FILED
May 5, 2017
Carla Bender
4th District Appellate
Court, IL

2017 IL App (4th) 140745-U

NO. 4-14-0745

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Douglas County
GREGORY A. MINER,	)	No. 14CF7
Defendant-Appellant.	)	
	)	Honorable
	)	Daniel L. Flannell,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Holder White and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not err by excluding testimony relating to an altercation between the victim, Gregory Miner, Jr., and his ex-girlfriend two days prior to the altercation at issue.

(2) The record is insufficient to consider defendant's fines and fees argument.

¶ 2 Defendant, Gregory A. Miner (Senior), appeals his conviction and seven-year prison sentence for aggravated battery (720 ILCS 5/12-3.5(f)(1) (West 2014)), arguing that the trial court's exclusion of certain testimonial evidence constituted plain error. Specifically, Senior contends that the excluded evidence was admissible under *People v. Lynch*, 104 Ill. 2d 194, 470 N.E.2d 1018 (1984), and its progeny. Senior also argues that the circuit clerk improperly assessed various fines against him, which this court should vacate. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Because Senior's appeal concerns only the trial court's evidentiary ruling and not the sufficiency of the evidence, we limit our discussion to those facts necessary to provide context.

¶ 5 In January 2014, the State charged Senior with domestic battery and aggravated battery in violation of sections 12-3.2(a)(1) and 12-3.05(f)(1) of the Criminal Code of 2012 (720 ILCS 5/12-3.2(a)(1), 12-3.05(f)(1) (West 2014)).

¶ 6 Gregory Miner, Jr. (Junior), Senior's son, had resided with Casey Postlewait, Junior's ex-girlfriend, from October 2013 to January 2014. Following two incidents in January 2014, during which Junior allegedly screamed at Casey and grabbed a cellular phone from her hand, Casey kicked Junior out of her apartment and later obtained an order of protection against him. Junior moved back into his parents' apartment. Approximately two days after returning home, Senior and Junior had a physical altercation, during which Senior stabbed Junior with a knife. Senior claimed that he was acting in self-defense.

¶ 7 Prior to trial, Senior filed a supplemental discovery answer, indicating Casey as a potential witness and stating that the purpose for calling her would be to demonstrate Junior's "violent and unpredictable behavior." During a sidebar conference at Senior's April 2014 jury trial, the State objected to the admissibility of Casey's testimony, arguing that her testimony would not show evidence of violence and, therefore, was inadmissible character evidence. Defense counsel responded that he intended to use Casey's testimony to show Junior's state of mind leading up to the altercation between Senior and Junior and not to bolster Senior's self-defense claim. Defense counsel specifically conceded that "there was no suggestion of physical vio-

lence." The trial court granted the State's motion to exclude Casey's testimony, and defense counsel requested to make an offer of proof, which the court granted.

¶ 8 During the offer of proof, Casey testified to the following facts. Casey and Junior lived together in her apartment from October 2013 to January 2014, at which time she kicked Junior out and obtained an order of protection against him. On two occasions in January 2014, Casey confronted Junior about text messages and e-mails he sent to other women. On both occasions, Junior allegedly became enraged and screamed at Casey in very close proximity. On the first occasion, Junior did not touch Casey, but he "got close to her face." On the second occasion, Casey was lying on the bed and Junior was standing above her, close enough that Casey was unable to move. During this altercation, Junior allegedly screamed at Casey and grabbed a cellular phone from her hand. Following the second altercation, Casey called the police, and Junior was removed from the apartment. Junior later returned to the apartment and rang Casey's doorbell, but she refused to allow Junior to enter and called the police again. The responding police officer took Junior to his parents' apartment. Following these incidents, Casey obtained an order of protection against Junior. Casey also stated Junior once called an ambulance for himself so that he could acquire medical assistance for his anger issues.

