karen testified that, since 2006, she has been working from home as a financial advisor. Although Karen and her assistant, Lisa

Ford, both have offices in Karen's basement, Karen explained that she often meets with clients at the dining room table. When clients visit, they park in Karen's driveway.

¶ 17 Karen's client left at 10:30 a.m. At 11 a.m., Karen was still working at the dining room table when she heard a car accelerate outside. She got up and started to walk out of the dining room when, through a window, she saw a "taupe-ish car" turn in toward her yard "at a fast speed" and heard "something hit the tree." She ran into the hallway, called 9-1-1, and pushed a button to activate her alarm system. While still on the phone with the 9-1-1 dispatcher, Karen heard "another huge crash" from the front of the house near the porch. After a third crash, she heard glass break. From the back window, she could see defendant "walking around the porch in circles."

¶ 18 Karen's neighbor testified that she heard a "big boom sound," looked out her living room window, and saw the front end of defendant's brown Camry "up against the front" of Karen's home. Defendant then backed his car away from the house and ran it into the house again, knocking down a brick pillar. Afterward, defendant got out of his car and "walked around in the yard for a little bit." Defendant did not attempt to enter the front door. He then threw a dislodged brick at Karen's front window.

¶ 19 Karen testified that she later discovered that her window had been broken and a brick was lying on the floor. Karen also observed that the exterior wall was "caved in" at a point approximately 12 feet from where Karen had been sitting at the dining room table. Karen explained that her home has an "open floor plan," and the dining room does not have a doorway. By stipulation of the parties, the trial court admitted into evidence People's exhibit No. 31, an estimate from Eric Roehm of Roehm Innovations, estimating that the amount of damage to

Karen's home totaled $17,680. The court also admitted into evidence photographs showing the damage the collision caused to Karen's home.

¶ 20 Officer Melissa Zabukovec testified that, as she was driving to Karen's home to respond to a dispatch call, defendant "flagged her down" a block and a half away from Karen's home. Zabukovec placed handcuffs on defendant, who said to her, "that's domestic violence." While she was transporting defendant to the police station, defendant told Zabukovec that Karen had stolen from him and that he just wanted his stuff back. During a police interview, defendant said that Karen had stolen $100,000 from him and his dead father. Shortly thereafter, Zabukovec accompanied defendant in an ambulance to a local hospital. During the ride, defendant told Zabukovec that "if he ever [got] out, that [Karen's] dead." Zabukovec did not respond, so defendant asked if she had heard him. When she said that she had, he responded "good, I wanted you to." When they arrived at the hospital, defendant asked Zabukovec whether she knew that every 15 minutes a woman dies. She responded that she did not, and defendant "just kind of kept repeating it."

¶ 21 On this evidence, the jury found defendant guilty of (1) criminal damage to property in excess of $10,000, (2) violation of an order of protection, and (3) attempt (first degree murder).

¶ 22 At the May 2011 sentencing hearing, the State requested $573.03 in restitution for the costs of installing Karen's alarm system and a new rear storm door. With respect to these costs, Karen testified that she installed the security system prior to this incident with defendant. Further, she testified that the insurance company had replaced her back door jamb after the collisions because the door did not close properly. The insurance company would not pay for a

new storm door, so Karen replaced it herself because she wanted to install a door that she could lock.

¶ 23 The trial court sentenced defendant to concurrent terms of 12 years in prison for attempt (first degree murder), 5 years for criminal damage to property, and 3 years for violating the order of protection. The court also ordered defendant to pay the restitution requested by the State.

¶ 24 This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 On appeal, defendant argues (1) the State failed to prove him guilty of attempt (first degree murder) beyond a reasonable doubt, and (2) the trial court erred by ordering him to pay restitution. We address defendant's contentions in turn.

¶ 27 A. The State Presented Sufficient Evidence That Defendant Intended To Kill Karen

¶ 28 Defendant contends that the State failed to prove him guilty of attempt (first degree murder) beyond a reasonable doubt. Specifically, defendant asserts that the evidence did not establish that when defendant drove his car into Karen's home, he did so with the specific intent to kill her. We disagree.

