2014 IL App (4th) 131114-U

NO. 4-13-1114

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 22, 2014
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Douglas County
TIMOTHY E. LITTLE,	)	No. 13CF8
Defendant-Appellant.	)	
	)	Honorable
	)	Michael G. Carroll,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding (1) the stalking statute was not unconstitutionally vague or overbroad, (2) the jury was properly instructed, (3) the trial court did not err by limiting defendant's cross-examination of a witness, and (4) sufficient evidence existed to support defendant's conviction.

¶ 2 In January 2013, the State charged defendant, Timothy E. Little, with multiple offenses, including stalking (720 ILCS 5/12-7.3(a)(2) (West 2012)). In October 2013, a jury found defendant guilty of stalking but acquitted him of the remaining offenses. Following a December 2013 sentencing hearing, the trial court sentenced defendant to 30 months' probation.

¶ 3 Defendant appeals, asserting (1) the stalking statute is unconstitutionally vague and overbroad, (2) the jury was improperly instructed, (3) the trial court improperly limited his cross-examination of the State's occurrence witness, and (4) insufficient evidence existed to support his conviction. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In January 2013, the State charged defendant by information with multiple offenses allegedly occurring on January 27, 2013. Relevant to this appeal is count II, which alleged defendant committed the offense of stalking against his wife, Sarah Little, in that he threatened her with a gun and then followed her to a women's shelter, a course of conduct that would cause a reasonable person to suffer emotional distress under section 12-7.3(a)(2) of the Criminal Code of 2012 (stalking statute) (720 ILCS 5/12-7.3(a)(2) (West 2012)).

¶ 6 A. Jury Trial

¶ 7 On October 21, 2013, defendant's case proceeded to jury trial. Witnesses provided the following testimony. In the interest of brevity, we recount only the testimony relevant to the resolution of this appeal.

¶ 8 1. *Sarah Little's Testimony*

¶ 9 a. Events Leading Up to January 27, 2013

¶ 10 Defendant and Sarah Little married in July 2012. Within a few weeks of the marriage, Sarah learned she was pregnant. Initially, she was excited about the pregnancy, but she began having second thoughts. She had medical concerns about having another baby because she had previously given birth to a premature son who died several months later from a congenital heart defect. Additionally, Sarah had concerns about the health of the marriage, as defendant constantly accused her of planning to leave him for her ex-husband, Steve Vogel, and became very controlling over where she was and what she did with "his" baby.

¶ 11 In September 2012, Sarah had moved out of the marital home following an argument, during which defendant put a gun in his mouth in front of her four-year-old son. She subsequently terminated her pregnancy but told defendant she suffered a miscarriage.

¶ 12 According to Sarah, defendant did not believe she miscarried and constantly questioned her about it until October 2012, when she admitted terminating the pregnancy. She described defendant as "irate" when she told him the truth**.** Later that month, Sarah returned home, saying she was afraid of defendant and also "felt guilty" for terminating the pregnancy. From July 2012 to January 2013, Sarah testified she "left" defendant about five times but always returned to him**.** Between October 2012 and January 2013, Sarah characterized her arguments with defendant as more heated because defendant remained agitated over her terminating the pregnancy.

¶ 13 b. January 27, 2013

¶ 14 On the morning of January 27, 2013, Sarah and defendant went to breakfast. They discussed plans to build a marital home, but Sarah expressed reservations. The two began arguing, at which time defendant brought up her recent abortion. During the argument with defendant, Sarah said he called her a "babykiller" and told her she "owed him a baby" that he would get "no matter what he would have to do." He also accused of her planning to leave him for Vogel. The pair returned to their home in Villa Grove, still arguing. Sarah said she went into the kitchen to throw away some garbage, while defendant began opening the numerous gun safes in the house. Sarah testified defendant removed numerous guns from the safes and started gathering them on the dining room table.

¶ 15 Sarah stated defendant told her he was going to take his guns to North Ward School, where her son attended preschool, the next day and "every baby killed would be on her." Sarah felt threatened, so she went upstairs to the master bedroom. Five minutes later, defendant appeared in the bedroom and opened the gun safe located in the bedroom closet. When she turned around, defendant held a gun in his hand. According to Sarah, he said, "I'm going to kill

you today." Sarah explained defendant typically kept that particular gun loaded, but she could not confirm it was loaded that day. She begged him to put the gun away or allow her to call her son, but defendant refused both requests. She described defendant's eyes as "very cold and very black[;] *** he was very hateful." Sarah testified defendant pointed the gun at her, at which time she screamed and grabbed his wrist. He shoved her away, saying she could scream, "but it wasn't going to help, it was too late." Sarah continued holding his wrist until he calmed down and went into the bathroom, at which time she went downstairs.

¶ 16 While downstairs, Sarah retrieved the car keys from defendant's coat pocket and waited to see if he remained calm. Defendant joined Sarah downstairs, telling her that he should kill her because she did not deserve to live. When defendant said he wanted tobacco, Sarah offered to buy some for him. Rather than driving to a store to buy tobacco, Sarah drove to Beth's Place, a women's shelter in Tuscola. She did not tell defendant she intended to drive to a shelter rather than the store. Later in the trial proceedings, defendant's ex-wife, Mandy Crumrin, testified she resided at Beth's Place in 2007, while seeking an order of protection against defendant.

¶ 17 Sarah testified, upon her arrival at Beth's Place, she parked in the parking lot, an area which was visible from three different directions. When inside, Sarah called Vogel, who had visitation with her son that day, to warn him about defendant's threats. Fifteen to twenty minutes later, an advocate asked Sarah to describe defendant's vehicle. Sarah later learned a truck matching that description drove by Beth's Place shortly after her arrival. Sarah said she was afraid defendant planned to kill her or Vogel.

