

2017 IL App (1st) 160599-U

No. 1-16-0599

Order filed December 15, 2017

Fifth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 15 CR 2403
)	
DEMARIO LOWRY,)	Honorable
)	Vincent Michael Gaughan,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm defendant's convictions for harassment of a witness and intimidation where the evidence at trial established each element of the offenses beyond a reasonable doubt.

¶ 2 Following a bench trial, defendant Demario Lowry was found guilty of one count of harassment of a witness (720 ILCS 5/32-4a(a)(2) (West 2014)) and two counts of intimidation (720 ILCS 5/12-6(a)(1) (West 2014)). The trial court merged the charges and sentenced him to 60 months in the Illinois Department of Corrections on the harassment count. On appeal,

defendant contends the State failed to prove him guilty beyond a reasonable doubt of the charges as it presented no evidence that he intended to harass the complainant, and that he communicated or conveyed a threat of injury.¹ We affirm.

¶ 3 Defendant and co-defendants Royale Rambert, Demarco Bell, and Antonio Baker, as is relevant here, were charged with harassment of a witness and two counts of intimidation and their cases proceeded to simultaneous bench trials. The harassment count alleged that they, with the intent to harass Devonte Scott, who was expected to testify as a witness in *People v. Timberlake*, case number 13 CR 16426, communicated indirectly with Scott the threat of injury, “to wit: to shoot” Scott, because of his potential testimony. 720 ILCS 5/32-4a(a)(2) (West 2014). The intimidation counts alleged the defendants, with the intent to cause Scott “to omit” testifying in court, communicated to him “indirectly by any means” a threat to inflict physical harm on him or another person, specifically to shoot him or another person on East Bowen Avenue, Chicago. 720 ILCS 5/12-6(a)(1) (West 2014).

¶ 4 The evidence at trial established that, in July 2013, Demarco Holmes and Scott were the victims of a robbery and vehicular hijacking outside Scott’s residence on East Bowen Avenue. Scott identified Dwayne Timberlake to police as one of the offenders in a photo array and physical lineup and was under subpoena to testify against Timberlake at trial on December 12, 2014.

¶ 5 On November 27, 2014, Ronald Richardson, Scott’s godbrother, was shot in the hand outside of Scott’s residence on East Bowen Avenue. Richardson testified he lived at Scott’s residence and was outside when he saw two gunmen in the west gangway of the house. He

¹ Defendant filed a motion for late notice of appeal on March 9, 2016, which was granted on March 17, 2016.

started running, shots were fired and he was struck in the hand. As a result of this shooting, Scott's father installed surveillance cameras around the house on November 29, 2014.

¶ 6 That evening, Scott was watching the live feed from the surveillance cameras when he observed his mother, Ocie Seay, and aunt, Shonda Seay, park and exit their vehicle outside the house. He noticed his mother duck and draw her pistol as a Chevy Impala slowed down, "driving suspicious." Ocie, a Cook County Department of Corrections officer, testified that a silver Chevy Impala idling at the intersection of her street made her uncomfortable. When it made a sudden turn onto her street, she grabbed her sister, ducked behind their vehicle and pulled out her service revolver. Two days prior Ocie had seen two gunmen shooting at Richardson, so as a result, she started carrying her service weapon.

¶ 7 Once the Impala drove off, the women went into the house where Scott was watching the live camera feed. On the feed, he observed the Impala park in the back alley of the house and noticed two men exit the vehicle. The hooded men walked through the gangway along the side of the house and looked at the house. They then turned around and got back into the vehicle, which "fled." Scott believed he noticed a handgun in the pocket of one of the individuals. Ocie was also watching the live feed at the same time. She noticed two individuals on the side of the house in the gangway "looking up at" the house. The police were called and informed of what happened.

¶ 8 Officer Veronica Negron responded to a call regarding the East Bowen Avenue residence and a suspicious automobile. Negron drove along the 600 block of East Bowen and curbed a Chevy Impala which matched the description of the vehicle in question. The occupants of the vehicle were subsequently identified as Bell, Rambert, Baker, and defendant. Rambert was in the driver's seat, Baker was sitting behind her, Bell was in the front passenger seat, and defendant

was in the rear passenger seat. Negron noticed Bell making furtive movements toward the floor of the automobile under the front passenger seat. As Negron attempted to move the suspects from the vehicle, Bell opened his door and ran. He was ultimately apprehended by Officer Magana², who had arrived on scene. Police recovered a Smith & Wesson 9-millimeter semiautomatic weapon with 16 live rounds from underneath the front passenger seat of the Impala.