¶ 29 The offense of attempt consists of two elements: (1) an intent to commit a specific offense, and (2) an overt act constituting a substantial step toward the commission of that offense. 720 ILCS 5/8-4(a) (West 2010); *People v. Witherspoon*, 379 Ill. App. 3d 298, 305, 883 N.E.2d 725, 731 (2008). Because intent is a state of mind, it can rarely be proved by direct evidence and instead may be inferred from surrounding circumstances. *Witherspoon*, 379 Ill. App. 3d at 307, 883 N.E.2d at 732.

¶ 30 We review a challenge to the sufficiency of the evidence by determining "whether, after 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." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). In doing so, we draw all reasonable inferences from the record in favor of the prosecution. *People v. Beauchamp*, 241 Ill. 2d 1, 8, 944 N.E.2d 319, 323 (2011). We may not reverse a conviction "unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt." *People v. Collins*, 214 Ill. 2d 206, 217, 824 N.E.2d 262, 267-68 (2005).

¶ 31 Here, the State presented sufficient evidence from which a reasonable jury could find defendant intended to murder Karen. Viewed in the light most favorable to the State, the evidence showed that defendant began making statements to Lucas in February 2010 about ramming his car into Karen's house and killing her. Defendant later acted on those threats to kill Karen driving his Camry into the front of her home.

¶ 32 Defendant points out that on cross-examination, Lucas admitted that she "was mistaken" about one of her statements. Defendant further asserts that because Lucas was friends with Karen, it is unlikely that defendant would tell Lucas that he intended to kill Karen. We are mindful, however, that the jury saw and heard the witnesses testify and is thus best equipped to judge their credibility. *People v. Wheeler*, 226 Ill. 2d 92, 114-15, 871 N.E.2d 728, 740 (2007). Moreover, according to Zabukovec, when she arrested defendant, he made statements to her that "if he ever [got] out, that [Karen's] dead" and that every 15 minutes, a woman dies.

¶ 33 Nonetheless, defendant claims that the fact that he did not try to enter Karen's

home after the collisions shows that he did not intend to kill Karen. In support of his claim, defendant cites *People v. Parker*, 311 Ill. App. 3d 80, 90, 724 N.E.2d 203, 211 (1999), wherein the court reasoned that, although abandonment is not a defense to criminal attempt in Illinois, a defendant's conduct after the purported attempt may be considered to determine whether defendant possessed the intent to kill at the time he took the substantial step. However, the State provides equally plausible explanations for defendant's not entering Karen's home after the collisions, which the jury could reasonably have accepted: namely, that defendant did not have (1) a weapon to overcome expected physical resistance from Karen and her assistant, (2) the physical means to enter Karen's home, or (3) enough time to complete the murder before security guards arrived. Accordingly, we conclude a reasonable jury could find defendant possessed the intent to kill Karen.

¶ 34 B. The Trial Court Erred by Ordering Restitution For Security Improvements

¶ 35 Defendant next contends that the trial court erred by ordering him to pay restitution for the cost of Karen's new storm door and alarm system. The State concedes this issue, and we accept the State's concession.

¶ 36 Section 5-5-6 of the Unified Code of Corrections (730 ILCS 5/5-5-6 (West 2010)) allows a trial court to award restitution to a person whose property is damaged by a defendant's criminal act. However, restitution is limited to "out-of-pocket expenses, damages, losses, or injuries found to have been proximately caused by the conduct of the defendant." 730 ILCS 5/5-5-6(a) (West 2010)).

¶ 37 Here, Karen testified at defendant's sentencing hearing that she (1) installed the security system prior to defendant driving into her home, and (2) replaced the storm door because

she wanted to install a door with a lock. These upgrades and repairs were unrelated to the events for which defendant was convicted. Accordingly, the trial court erred by ordering defendant to pay restitution for those expenditures.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm the trial court's judgment but vacate the court's restitution order requiring defendant to pay for the costs of Karen's security system and storm door. We remand for issuance of an amended sentencing judgment so reflecting. As part of our judgment, we award the State its statutory $50 fee against defendant as costs of this appeal.

¶ 40 Affirmed in part and vacated in part; cause remanded with directions.