¶ 18 c. Divorce Proceedings

¶ 19 Soon after the January 27, 2013, incident, Sarah filed for divorce. The trial court admitted the divorce petition as evidence but denied defendant the opportunity to cross-examine Sarah about its contents, stating the document spoke for itself. Defendant asserted he sought to demonstrate an adversarial relationship between him and Sarah. Further, defendant argued the petition demonstrated Sarah was biased because she sought financial gain through her maintenance request, a request the court would more likely grant if she testified that he mistreated her. The court noted Sarah's request for maintenance provided her no motive to lie because (1) if defendant were convicted and sentenced to prison, she would receive no maintenance; and (2) maintenance is decided independently of fault in a divorce proceeding.

¶ 20 2. *Sharon Jarboe*

¶ 21 Sharon Jarboe, the executive director for Beth's Place, testified Sarah arrived at the shelter at around noon on January 27, 2013, and parked in the front parking lot. Shortly thereafter, Jarboe went outside to clean up garbage in the parking lot. While cleaning up, she heard a vehicle approach. She said vehicles usually drove by quickly because no stop signs were located nearby. However, this vehicle drove by "very slowly," which caught her attention. Jarboe described the vehicle as a two-toned brown pickup truck with silver tool boxes lining the bed of the truck. She then identified defendant in open court as the driver of the vehicle. Despite the misty rain, she testified she saw him clearly. Once defendant passed by Beth's Place, Jarboe said he sped up and drove away. Because she was concerned about the safety of the shelter and its occupants, she placed the building on lockdown and called the police.

¶ 22 3. *Steve Vogel*

¶ 23 Vogel testified he lived in a country home near Tuscola on a quiet street with only one other home nearby. On January 27, 2013, he had visitation with his and Sarah's son. That

day, he received a call from Sarah, after which he secured their son in a safe location within his home. Vogel then watched the roadway from a window, at which time he observed defendant drive by in his two-toned brown Chevrolet pickup truck. Defendant drove by at "cruising speed" once and did not return.

¶ 24 4. *Detective Peter Buckley*

¶ 25 Detective Peter Buckley, the chief deputy of the Douglas County sheriff's office, testified, on January 27, 2013, he arrested and interviewed defendant. According to Buckley, defendant told him about being upset over Sarah terminating her pregnancy. Defendant "wanted her to feel like the parents of school children who were killed in school shootings" and further stated, "she deserves to lose things." Defendant explained to Buckley that when he threatened to shoot students, it was because he "was filled with anger and rage." Defendant further told Buckley, "I didn't know what I was saying" when he threatened to shoot students. Additionally, he said he wanted Sarah to feel like the parent of a school-shooting victim because that was how he felt.

¶ 26 During the argument with Sarah, defendant said he became so angry that he pointed the gun at himself twice in an attempt to commit suicide, saying that if he killed anyone, it would be Sarah's fault. However, he told Buckley he did not believe he could hurt anyone, stating, "[i]t was not possible I would have carried out any threat, period. I could never hurt anyone, period." He also acknowledged he may have inadvertently pointed the gun at Sarah. According to defendant, Sarah grabbed his wrist to keep him from killing himself.

¶ 27 Defendant told Buckley he went on a 30- to 40-minute drive to calm down following his altercation with Sarah. He admitted he drove by Vogel's house but stated he did

not have a gun in the car with him. However, he indicated he did not recall driving by Beth's Place.

¶ 28 5. *Defendant*

¶ 29 Defendant denied ever threatening Sarah or pointing a gun at her. He acknowledged learning of Sarah's abortion "destroyed" him. In fact, he recounted sleeping with the sonogram after he learned of Sarah's "miscarriage."

¶ 30 Defendant stated that on January 27, 2013, he and Sarah had an argument while at a restaurant, which continued as they returned home. He denied threatening to shoot anyone at the school; rather, he told her she made him feel like the parent of a school-shooting victim. That day, he intended only to kill himself. He said he pointed the gun at his head and told Sarah it was her fault he was ending his life, at which time she grabbed his hand and pulled the gun away from his head. He denied saying she deserved to lose things. After the argument, defendant said they both calmed down and he began putting his guns away. Contrary to Sarah's statement, he said the guns were on the table from the night before when he attempted to chase coyotes from his property.

¶ 31 Following the argument, Sarah decided to go to the grocery store and defendant asked her to pick up some tobacco. After she drove away, defendant left the house in his two-toned brown pickup truck to check on vehicle trailers related to his business. Due to the freezing rain and sleet, he drove slowly. He admitted to driving by Vogel's house but stated he only passed it en route to a friend's house. He denied intentionally driving by Beth's Place, testifying he did not even know its location.

¶ 32 On this evidence, the jury found defendant guilty of stalking Sarah (count II) but not guilty of the remaining counts.

¶ 33 B. Posttrial and Sentencing Hearings

¶ 34 In November 2013, defendant filed a posttrial motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The motion alleged, among other things, (1) insufficient evidence existed to find defendant guilty of stalking, and (2) the trial court inappropriately prohibited cross-examination of Sarah regarding the divorce proceedings. His supporting memorandum asserted the court's limitation of his cross-examination of Sarah prevented him from exploring her bias and motive to lie based on her (1) maintenance request in the divorce proceedings and (2) potential civil lawsuit against defendant. Defendant attached to his memorandum an affidavit from the attorney representing him in the divorce proceedings, averring Sarah refused to waive any civil claims against defendant. In December 2013, the court denied defendant's posttrial motion. Immediately thereafter, defendant's sentencing hearing commenced. Following the presentation of evidence, the court sentenced defendant to 30 months' probation.

¶ 35 This appeal followed.

¶ 36 II. ANALYSIS

¶ 37 On appeal, defendant asserts (1) the stalking statute is unconstitutionally vague and overbroad, (2) the jury was improperly instructed, (3) the trial court improperly limited his cross-examination of the State's occurrence witness, and (4) insufficient evidence existed to support his conviction. We address defendant's contentions in turn.

