2018 IL App (5th) 150543-U

NO. 5-15-0543

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 13-CM-1803
	)	
DELLA HARRIS,	)	Honorable
	)	Patricia H. Kievlan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE OVERSTREET delivered the judgment of the court.
Presiding Justice Barberis and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held*: No meritorious issue can be raised on appeal, and therefore appointed appellate counsel is granted leave to withdraw, and the judgment of conviction is affirmed.

¶ 2 This appeal is from a judgment of conviction. The circuit court found the defendant, Della Harris, guilty of violating an order of protection (720 ILCS 5/12-3.4(a)(1) (West 2012)), a Class A misdemeanor (*id.* § 12-3.4(d)), and subsequently sentenced her to pay a fine and costs totaling $200. The defendant's court-appointed attorney on appeal, the Office of the State Appellate Defender (OSAD), has filed a motion to withdraw as counsel, on the ground that this appeal lacks merit, along with a

brief in support of the motion. See *Anders v. California*, 386 U.S. 738 (1967). OSAD served the defendant with a copy of its motion and brief. This court gave the defendant ample opportunity to file a *pro se* brief, memorandum, or other document explaining why the appeal has arguable merit or why OSAD should not be allowed to withdraw, but the defendant has not taken advantage of that opportunity. This court has examined OSAD's motion and supporting brief, as well as the entire record on appeal, and has concluded that OSAD's motion should be granted and the judgment of conviction should be affirmed.

¶ 3 BACKGROUND

¶ 4 In April 2013, in St. Clair County case number 13-CM-1803, the State filed an information charging the defendant with violating an order of protection. The State alleged that on November 14, 2012, the defendant violated an order of protection issued on June 14, 2011, by communicating via telephone with complainant Henry J. Luster. Pursuant to a warrant, the defendant was taken into custody on April 29, 2013; the next day, she posted bond. When the defendant failed to appear for a bench trial, another warrant was issued. The defendant was taken into custody again on August 7, 2013; that same day, she was released on her own recognizance. (The defendant never filed a demand for a speedy trial.) Case number 13-CM-1803 is the subject of the instant appeal.

¶ 5 Sometime after April 2013, apparently, the State brought two additional misdemeanor cases against the defendant, *viz.*: St. Clair County case number 13-CM-7599, wherein the defendant was charged with harassment by telephone, and St.

Clair County case number 13-CM-7600, wherein she was charged with false reporting to a public police agency. Those two misdemeanor cases are not subjects of the instant appeal, and the records of those two cases are not included in the record on appeal. However, the record on appeal includes references to those two cases, and this court's disposition of OSAD's third potential issue (see below) requires mention thereof.

¶ 6 An assistant public defender represented the defendant in all three misdemeanor cases (*i.e.*, the case now before this court plus the two others). On February 13, 2014, defense counsel asserted a *bona fide* doubt of the defendant's fitness, and the circuit court appointed Dr. Daniel Cuneo to evaluate the defendant for fitness.

¶ 7 On January 30, 2015, the circuit court, with Judge Kievlan presiding, conducted a fitness hearing in all three misdemeanor cases. Dr. Cuneo, a clinical psychologist, testified that he evaluated the defendant for fitness to stand trial in March 2014 and again on the day of the fitness hearing. The defendant knew who she was, knew where she was, and correctly stated the month, date, and time. Dr. Cuneo diagnosed the defendant with Bipolar I, Most Recent Episode Manic, and he explained that her "mood swings" between "extremely manic" and "extremely depressed" would continue until such time as she was stabilized with medication. According to Dr. Cuneo, this condition "substantially impair[ed] [the defendant's] ability to understand the nature and purpose of the *** proceedings against her and to assist in her own defense." He found that the defendant's "difficulty" in "staying on track" caused her to "bounce[ ] from one subject to another" and would impair her ability to understand what was happening in the courtroom. He also found that defendant suffered from "cognitive confusion" and a

"limited attention span," which could preclude her from communicating rationally with her attorney. While the defendant had a basic understanding of the role of her public defender, she also thought that the prosecutor was trying to help her and was going to dismiss the case. Finally, Dr. Cuneo opined that the defendant was unfit to stand trial, but could attain fitness within one year, and probably within 60 days, if she received inpatient treatment with psychotropic medications.

¶ 8 After listening to the direct examination, the cross-examination, and the redirect examination of Dr. Cuneo, Judge Kievlan made reference to the statutory list of matters relevant to the issue of fitness (see 725 ILCS 5/104-16(b) (West 2014)) and began her own questioning of Dr. Cuneo. In answer to the judge's queries, Dr. Cuneo testified that the defendant knew what she was charged with, and she recognized her attorney and understood that he was working to defend her against the charge. As for the defendant's memory of the events and circumstances that led to the charge, Dr. Cuneo testified that the defendant "[a]t times" recalled those events and circumstances, but she "start[ed] getting confused" whenever mania set in.

