2018 IL App (1st) 160928-U

No. 1-16-0928

Order filed August 17, 2018

Fifth Division

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 9260
	)	
JEREMY O'NEAL,	)	Honorable
	)	James Michael Obbish,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient for the trial court to find defendant had the required knowing mental state for aggravated battery when he threw a concrete block into the window of a house that he knew was occupied. Additionally, the mittimus and the trial court's fines and fees order are corrected; two charges erroneously imposed against defendant are vacated and a portion of defendant's presentence custody credit can be applied to several fines.

¶ 2 Following a bench trial, defendant Jeremy O'Neal was convicted of the aggravated battery of a child under the age of 13 causing great bodily harm (720 ILCS 5/12-3.05(b)(1)

(West 2014)) and was sentenced to six years in prison. On appeal, defendant contends his conviction should be reduced to the lesser-included offense of reckless conduct because the evidence did not establish he knowingly caused injury when he threw a piece of concrete at the window of a home. Defendant also argues he should receive an additional 10 days of sentencing credit, two fees were improperly assessed against him, and a portion of the monetary credit for the days he spent in custody prior to his sentencing should be applied to several assessments he contends are fines.

¶ 3 At trial, Marcus McGee testified he and his wife, Patricia Hicks, regularly cared for their 16 grandchildren in their Chicago home. At about 8:30 p.m. on May 3, 2015, McGee's stepdaughter, Janica Lee, and Lee's infant daughter were in the house along with McGee, Hicks and a fifth person that McGee referred to as Yanie.

¶ 4 McGee and Hicks were watching television when defendant knocked at the door. Defendant was a friend of McGee's stepson. When McGee answered the door, defendant "insisted" to McGee that a woman named Diana Black was at their house. McGee told defendant Black was not there and that Lee was the woman defendant saw. Defendant accused McGee of "hiding" Black. McGee and defendant argued as defendant refused to accept McGee's answer.

¶ 5 When McGee told defendant he could come inside and check the house if he gave McGee money, defendant became upset. As defendant walked away from the house, he told McGee that "you're going to make her pay for this" or a similar threatening statement. Defendant got in his van and drove away but returned almost immediately through an alley near the house, leading McGee to believe he had only driven around the block.

¶ 6 Defendant parked his van in front of McGee's house, "jumped out" and threw a brick through a window of the house as he stood at the curb near his vehicle. McGee chased defendant and punched him through the window of the van as defendant drove away.

¶ 7 The brick thrown by defendant went through the window of a room in McGee's house that was originally a dining room but had been converted into a bedroom. Lee's child, who was sleeping in that room, was struck in the head by the thrown brick. The brick and broken glass were on the bed. The child was crying and vomiting and had a knot on her head that McGee testified "was getting bigger and bigger by the second." The child was taken to Comer Children's Hospital.

¶ 8 Photographs of the brick and the damaged window were entered into evidence. McGee described the brick as having a wire and a piece of ceramic tile attached to it. McGee was interviewed by police and showed them the brick retrieved from the bedroom. McGee took the officers through the alley to an area about two houses away from his house and showed the officers a pile of debris that included concrete and bricks.

¶ 9 Hicks testified that the room converted to a bedroom had a queen bed and a toddler bed and she slept there. Hicks cared for her grandchildren "throughout the day." She knew defendant as a friend of her son and had seen him "12 or 13 times" before. Hicks said defendant and her son were at her house "all the time." Black had previously visited and spent the night at her house and had been there earlier on the day of this incident.

¶ 10 When defendant came to the door, he asked where "that bitch" was, referring to Black, and she and McGee both told him Black was not there. Defendant told them he was "looking at her upstairs in the window," but Hicks told him that was not Black. Defendant remained on the

porch for about another minute, arguing with McGee. Defendant said they were "all going to make her pay for this one."

¶ 11 Lee had put the child to sleep in Hicks's bed either while defendant was still at the door or shortly after he left. Less than a minute later, defendant drove back to the house. After defendant got out of his van, "[w]ords were exchanged" and defendant turned around and threw the brick at the window. Police interviewed Hicks that night and again on May 5.