¶ 38 A. Constitutionality of the Stalking Statute

¶ 39 Defendant asserts the stalking statute is unconstitutionally vague and overbroad in that it criminalizes innocent behavior. Challenges to the constitutionality of a statute may be raised at any time. *People v. McCarty*, 223 Ill. 2d 109, 123, 858 N.E.2d 15, 25 (2006). We

review *de novo* constitutional challenges to a statute. *People v. Masterson*, 2011 IL 110072, ¶ 23, 958 N.E.2d 686.

¶ 40 "[A] statute enjoys a strong presumption of constitutionality." *People v. Nakajima*, 294 Ill. App. 3d 809, 817, 691 N.E.2d 153, 158 (1998). In determining the constitutionality of a statute, the reviewing court's role is to ascertain and give effect to the legislature's intent. *Id*. A statute must be construed "so as to sustain its constitutionality and presume any interpretation that renders the law valid was intended by the legislature." *Id*.

¶ 41 The State charged defendant under subsection (a)(2) of the stalking statute, which provides, "[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 *** suffer other emotional distress." 720 ILCS 5/12-7.3(a)(2) (West 2012). A course of conduct requires, in part, two or more acts. 720 ILCS 5/12-7.3(c)(1) (West 2012). Specifically, defendant contends the statute "requires the State to prove nothing more than the [d]efendant engaged in two (2) or more acts, directed at a specific person, which would cause a reasonable person to suffer 'other emotional distress.' " Defendant asserts this language encompasses innocent conduct, thus rendering the statute both overbroad and vague. We address these arguments separately.

¶ 42 1. *Overbreadth Challenge*

¶ 43 Defendant argues subsection (a)(2) of the stalking statute is unconstitutional because it criminalizes otherwise lawful conduct protected by the first amendment. See U.S. Const., amend. I. To prove a statute is overbroad in the context of the first amendment, a defendant must demonstrate "a substantial number of its applications are unconstitutional, judged

in relation to the statute's plainly legitimate sweep." *People v. Clark*, 2014 IL 115776, ¶ 11, 6 N.E.3d 154.

¶ 44 In support of his argument, defendant points to the supreme court's holding in *Clark*, which invalidated an eavesdropping statute because the overbroad sweep of the statute criminalized innocent conduct otherwise permissible under the first amendment. *Id*. ¶ 25, 6 N.E.3d 154. In reaching this conclusion, the supreme court found that while the government had a legitimate interest in protecting the recording of private speech, the statute reached beyond private speech and criminalized the recording of public speech. *Id*. ¶ 21, 6 N.E.3d 154. The court noted an individual would be subject to prosecution under the eavesdropping statute for recording (1) a loud argument or conversation in the street, (2) a political debate in the park, or (3) public interactions between police and citizens, none of which implicated an individual's privacy interests. *Id.* Defendant asserts the same reasoning applies to the present case.

¶ 45 Pursuant to *Clark*, we must first construe the statute in order to determine the legitimate sweep of the statute. The purpose of the stalking statute is "to prevent violent attacks by allowing the police to act before the victim was actually injured and to prevent the terror produced by harassing actions." *People v. Bailey*, 167 Ill. 2d 210, 224, 657 N.E. 2d 953, 960 (1995). Thus, the statute legitimately impacts harassing activities, which are frequently a precursor to violence.

¶ 46 In support of his overbreadth argument, defendant contends the recent appellate court opinion in *People v. Douglas*, 2014 IL App (5th) 120155, 6 N.E.3d 876, is distinguishable from the present case. In *Douglas*, the Fifth District concluded the defendant's hypothetical examples consisting of consensual rather than nonconsensual contact failed to demonstrate how the statute punished innocent conduct. *Id*. ¶ 41, 6 N.E.3d 876. Defendant asserts his two

hypothetical examples are distinguishable from those presented in *Douglas* because his examples focus on otherwise lawful nonconsensual communication between the parties. Here, the distinction is of no consequence.

¶ 47 First, defendant hypothesizes an attorney who represents a husband during a divorce proceeding will likely cause emotional distress to the wife when he serves her with divorce papers. That same attorney would cause a second occasion of emotional distress by taking the wife's deposition on behalf of his client. According to defendant, the attorney's lawful behavior could be prosecuted as stalking.

¶ 48 Second, defendant provides a scenario in which a husband "argues forcefully," albeit in a civilized manner, with his wife over the issue of abortion on two or more occasions and thereby causes his wife emotional distress because she had previously undergone an abortion.

¶ 49 In both of these examples, the hypothetical defendant's conduct is not impacted by subsection (a)(2) of the stalking statute. Subsection (a)(2) requires the state show the course of conduct would cause a *reasonable* person to suffer other emotional distress. 720 ILCS 5/12-7.3(a)(2) (West 2012). Thus, in both situations, even if the contact between the parties was not consensual, the conduct of the hypothetical defendant would not be of such a nature to cause a *reasonable* person other emotional distress.

¶ 50 Defendant then extends the second hypothetical to the present case, and he asserts the statute criminalized his otherwise lawful right to confront his wife about her abortion simply because it caused her emotional distress. In making this argument, defendant relies on *Snyder v. Phelps*, 562 U.S. 443, 131 S. Ct. 1207 (2011), in which the Supreme Court upheld the right of a church to protest in the vicinity of a military funeral. Defendant asserts those same protestors

could be found guilty under the Illinois stalking statute, demonstrating the overbreadth of the statute. Defendant points to the following language in *Snyder* to support his argument: "[g]iven that [the protestors'] speech was at a public place on a matter of public concern, that speech is entitled to 'special protection' under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt." *Id*. at __, 131 S. Ct. at 1219.

¶ 51 However, defendant oversimplifies the holding in *Snyder* and disregards the extensive analysis undertaken by the court. We note the *Snyder* court first determined, by considering all the circumstances of the case, whether the speech was of public or private concern. *Id*. at __, 131 S. Ct. at 1215-16. This required a review of the content, form, and context of the speech. *Id*. at __, 131 S. Ct. at 1216. We must be mindful that "[i]n considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said." *Id*. In *Snyder*, the court found the protestors "conducted [their] picketing peacefully on matters of public concern at a public place adjacent to a public street." *Id.* at __, 131 S. Ct. at 1218. Nothing in the evidence suggests that in driving by Beth's Place, defendant intended to peacefully protest a matter of public concern in a public forum. This is particularly true when, in his own testimony and in statements to police, he denied intentionally driving by Beth's Place. Even following defendant's unsupported logic that the jury could have found he intended to protest Sarah's abortion at Beth's Place, nothing in the record demonstrates defendant intended to "convey his position on abortion utilizing a method designed to reach as broad a public audience as possible."