¶ 9 The judge noted that when the defendant entered the courtroom that day, the defendant "addressed [her] as Judge," and asked Dr. Cuneo whether the defendant "[knew] the people who are the players in … this scenario," and Dr. Cuneo answered in the affirmative. The judge also noted that the defendant had been able to file *pro se* pleadings in family court, in accord with the judge's own instructions to her, and that whenever the defendant engaged in "dramatics" in her courtroom, she told the defendant to stop, and the defendant immediately stopped the behaviors and apologized. Dr. Cuneo

replied that the judge certainly seemed to be "getting through to [the defendant]" on those prior occasions, but he continued to think that mania would affect the defendant's ability to cooperate, to understand, and to concentrate. Dr. Cuneo also testified that people who are unfit to be tried may nevertheless be capable of filing *pro se* pleadings; he had observed as much on many occasions. According to Dr. Cuneo, the defendant would have "difficulty" staying focused throughout a two-hour trial, especially since she was not receiving the kinds of medication typically prescribed for a person with bipolar disorder, "a Lithium or a Depakote." Instead of those needed medications, she was receiving only an antidepressant.

¶ 10 During closing arguments at the fitness hearing, the State asked the court to find the defendant unfit and to order an evaluation and treatment. The defendant's appointed attorney argued in favor of a finding of fitness. Counsel noted, *inter alia*, that his client had sat through an hour-long fitness hearing without any outbursts.

¶ 11 At the end of the fitness hearing, the judge stated that she found as follows: the defendant understood that she was charged with violating a court order; the defendant understood courtroom proceedings and could conform her behavior to the courtroom setting; she understood the functions of her attorney, the prosecutor, and the judge, as evidenced by, *e.g.*, her not approaching or speaking with the prosecutor during hearings; she was oriented as to time, place, and person, and she recognized persons, places, and things; she came to court as required, and on occasions when she could not get to court, she phoned and said that she could not be there; and she understood the proceedings sufficiently to help her attorney. In reaching that last finding, the judge found two

matters compelling. First, during a recent case in juvenile court, the defendant took all of the various steps necessary to regain custody of two of her children (not including K.L., her son by the complainant in the instant misdemeanor case) from the Department of Children and Family Services. "That's a big hill to climb," the judge observed. "And that was done in the context of a court proceeding." Second, in the order-of-protection case, which was also before Judge Kievlan, the defendant, acting *pro se*, scheduled a hearing in the case. At that hearing in the order-of-protection case, the defendant explained to the judge how the order of protection was preventing her from being awarded visitation with K.L. in a contemporaneous case in family court, and the judge responded by crafting an order that solved the problem the defendant had described. The judge concluded that she found the defendant fit to stand trial.

¶ 12 On March 2, 2015, the defendant filed through counsel a motion *in limine* in all three misdemeanor cases, requesting that the State be prohibited from presenting evidence of criminal acts not charged in the information. On June 1, 2015, the defendant filed in the three misdemeanor cases a notice that she, at trial, might rely on the affirmative defense of necessity.

¶ 13 On July 2, 2015, the court called all three misdemeanor cases for bench trial. On motion of the State, the court dismissed the charge of false reporting to a public police agency in No. 13-CM-7600. Trial began on the two remaining misdemeanor charges—violating an order of protection in No. 13-CM-1803 (the subject of this appeal) and harassment by telephone in No. 13-CM-7599.

¶ 14 At the trial, thc court took judicial notice of a two-year plenary order of protection that had been entered by the circuit court of St. Clair County in case number 06-F-964 on June 14, 2011. The order of protection named Henry J. Luster as the petitioner and named the defendant as the respondent. In addition to Henry J. Luster, the order of protection named one other protected person, Joyce A. Luster, who was the wife of Henry J. Luster. Under the terms of the order of protection, the defendant was required, *inter alia*, to "stay away" from Henry J. Luster and Joyce A. Luster, which included a prohibition on contacting them by telephone, and to refrain from threatening or harassing them. The plenary order of protection was due to expire on June 14, 2013, but it was extended twice, and remained in effect at the time of the defendant's misdemeanor trial.

