IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

ROBERT WILLIAM QUINN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

APPELLATE CASE NO.: 2014-AP-40-A-O
Lower Case No.: 2014-MM-5269-A-O

Appeal from the County Court
for Orange County, Florida
Wilfredo Martinez, County Court Judge

Robert Wesley, Public Defender
and Jennifer Lyn Keegan, Assistant Public Defender
for Appellant

Jeffrey L. Ashton, State Attorney
and Joseph P. Kelly, Assistant State Attorney
for Appellee

Before O'KANE, ROCHE and APTE, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING IN PART AND REVERSING IN PART TRIAL COURT

Following a jury trial, Robert William Quinn ("Appellant") was convicted of stalking and criminal mischief. Appellant appeals. We affirm in part and reverse in part.

Facts and Procedural History

On July 30, 2014, following a jury trial, Appellant was adjudicated guilty of stalking (count 1) and criminal mischief (count 2). On that same day, he was sentenced to 365 days in jail

with credit for 74 days time served on count 1 and 60 days in jail with credit for 60 days time served on count 2. The trial court recommended that the Department of Corrections not award Appellant gain time on count 1. On July 31, 2014, the trial court modified Appellant's sentence on count 1 and imposed the following conditions: (1) "No contact whatsoever directly or indirectly with the victim Stormy Hewitt for 1 Year and 6 Months;" (2) "Maintain At Least 500 Feet Of the Residence, Vehicle, Place of Employment and Any Area the Victim is Known to Frequent for 1 Year 6 Months;" and (3) "Do Not Possess Any Weapons or Firearms For 1 Year 6 Months."

At trial, Officer Bishop testified that she responded to a disturbance call on April 16, 2014, and met with Stormy Hewitt, the victim. Officer Bishop learned from the victim that Appellant was trying to get into the victim's apartment, followed the victim around the city, and went to the victim's job. The victim gave Officer Bishop three notes; two of the notes were from Appellant and one was from a witness referencing damage to the victim's vehicle. Officer Bishop also spoke with Appellant who stated that he and the victim were still dating, he was just trying to speak to the victim, he called the victim, and he had left some notes on the victim's car and had been at the victim's door.

Officer Bishop found a small flashlight in Appellant's pocket after arresting him, which was consistent with the victim's story. Officer Bishop saw damage to the doorframe of the apartment as if someone was trying to force entry and also saw damage to the victim's vehicle. Appellant repeatedly objected to the admission of Exhibit 1, which contained a flashlight and three notes, into evidence on the basis of hearsay and authentication objections, and the trial court sustained the objection but allowed the State to continue to lay the foundation. Ultimately,

Exhibit 1 was received into evidence and the flashlight and two notes purportedly from Appellant were published to the jury.

The victim testified that Appellant was her ex-boyfriend and that on April 16, 2014, around 3:30 in the morning, the victim saw Appellant by her car when her current boyfriend was dropping her off by her car after a night downtown. Appellant appeared to be using a flashlight to look into the victim's car and the victim felt off-guard, confused, and nervous after seeing Appellant. Appellant followed the victim and her boyfriend twice when she attempted to drive by her car.

After driving around and finally losing Appellant, the victim went to her car and saw a note from Appellant on her car. The victim recognized Appellant's handwriting and seeing the note made her upset. As soon as the victim got home, she saw Appellant's car parked outside and drove around to the back of her apartment so that Appellant would not see her. She noticed a note on her door from Appellant and recognized his handwriting. Seeing the note made the victim upset. After her current boyfriend entered her apartment, the victim heard knocking on the door, so she turned off the lights, looked through the peephole, and saw Appellant outside. Appellant continued to knock and cry outside her door for 20 to 25 minutes while the victim remained silent and did not open the door. Appellant stopped knocking for 5 to 10 minutes and called the victim's phone several times.

The victim felt sad and upset while Appellant was outside her door. After 5 to 10 minutes of silence, Appellant came back yelling, sounding angry, shining a flashlight through her window, and banging on the victim's door loud and hard for about 25 minutes. The victim was

really upset and was pretty sure she was crying. Appellant kicked her door, and when the victim saw light coming from where the doorframe had broken, she immediately called 911.

During the 911 call, the victim stated that her ex-boyfriend was at her house right now and that he "just kicked my door" and "he just broke my door." The 911 call was admitted into evidence and published over Appellant's hearsay and relevancy objections. The victim felt upset and angry when making the call, but had stopped crying at that point. The victim believed Appellant left as soon as she picked up the phone to call 911 and after the police arrived, she noticed that two of the tires on her car were flat. The victim's doorframe was cracked, busted, and broken, and she did not give Appellant permission to damage her doorframe or to come to her house.