¶ 9 Following the offer of proof, defense counsel argued that Casey's testimony sufficiently demonstrated violent behavior and was, thus, admissible to bolster Senior's self-defense claim. The State reiterated that yelling alone is insufficient proof of violence or aggression under Illinois law and Casey's testimony was not indicative of violent or aggressive behavior within the meaning of *Lynch*. The trial court agreed and reaffirmed its decision to exclude Casey's testimony.

¶ 10 In April 2014, a jury returned a guilty verdict on both charges. The trial court later (1) merged the domestic battery conviction with the aggravated battery conviction and (2) sentenced Senior, who was extended-term eligible, to seven years in prison. In conjunction with Senior's sentence, the court ordered Senior to pay costs but did not assess any fines. The sentencing order did not include any costs, fines, or fees.

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 A. Senior's Evidentiary Claim

¶ 14 Senior argues that the trial court's exclusion of Casey's testimony was clearly erroneous. Because Senior has conceded that he forfeited this evidentiary argument by not filing a posttrial motion and we conclude that plain error did not occur, we honor Senior's forfeiture.

¶ 15 1. *The Standard of Review*

¶ 16 We review a trial court's evidentiary ruling for an abuse of discretion. *People v. Pikes*, 2013 IL 115171, ¶ 12, 998 N.E.2d 1247. "The threshold for finding an abuse of discretion *** is a high one and will not be overcome unless it can be said that the trial court's ruling was arbitrary, fanciful, or unreasonable, or that no reasonable person would have taken the view adopted by the trial court." *People v. Yeoman*, 2016 IL App (3d) 140324, ¶ 27, 58 N.E.3d 136. "Reasonable minds can disagree about whether certain evidence is admissible without requiring a reversal of a trial court's evidentiary ruling under the abuse of discretion standard." *Id.*

¶ 17 2. *The Plain-Error Doctrine*

¶ 18 Senior acknowledges that he has forfeited review of the evidentiary claim he now raises by his failure to file a posttrial "motion for a new trial necessary to fully preserve the issue

for appeal." Notwithstanding his admitted forfeiture, Senior requests that this court review his evidentiary claim under the plain-error doctrine.

¶ 19 Illinois Supreme Court Rule 615(a) (eff. Jan.1, 1967) provides as follows:

> "**(a) Insubstantial and Substantial Errors on Appeal**. Any error, defect, irregularity, or variance[,] which does not affect substantial rights[,] shall be disregarded. Plain errors or defects affecting substantial rights *may* be noticed although they were not brought to the attention of the trial court." (Emphasis added.) .

¶ 20 "In *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988), the supreme court unequivocally held that for an issue to be preserved for review on appeal, the record must show that (1) a contemporaneous objection to the trial court's error was made, and (2) the issue was contained in a written posttrial motion." *People v. Rathbone*, 345 Ill. App. 3d 305, 308-09, 802 N.E.2d 333, 336 (2003). However, the plain-error doctrine allows a reviewing court to bypass forfeiture rules and consider a clear or obvious error that occurred at the trial. *People v. Shaw*, 2016 IL App (4th) 150444, ¶ 69, 52 N.E.3d 728. Specifically, the plain-error doctrine operates in the following two instances:

> "The plain error rule may be invoked if the evidence *** was closely balanced[ ] or if the error was so egregious as to deprive the defendant of a fair *** hearing. [Citation.] The second prong of the plain error rule should be invoked only when the possible error is so serious that its consideration is necessary to preserve the integrity and reputation of the judicial process. *** [Citation.] The

> rule is not a general saving clause for alleged errors but is designed to redress serious injustices. [Citation.]" (Internal quotation marks omitted.) *People v. Baker*, 341 Ill. App. 3d 1083, 1090, 794 N.E.2d 353, 359 (2003).

"In both instances, the burden of persuasion remains with the defendant." *People v. Herron*, 215 Ill. 2d 167, 187, 830 N.E.2d 467, 480 (2005).