¶ 15 Henry J. Luster testified that he and the defendant had a child together, a boy named K.L., who was 10 years old at the time of trial. Luster characterized the relationship between himself and the defendant as "hateful." During direct examination, the prosecutor asked Luster who was "listed" on the order of protection, and Luster answered, "Me, my wife, and my son." (This court notes that the order of protection did not include any mention of, or reference to, Luster's son or any other minor child.) On November 14, 2012, while the protective order was in effect, Luster received a telephone call from the defendant. Luster was very familiar with the defendant's voice, and on that occasion he recognized her voice as she "cuss[ed] [him] out and all kinds of stuff."

¶ 16 After questioning Luster about the phone call of November 14, 2012, the prosecutor asked Luster whether the defendant phoned his cell phone on June 17, 2013. Luster answered in the affirmative. The prosecutor then asked Luster, "And did she ever

make any threats or anything like that?", and Luster answered, "Well, she always threaten [*sic*] me. She always threatens me … when she calls."

¶ 17 After Luster finished testifying, defense counsel moved for a directed verdict. Defense counsel argued that Luster clearly "lied" when he testified that his son, K.L., was among those "listed" on the protective order, and that this lie vitiated the entirety of Luster's testimony, leaving the State without any reliable evidence of guilt. In response to this argument, the court directed its clerk to print out a sheet from the Law Enforcement Agencies Data System (LEADS) system. Examining the LEADS sheet, the court took judicial notice that it listed Henry Luster, Joyce Luster, and K.L. as the persons protected under the protective order. The court seemed to suggest that the inclusion of K.L. on the LEADS sheet contradicted defense counsel's argument that Luster lied when he stated that his son K.L. was "listed" on the protective order. The court added that Henry J. Luster was clearly a protected person under the order, and counsel agreed with that point.

¶ 18 The defendant did not testify on her own behalf and did not call any witnesses. Through counsel, she merely asked that the court take judicial notice of a January 2015 fitness report in which Dr. Cuneo concluded that she had "severe mental health issues" and was unfit to stand trial.

¶ 19 The court heard closing arguments. The defendant relied on a necessity defense. Her attorney argued that the defendant had chosen a lesser harm over a greater harm. More specifically, she had chosen the lesser harm of contacting Henry J. Luster in an

attempt to communicate with her young son, K.L., over the greater harm of foregoing communication with the child.

¶ 20 The court rejected the defendant's necessity defense and found the defendant guilty of violating an order of protection in case number 13-CM-1803. The court stated that if the defendant wanted communication with her son, she could have sought recourse through the courts; violating the order of protection was not necessary for the purpose of communicating with him. The court ordered the defendant to pay a fine and costs totaling $200. As for case number 13-CM-7599, the court found the defendant not guilty of the charge therein, harassment by telephone. The court explained that the State had failed to prove its allegations that the defendant threatened Henry J. Luster with bodily harm and threatened to blow up his house.

¶ 21 Through counsel, the defendant filed a posttrial motion in case number 13-CM-1803. She claimed that the State failed to prove guilt beyond a reasonable doubt, that the court erred in considering the LEADS sheet, and that the State made inflammatory closing arguments that deprived the defendant of a fair trial. After a hearing, the court denied the motion. This appeal followed.

¶ 22 ANALYSIS

¶ 23 This appeal is from a judgment of conviction in case number 13-CM-1803. As previously mentioned, the defendant's court-appointed attorney on appeal, OSAD, has filed an *Anders* motion to withdraw as counsel, on the ground that this appeal lacks merit. Along with its *Anders* motion, OSAD has filed an *Anders* brief, wherein it discusses five potential issues on review. Those potential issues are: (1) whether the circuit court

violated the defendant's right to a speedy trial by holding the bench trial more than two years after the information was filed; (2) whether the court erred by finding the defendant fit to stand trial; (3) whether the court erred by allowing testimony about a criminal act not mentioned in the information—specifically, "a second phone call" from the defendant to Henry J. Luster on June 17, 2013, in violation of the protective order—where the defendant had made a pretrial motion to exclude such testimony; (4) whether the trial court erred by *sua sponte* taking judicial notice of the LEADS sheet, and considering the contents thereof, while ruling upon the motion for a directed verdict; and (5) whether the trial court erred by *sua sponte* taking judicial notice of the reasons for its earlier finding that the defendant was fit to stand trial.

¶ 24 As to the first of the five potential issues discussed by OSAD, there clearly was no violation of the defendant's right to a speedy trial. Although more than two years elapsed between the time the defendant was first taken into custody and the time she was tried, she was out on bond or on her own recognizance for essentially all of that time, and she never filed a demand for a speedy trial. See 725 ILCS 5/103-5(b) (West 2012). Furthermore, the record makes clear that almost all of the lengthy delay was attributable to the defendant.