¶ 52 In addition, unlike in *Snyder*, a preexisting relationship and conflict existed between defendant and Sarah. This preexisting relationship and conflict strongly suggest

defendant is attempting to mask an attack on Sarah over a private matter as a protest of a matter of public concern. This case is clearly distinguishable from *Snyder*. Regardless, defendant's assertion that the statute improperly restricts his freedom to protest his wife's abortion is without merit, as subsection (d)(2) protects his right, had he been doing so, to lawfully protest. 720 ILCS 5/12-7.3(d)(2) (West 2012).

¶ 53 In his reply brief, defendant raises numerous other examples of conduct resulting in emotional distress that could be prosecuted as stalking, such as (1) a parent repeatedly expressing displeasure to a teacher regarding a student's grades, (2) an individual arguing with the same umpire following multiple sporting events, or (3) a person who repeatedly expresses displeasure to a neighbor over loud music. We find these scenarios similarly lacking because they involve situations in which a *reasonable* person would not be caused emotional distress or the hypothetical individual is exercising his otherwise lawful freedom of speech, which exempts him from the stalking statute. 720 ILCS 5/12-7.3(d)(2) (West 2012).

¶ 54 Accordingly, we conclude defendant has failed to demonstrate a substantial number of the statute's applications would criminalize conduct otherwise permissible under the first amendment.

¶ 55 2. *Vagueness Challenge*

¶ 56 Defendant also briefly addresses his vagueness challenge as a corollary to his overbreadth challenge, noting the two issues are closely related, but he does not fully develop the argument. To demonstrate a statute is vague, a defendant must show "(1) a person of ordinary intelligence would not have a reasonable opportunity to understand what conduct the statute prohibits; or (2) the statute authorizes or encourages arbitrary enforcement." *People v. Sucic*, 401 Ill. App. 3d 492, 504, 928 N.E.2d 1231, 1243 (2010). We can only assume defendant is

asserting that, because the statute is overbroad, it is also vague. Because we have determined the statute is not overly broad, we conclude defendant has similarly failed to demonstrate subsection (a)(2) of the stalking statute is vague.

¶ 57 B. Jury Instructions

¶ 58 Defendant next argues the trial court improperly instructed the jury as to the law on stalking. Before we address the merits of this issue, we note the parties disagree as to the appropriate standard of review. Defendant argues we should review *de novo* the accuracy of the jury instructions pursuant to *People v. Hale*, 2012 IL App (4th) 100949, ¶ 19, 967 N.E.2d 476. Conversely, the State asserts the issue is subject to plain-error review because, though defendant objected to the State's stalking instruction, he failed to raise the specific issues he now raises on appeal.

¶ 59 During the trial, the State tendered its non-Illinois Pattern Jury Instruction No. 20, which stated, "[a] person commits the offense of Stalking when he knowingly engages in a course of conduct directed a specific person, and he knows or should know that this course of conduct would cause a reasonable person to suffer emotional distress." Defendant objected on the grounds that (1) the State used the same definition to cover two separate counts of stalking, and (2) the definition criminalized innocent conduct. Defendant proffered no alternative instruction. In his posttrial motion, defendant contended, "[t]he jury instruction concerning the definition of stalking was erroneously given over objection, and the corresponding issues instruction was erroneous. The given instructions were incomplete and misleading." The defendant did not further this argument in his supporting memorandum or during the hearing.

¶ 60 On appeal, defendant argues the jury instructions failed to (1) define "emotional distress" and (2) include statutory language explaining, "[t]his section does not apply to an

exercise of the right to free speech or assembly that is otherwise lawful." See 720 ILCS 5/12-7.3(d)(2) (West 2012). Defendant neither voiced these specific objections nor offered those instructions at any point before the trial court. Accordingly, this issue would ordinarily be deemed forfeited. *People v. Herron*, 215 Ill. 2d 167, 175, 830 N.E.2d 467, 472 (2005) (an issue is deemed forfeited where the appellant fails to preserve the record before the trial court). However, "substantial defects are not waived by failure to make timely objections thereto if the interests of justice require." See Illinois Supreme Court Rule 451(c) (eff. Apr. 8, 2013). This provision is construed identically to the plain-error rule set forth in Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967). See *Herron*, 215 Ill. 2d at 175, 830 N.E.2d at 473. Thus, we agree with the State that defendant must demonstrate plain error to overcome forfeiture of this issue.

¶ 61 To demonstrate plain error, a defendant must first show a clear or obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007). If the defendant proves a clear or obvious error occurred, he then must show the error (1) alone threatened to tip the scales of justice in a closely balanced case, or (2) is so serious that it affected the fairness of the trial and integrity of the judicial process. *Id.* "[A]n omitted jury instruction constitutes plain error only when the omission creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial." *People v. Hopp*, 209 Ill. 2d 1, 12, 805 N.E.2d 1190, 1197 (2004). Generally, the trial court is under no obligation to issue an instruction *sua sponte*. *People v. Mullen*, 80 Ill. App. 3d 369, 376, 399 N.E.2d 639, 644 (1980). However, "[t]he failure correctly to inform the jury of the elements of the crime charged has been held to be error so grave and fundamental that the [forfeiture] rule should not apply." *People v. Ogunsola*, 87 Ill. 2d

216, 222, 429 N.E.2d 861, 864 (1981). We now turn to defendant's two contentions of error as they relate to the jury instructions.

¶ 62 1. *Definition of "Emotional Distress"*

¶ 63 Defendant argues the trial court erred by failing to issue, *sua sponte*, a jury instruction defining "emotional distress," as it was an element of the offense of stalking. We disagree.