¶ 12 On cross-examination, Hicks stated the blinds in the room where the child slept were closed. When the brick came through the window, it went through the blinds and the window and struck the back wall of the room, causing a crack in the wall.

¶ 13 Lee testified her child was seven months old on the date of this incident. When defendant arrived, Lee was upstairs with the child and looked out the window to see him. While defendant was arguing, Lee took the child downstairs to a bed in Hicks's room. Lee heard defendant and McGee arguing but she was not facing the front door. Lee then heard glass shatter and heard her child crying.

¶ 14 Chicago police detective Jason Pullappally testified that on May 5, he conducted an investigation of the incident. McGee and Hicks both identified photographs of defendant as the offender, and they gave the detective the item thrown through the window, which the detective described as "a chunk of concrete with metal meshing."

¶ 15 Detective Pullappally observed a hole in the glass window and a hole in the wooden blinds mounted inside the window, as well as a dent on the back wall above an adult-sized bed. The detective measured the distance from the street curb to that window at 39 feet and from the window to the back wall at 14 feet.

¶ 16 McGee and Hicks had given an officer the name of defendant and a description of his 2002 white Dodge van and its license plate information, and a police investigative alert was issued. Chicago police officer Nick Zattair testified that between 9 and 10 a.m. on May 14, 2015, he noticed a white van with a license plate that matched an investigative alert traveling east on 87th Street. When Officer Zattair activated his emergency lights, the van turned into an alley and "came to an abrupt stop." The driver of the van, whom the officer identified as defendant, got out and ran away.

¶ 17 Defendant was apprehended after a brief chase and told Officer Zattair his name was Cordell Barrington. When the officer responded "we both know that's not your name," defendant said his name was Jeremy O'Neal and that he knew the police were looking for him because he saw it "on TV."

¶ 18 The parties stipulated that Dr. Christopher Montgomery of Comer Children's Hospital would testify the child was hospitalized there for two days. The child was diagnosed with a subgaleal hematoma, or bleeding under the scalp but outside of the skull, and a parenchymal hemorrhage, or bleeding in the brain. The top of her skull was fractured. She was prescribed anti-seizure medication.

¶ 19 After the State rested, the trial court denied the defense's motion for a directed finding. The defense presented no evidence.

¶ 20 After closing arguments, the trial court noted the defense theory that defendant did not know his act could result in the injury that occurred. The court stated defendant's knowledge could be shown by circumstantial evidence. The court recounted the events that preceded defendant's act of throwing the brick and that the distance that the brick traveled, according to

the detective's measurements, demonstrated the "force and the determination that was being exerted by [defendant] to fire it into a house."

¶ 21 The trial court's remarks continued:

> "[H]ad Mr. O'Neal thrown the brick, the bludgeon, the weapon through maybe a garage window and struck somebody that might have been in the garage that he couldn't see because it was dark or something, one could have the argument that this was an unintended consequence or reckless. But this is a house, and this is not just a house that may or may not be occupied. It's a house that Mr. O'Neal is very much aware is occupied."

¶ 22 The court noted defendant had been inside the house "multiple" times and would have been aware of its residents, having just seen inside the house while arguing with McGee. The court also noted defendant believed Black was inside.

¶ 23 The court remarked:

> "When you take this type of weapon and you use the kind of force that he used to throw it into an occupied house, then you are imputed with the knowledge that your acts could cause possibly death or great bodily harm.
>
> I mean, this thing [the concrete piece entered into evidence] could kill me, I believe, and I'm a little bigger than a seven-month-old child. This could kill anybody striking them in the head. This was not a reckless act. This was a deliberate act throwing at an occupied house in a vengeance."

¶ 24 The court noted that defendant left the house to retrieve the concrete, returned to the house, "fire[d] it through the house" and ran away. The court also noted defendant fled when he was seen by Officer Zattair.

¶ 25 The trial court found defendant guilty of aggravated battery for committing a battery that caused great bodily harm to a child under the age of 13, which is a Class X felony. The trial court sentenced defendant to six years in prison.