Travis Avera ("Mr. Avera"), the victim's current boyfriend testified that he was dropping his girlfriend, the victim, off by her car when he saw Appellant looking into the victim's vehicle with a flashlight. Appellant began following Mr. Avera and the victim after they drove by. When they returned to the victim's car, there was a note on her car. Mr. Avera went to the victim's apartment and Appellant showed up, banging on the victim's door yelling and crying. When Appellant came back to the victim's door after a brief respite, Appellant was yelling and banging harder, shining a flashlight, and kicked and broke the door.

Appellant moved for judgment of acquittal arguing that the State had not demonstrated that the victim suffered from substantial emotional distress to prove the offense of stalking and that the State had not demonstrated that the victim owned the door that was damaged to prove the offense of criminal mischief. The State responded that Appellant's actions would cause substantial emotional distress in a reasonable person and that the victim was the owner or

custodian of the door. The trial court denied the motion for judgment of acquittal on both counts. Appellant objected to one of the notes, which was never published to the jury or authenticated, being admitted into evidence and going back to the jury and the State agreed to the note not being sent back to the jury. The jury found Appellant guilty of stalking and criminal mischief.

Issues

Whether the trial court erred (1) by admitting State's Exhibit 2 into evidence because it was hearsay; (2) in sentencing Appellant because the sentence included an unlawful recommendation; (3) in calling a second hearing *sua sponte* and imposing additional sentencing conditions; (4) by admitting State's Exhibit 1 into evidence because it was hearsay and not properly authenticated; and (5) by denying the motion for judgment of acquittal.

Issue 1: State's Exhibit 2

Appellant argues that the trial court prejudicially erred in admitting State's Exhibit 2, the 911 call, into evidence because the exhibit consisted of hearsay, the State failed to lay the proper foundation, and the trial court did not make the proper findings to admit the statement. The State asserts that the 911 call was admissible under either the spontaneous statement or excited utterance hearsay exceptions. The standard of review for a trial court's evidentiary rulings is abuse of discretion. *Padgett v. State,* 73 So.3d 902, 904 (Fla. 4th DCA 2011).

"A statement qualifies as an excited utterance if it was made (1) with regard to an event that was startling enough to cause nervous excitement, (2) before there was time for the declarant to contrive or misrepresent, and (3) while the declarant was under the stress or excitement caused by the event." *Floyd v. State*, 18 So. 3d 432, 445 (Fla. 2009). A spontaneous statement is admissible as a hearsay exception if it describes or explains an event and is made while the

declarant is perceiving the event or immediately thereafter, unless the circumstances indicate a lack of trustworthiness. *Ibar v. State*, 938 So. 2d 451, 467 (Fla. 2006).

The victim testified that she immediately called 911 when Appellant kicked her door and stated on the recorded 911 tape that Appellant "just kicked my door" and "he just broke my door." The victim testified that immediately prior to calling 911, Appellant had been yelling, crying, and pounding and kicking her door for about 25 minutes, and she was upset and angry when making the 911 call. Therefore, the trial court did not err in admitting the tape of the 911 call under either the excited utterance or spontaneous statement hearsay exceptions.

Issue 2: Sentence Recommendation

Appellant argues the trial court erred in sentencing Appellant and denying his motion to modify sentence because the sentence contained the unlawful recommendation that he not be awarded gain time. Appellant argues that the award of gain time is solely within the province of the Department of Corrections, the trial court did not have the authority to interfere with the award of gain time, and that the recommendation should be stricken from Appellant's sentence. The State argues the trial court's recommendation did not usurp the authority of the Department of Corrections because it was not mandatory.

A trial court does not have the authority to bar or grant gain time as that authority resides with the Department of Corrections. *Miller v. State*, 882 So. 2d 480, 481 (Fla. 5th DCA 2004). Here, the trial court recommended but did not order that Appellant be barred from receiving gain time. Therefore, the trial court did not usurp the authority of the Department of Corrections and the recommendation was not unlawful.

Issue 3: Additional Sentencing Conditions

As Appellant argues and the State concedes, it was error for the trial court to *sua sponte* impose additional sentencing conditions after Appellant began serving his sentence. *See Chapman v. State*, 14 So. 3d 273, 274 (Fla. 5th DCA 2009) (After "the sentencing hearing has been concluded, double jeopardy principles preclude the sentence from being increased."). Therefore, the additional sentencing conditions imposed should be stricken.

Issue 4: State's Exhibit 1

Appellant argues that the trial court erred in admitting State's Exhibit 1, which contained a flashlight and three written notes, into evidence because the proper predicate for authentication and exception for hearsay were not laid prior to its admission. The State argues that the admission of Exhibit 1 was conditional and that the State subsequently authenticated the items and established relevancy and hearsay exceptions, except for one note that the State stipulated to being removed and was never viewed by the jury.