¶ 9 Detectives Paul Galiardo and Dewilda Gordon interviewed the witnesses from the incident at East Bowen Avenue and reviewed the surveillance videos. At trial the videos were published to the court without objection. Galiardo testified that the surveillance videos depicted defendant exiting the vehicle. He reached this conclusion by identifying in the videos the unusual pattern on the back of the jeans worn by the individual exiting the rear passenger side door. The pattern was the same as the pattern on the back of the jeans defendant was photographed wearing during the booking procedures a few hours after the incident. The booking photos depicting the unusual pattern on the back of defendant's jeans were admitted into evidence.

¶ 10 The surveillance videos provided six different camera feeds. The video recording from the front of Scott's residence show two women parking and exiting an SUV. As a silver sedan drives past, one woman stands behind their vehicle while the other woman ducks behind the SUV. Once the automobile passes them, they enter the residence. Two videos recording the back alleyway of the Scott residence show, two minutes after the women exited their vehicle, a similar looking silver sedan pull into the alley, park next to a trash can labeled "605," and turn off its lights. Two men exit the vehicle from the front and rear passenger seats. The man from the front

² Officer Magana's first name was not provided.

passenger seat drops something and tosses it back into the vehicle. The same individual is also holding a dark object in his right hand which he tucks into his pocket. A recording of the backyard camera shows the two men approaching the house from the rear. A recording of the front door then shows the men appearing from the side of the house, in the gangway. They appear to look up at the camera or the front door and then turn around. They come back into view on the backyard video, walk toward the alley through the backyard, and enter the silver sedan, which then drives off down the alley.

¶ 11 The parties stipulated that Illinois State Police forensic scientist Kurt Murray tested 10 spent cartridges recovered from the scene of the Ronald Richardson shooting on November 27, 2014. Murray concluded that, with a reasonable degree of scientific certainty, 6 of the 10 cartridges came from the 9-millimeter weapon discovered in the Impala. Additionally, the parties stipulated that, between December 18, 2013, and November 19, 2014, Rambert visited the incarcerated Timberlake 34 times and Baker visited him 5 times.

¶ 12 The court found defendant guilty of all charges. It stated that defendant was seen on video and other circumstantial evidence from Officer Negrón placed him in the rear passenger seat of the vehicle in question. The surveillance video also shows him exiting the automobile and walking along the west gangway of the Scott residence. The court considered these facts, along with the shooting which occurred two nights earlier, which was connected to codefendant Bell through the recovered weapon, as sufficient circumstantial evidence, and as a result drew a

reasonable inference establishing every element of harassment and intimidation of a witness beyond a reasonable doubt.³

¶ 13 On appeal, defendant argues that the State failed to prove beyond a reasonable doubt that he intended to harass the complainant, and that he communicated or conveyed a threat that would result in a conviction on the harassment and intimidation counts.

¶ 14 Where a criminal conviction is challenged based on insufficient evidence, a reviewing court, considering all of the evidence in the light most favorable to the prosecution, must determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. This standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *People v. Howery*, 178 Ill. 2d 1, 38 (1997). Accordingly, a reviewing court will not substitute its judgment for that of the trier of fact on issues involving the weight of the evidence or the credibility of the witnesses. *People v. Cooper*, 194 Ill. 2d 419, 430-31 (2000). The trier of fact is not required to disregard inferences that flow normally from the evidence or to seek all possible explanations consistent with innocence and elevate them to reasonable doubt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). Furthermore, a criminal conviction may be based solely on circumstantial evidence, and the same standard of review will apply. *Brown*, 2013 IL 114196, at ¶ 49.

¶ 15 To sustain a conviction, “[i]t is sufficient if all of the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant’s guilt.” *People v. Hall*, 194 Ill. 2d 305, 330 (2000). In reviewing a trial court’s decision, we must give proper deference to the trier

³ The court found Rambert and Baker not guilty and Bell guilty of all charges. These findings are not relevant in this appeal.

of fact who observed the witnesses testify, because it was in the “superior position to assess the credibility of witness, resolve inconsistencies, determine the weight to assign the testimony and draw reasonable inferences therefrom.” *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 24. A criminal conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant’s guilt. *People v. Wheeler*, 226 Ill. 2d 92, 115 (2007).

