

No. 1-09-3505

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 5203
)	
WYNTON BELL,)	Honorable
)	Joseph M. Claps,
Defendant-Appellant.)	Judge Presiding.

JUSTICE SALONE delivered the judgment of the court.
Justice PUCINSKI concurred in the judgment.
Justice STERBA dissented in the judgment.

ORDER

¶ 1 *Held:* Where the testimony of the complaining witnesses was incredible, the defendant's conviction was reversed.

¶ 2 After a bench trial, defendant Wynton Bell was convicted of aggravated battery and sentenced to two years of probation. On appeal, defendant contends the State failed to prove he committed an aggravated battery beyond a reasonable doubt. We reverse.

¶ 3 Defendant was charged with aggravated battery on a public way, attempted robbery, and unlawful restraint based on an incident that occurred at the corner of 107th Street and Hoyne Avenue on February 8, 2008. The State's theory at trial was that defendant and his friend, Shawn

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Strickland, attempted to rob the complaining witnesses that night and, during the attempt, defendant punched James Bennett. The defense theory was that the complaining witnesses were throwing snowballs at cars and hit the car defendant occupied. Defendant and Strickland got out of the car, but never approached the group. They exchanged words then drove away without any physical altercation.

¶ 4 At trial, the three complaining witnesses, James Bennett, Shawn Borisy, and Tim O'Brien, testified to substantially the same version of events. Around 9 p.m. they were "hanging out" with 15 or 20 friends on the corner of Hoyne and 107th. They were 15 years old. They saw defendant wearing a white towel on his head on the corner nearby. He left after about five minutes. Later, defendant, who was no longer wearing a towel on his head, and Strickland got out of a black two-door Pontiac driven by a female, approached their group, asked where the money was and began frisking various members for wallets and cell phones. While defendant was frisking Bennett, Bennett pushed defendant's hand away, and defendant punched Bennett in the jaw. Someone in the group started taking down the Pontiac's license plate number. The girls in the car told defendant and Strickland to get back in, they did, and the car drove away. Nothing was taken. Bennett, Borisy, and O'Brien all denied throwing snowballs at cars that night and testified there was no snow on the ground.

¶ 5 At trial, James Bennett testified that defendant's punch caused slight bruising. At some point earlier in the evening, a red Cadillac had almost hit Bennett and his friends. When Bennett spoke with the police that night, he told them defendant rifled through his pockets. He also told them he walked across the street after he was hit and that defendant looked 18 years old. Bennett talked to the police again on February 10, 2008, but denied telling them that he was knocked to the ground when defendant struck him. Bennett identified defendant as the person who struck him in a photo array on February 10, 2008, and in a lineup on February 12, 2008. Bennett did not discuss the case with Borisy or O'Brien.

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¶ 6 Shawn Borisy testified that five minutes before he saw defendant on the corner, a red Cadillac drove by their group. When defendant was on the corner, he kept looking at their group. Borisy saw defendant swing at Bennett. Borisy also saw Strickland check O'Brien's pocket and then ask "if he should punch him." Borisy identified Strickland in a photo array as the person who frisked O'Brien and identified defendant in a lineup as the person who struck Bennett. Borisy said he discussed the case a few times with Bennett after the lineup, but not with O'Brien. When he spoke with the police he did not tell them he saw defendant go into Bennett's pockets though he did tell them that defendant and Strickland looked to be between 16 and 18 years old. Borisy also denied telling the detectives that he took down the license plate number himself.

¶ 7 Tim O'Brien testified that he was unable to see well that night because he was not wearing his glasses. Before he saw the man with a white towel on his head standing on the corner, a red Cadillac swerved at and almost hit their group of friends. About 20 or 30 minutes after he saw the Cadillac, two men approached their group. O'Brien did not see them get out of a vehicle, but noticed the black Pontiac as they approached. One of the individuals went through his pockets and asked whether he should hit O'Brien for money. O'Brien was unable to identify anyone in the photo array or lineup, but he did testify that the person who swung at Bennett was a different person than the one who approached him. O'Brien discussed the case with Bennett and Borisy a few times after the incident.

¶ 8 Officer John McDermott testified that, based on the license plate number, he learned that the black Pontiac was registered to Tempest and Nicey Evans. On February 10, 2008, he went to the Evans' home and saw the Pontiac parked out front. He showed Nicey Evans a picture of defendant and Strickland then put together a photo array that he later showed to Bennett. Bennett identified defendant as the person who punched him. McDermott arrested defendant around 1:10 p.m. on February 11, 2008.

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¶ 9 Detective Habiak testified that, during an interview, Borisy told her that defendant and Strickland did not have towels on their heads but had them in their pockets and that Borisy took down the license plate number himself. During the lineup, Bennett identified defendant as the person who punched him. Habiak was unaware that Bennett's father was a sergeant with the Chicago Police Department.

¶ 10 Officer Timothy Clancy testified that he interviewed Bennett the night of the incident. Bennett said someone grabbed for his jacket pocket, but did not say that someone rifled through his pockets. Bennett also told Clancy that defendant and Strickland were 16 to 18 years old. Clancy saw redness on Bennett's face when he arrived, but did not note it in his report.

