2020 IL App (4th) 180123-U

NO. 4-18-0123

FILED
May 28, 2020
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
THOMAS DRAKE PRICE,	)	No. 17CF24
Defendant-Appellant.	)	
	)	Honorable
	)	Scott D. Drazewski,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Knecht and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, granting appellate counsel's motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), in the absence of meritorious issues to raise on appeal.

¶ 2 In July 2017, the trial court found defendant, Thomas Drake Price, fit to stand trial. Following a September 2017 bench trial, the trial court found defendant guilty of (1) residential burglary (720 ILCS 5/19-3(a) (West 2016)), (2) attempt (criminal sexual assault) (720 ILCS 5/8-4 (West 2016)), and (3) intimidation (720 ILCS 5/12-6(a)(1) (West 2016)). In November 2017, the court sentenced defendant to eight and a half years' imprisonment for residential burglary, concurrent to a four-year sentence for attempt (criminal sexual assault), and concurrent to a three-year sentence for intimidation.

¶ 3 Counsel for defendant identifies, as potential arguments on appeal, that (1) the trial court abused its discretion when it found defendant fit to stand trial, (2) the State failed to

prove defendant guilty beyond a reasonable doubt, and (3) the court abused its discretion when it sentenced defendant to eight and half years' imprisonment for residential burglary, four years for attempt (criminal sexual assault), and three years for intimidation.

¶ 4 Pursuant to *Anders v. California*, 386 U.S. 738 (1967), defendant's appellate attorney moves to withdraw as counsel. See *People v. Jones*, 38 Ill. 2d 384, 385, 231 N.E.2d 390, 391-92 (1967). Counsel states he read the record in this case. According to counsel, after his review, he concluded this case presents no viable grounds for appeal and any appeal would be "frivolous." He supported his motion with a memorandum of law containing potential issues and argument as to why the issues lack merit. Counsel mailed defendant a copy of his motion and memorandum. After examining the record and executing our duties consistent with *Anders*, we grant appellate counsel's motion to withdraw and affirm the trial court's judgment.

¶ 5 I. BACKGROUND

¶ 6 In January 2017, a McLean County grand jury returned indictments against defendant charging him with (1) home invasion (720 ILCS 5/19-6(a)(2) (West 2016)), (2) two counts of residential burglary (720 ILCS 5/19-3(a) (West 2016)), (3) attempt (criminal sexual assault) (720 ILCS 5/8-4 (West 2016)), (4) intimidation (720 ILCS 5/12-6(a)(1) (West 2016)), (5) unlawful restraint (720 ILCS 5/10-3 (West 2016)), and (6) criminal trespass to a residence (720 ILCS 5/19-4(a)(2) (West 2016)).

¶ 7 A. Fitness Evaluation

¶ 8 In February 2017, defendant's trial counsel filed a petition requesting the trial court appoint a qualified expert to determine defendant's fitness to stand trial. The court granted the motion and appointed Dr. Terry Killian to examine defendant to determine his fitness to stand trial.

¶ 9 In March 2017, Dr. Killian evaluated defendant. In July 2017, Dr. Killian submitted—to the trial court—a written report detailing his findings. In the written report, Dr. Killian found defendant fit to stand trial. Dr. Killian stated that defendant "demonstrated a more than adequate understanding of the nature and purpose of the proceedings against him and appears capable of rationally assisting his attorney in his own defense."

¶ 10 Subsequently, the trial court held a fitness hearing to determine whether defendant was fit to stand trial. At the hearing, the parties stipulated that "if called to testify, Dr. Killian would testify as to the contents of his report or similar to the contents of his report." The court found defendant fit to stand trial, stating:

> "All right. The [c]ourt then having accepted a stipulation to the admission of the report and, further, that the author of the report, Dr. Killian, is an expert and that he would testify in accordance with the information in his report, the [c]ourt will consider the report in its discretion in determining the issues of the defendant's fitness.
>
> The report does include additional information, which is being taken into consideration by the [c]ourt, not just the ultimate findings or conclusions that he has made, meaning Dr. Killian has made, on page seven but also address issues pertaining to the defendant's knowledge and understanding of the charges, the proceedings, the consequences of a plea or judgment, the sentence, the functions of the participants in the trial process, the defendant's

ability to observe, recollect, and relate occurrences, the defendant's behavior and abilities, orientation as to time and place.

The [c]ourt having further—and this is important based upon a recent Fourth District opinion—having further observed the defendant's demeanor in court and his ability to cooperate with counsel, would find that the State has met its burden of proof by a preponderance of the evidence finding the defendant fit; and as a result, the [c]ourt will find the defendant fit at this time."