¶ 16 Defendant first argues that the State failed to prove him guilty of harassment of a witness. To prove defendant guilty of harassment of a witness as charged, the State had to prove that he, with intent harassed future witness Scott and conveyed a threat of injury to Scott, specifically, to shoot him. See 720 ILCS 5/32-4a(a)(2) (West 2014).

¶ 17 Defendant first argues the State failed to prove he had the requisite intent to harass Scott. He also contends that there was no evidence of verbal communication or personal contact between defendant and Scott and, thus, his true motivation for being present at East Bowen Avenue remains unclear and subject to speculation and conjecture. He claims the State presented no evidence to show a nexus between his actions and an attempt to influence Scott in Timberlake’s case.

¶ 18 The statute does not define “harass,” and giving the term its common meaning in this statutory context, “to harass” means “to create an unpleasant or hostile situation for[,] especially by uninvited and unwelcome verbal or physical conduct.” *Merriam-Webster Online Dictionary*, <https://www.merriam-webster.com/dictionary/harass> (last visited October 29, 2017). To establish intent to harass, a defendant need not actually communicate to the victim that he is harassing the victim because of the victim’s potential testimony. *People v. Cardamone*, 232 Ill. 2d 504, 518-19

(2009). The trier of fact can infer intent from a defendant's acts and the circumstances surrounding the commission of the offense. *People v. Butler*, 375 Ill. App. 3d 269, 274 (2007). A defendant is presumed to intend the natural and probable consequences of his actions. *People v. Terrell*, 132 Ill. 2d 178, 204 (1989). We find the evidence ample enough to demonstrate defendant had the intent to harass Scott because of his potential testimony against Timberlake.

¶ 19 Two evenings after two men shot and injured Richardson at Scott's residence, defendant drove past the house in a manner that made Scott's mother uncomfortable. Defendant was in a vehicle with Rampert and Baker, who had visited Timberlake in jail numerous times, and Bell, who was in possession of the handgun that fired the bullets at Richardson. They pulled into the alley, parked behind Scott's home, and shut off the lights of the vehicle. Defendant and Bell, the front seat passenger, stepped out of the automobile and entered the same gangway from which the shots were fired at Richardson. Bell was holding a dark object in his right hand, and placed it into his pocket as he walked. The men walked along the side of the house to the front and looked up at the building. Whatever they saw caused them to retrace their steps, return to the vehicle, and drive away.

¶ 20 Intent to harass can be inferred from the surrounding circumstances (*People v. Berg*, 224 Ill. App. 3d 859, 862 (1991)), and we find the court's determination that defendant intended to harass Scott because of his future testimony against Timberlake is a reasonable inference from the evidence. This case is ideally suited for resolution by the trier of fact, as the court heard the testimony, viewed the video surveillance clips, and weighed the evidence. This evidence showed defendant, Bell, Rampert, and Baker first surveilled Scott's home by driving by in their vehicle. Then, defendant and Bell skulked around the house in the dark toward the front while Rampert

and Baker, who had frequently visited the incarcerated Timberlake, waited in the automobile. Defendant and Bell turned back after looking up at the front of the house. Given the surveillance camera installed above the front door, it is a fair inference that they turned back because they noticed the camera. It is also a reasonable inference that, since defendant came to Scott's home in the company of Timberlake's associates Baker and Rampert, he was there in connection with Scott's testimony against Timberlake. We cannot say that no rational trier of fact could find that defendant was outside Scott's home with the intent to harass him because of his future testimony against Timberlake.

¶ 21 The evidence is also sufficient to demonstrate that defendant conveyed a threat to shoot Scott. If, as here, a defendant has the requisite intent, then the witness-harassment statute provides for two alternative bases for liability: (1) direct or indirect communication with the witness that produces mental anguish or emotional distress; or (2) conveyance of a threat of injury or damage to the person or property of the witness. 720 ILCS 5/32-41(a)(2) (West 2014); *Cardamone*, 232 Ill. 2d at 665. The first basis is "a subjective one, based on whether the communication in fact produced mental anguish or emotional distress in the mind of the victim." *Id.* at 664 (quoting *Berg*, 224 Ill. App. 3d at 863-64). Defendant, however, was charged and convicted on the second basis, which is not subjective and requires only that a threat be conveyed.

¶ 22 We find defendant's driving slowly past Scott's house and the subsequent entry into Scott's gangway, accompanied by Bell who was holding a black object in his hand, just two days after another family member was shot in the same gangway, was sufficient to convey the threat that Scott similarly would be shot. It is a reasonable inference that the dark object Bell was

holding in his hand as he walked to the gangway was the loaded firearm recovered from under his seat, the same firearm that was fired at Richardson from the same gangway.