¶ 64 First, the State's instructions defining the offense of stalking correctly set forth the law as contained in section 12-7.3(a)(2) of the stalking statute (720 ILCS 5/12-7.3(a)(2) (West 2012)). In accordance with the statute, the State's instruction outlined the State's obligation to prove defendant (1) "knowingly engaged in a course of conduct directed at Sarah Little, in that defendant threatened Sarah Little with a gun"; (2) "followed or monitored Sarah Little at a women's shelter"; and (3) "knew or should have known this course of conduct would cause a reasonable person to suffer emotional distress." Thus, the jury was instructed as to the elements of the offense. The question is whether the failure of the trial court to *sua sponte* issue a definition of "emotional distress" created a serious risk that the jurors incorrectly convicted defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial.

¶ 65 In support, defendant relies on *Ogunsola*, 87 Ill. 2d at 223, 429 N.E.2d at 864, which held, "[j]ury instructions that incorrectly define the offense cause prejudice to a criminal defendant far more serious than instructions that do not include a definition of a term [citation] or that omit an instruction on a collateral issue [citation]." However, defendant does not assert on appeal that the definition of stalking is incorrect, thus bringing this case in line with *Ogunsola*;

rather, he argues the instructions failed to include a definition of a term. Accordingly, *Ogunsola* is distinguishable from the present case.

¶ 66 Defendant's reliance on this court's decision in *Hale*, 2012 IL App (4th) 100949, 967 N.E.2d 476, is similarly misplaced. In *Hale*, the trial court instructed the jury that one element of the offense of threatening a public official was proof of a threat. *Id*. ¶ 23, 967 N.E.2d 476. However, the statute required the State to prove more than just a "threat"; rather, the State was required to prove the threat "contain[ed] *specific* facts indicative of a *unique threat* to the person, family or property of the officer and *not a generalized threat of harm*." (Emphases in original.) *Id*. ¶ 23, 967 N.E.2d 476; 720 ILCS 5/12-9(a-5) (West 2008). *Hale*, like *Ogunsola*, discussed errors in outlining the elements of the case, whereas the present case centers on the definition of one of those elements. As the supreme court noted in *Ogunsola*, incorrectly defining the offense is "far more serious" than failing to include the definition of a term. *Ogunsola*, 87 Ill. 2d at 223, 429 N.E.2d at 864.

¶ 67 Defendant contends without the appropriate definition of "emotional distress," the jury could not have determined whether Sarah suffered emotional distress. We disagree. As the State points out, the legal definition of emotional distress as it relates to stalking mirrors the common understanding of the term. "[T]he jury need not be instructed on the terms *** [that] have a plain meaning within the jury's common knowledge." *People v. Powell*, 159 Ill. App. 3d 1005, 1013, 512 N.E.2d 1364, 1370 (1987). "Emotional distress" is defined in the stalking statute as "significant mental suffering, anxiety or alarm." 720 ILCS 5/12-7.3(c)(3) (West 2012)). This legal definition is consistent with the common understanding of the term. For example, Black's Law Dictionary defines emotional distress as "[a] highly unpleasant mental reaction (such as anguish, grief, fright, humiliation, or fury) that results from another person's

conduct; emotional pain and suffering." Black's Law Dictionary 563 (8th ed. 2004). Merriam-Webster's Collegiate Dictionary defines "emotional" as "markedly aroused or agitated in feeling or sensibilities." Merriam-Webster's Collegiate Dictionary 378 (10th ed. 2000). It further defines "distress" as "to cause to worry or be troubled." Merriam-Webster's Collegiate Dictionary 337 (10th ed. 2000). The definition of "emotional distress" as contained within the stalking statute is consistent with both Merriam-Webster's Collegiate and Black's Law Dictionaries. Accordingly, an instruction was not necessary for the jury to understand the legal definition of emotional distress. This is in line with other cases in which the trial court either declined or failed to offer definitional instructions. See, *e.g.*, *People v. Edwards*, 343 Ill. App. 3d 1168, 1180, 799 N.E.2d 899, 908 (2003) (failure to define "robbery" did not constitute grave error); *People v. Manning*, 334 Ill. App. 3d 882, 890, 778 N.E.2d 1222, 1228 (2002) (no error where trial court failed to define "conceal"); *People v. Bradley*, 192 Ill. App. 3d 387, 394, 548 N.E.2d 743, 748 (1989) (term "stolen motor vehicle" was readily understood and not in need of further definition via instruction). Thus, defendant has failed to demonstrate the court was under an obligation to issue, *sua sponte*, an instruction defining the term "emotional distress."

¶ 68 Further, nothing in the record suggests the jury was confused or misapprehended the definition of "emotional distress." During deliberations, the jury sent numerous notes asking for (1) transcripts of witness testimony, (2) a copy of Detective Buckley's police report, and (3) clarification of the law is it pertained to other counts. This jury did not hesitate to ask for clarification from the trial court during deliberations. At no time did the jury express any confusion or misapprehension of the law as to "emotional distress."

¶ 69 The exception to the forfeiture rule allowing plain-error review is difficult to meet. *People v. Young*, 2013 IL App (2d) 120167, ¶ 32, 997 N.E.2d 285. Defendant has not

demonstrated the trial court erred by failing to issue, *sua sponte*, a definition of the term "emotional distress," nor has he shown the omission created a serious risk that the jurors incorrectly convicted him because they did not understand the applicable law, so as to severely threaten the fairness of the trial.

¶ 70 2. *First-Amendment Exemption to Stalking*

¶ 71 With respect to his assertion the trial court tendered incomplete instructions regarding the stalking offense, defendant argues the court should have included the statutory language explaining, "[t]his section does not apply to an exercise of the right to free speech or assembly that is otherwise lawful." See 720 ILCS 5/12-7.3(d)(2) (West 2012). Defendant contends the jury could have disbelieved his testimony that he was driving around to calm down or check on his trailers and instead believed he meant to confront Sarah again. By failing to include the statutory language, defendant asserts the court (1) failed to instruct the jury regarding an element of the offense, and (2) allowed the jury to criminalize his otherwise lawful behavior of speaking to his wife. Conversely, the State contends the language outlines an exemption that is not applicable to this set of facts. We agree with the State.