¶ 11 Officer Dean Korbis testified that he interviewed Bennett on February 10, 2008. Bennett told Korbis that he was knocked to the ground when he was struck in the face. Korbis did not recall learning that Bennett's father was a sergeant with the Chicago Police Department.

¶ 12 Tatyanna Williams, a friend of defendant's, testified that in the afternoon of February 8, 2008, defendant and Strickland were playing in a basketball game. She went to the game with Nicey Evans and Diamond Davis. After the game, Evans drove Williams, Davis, Strickland, and defendant to a friend's house so defendant could pick up his car. At a stop sign, a group of boys started throwing snowballs and hit the car. Defendant and Strickland jumped out of the car and exchanged words with the group. They were not angry, they just wanted to know why the boys were throwing snowballs. Defendant and Strickland stayed within two feet of the car and never hit anyone or searched through anyone's pockets. After about 20 seconds, they jumped back into the car. In February 2008, Williams and Strickland were dating, but were no longer dating at the time of trial. Williams never saw defendant with a white towel on his head.

¶ 13 Defendant testified that in February 2008 he was 17 years old. After the basketball game, Evans was driving him to pick up his car, a Ford Explorer. Davis, Williams, and Strickland were also in the car. When Evans's car was hit by a snowball, defendant and Strickland got out of the

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car and asked who threw the snowball. Defendant was upset and wanted to "have a few words with them because *** you shouldn't be doing that." He and Strickland stayed about two feet from the car and got back in after 20 or 30 seconds. Defendant never approached the boys, went through their pockets, or punched anyone in the face. He never wore a white towel on his head. Defendant was arrested on February 11, 2008, but did not speak with the detectives about the incident. He was treated very unfairly at the police station because they left him sitting for "like a day" before they talked to him.

¶ 14 Detective William Sotak testified that he and Habiak spoke with defendant around 4:15 p.m. on February 11, 2008, and that they discussed the incident of February 8. Defendant never mentioned that Williams was in Evans's car.

¶ 15 Nicey Evans testified that, after the basketball game, she drove Davis, Williams, Strickland, and defendant to defendant's house. Defendant got into his car, a red Cadillac, then Evans followed defendant. Snowballs hit both cars. They parked the cars a few houses from the corner, then defendant and Strickland decided to say something to the boys. They walked to the boys on the corner. Evans turned her car around, drove to the corner, and told defendant to get into the car. Evans did not see defendant or Strickland punch any of the boys.

¶ 16 In making its determination, the trial court reasoned:

"[I]t is more likely than not that somebody in this group was throwing snowballs or something. *** [A] reasonable person would not stop with one other man to confront ten or twelve other males unless they had a death wish or unless some other intervening event causes them to stop thinking clearly. My view of the evidence suggests to me that something someone did in that group whether it was gestures, it doesn't matter, caused this defendant and his compatriots to stop.

Now, the State charges this gentleman with attempted robbery. There is nothing in this record that would suggest that that in fact happened. There would be no reason to go through everybody's pockets and not take anything. That is just absurd.

The defense argues no one was struck. Likely that is absurd. The only prudent thing that happened here is that when Mr. Bennett was struck neither Mr. Bennett or no one else in that group retaliated, thankfully.

My job is to evaluate the State's evidence to determine whether or not that evidence has proven this defendant guilty beyond a reasonable doubt of any of the offenses. That is my job."

The court found defendant guilty of aggravated battery and not guilty of unlawful restraint and attempted robbery. Defendant's motion for new trial was denied. The trial court sentenced defendant to two years of probation.

¶ 17 On appeal, defendant contends that the State failed to prove him guilty of aggravated battery beyond a reasonable doubt. Specifically, defendant argues that his conviction should be reversed because the testimony of the State's witnesses was contradictory and impeached, while defendant's testimony was unimpeached and corroborated by other witnesses. Defendant also notes that the trial court expressed doubts about the credibility of the State's witnesses.

¶ 18 A person commits the offense of battery if he: "intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual." 720 ILCS 5/12-3 (West 2008). That person commits aggravated battery when, in committing a battery, he or the victim is "on or about a public way." 720 ILCS 5/12-4(b)(8) (West 2008).

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¶ 19 The standard of review on a challenge to the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). In a bench trial, it is for the judge, as the trier of fact, to determine the credibility of witnesses, weigh the evidence, draw reasonable inferences and resolve any conflicts in the evidence. *Siguenza-Brito*, 235 Ill. 2d at 228. Additionally, the trier of fact may accept or reject as much or as little of a witness's testimony as it chooses. *People v. Howard*, 376 Ill. App. 3d 322, 329 (2007). Nevertheless, a reviewing court will reverse a conviction where the evidence is so improbable or unsatisfactory as to create a reasonable doubt of a defendant's guilt. *Givens*, 237 Ill. 2d at 334.