¶ 23 Defendant contends that his mere presence in the gangway on East Bowen Avenue does not give rise to the essential element of communicating a threat to Scott. Defendant asserts that the evidence presented was insufficient to establish that (1) he ever formulated a threatening message, (2) this “non-existent” message was ever communicated to Scott, and (3) he knew Scott was present in the house to receive a message or was watching on the video feed installed earlier that day. But, as charged, the statute does not require that defendant directly convey the threat to Scott or that he intend to convey the threat. Only that the threat be conveyed. The threat here was conveyed, as Scott and Ocie observed the suspicious nighttime drive-by and the two hooded men entering the gangway from which Richardson had been shot. Based on this record, we affirm the conviction for harassment of a witness as we do not find the evidence so unreasonable, improbable, or unsatisfactory that no rational trier of fact could find that defendant, with the intent to harass future witness Scott because of his potential testimony in the case against Timberlake, conveyed a threat to shoot Scott.

¶ 24 Defendant also argues the State did not meet its evidentiary burden to prove the intimidation charges.

¶ 25 To prove intimidation as charged, the State had to prove that defendant, with the intent to cause Scott “to omit the performance of any act” (here, to testify in court), communicated to Scott “indirectly by any means, a threat to perform without lawful authority” the infliction of physical harm on Scott or any other person (here, to shoot Scott or another person at 605 East Bowen). 720 ILCS 5/12-6(a)(1) (West 2014).

¶ 26 Intimidation requires that a threat be communicated with the specific intent to coerce someone else to do something against his will. *People v. Casciaro*, 2015 IL App (2d) 131291, ¶ 84. It requires proof of a threat that physical harm will be inflicted “at some point, possibly in the future.” *Casciaro*, 2015 IL App (2d) 131291, ¶ 85. But the means or method by which the threat is communicated is not an essential element of the offense. *Id.*

¶ 27 As used in the intimidation statute, “threat” implicitly requires “that the expression, in its context, has a reasonable tendency to create apprehension that its originator will act according to its tenor.” *People v. Byrd*, 285 Ill. App. 3d 641, 647 (1996). The victim must fear that the maker of the threat will carry out the threat. *Casciaro*, 2015 IL App (2d) 131291, ¶ 84. However, the specific intent at issue in the offense is the intent to coerce, to cause someone to act or not act, rather than the intent to carry out the threat. *Byrd*, 285 Ill. App. 3d at 648. The intent to coerce the victim can be inferred from the defendant’s statements and surrounding circumstances. *Casciaro*, 2015 IL App (2d) 131291, ¶ 84.

¶ 28 Defendant argues that the State failed to present any evidence that established (1) he intended to deter or prevent Scott from testifying in court, (2) his actions constituted a legitimate threat to shoot anyone, or (3) he actually communicated this “threat” to Scott. Defendant asserts his actions can be reasonably characterized as ambiguous and/or non-threatening, and therefore do not provide a sufficient basis to sustain a conviction for intimidation.

¶ 29 Under the circumstances here, defendant’s actions cannot reasonably be characterized as ambiguous and/or nonthreatening. As discussed previously in the context of the harassment conviction, defendant’s actions were sufficient to communicate the threat that Scott would be shot. The suspicious drive-by and presence of two hooded, unknown men in Scott’s gangway

occurred just two days after Richardson, Scott's family member, had been shot by two men from the same gangway. From this, the court could clearly find that defendant's actions had a reasonable tendency, under the circumstances, to place Scott in fear that one of the men would shoot him or someone else on East Bowen Avenue.

¶ 30 Further, defendant committed his actions in the company of Timberlake's associates Rampert and Baker, and Scott was slated to testify as the complaining witness at Timberlake's trial. The trial court could, therefore, come to the reasonable conclusion that defendant communicated the threat to shoot Scott or someone else in his home with the specific intent to coerce Scott regarding his testimony against Timberlake, specifically to deter or prevent him, against his will, from testifying against Timberlake. Taken together, in a light most favorable to the State, the evidence was not so improbable or unsatisfactory that no rational trier of fact could find defendant, with the intent to cause Scott "to omit the performance of" testifying against Timberlake in court, communicated to Scott a threat to shoot Scott or another person on East Bowen Avenue.

¶ 31 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 32 Affirmed.