¶ 72 As noted above, the State set forth the appropriate elements of the stalking offense as outlined in section 12-7.3(a)(2) of the stalking statute (720 ILCS 5/12-7.3(a)(2) (West 2012)). The question is whether this additional sentence, found in subsection (d)(2), was improperly omitted as an element of the offense, thus requiring reversal.

¶ 73 The State asserts the first-amendment exemption to the stalking offense is just that, an exemption. Accordingly, the State argues it is not an element of the offense. We agree.

¶ 74 Generally, where a criminal statute contains exceptions to its applicability, the State must allege and prove the defendant's actions do not fall within those exceptions. *People v.*

Close, 238 Ill. 2d 497, 508, 939 N.E.2d 463, 469 (2010). However, if the exception serves only to withdraw certain acts or persons from the operation of the statute, the State is not required to prove the exemption fails to apply. *Id.* " 'Exemptions are generally mere matters of defense.' " *Id*.

¶ 75 Here, the first-amendment exemption serves only to withdraw otherwise lawfully protected first-amendment actions from the operation of the statute. 720 ILCS 5/12-7.3(d)(2) (West 2012). In other words, the stalking provision applies to individuals who knowingly engage in a course of conduct that the individual knows or should know will result in emotional distress. 720 ILCS 5/12-7.3(a)(2) (West 2012). A person who is otherwise guilty of stalking is exempt from the operation of the statute if that individual is "exercis[ing] *** the right to free speech or assembly that is otherwise lawful." 720 ILCS 5/12-7.3(d)(2) (West 2012). Because this provision withdraws the operation of the stalking statute from those lawfully exercising their first-amendment rights, the State was not required to prove the exemption failed to apply to defendant's behavior.

¶ 76 Defendant asserts that, where statutes contain exemptions, those exemptions are usually affirmative defenses. However, in *Close*, a defendant charged with driving while his license was revoked argued the statutory exemption excluding those with restricted-driving permits constituted a required element for the State to prove. *Close*, 238 Ill. 2d at 508-09, 939 N.E.2d at 469. The supreme court disagreed, noting the exemption simply removed those with restricted-driving permits from criminal liability and was not part of the substantive offense of driving while license revoked. *Id*. Defendant then directs our attention to *People v. Finkenbinder*, 2011 IL App (2d) 100901, 963 N.E.2d 1069, for the proposition that a provision that is neither an element nor an affirmative defense is properly characterized as an exemption.

Defendant asserts *Finkenbinder* highlights that statutes typically expressly state when the defendant has the burden of proving the exemption applies. *Id.* ¶ 10, 963 N.E.2d 1069. While Finkenbinder does note the usual explicit expression in a statute placing the burden of proof on the defendant, it certainly does not stand for the proposition that such a statement is required. In any event, nothing in the record suggests defendant fell within the exemption.

¶ 77 The purpose of jury instructions is to "convey the legal rules applicable to the evidence presented at trial and thus guide the jury's deliberations toward a proper verdict." *People v. Mohr*, 228 Ill. 2d 53, 65, 885 N.E.2d 1019, 1025 (2008). To prevail, a defendant must demonstrate some evidence in the record justified the instruction. See *id.* at 65, 885 N.E.2d at 1025-26. Where an instruction is not supported by either the evidence or the law, it should not be given. *Id.* at 65, 885 N.E.2d at 1026. The reviewing court's role is to consider whether the instructions, taken as a whole, fully and fairly set forth the law applicable to the theories presented by the State and the defendant. *Id.* We will not overturn the trial court's decisions as to jury instructions absent an abuse of discretion. *Id.* at 66, 885 N.E.2d at 1026. " 'A trial court abuses its discretion if jury instructions are not clear enough to avoid misleading the jury [.]' " *Id.* at 66, 885 N.E.2d at 1026 (quoting *In re Timothy H.*, 301 Ill. App. 3d 1008, 1015, 704 N.E.2d 943, 948 (1998)).

¶ 78 Defendant's argument for the inclusion of this exemption is contrary to his theory of the case as presented at trial. Throughout the entire course of the proceedings, defendant's theory of the case was that he had no knowledge Sarah was at Beth's Place, or even of the location of the shelter. Defendant concedes the same in his appellate brief but goes on to state, "[i]f, for the sake of argument, the State proved the Defendant drove by Beth's Place, to express his opposition to abortion knowing Sarah would be offended by his actions, he would have a

First Amendment right to do so under the statutory exemption." Absolutely nothing in the record supports defendant's contention that he intended to peacefully protest his wife's actions in a way consistent with his right to freedom of speech. We will not accept this alternative theory now on appeal, especially where nothing in the record suggests he intended to engage in his lawful exercise of free speech or assembly.

¶ 79 Defendant further argues without the statutory language of subsection (d)(2), the offense of stalking becomes a strict-liability offense. However, the statute clearly requires the *scienter* requirement of knowledge, so this claim is without merit. See 720 ILCS 5/12-7.3(a)(2) (West 2012).

¶ 80 Thus, the trial court did not abuse its discretion by failing to instruct the jury where the first-amendment exception was not (1) an element of the offense or (2) applicable to the evidence or the theories presented by either the State or defendant. Because we find no error, defendant has forfeited this issue.

¶ 81 C. Limited Cross-Examination

¶ 82 Defendant next contends the trial court improperly limited his cross-examination of Sarah's potential bias due to the pending divorce proceedings. Specifically, defendant asserts the court should have permitted him to explore Sarah's bias as it pertained to (1) her maintenance request and (2) a potential civil lawsuit.