¶ 25 As to the second of the five potential issues, the circuit court did not abuse its discretion in finding the defendant fit to stand trial. See, *e.g.*, *People v. Contorno*, 322 Ill. App. 3d 177, 179 (2001) (finding of fitness to stand trial will not be reversed absent an abuse of discretion). The record shows that the court, when assessing the defendant's fitness, actively and affirmatively exercised its discretion. *Id.* The court demonstrably

understood its role at a fitness hearing and vigorously fulfilled that role, particularly through its detailed questioning of Dr. Cuneo. Finally, the court carefully explained its finding of fitness, citing specific portions of Dr. Cuneo's testimony and the court's own observations of the defendant, and these points justified the finding of fitness. The circuit court's ruling was reasonable and grounded in evidence.

¶ 26 As to the third potential issue, the circuit court did not err in allowing Henry J. Luster to testify at trial that the defendant telephoned him on June 17, 2013. OSAD suggests that error was committed. It argues that the admission of testimony concerning the June 17, 2013, telephone call was erroneous because the information in case number 13-CM-1803, charging the defendant with violating an order of protection, did not mention the June 17, 2013, telephone call, but mentioned only the November 14, 2012, telephone call. OSAD then suggests that this alleged error cannot be the basis for a meritorious argument because it has been forfeited and does not qualify as plain error. OSAD is correct in stating that the information in case number 13-CM-1803 did not mention the June 17, 2013, phone call, and mentioned only the November 14, 2012, phone call. However, it must be remembered that case number 13-CM-1803 was not the only case for which the defendant was on trial. As the court made clear at the trial's start, defendant was being tried on case number 13-CM-1803 and case number 13-CM-7599. The charging instrument in case number 13-CM-7599 is not part of the record on appeal, but the record does suggest that in case number 13-CM-7599, the defendant was charged with harassment by telephone, and she was alleged to have telephoned Henry J. Luster on June 17, 2013, to have threatened him with bodily harm, to have threatened to blow up

his house, and to have yelled and cursed at him. Given the nature of the allegations in case number 13-CM-7599, testimony about the June 17, 2013, telephone call was relevant and admissible at trial. There was no error in admitting that testimony.

¶ 27 As to the fourth potential issue, even if the trial court committed error by *sua sponte* taking judicial notice of the LEADS sheet and considering its contents when ruling upon the defendant's motion for a directed verdict of not guilty at the close of the State's evidence, and even if the error had been preserved for review, the error was harmless. From the State's evidence, considered most strongly in the State's favor, a reasonable mind certainly could have fairly concluded that the defendant was guilty beyond a reasonable doubt. See *People v. Withers*, 87 Ill. 2d 224, 230 (1981). Therefore, a directed verdict of not guilty would have been inappropriate. The defendant was being tried on a charge of violating an order of protection by telephoning Henry J. Luster on November 14, 2012. The State's evidence, in the form of Luster's testimony, indicated that the defendant telephoned Luster on November 14, 2012. Meanwhile, there was no dispute that a plenary order of protection was in effect on that date, no dispute that the order prohibited the defendant from telephonically contacting the protected persons, and no dispute that Henry J. Luster was a protected person. With or without the LEADS sheet, and its incorrect indication that K.L., too, was a protected person under the protective order, the defendant's motion for a directed verdict would have been, and should have been, denied.

¶ 28 The fifth and final potential issue is whether the trial court erred when it *sua sponte* took judicial notice of the reasons for its earlier finding that the defendant was

fit to stand trial. At trial, defense counsel asked that the court take judicial notice of Dr. Cuneo's testimony at the fitness hearing, particularly Dr. Cuneo's description of the defendant's mental-health problems and his opinion that the defendant was unfit for trial. Counsel also asked that the court take judicial notice of the fact that the court had found the defendant fit. The court agreed to take judicial notice of those matters. The court then went on to say that it also would take judicial notice of its reasons for finding the defendant fit. It is well known that a court may take judicial notice of adjudicative facts regardless of whether a party has asked it to do so. See Ill. R. Evid. 201(c) (eff. Jan. 1, 2011). There was no error in the circuit court's taking judicial notice of a fact without waiting for a party's request. Even if the court erred in taking judicial notice of its reasons for finding the defendant fit for trial, this court cannot imagine how the error would have made any difference at trial, given the nature of the charges and the nature of the defense (*i.e.*, a necessity defense).

¶ 29 CONCLUSION

¶ 30 Of the five potential issues discussed by OSAD in its *Anders* brief, none has arguable merit. This court is confident that no significant error occurred below. Accordingly, OSAD is granted leave to withdraw as counsel, and the judgment of conviction is affirmed.

¶ 31 Motion granted; judgment affirmed.