The standard of review for a trial court's evidentiary rulings is abuse of discretion. *Padgett*, 73 So. 3d at. 904. "*Prima facie* evidence must be introduced in order to prove that the evidence is authentic" and the evidence can be direct or circumstantial. *State v. Love*, 691 So. 2d 620, 621 (Fla. 5th DCA 1997). "Evidence may be authenticated by examination of its appearance, contents, substance, internal patterns, or other distinctive characteristics in conjunction with the circumstances." *Gosciminski v. State*, 132 So. 3d 678, 700 (Fla. 2013). The flashlight was authenticated by the victim and her current boyfriend's testimony that Appellant had a flashlight and Officer Bishop's testimony that she found the flashlight in Appellant's pocket on the night of the offense.

Two of the notes, one left on the victim's car and one left at the victim's door, were authenticated by the victim's testimony that she recognized Appellant's handwriting and that the notes appeared after she saw Appellant by her car and apartment and Officer Bishop's testimony that Appellant admitted he had left notes on the victim's car and had been at the victim's door trying to get the victim to talk to him. The State alleged that the notes were written by Appellant; thus, the notes were admissible under the party-opponent exception to hearsay. *See Rae v. State*, 638 So. 2d 597, 598 (Fla. 4th DCA 1994). Therefore, the trial court did not abuse its discretion in admitting the flashlight or the two notes, one found on the victim's car and the other found at her door.

Appellant argues that the admission of the third note into evidence was reversible error and the identity of the declarant was never revealed. The State asserts that it stipulated to the removal of the last note from evidence, it was never viewed by the jury, and its contents were never disclosed at any time. Although it was error to admit the note written by an unknown witness that referenced damage to the victim's vehicle into evidence, the error was harmless as the note was never viewed by the jury or published.

Issue 5: Motion for Judgment of Acquittal

Appellant argues that the trial court erred in denying the motion for judgment of acquittal because the State did not establish ownership of the property damaged in order to prove criminal mischief and the State did not establish that the victim suffered from substantial emotional distress to prove stalking. The State argues that the motion for judgment of acquittal was properly denied because there was sufficient evidence for the jury to find Appellant guilty of criminal mischief and stalking.

The standard of review for a ruling on a motion for judgment of acquittal is *de novo*. *Celeste v. State*, 79 So. 3d 898, 899 (Fla. 5th DCA 2012). A motion for judgment of acquittal should not be granted "if, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of all the elements of the crime beyond a reasonable doubt." *Id*. A reviewing court will not reverse where there is substantial, competent evidence to support the jury's verdict. *Id*.

To prove the offense of criminal mischief, the State must demonstrate that Appellant willfully and maliciously damaged "property belonging to another." § 806.13(1)(a), Fla. Stat. (2014). The victim and her current boyfriend both testified that Appellant pounded and kicked her door which resulted in the frame being broken. The victim repeatedly used possessive terms such as "my door" when referencing the broken door. There was substantial, competent evidence to support the jury's verdict. Accordingly, the trial court did not err in denying the motion for judgment of acquittal on the criminal mischief count.

To prove the offense of stalking, the State must prove that Appellant willfully, maliciously, and repeatedly followed, harassed, or cyberstalked the victim. § 784.048(2), Fla. Stat. (2014). Harassment is defined as "a course of conduct directed at a specific person which causes substantial emotional distress to that person and serves no legitimate purpose." § 784.048(1)(a), Fla. Stat. (2014). The standard for determining substantial emotional distress is whether a reasonable person in the victim's position would suffer substantial emotional distress. *T.B. v. State*, 990 So. 2d 651, 654 (Fla. 4th DCA 2008). There was substantial, competent evidence to support the jury's verdict based on the victim's testimony that Appellant called the victim multiple times; followed the victim and her boyfriend around; came to the victim's house

uninvited; peered through the windows of the victim's house and car with a flashlight; left notes on the victim's car and door; pounded, kicked, and broke the victim's door; and damaged the victim's tires. Therefore, the trial court did not err in denying the motion for judgment of acquittal on the stalking count.

It is therefore **ORDERED AND ADJUDGED** that Appellant's judgment is **AFFIRMED**, Appellant's sentence is **AFFIRMED** in part and **REVERSED** in part, and we remand for the trial court to strike the additional sentence conditions from Appellant's sentence.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 30th day of November, 2015.

/S/
JULIE H. O'KANE
Presiding Circuit Court Judge

ROCHE and APTE, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing order was furnished to **The Honorable Wilfredo Martinez, County Court Judge**, 425 North Orange Avenue, Suite 820, Orlando, Florida 32801; **Jennifer Lyn Keegan, Assistant Public Defender,** 435 North Orange Avenue, Suite 400, Orlando, Florida 32801; and **Joseph P. Kelly, Assistant State Attorney,** 415 North Orange Avenue, P.O. Box 1673, Suite 300, Orlando, Florida 32801, this 30th day of November, 2015.

/S/
Judicial Assistant