¶ 21 As the plain language of Rule 615(a) indicates, "remedial application of the plain[-]error doctrine is discretionary." *People v. Clark*, 2016 IL 118845, ¶ 42, 50 N.E.3d 1120. "As a matter of convention, our court typically undertakes plain-error analysis by first determining whether error occurred at all." *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1059 (2010). Accordingly, we choose to begin our plain-error analysis by first addressing whether any error occurred at all.

¶ 22 3. Lynch *Evidence*

¶ 23 "[W]hen the theory of self-defense is raised, the victim's *aggressive and violent* character is relevant to show who was the aggressor, and the defendant may show it by appropriate evidence[.]" (Emphasis added.) *Lynch*, 104 Ill. 2d at 200, 470 N.E.2d at 1020. The rationale for admitting such evidence is twofold. *Id.*

> "First, the defendant's knowledge of the victim's violent tendencies necessarily affects his perceptions of and reactions to the victim's behavior. The same deadly force that would be unreasonable in an altercation with a presumably peaceful citizen may be reasonable in response to similar behavior by a man of known violent and ag-

> gressive tendencies. One can only consider facts one knows, however, and evidence of the victim's character is irrelevant to this theory of self-defense unless the defendant knew of the victim's violent nature ***.
>
> Second, evidence of the victim's propensity for violence tends to support the defendant's version of the facts where there are conflicting accounts of what happened. In this situation, whether the defendant knew of this evidence at the time of the event is irrelevant." *Id.*

When considering evidence falling under the purview of the second *Lynch* purpose, "[p]roof is needed that the victim committed [an aggressive and violent act]." *People v. Cook*, 352 Ill. App. 3d 108, 128, 815 N.E.2d 879, 897 (2004).

¶ 24 The first inquiry with respect to *Lynch* is whether the proffered evidence is the type covered by *Lynch, i.e.*, evidence of violent and aggressive behavior. See *Yeoman*, 2016 IL App (3d) 140324, ¶ 30, 58 N.E.3d 136 (concluding *Lynch* was inapplicable because the proffered evidence was not indicative of violent or aggressive tendencies). "In general, battery is *prima facie* probative enough of aggressive and violent tendencies to be admissible." *Lynch*, 104 Ill. 2d at 203, 470 N.E.2d at 1021. However, "[y]elling at another person is insufficient to establish a violent character." *People v. Huddleston*, 176 Ill. App. 3d 18, 28, 530 N.E.2d 1015, 1022 (1988).

¶ 25 4. *Senior's Offer of Proof*

¶ 26 Junior's actions here fall somewhere in between a battery, which is probative of

aggressive and violent tendencies, and merely yelling, which is insufficient to establish a violent character. In Senior's offer of proof, Casey stated that Junior was screaming in her face during both incidents and was close enough to her that she could not move from the bed during the second incident. When asked whether Junior made physical contact with her during the first incident, Casey responded: "No. He just got close to my face." When asked the same question about the second incident, Casey responded: "He grabbed the phone out of my hand."

¶ 27 Whether grabbing the phone out of Casey's hand, taken together with the attendant circumstances, constituted a battery is a factual question to be determined by a fact finder. See 720 ILCS 5/12-3(a) (West 2014) ("A person commits battery if he or she knowingly without legal justification by any means (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual."); see also *People v. Crespo*, 203 Ill. 2d 335, 344, 788 N.E.2d 1117, 1122 (2001) (stating whether a battery has occurred is a question of fact). Although battery is *prima facie* probative enough of violent tendencies, the question of whether Junior's actions toward Casey constituted a battery is a question of fact to be determined by the trial court in this instance because the court is tasked with determining whether this evidence is admissible under *Lynch*. Even if Junior's conduct constituted battery, that fact alone does not justify admission; the conduct must be sufficiently violent and aggressive to warrant admission. See *Lynch*, 104 Ill. 2d at 200, 470 N.E.2d at 1020.