¶ 26 On appeal, defendant contends his aggravated battery conviction should be reduced to the lesser included offense of reckless conduct because the State did not prove he acted knowingly in causing the child's injury. Defendant contends his conduct was reckless, as opposed to knowing, because he could not see inside the house, did not know who was present and could not have predicted the path of the concrete block.

¶ 27 As a threshold matter, we address defendant's argument that this court should review the evidence with no deference to the trial court's ruling. He asserts a *de novo* standard should be applied because the facts are not in dispute. However, this court has continued to apply the reasonable doubt standard in cases where the underlying facts are not disputed. *People v. Ford*, 2015 IL App (3d) 130810, ¶ 15; *People v. Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 12. Here, defendant contends the facts were insufficient to show his conduct was knowing; therefore, this court must consider whether the trial court, as the trier of fact in this bench trial, could reasonably find that defendant acted with that mental state.

¶ 28 When considering a challenge to a criminal conviction based on the sufficiency of the evidence, the reviewing court must determine whether, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the required elements of the crime

beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Bradford*, 2016 IL 118674, ¶ 12. It is the responsibility of the trier of fact to weigh the evidence and draw reasonable inferences from the facts. See *Bradford*, 2016 IL 118674, ¶ 12. As a reviewing court, we will not substitute our judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of the witnesses. *Id*. On appeal from a criminal conviction, this court will not reverse the judgment of the trial court unless the evidence is so unreasonable, improbable or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt. *Id*.

¶ 29 Defendant was convicted of aggravated battery to a child under the age of 13. To prove defendant guilty of that offense, the State was required to show that he knowingly caused great bodily harm to the child by throwing the piece of concrete at the house. 720 ILCS 5/12-3.05(b)(1) (West 2014). Defendant does not challenge the proof as to the element of the victim's age or that the child's injuries constituted "great bodily harm" under the statute; he only contends he did not act with a knowing mental state.

¶ 30 A person acts knowingly when he is "consciously aware" that his conduct is practically certain to cause the proscribed result. 720 ILCS 5/4-5(a) (West 2014); *People v. Willett*, 2015 IL App (4th) 130702, ¶ 51. In this case, therefore, defendant could be found to act knowingly if he was consciously aware that his conduct was practically certain to cause great bodily harm. In contrast, a person acts recklessly if he consciously disregards a substantial and unjustifiable risk that the victim would be harmed. 720 ILCS 5/4-6 (West 2014).

¶ 31 A mental state is seldom proved by direct evidence and must generally be inferred from the surrounding circumstances. *People v. Lissade*, 403 Ill. App. 3d 609, 612 (2010). Moreover, where, as here, a defendant denies his intent to commit the crime, the State may prove his mental

state through circumstantial evidence. *People v. Steele*, 2014 IL App (1st) 121452, ¶ 23. Intent may be inferred from (1) the defendant's conduct surrounding the act, including his words; (2) the surrounding circumstances; (3) the weapon used and (4) the force of the blow. *Id*.; *People v. Phillips*, 392 Ill. App. 3d 243, 259 (2009). Evidence of the defendant's flight and his use of an assumed name may be admitted as proof of his consciousness of guilt. *People v. Harris*, 225 Ill. 2d 1, 23 (2007); *People v. Effinger*, 2016 IL App (3d) 140203, ¶ 20.

¶ 32 Although defendant argues he lacked a knowing mental state because he could not see inside the house when he threw the concrete block, defendant was aware that several people were inside the residence. Moreover, the State was not required to show that defendant could have foreseen the exact trajectory of the concrete block after he threw it. Defendant argued with McGee and then drove around the block for a short time to retrieve the block. Therefore, when defendant threw the concrete block at the house less than a minute after speaking to McGee, defendant committed that act knowing that McGee and others were in the house moments earlier.

¶ 33 Defendant contends he acted recklessly, not knowingly, because the window was covered by wood blinds. He argues that because he did not know someone was in the room where the object went through the window, it cannot be inferred that he was practically certain the block would strike someone. However, the trial court expressly rejected that argument in finding that defendant's acts were not merely reckless, as would be the case had defendant thrown the block through a garage that he did not know was occupied. The court noted that the structure in this case was "a house that Mr. O'Neal is very much aware is occupied."