¶ 11 B. Defendant's Bench Trial

¶ 12 Prior to trial, the State dismissed three counts: (1) one count of residential burglary, (2) unlawful restraint, and (3) criminal trespass to a residence. Defendant waived his right to a jury trial. The parties proceeded to trial on (1) one count of residential burglary, (2) home invasion, (3) attempt (criminal sexual assault), and (4) intimidation.

¶ 13 During a September 2017 bench trial, the trial court heard the following relevant testimony. K.B., the victim, testified that around 7 a.m. on the morning of January 10, 2017, she woke up to a knock on her back door. When she opened the door, she observed defendant standing outside. K.B. testified defendant lived across the yard in a different apartment duplex. When K.B. opened the door, she asked defendant what he was doing at her apartment, but he did not respond. K.B. stepped aside and allowed defendant to come inside. K.B. testified she considered defendant a friend at that time and occasionally gave him rides.

¶ 14 Once inside the apartment, defendant walked toward K.B. and grabbed her arms and wrists. K.B. asked defendant to leave, but he refused. Defendant then pressed himself against K.B. and bit her on the ears and neck. Defendant told K.B. to "suck his dick" and said if

she refused, he would bite her ear off. He then grabbed K.B. by the hair and threw her to the ground where she fell to her knees. While holding K.B.'s hair with one of his hands, defendant used his other hand to remove his penis from his pants. With his penis exposed, defendant again told K.B. to "suck his dick[,]" and then he tried to push his penis toward her face.

¶ 15 Eventually, K.B. twisted her way out of defendant's hold. She then grabbed a knife from the kitchen and told defendant she would cut him if he did not leave her apartment. Defendant refused to leave the apartment and continued to expose his penis. In response, K.B. cut defendant on the cheek, which caused him to bleed. K.B. then grabbed defendant by the shoulder, put the knife to his back, opened the back door, and pushed him out of her apartment.

¶ 16 After closing and locking the door, K.B. called her uncle. Her uncle then called the police. Two officers responded to K.B.'s apartment and spoke with K.B. Based on the information provided by K.B., the officers went to defendant's apartment. At defendant's apartment, the officers found defendant curled up in a ball on the floor and unresponsive. Defendant had a towel pressed against his neck and face, which was covered in blood. An ambulance arrived and transported defendant to the hospital.

¶ 17 After leaving the hospital, defendant was transported to McLean County jail where Police Chief Jason Williamson interviewed him. A video of the interview played during trial. During the interview, defendant told Chief Williamson that he went over to K.B.'s apartment because he was "horny" and that he "didn't think it would be a big deal since I've known her for a while." Defendant acknowledged that K.B. told him to stop. Defendant stated, "I'm in the wrong here."

¶ 18 At the close of trial, the court found the State failed to prove defendant entered K.B.'s apartment without authority. The court acquitted defendant of home invasion but found him guilty of residential burglary, attempt (criminal sexual assault), and intimidation.

¶ 19 C. Sentence and Motion to Reconsider

¶ 20 At a November 2017 sentencing hearing, the court heard evidence in aggravation and mitigation. Ultimately, the court sentenced defendant to eight and half years' imprisonment for residential burglary, concurrent to a four-year sentence for attempt (criminal sexual assault), and concurrent to a three-year sentence for intimidation.

¶ 21 Subsequently, defendant filed a motion to reconsider his sentence. The trial court denied the motion.

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 On appeal, appellate counsel argues this case presents no potentially meritorious issues for review. We agree, grant appellate counsel's motion to withdraw, and affirm the trial court's judgment.

¶ 25 A. Fitness to Stand Trial

¶ 26 When evaluating whether there exists arguable merit to a claim that the trial court abused its discretion when it found defendant fit to stand trial, we recognize that a criminal defendant has a constitutional right not to be tried or convicted while he is incompetent to stand trial. See *People v. Newell*, 196 Ill. App. 3d 373, 377, 553 N.E.2d 722, 725 (1990). While the law presumes a defendant is fit to stand trial, "[a] defendant is unfit if, because of his mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense." 725 ILCS 5/104-10 (West 2016). Absent an abuse of discretion,

a court's decision finding a defendant fit to stand trial will not be reversed. *Newell*, 196 Ill. App. 3d at 377.

¶ 27 A defendant's fitness to stand trial may be raised by the trial court, the defense, or the State at any time before, during, or after trial. 725 ILCS 5/104-11(a) (West 2016). "When the issue of fitness involves the defendant's mental condition, the court shall order an examination of the defendant by one or more licensed physicians, clinical psychologists, or psychiatrists chosen by the court." 725 ILCS 5/104-13(a) (West 2016). After the court has ordered an examination and received the corresponding expert report, it "shall conduct a hearing to determine the issue of the defendant's fitness." 725 ILCS 5/104-16(a) (West 2016).