¶ 20 Here, we find the evidence was insufficient to prove defendant guilty beyond a reasonable doubt. According to the complaining witnesses, defendant watched their group of friends from the nearby corner and, shortly after, approached the group of 15 to 20 people with Strickland. Then defendant and Strickland, who were unarmed, allegedly began frisking the group members looking for cell phones and wallets, but left without taking anything. As the trial court observed, "[t]here would be no reason to go through everybody's pockets and not take anything. That is just absurd." That defendant, along with another unarmed teen, would approach and attempt to rob a group of 15 to 20 teens, punch Bennett, then simply walk away, is similarly incredible. See *People v. Dawson*, 22 Ill. 2d 260, 265 (1961) (the court found it was unbelievable that the defendant, a police officer, stayed on the scene of his alleged crime to have a drink instead of fleeing, and reversed the armed robbery conviction); *People v. Lonzo*, 20 Ill. App. 3d 721, 726 (1974) (the defendant's armed robbery conviction was reversed where the court found it was contrary to human experience for him to stop and change a tire near the store he had allegedly held up); *People v. Anderson*, 20 Ill. App. 3d 840, 848-49 (1974) (the defendant's convictions for sexual assault and robbery were reversed after the court found it to be "doubtful"

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that the defendant could have "brazenly accost[ed]" the victim in broad daylight and then forcibly moved the victim across a busy street without gaining attention).

¶ 21 Though the trial court, as fact-finder, may accept only portions of a witness's testimony, it must act reasonably in doing so. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). Here, it was unreasonable for the trial court to reject the majority of the complainants' testimony as "absurd" and still accept their testimony that defendant punched Bennett. The only indication that Bennett may have been punched, aside from the questionable witness accounts, was Officer Clancy's testimony that he saw redness on Bennett's face when he arrived, a fact that Clancy failed to note in his police report. Where, as here, the evidence presented in support of defendant's conviction is so unsatisfactory as to leave a reasonable doubt of defendant's guilt, we must reverse.

¶ 22 For the foregoing reasons, the judgment of the trial court is reversed.

¶ 23 Reversed.

¶ 24 JUSTICE STERBA, dissenting:

¶ 25 I cannot join in today's decision because I do not agree with the majority that the State failed to prove defendant committed an aggravated battery beyond a reasonable doubt. Accordingly, I would affirm.

¶ 26 The majority recognizes that the trial court is free to accept certain portions of witness testimony while rejecting others. *People v. Howard*, 376 Ill. App. 3d 322, 329 (2007). However, the majority ultimately concludes it was unreasonable for the trial court to reject the State's witnesses' testimony that defendant went through Bennett's pockets but accept the testimony that defendant punched Bennett. I disagree. Importantly, when considering a challenge to the sufficiency of the evidence, it is not the function of this court to retry the defendant. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). Stated differently, in order to sustain a conviction "it is the trier of fact, not this court, who must be convinced of defendant's guilt beyond a

reasonable doubt." *People v. Smith*, 299 Ill. App. 3d 1056, 1062 (1998). Moreover, we must give great weight to the trial court's credibility determinations and reverse only where the determination is manifestly erroneous. *People v. Reynolds*, 178 Ill. App. 3d 756, 762 (1989).

¶ 27 In the instant case, the trial court disbelieved Bennett and Borisy's testimony that defendant had rifled through Bennett's pockets on the basis that there was no evidence anything was taken. Specifically, the court stated: "There would be no reason to go through everybody's pockets and not take anything. That is just absurd." On the other hand, the trial court did not find a similar basis to reject the State's witnesses' testimony that defendant punched Bennett. Taking the court's credibility findings into consideration, the evidence at trial established that Bennett, Borisy, O'Brien, and their friends were throwing snowballs at cars. Defendant, Williams and Evans all testified that defendant and Strickland got out when a snowball hit their car. Though defendant and Williams both testified that defendant never strayed from the car, Bennett and Borisy testified that defendant and Strickland approached them.¹ Both Bennett and Borisy also testified that Bennett was struck by defendant and Officer Clancy testified that he saw redness on Bennett's face when he arrived. Additionally, Bennett and Borisy identified defendant in a photo array and a lineup as the one who struck Bennett. Borisy also identified Strickland as the second person involved. Further, contrary to defendant's argument, his testimony did not go unimpeached. He claimed he was forced to sit at the police station for "like a day" and refused to discuss the incident, though defendant was arrested around 1 p.m. on February 11, 2008, and Detective Sotak testified he interviewed defendant around 4:15 p.m. that afternoon. Sotak also testified that defendant discussed the incident with him. Moreover, Evans's testimony was that defendant was driving his own car, a red Cadillac, when they were hit

¹ O'Brien testified he was not wearing his glasses that night and was unable to identify anyone in either a photo array or lineup.

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by snowballs, while defendant testified that he was in Evans's car when they were hit and his own car was an Explorer.

¶ 28 In light of this evidence, I do not believe the trial court was unreasonable in accepting the State's witnesses' testimony that defendant struck Bennett. It was not necessarily unbelievable or contrary to human experience that defendant would exit a car and punch Bennett if he believed Bennett might have thrown snowballs that struck the car. Thus, it is my view that the evidence is sufficient to sustain a conviction of aggravated battery. I therefore respectfully dissent.