¶ 34 This case is analogous to *People v. Lesley*, 144 Ill. App. 3d 22, 24 (1986), in which this court affirmed the defendant's aggravated battery conviction based on his act of throwing rocks

at an occupied school bus, striking the bus driver. On appeal, the defendant asserted the State did not prove beyond a reasonable doubt that he knowingly caused great bodily harm to the bus driver and only showed that he knowingly threw rocks at the bus. *Id*. at 23. This court noted that the prosecution, as often is the case in these circumstances, needed to prove the defendant's mental state by circumstantial evidence, and the court stated it had "no difficulty in finding that the defendant acted knowingly or that it was practically certain that great bodily harm would result to the driver from the forceful throwing of rocks at an occupied bus." *Id*.

¶ 35 Even though we note that here, unlike in *Lesley*, defendant could not see inside the room where he threw the brick, the fact that defendant was aware that the home in this case was occupied supports the determination that he acted with the required mental state. See also *People v. Hauschild*, 364 Ill. App. 3d 202, 220 (2006), *reversed in part on other grounds*, 226 Ill. 2d 63 (2007) (when the defendant discharged multiple gunshots in a "pitch black" room occupied by a dog moments earlier, the trier of fact could conclude that the defendant knew his act was "practically certain" to injure the animal so as to support conviction for criminal damage to property).

¶ 36 Furthermore, defendant's conduct surrounding the act, including his words and the manner in which he threw the object, further support a determination that he acted knowingly, *i.e.*, that he was aware his conduct was practically certain to cause great bodily harm. Defendant displayed anger when speaking to McGee, referring to Black as a "bitch" and warning they were "all going to make her pay for this one." In addition, the evidence established defendant threw the concrete block with force. Detective Pullappally testified there was a dent in the back wall of the room where the block was thrown, and he also testified the block traveled approximately 39

feet from the curb when it went through the window and another 14 feet from the window to the back wall. We conclude that the evidence was sufficient to show defendant was aware his act was practically certain to cause great bodily harm, and thus that he acted knowingly, when he threw a concrete block at a window of a home that was occupied minutes earlier.

¶ 37 Defendant's remaining assertions involve the imposition of various fines and fees against him and the application of presentence custody credit to some of those charges. The trial court imposed a total of $639 in fines and fees in this case.

¶ 38 Although defendant did not raise a challenge to his fines and fees in the circuit court, he contends we can reach this issue under the plain error doctrine or as a claim of the ineffectiveness of his trial counsel. However, the rules of waiver also apply to the State, and where, as here, the State does not argue that defendant has forfeited these issues, it waives the forfeiture. See *People v. Reed*, 2016 IL App (1st) 140498, ¶ 13. We therefore address defendant's claims, and we may modify the circuit court's order, if necessary, without remanding the case, pursuant to Supreme Court Rule 615(b) (Ill. S. Ct. R. 615(b) (eff. Aug. 27, 1999)). See *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 22.

¶ 39 Defendant argues that two charges were incorrectly imposed against him. He first contends, and the State correctly concedes, the trial court should not have imposed an electronic citation fee because that charge only applies to a defendant in "any traffic, misdemeanor, municipal ordinance or conservation case." 705 ILCS 105/27.3e (West 2014). Because those categories do not apply here, we vacate the $25 charge.[1]

[1] Although we are vacating the $25 charge, we note this statute only allows for the imposition of a $5 fee. 705 ILCS 105/27.3e (West 2014).

¶ 40 Second, defendant asserts the trial court erroneously assessed a $5 court system fee (55 ILCS 5/5-1101(a) (West 2014)), which applies only to violations of the Illinois Vehicle Code. The State does not address this charge; however, defendant is correct that it should not have been imposed here because his conviction does not involve that statute. See *People v. Willis*, 409 Ill. App. 3d 804, 818 (2011). Accordingly, we also vacate that $5 charge.