¶ 83 We begin by noting the parties dispute the standard of review. The State asserts defendant forfeited these issues. Conversely, defendant asserts the court's limitation of cross-examination as to bias or motive to lie is subject to *de novo* review. As we conclude different standards of review apply to each issue, we discuss them independently.

¶ 84 1. *Maintenance Request*

¶ 85 With respect to defendant's cross-examination of Sarah's request for maintenance, the State asserts defendant forfeited this issue by acquiescing to the trial court's order prohibiting cross-examination of the divorce petition. Conversely, defendant asserts the court's limitation of cross-examination as to bias or motive to lie is subject to *de novo* review.

¶ 86 The State rests its argument on a single statement made by defense counsel during trial. Defendant attempted to cross-examine Sarah regarding potential bias and motive to lie based on her divorce petition's request for maintenance, at which time the State objected. The trial court sustained the objection and defendant responded, "I can't cross-examine?" The court replied the document spoke for itself, and defendant answered, "Okay. That's fine." The State interprets that statement as defendant's acquiescence to the court's order. However, taken in the context of the entire proceedings, we disagree. Defendant challenged this issue multiple times—contemporaneously, during a sidebar, at the instruction conference, and in his posttrial motion—leading us to conclude defendant was not acquiescing to the court's order but was merely acknowledging it. Thus, defendant has not forfeited this issue.

¶ 87 While we conclude this issue is not forfeited, we do not agree with defendant's assertion the trial court's decision to limit his cross-examination is subject to *de novo* review. Defendant cites to *People v. Thompson*, 75 Ill. App. 3d 901, 394 N.E.2d 422 (1979), to support the *de novo* standard of review. *Thompson* states a defendant has the right to cross-examination, but the court's limitation of cross-examination relating to interest, bias, or motive is "subject to the broad discretion of the trial court to preclude repetitive or undue harassing interrogation and, assuming a proper subject matter, to control the extent of the cross-examination." *Id.* at 903, 394 N.E.2d at 424. This does not outline a *de novo* standard of review; rather, the court's limitation of cross-examination as it relates to bias is subject to review under an abuse-of-discretion

standard. See, *e.g.*, *People v. Wilson*, 2012 IL App (1st) 092910, ¶ 24, 965 N.E.2d 667; *People v. Davis*, 193 Ill. App. 3d 1001, 1004-05, 550 N.E.2d 677, 679 (1990), *People v. Fultz*, 2012 IL App (2d) 101101, ¶ 57, 971 N.E.2d 596. However, we note our holding would remain the same, regardless of the standard of review.

¶ 88 Defendant asserts the trial court improperly limited his cross-examination of Sarah regarding the divorce proceedings because her request for maintenance demonstrated a bias or motive to lie in hopes she would financially gain from a guilty verdict.

¶ 89 In support of his arguments, defendant cites *People v. Baptiste*, 37 Ill. App. 3d 808, 347 N.E.2d 92 (1976). In *Baptiste*, the defendants asserted the trial court deprived them of a fair trial because they were prohibited from challenging the credibility of witnesses through cross-examination of the key witnesses' pending criminal charges. *Id.* at 811, 347 N.E.2d at 94. The appellate court concluded, "[i]t was for the jury to decide whether the pending charges against [one of the witnesses] provided a further motive to offer false testimony beyond the self-evident interest of a victim of a crime." *Id.* at 813, 347 N.E.2d at 95. Accordingly, defendant argues he had the right to present the jury with potential bias or motive to lie.

¶ 90 Defendant also relies on *Thompson*, 75 Ill. App. 3d 901, 394 N.E.2d 422. In *Thompson*, the trial court prohibited the defendant from cross-examining a witness about bias by demonstrating that the outcome of the case would impact the amount of money the witness could receive from an insurance settlement. *Id.* at 903, 394 N.E.2d at 424. The appellate court concluded the trial court abused its discretion by prohibiting the cross-examination, reasoning, "[i]f a witness has or may have an expectancy of a financial benefit as a result of the litigation being brought, the quality of his testimony may be affected." *Id.* at 904, 394 N.E.2d at 425.

¶ 91 The State asserts defendant's reliance on *Thompson* and *Baptiste* is misplaced because, here, defendant had no legal basis for his argument of bias based on Sarah's maintenance request, as an award of maintenance cannot be based on marital misconduct. 750 ILCS 5/504(a) (West 2012) (the court may grant maintenance in a divorce proceeding as it deems just and "without regard to marital misconduct"). We agree. To allow defendant to imply that Sarah had a motive to lie in order to collect additional maintenance would mislead the jury regarding a nonexistent financial interest. "The evidence used to impeach *** must give rise to an inference that the witness has something to gain or lose by his testimony." *People v. Coleman*, 206 Ill. 2d 261, 278, 794 N.E.2d 275, 287 (2002). Under the law, Sarah's request for maintenance could not legally be dependent upon her testimony alleging marital misconduct; thus, that line of questioning could not give rise to an inference that Sarah had something to gain or lose by her testimony in terms of her maintenance request. Accordingly, we conclude the court did not abuse its discretion in limiting defendant's cross-examination on Sarah's request for maintenance.

¶ 92 2. *Potential Civil Lawsuit*

¶ 93 With respect to defendant's argument that the trial court improperly restricted his cross-examination based on a potential lawsuit, the State argues defendant forfeited this issue by raising it for the first time in his posttrial motion. We agree. While defendant made it clear during the trial proceedings that he objected to the trial court's limitation of his cross-examination as it pertained to Sarah's request for maintenance, he failed to sufficiently raise the issue that Sarah refused to waive defendant's civil liability. Though the trial court precluded defendant from raising issues related to the divorce petition, the order did not preclude defendant from asking Sarah about a pending or prospective civil lawsuit. Accordingly, this issue is

forfeited unless defendant can demonstrate plain error. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967).

¶ 94 As previously noted, to establish plain error, a defendant must first demonstrate the court committed a clear or obvious error. *Piatkowski*, 225 Ill. 2d at 565, 870 N.E.2d at 410-11. To demonstrate a clear or obvious error, defendant must show the court abused its discretion by limiting his cross-examination. *Thompson*, 75 Ill. App. 3d at 903, 394 N.E.2d at 424.