¶ 28 Prior to conducting the offer of proof, defense counsel informed the trial court that he intended to offer Casey's testimony to show Junior's state of mind and attitude leading up to the incident at bar rather than to bolster Senior's self-defense claim. Counsel specifically conceded "there was no suggestion of physical violence" in Casey's account of events. Following

the offer of proof, defense counsel argued that Junior's screaming *was* sufficiently violent and aggressive to trigger *Lynch*. The State responded that yelling is insufficient to invoke *Lynch* pursuant to *Huddleston* and that there was no evidence of violence based on Casey's testimony. Considering these arguments together with Casey's testimony during the offer of proof, we decline to conclude that the trial court clearly or obviously abused its discretion by ruling that the testimony was not sufficiently violent or aggressive to invoke *Lynch*.

¶ 29 Senior asserts that the similarities between certain statements made by Junior during his altercations with Casey and Senior warranted admission. Senior also places much emphasis on the fact that Junior voluntarily sought treatment for his anger issues. However, Casey's testimony could be considered cumulative—and therefore properly excluded under Illinois Rule of Evidence 403 (eff. Jan. 1, 2011)—because the defense presented evidence of Junior's past violence against Senior, which is arguably stronger evidence for Senior's self-defense claim than Casey's testimony would have been. See *Lynch*, 104 Ill. 2d at 200, 470 N.E.2d at 1020 (holding aggressive or violent tendencies may be shown by appropriate, *i.e.*, competent, evidence). Because we conclude the trial court did not clearly commit error by excluding Casey's testimony, we need not engage in a plain-error analysis, and we honor Senior's forfeiture of his evidentiary claim.

¶ 30 B. Improperly Assessed Fines

¶ 31 Senior also argues that the circuit clerk, not the trial court, assessed various fines, which this court should vacate.

¶ 32 "The determination of whether the circuit clerk imposed a fine against [the] defendant is an issue of statutory construction and is reviewed *de novo*." *People v. Hible*, 2016 IL

App (4th) 131096, ¶ 14, 53 N.E.3d 319. Referencing “Appx. A,” Senior argues the circuit clerk improperly assessed the following fines: (1) a $10 "Lump Sum Surcharge”; (2) a $100 "Violent Crime" assessment; (3) a $10 "Medical Costs" assessment; and (4) a $50 court systems fee. Senior argues that because these assessments are fines, not fees, they are void and should be vacated pursuant to *People v. Castleberry*, 2015 IL 116916, ¶ 11, 43 N.E.3d 932. The State concedes these assessments are fines, not fees, and because the circuit clerk had no authority to assess them, they should be vacated.

¶ 33 Illinois Supreme Court Rule 608(a)(13) (eff. Dec. 11, 2014) requires that the record on appeal contain the trial court's judgment and sentence. Here, the record on appeal contains the sentencing order, which reflects the court's seven-year sentence but does not reflect any costs assessed against Senior. Both Senior and the State cite the sentencing order when discussing the various assessments, but, as stated, the sentencing order does not contain any mention of costs or assessments. In fact, nothing in the record on appeal lists what costs were assessed against Senior. The transcript of the sentencing hearing demonstrates the court ordered Senior to pay "costs" but did not delineate which costs were to be assessed, and that delineation appears nowhere in the record on appeal. No “Appx. A” is in the record before us, and the appendix attached to Senior’s brief contains the sentencing order, which, as stated, does not outline the costs allegedly assessed against him. Accordingly, we conclude that the record on appeal is insufficient to consider whether any assessments were fines or fees and that Senior has therefore forfeited the issue. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92, 459 N.E.2d 958, 959 (1984) (to support a claim of error on appeal, the appellant has the burden to present a sufficiently complete record).

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we affirm Senior's conviction. As part of our judgment, we award the State its $75 statutory assessment against Senior as costs of this appeal. 55 ILCS 5/4-2002 (West 2014).

¶ 36 Affirmed.