¶ 41 Defendant next contends several assessments imposed by the trial court constitute fines that can be offset by his presentence custody credit. A defendant is entitled to a credit of $5 for each day he is incarcerated, with that amount to be put toward the fines levied against him as part of his conviction. 725 ILCS 5/110-14(a) (West 2014). The fines and fees order states that the trial court granted defendant credit for 292 days spent in custody. Defendant asserts on appeal, and the State agrees, that he should receive an additional 10 days of that credit, for a total of 302 days of presentence custody credit and the mittimus should be corrected to reflect that credit. Thus, at $5 per day, defendant has accumulated $1510 worth of credit that can be applied toward his eligible fines.

¶ 42 Before considering whether the individual charges challenged by defendant can be offset by his presentence custody credit, we note that credit can be applied only to fines, and we set out the difference between a "fine" and a "fee." A "fee" is defined as "a charge that seeks to recoup expenses incurred by the state or to compensate the state for some expenditure incurred in prosecuting the defendant." (Internal quotations omitted.) *People v. Graves*, 235 Ill. 2d 244, 250 (2009), citing *People v. Jones*, 223 Ill. 2d 569, 582 (2006). In contrast, a "fine" is "punitive in nature" and is "a pecuniary punishment imposed as a part of a sentence on a person convicted of a criminal offense." (Internal quotations omitted.) *Graves*, 235 Ill. 2d at 250, citing *Jones*, 223

Ill. 2d at 581, quoting *People v. White*, 333 Ill. App. 3d 777, 781 (2002). The labeling of a charge as a "fee" or a "fine" by the legislature is not dispositive. *Graves*, 235 Ill. 2d at 250-51 ("the most important factor is whether the charge seeks to compensate the state for any costs incurred in prosecuting the defendant").

¶ 43 Under those definitions, defendant argues, and the State correctly concedes, that this court has found the $15 State Police operations charge (705 ILCS 105/27.3a (1.5) (West 2014)) and the $50 Court System charge (55 ILCS 5/5-1101(c)(1) (West 2014)) are both fines to which the credit can be applied. See *People v. Warren*, 2016 IL App (4th) 120721-B, ¶ 147 (State Police operations charge is a fine); *People v. Blanchard*, 2015 IL App (1st) 132281, ¶ 22 (Court System charge is a fine). The Court System charge was deemed to be a fine because it was imposed upon the conviction of each defendant found guilty of a felony, regardless of what transpired in the particular case and did not compensate the State for prosecuting that particular defendant. *People v. Wynn*, 2013 IL App (2d) 120575, ¶ 17; see also *Graves*, 235 Ill. 2d at 253 (costs assessed under section 5-1101 of the Counties Code are "monetary penalties to be paid by a defendant" upon a judgment of guilty). Accordingly, defendant's presentence custody credit should be applied to offset those two charges.

¶ 44 Defendant further asserts, and the State again agrees, that he is entitled to credit against four other assessments that are listed on the trial court's fines and fees order as "FINES OFFSET" by presentence custody credit: the $10 Mental Health Court fine (55 ILCS 5/5-1101(d-5) (West 2014)); the $5 Youth Diversion/Peer Court fine (55 ILCS 5/5-1101(e) (West 2014)); the $5 Drug Court fine (55 ILCS 5/5-1101(f) (West 2014)); and the $30 Children's Advocacy Center fine (55 ILCS 5/5-1101(f-5) (West 2014)). We accept the State's concession

and hold that those four assessments are fines subject to offset by defendant's presentence custody credit. See *People v. Price*, 375 Ill. App. 3d 684, 700-01 (2007) (Mental Health Court and Youth Diversion/Peer Court fines); *People v. Unander*, 404 Ill. App. 3d 884, 886 (2010) (Drug Court fine); *People v. Jones*, 397 Ill. App. 3d 651, 660-61 (2009) (Children's Advocacy Center fine). In addition, the $30 juvenile expungement fund charge imposed in the trial court's fines and fees order (730 ILCS 5/5-9-1.17 (West 2014)) is a fine to which defendant's credit can be applied. See *People v. Maggio*, 2017 IL App (4th) 150287, ¶ 53; *Wynn*, 2013 IL App (2d) 120575, ¶ 16 (charge used to fund the expungement of juvenile records is imposed in any case involving a guilty plea or conviction and is unrelated to the adult defendant against whom the charge is assessed).