¶ 28 A court's fitness determination may not be based solely upon a stipulation to the existence of psychiatric conclusions or findings. *People v. Cook*, 2014 IL App (2d) 130545, ¶ 14, 25 N.E.3d 717.

> "While the court may accept a stipulation that, if called to testify, an expert would testify consistently with his or her report, it is incumbent upon the court to make a record reflecting that it did more than merely base its fitness finding on the stipulation to the expert's ultimate conclusion. The court must state on the record the factual basis for its finding, which must be more than a mere acceptance of a stipulation that the defendant is fit or that an expert found the defendant fit." *Cook*, 2014 IL App (2d) 130545, ¶ 20.

The court's fitness finding is based "not only on stipulations but also on its observations of the defendant and a review of the psychological report." *Id.* ¶ 15.

¶ 29 Here, the trial court considered (1) the parties' stipulation that Dr. Killian would provide testimony consistent with the contents of his report, (2) the contents of Dr. Killian's report, and (3) its own observations of defendant at the fitness hearing. The court found defendant fit to stand trial, stating:

> "All right. The [c]ourt then having accepted a stipulation to the admission of the report and, further, that the author of the report, Dr. Killian, is an expert and that he would testify in accordance with the information in his report, the [c]ourt will consider the report in its discretion in determining the issues of the defendant's fitness.
>
> The report does include additional information, which is being taken into consideration by the [c]ourt, not just the ultimate findings or conclusions that he has made, meaning Dr. Killian has made, on page seven but also address issues pertaining to the defendant's knowledge and understanding of the charges, the proceedings, the consequences of a plea or judgment, the sentence, the functions of the participants in the trial process, the defendant's ability to observe, recollect, and relate occurrences, the defendant's behavior and abilities, orientation as to time and place.
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> The [c]ourt having further—and this is important based upon a recent Fourth District opinion—having further observed the defendant's demeanor in court and his ability to cooperate with counsel, would find that the State has met its burden of proof by a

preponderance of the evidence finding the defendant fit; and as a result, the [c]ourt will find the defendant fit at this time."

¶ 30 This case is analogous to *People v. Robinson*, 221 Ill. App. 3d 1045, 582 N.E.2d 1299 (1991) and *People v. Mounson*, 185 Ill. App. 3d 31, 540 N.E.2d 834 (1989). In *Robinson*, 221 Ill. App. 3d at 1050, and *Mounson*, 185 Ill. App. 3d at 37-38, the appellate court found the trial court properly exercised judicial discretion in finding the defendant fit to stand trial. In both cases, the trial court based its fitness finding not only on its review of the stipulated psychological report but also on its own observations of the defendant's behavior. *Robinson*, 221 Ill. App. 3d at 1050; *Mounson*, 185 Ill. App. 3d at 37-38.

¶ 31 B. Sufficiency of the Evidence.

¶ 32 Similarly, we conclude there is no arguable merit to a claim that the State failed to prove defendant guilty beyond a reasonable doubt. When considering the sufficiency of the evidence, we determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the required elements of the crime beyond a reasonable doubt. *People v. Bradford*, 2016 IL 118674, ¶ 12, 50 N.E.3d 1112. "It is the responsibility of the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts." *Id.* It is not our function to retry the defendant. *People v. Givens*, 237 Ill. 2d 311, 334, 934 N.E.2d 470, 484 (2010). We reverse a conviction only where the evidence is so unreasonable, improbable, or unsatisfactory that it raises a reasonable doubt of the defendant's guilt. *People v. Belknap*, 2014 IL 117094, ¶ 67, 23 N.E.3d 325.

¶ 33 To prove defendant guilty of residential burglary (720 ILCS 5/19-3(a) (West 2016)), the State must present evidence to establish beyond a reasonable doubt that defendant

knowingly and without authority remained within the dwelling place of K.B., with the intent to commit therein the felony offense of criminal sexual assault. 720 ILCS 5/19-3(a) (West 2016).

¶ 34 To prove defendant guilty of attempt (criminal sexual assault) (720 ILCS 5/8-4 (West 2016)), the State must present evidence to establish beyond a reasonable doubt that defendant, with the intent to commit the offense of criminal sexual assault, performed an act which constituted a substantial step toward the commission of the offense of criminal sexual assault, in that defendant exposed his sex organ with the intent to commit an act of sexual penetration upon K.B. involving the sex organ of defendant and the mouth of K.B. 720 ILCS 5/8-4 (West 2016).