¶ 95 Defendant contends Sarah's refusal to waive any potential civil claims against him in the context of the divorce proceedings showed a financial motive to lie. Conversely, the State argues Sarah's refusal to waive any potential claims does not demonstrate a financial motive to lie because nothing in the record suggested she intended to file such a claim. We agree with the State.

¶ 96 As the State notes, "[t]he actual pendency of civil litigation is relevant as tending to show the bias or interest of a witness, and thus is a proper subject matter of cross-examination." *People v. Martinez*, 120 Ill. App. 3d 305, 308, 458 N.E.2d 104, 108 (1983). However, where the defendant seeks to impeach based upon *potential* litigation, the bias "is so indefinite and questionable as to have little probative value." *Id.* "To be admissible, evidence showing bias must be direct and positive, not remote or uncertain." *Davis*, 193 Ill. App. 3d at 1004, 550 N.E.2d at 679.

¶ 97 At trial, defendant did not attempt to ask Sarah any questions regarding pending or potential civil litigation for emotional distress, nor did he bring this issue to the trial court's attention contemporaneously or during the sidebar. Nothing in the record suggests Sarah intended to initiate civil proceedings against defendant. Thus, the court did not abuse its

discretion because defendant did not properly raise the issue during the trial to allow the court to exercise its discretion in the first place.

¶ 98 D. Insufficient Evidence

¶ 99 Finally, defendant argues the State presented insufficient evidence to prove him guilty beyond a reasonable doubt.

¶ 100 Where a defendant challenges the sufficiency of the evidence, we must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the necessary elements to prove the defendant guilty beyond a reasonable doubt. *People v. Wheeler*, 226 Ill. 2d 92, 114, 871 N.E.2d 728, 740 (2007). A conviction will not be upheld where the evidence is so improbable or unsatisfactory so as to give rise to reasonable doubt. *People v. Smith*, 185 Ill. 2d 532, 542, 708 N.E.2d 365, 370 (1999).

¶ 101 Section 12-7.3(a)(2) of the stalking statute (720 ILCS 5/12-7.3(a)(2) (West 2012)) provides, "[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 *** suffer other emotional distress." A "course of conduct" consists of:

> "[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 2012)).

¶ 102 Defendant asserts the State failed to provide evidence of two or more instances that constitute "a course of conduct." The State argues the "two acts" creating a course of conduct consisted of (1) the alleged threats defendant made at the marital residence, and (2) defendant driving by Beth's Place. Defendant contends the State failed to prove his act of driving by Beth's Place constituted a second act. In support, he argues (1) he offered unrebutted testimony that he did not know the location of Beth's Place; (2) he drove by Beth's Place inadvertently while checking on trailers for his business; (3) the State presented no evidence that Beth's Place contained signage identifying the building; (4) he had no way of knowing Sarah was going to Beth's Place, as she stated she was going to buy tobacco; and (5) the evidence demonstrated only that he drove by the building slowly, not that he surveilled or monitored the location.

¶ 103 First, although defendant offered unrebutted testimony that he did not know the location of Beth's Place and did not intentionally drive by it, the jury was not required to believe his self-serving statement. "It falls within the province of the trier of fact to judge the credibility of witnesses, resolve conflicts in the evidence, and draw conclusions based on all the evidence." *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 21, 954 N.E.2d 718. Thus, the jury "is free to accept or reject as much or as little of a witness's testimony as it pleases." *Id.* ¶ 22, 954 N.E.2d 718. Nor was the jury required to accept either of defendant's contradictory statements that, following Sarah's departure, he drove (1) aimlessly for 30 to 40 minutes to calm down, or (2) to check on his trailers for his business. The location of Sarah's car in the parking lot, in full view of anyone passing by, would have alerted defendant to her presence, even if the building

contained no signage identifying it as a shelter. Jarboe, the executive director of Beth's Place, testified defendant drove by "very slowly," which was unusual enough to catch her attention, and then sped up after passing the property. Defendant's behavior was irregular and unsettling enough for Jarboe to place the facility on lockdown and call for police assistance. Additionally, defendant's argument he did not know about the existence of Beth's Place is more specious given his ex-wife's testimony that she resided at Beth's Place while seeking an order of protection against him in 2007. Finally, Vogel testified defendant drove by his residence during this time period, from which the jury could infer defendant was not merely driving around to calm down or check on his trailers. In resolving the evidence in favor of the State, a reasonable jury could conclude defendant drove around attempting to find Sarah so he could surveil or monitor her location, thus constituting a second act to create a "course of conduct."

¶ 104 If we were to uphold his conviction, defendant asserts, "it would be possible for any innocent person who coincidentally travels along a road for lawful and legitimate purposes, without any purpose of stalking another individual, to be convicted merely because that individual coincidentally happens to travel past a building or place where the alleged victim decides to travel following an argument with his or her spouse." In raising this argument, defendant oversimplifies the stalking statute. As defendant initially argues, a conviction for stalking under section (a)(2) requires two or more acts in which the alleged victim is followed, monitored, observed, surveilled, or threatened, not just a single, innocent act. 720 ILCS 5/12-7.3(a)(2), (c)(1) (West 2012). Defendant also overlooks that this action must cause the alleged victim emotional distress. 720 ILCS 5/12-7.3(a)(2) (West 2012). Further, this argument ignores that the trier of fact must find the defendant *knowingly* engaged in the course of conduct. 720 ILCS 5/12-7.3(a)(2) (West 2012). This *scienter* requirement would exclude a defendant who

coincidentally or innocently drives by the location where the victim sought refuge. We therefore reject defendant's argument.

¶ 105 Accordingly, we conclude the evidence was sufficient for a rational jury to find the necessary elements to prove defendant guilty of stalking Sarah beyond a reasonable doubt.

¶ 106 III. CONCLUSION

¶ 107 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we grant the State its $75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2012).

¶ 108 Affirmed.