¶ 45 The State argues that because the fines and fees order entered by the trial court categorizes some of those assessments as fines that are subject to offset, defendant has already been credited the total amount of several of those charges and "is not entitled to additional credit." However, the trial court's written order only designates what charges are imposed against defendant, in separate categories of fines to be offset or not offset by defendant's presentence custody credit, and lists a total amount of fines and fees due. The order does not indicate that defendant has received credit against these fines. To ensure that defendant's credit is applied to these fines (the $15 State Police operations charge, the $50 Court System charge, the $10 Mental Health Court fine, the $5 Youth Diversion/Peer Court fine, the $5 Drug Court fine and the $30 Children's Advocacy Center fine), we order the clerk of the circuit court to correct the fines and fees order to reflect a credit against those charges. See *People v. Mullen*, 2018 IL App (1st) 152306, ¶ 58 (modification of the order is necessary and is frequently required

where the order is devoid of calculations, leaving this court "unsure whether the presence or absence of a calculation [in the fines and fees] order affects whether a defendant receives the necessary credit").

¶ 46 Defendant challenges six other charges, and the State responds that they are not fines and thus cannot be offset. Those charges include the $190 felony complaint fee (705 ILCS 105/27.2a (w) (West 2014)); the $15 clerk automation fee (705 ILCS 105/27.3a (1), (1.5) (West 2014)); the $25 document storage fee (705 ILCS 27.3c(a) (West 2014)); the $25 court services fee (55 ILCS 5/5-1103 (West 2014)); the $2 State's Attorney records automation fee (55 ILCS 5/4-2002.1(c) (West 2014)) and the $2 Public Defender records automation fee (55 ILCS 5/3-4012 (West 2014)).

¶ 47 The Illinois Supreme Court has granted leave to appeal in a case in which this court held that all of these charges are fees, not fines, and therefore are not subject to offset by a defendant's presentence custody credit. *People v. Clark*, 2017 IL App (1st) 150740-U, ¶¶ 21-23, *appeal allowed*, No. 122495 (Sept. 27, 2017). Numerous appellate court decisions have addressed these assessments and found them to be fees. *People v. Smith*, 2018 IL App (1st) 151402, ¶¶ 15-16. The majority of cases addressing the $2 State's Attorney records automation charge and the $2 Public Defender records automation charge have found they are fees not subject to offset. See, *e.g.*, *id*. ¶ 16; *People v. Brown*, 2017 IL App (1st) 150146, ¶ 38 (collecting cases); *contra People v. Camacho*, 2016 IL App (1st) 140604, ¶¶ 47-56 (finding those assessments do not compensate the State for any costs associated in prosecuting a particular defendant and thus cannot be considered fees). In light of that precedent, we find that those six assessments are fees that cannot be offset by defendant's presentence custody credit.

¶ 48 We therefore hold that the $25 electronic citation fee and the $5 court system fee are vacated. Furthermore, the $15 State Police operations charge, the $50 Court System charge, the $10 Mental Health Court fine; the $5 Youth Diversion/Peer Court fine; the $5 Drug Court fine and the $30 Children's Advocacy Center fine, as well as the $30 juvenile expungement fund assessment, are all fines that should be offset by defendant's presentence custody credit. Accordingly, the total amount due is reduced to $464.

¶ 49 In conclusion, defendant's conviction for aggravated battery to a child under the age of 13 is affirmed because the evidence was sufficient for the trial court to conclude defendant acted with a knowing mental state when he threw a concrete block into the window of an occupied home. Two fees that were incorrectly assessed against defendant are vacated, and the clerk of the circuit court is ordered to correct the fines and fees order to reduce the amount owed to $464 and to correct the mittimus to reflect an additional 10 days of time spent in custody.

¶ 50 Affirmed; fines and fees order and mittimus corrected.