¶ 35 To prove defendant guilty of intimidation (720 ILCS 5/12-6(a)(1) (West 2016)), the State must present evidence to establish beyond a reasonable doubt that defendant, without lawful authority, directly communicated a threat to inflict physical harm on the person of K.B. to perform an act of sexual penetration involving the sex organ of defendant and the mouth of K.B. 720 ILCS 5/12-6(a)(1) (West 2016).

¶ 36 Here, K.B. testified that, after she allowed defendant into her apartment, he demanded she perform a sex act on him. K.B. testified that defendant (1) exposed his penis, (2) forced her to the ground, (3) told her to "suck his dick[,]" (4) threatened to bite her ear off if she did not comply, and (5) pushed her face towards his penis. K.B. testified she repeatedly asked defendant to leave her apartment but he refused.

¶ 37 Defendant, in a taped interview with Chief Williamson, corroborated K.B.'s testimony. Defendant stated that he had known what his intentions were when he went over to K.B.'s apartment. Defendant also acknowledged that K.B. told him to stop. Defendant stated to Chief Williamson, "I'm in the wrong here."

¶ 38 We find that by attempting to force K.B. to perform an act of sexual penetration on him, defendant took a substantial step toward the commission of sexual assault resulting in the offense of attempt (criminal sexual assault). Where defendant committed the offense of attempt (criminal sexual assault) after K.B. repeatedly asked defendant to leave her apartment and he refused, we find defendant committed the offense of residential burglary. Further, defendant committed the offense of intimidation where he threatened to bite K.B.'s ear off if she did not comply with his demands.

¶ 39 Here, when reviewing the evidence in the light most favorable to the State, we find the State proved defendant guilty of all three offenses beyond a reasonable doubt.

¶ 40 C. Sentencing

¶ 41 Also, we find no arguable merit to a claim that the court abused its discretion when it sentenced defendant to eight and half years' imprisonment for residential burglary, four years' imprisonment for attempt (criminal sexual assault), and three years' imprisonment for intimation. A trial court has discretion in sentencing, and we will not reverse a sentence absent an abuse of discretion. *People v. Snyder*, 2011 IL 111382, ¶ 36, 959 N.E.2d 656. "A sentence which falls within the statutory range is not an abuse of discretion unless it is manifestly disproportionate to the nature of the offense." *People v. Franks*, 292 Ill. App. 3d 776, 779, 686 N.E.2d 361, 363 (1997).

¶ 42 Residential burglary is a Class 1 felony with a sentencing range of 4 to 15 years in prison. 720 ILCS 5/19-3(b) (West 2016); 730 ILCS 5/5-4.5-30(a) (West Supp. 2017). Attempt (criminal sexual assault) is a Class 2 felony with a sentencing range of three to seven years in prison. 720 ILCS 5/11-1.20(b)(1) (West 2016); 720 ILCS 5/8-4(c)(3) (West 2016); 730 ILCS

5/5-4.5-35(a) (West Supp. 2017). Intimidation is a Class 3 felony with a sentencing range of 2 to 10 years in prison. 720 ILCS 5/12-6(b) (West 2016).

¶ 43 Here, the trial court considered evidence in aggravation and mitigation prior to sentencing defendant. Ultimately, the court sentenced defendant to eight and half years' imprisonment for residential burglary, concurrent to a four-year sentence for attempt (criminal sexual assault), and concurrent to a three-year sentence for intimidation. In looking to the applicable sentencing statutes, we find the court sentenced defendant within the ranges permitted by the statutes. Therefore, the trial court did not abuse its discretion when sentencing defendant.

¶ 44 D. Motion to Withdraw

¶ 45 In *Jones*, 38 Ill. 2d at 385, the Illinois Supreme Court set forth the proper procedure for appellate counsel's request to withdraw based on an *Anders* motion in a criminal case. The court stated,

> "Pursuant to the *Anders* decision, an attorney seeking to withdraw from a case because he has decided the appeal is without merit must file a supporting brief or memorandum analyzing the case legally, citing record references to the transcript and any cases upon which he relies in arriving at his ultimate conclusion. The memorandum or brief of counsel's investigation and evaluation of the appeal should cover not only points his client has raised, or wishes to raise, but in addition anything in the record that might arguably support the appeal." (Internal quotation marks omitted.) *Jones*, 38 Ill. 2d at 385.

¶ 46 After examining the record, the motion to withdraw, and appellate counsel's memorandum of law, we agree with counsel that this appeal presents no issues of arguable merit. Counsel's motion and memorandum sufficiently comply with the above procedures. We therefore grant counsel's motion to withdraw and affirm the judgment of the trial court.

¶ 47 III. CONCLUSION

¶ 48 For the reasons stated, we affirm the trial court's judgment.

¶ 49 Affirmed.