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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 11-CM-173
)	
TIM KRISTY,)	Honorable
)	William I. Ferguson,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

Held: The State disproved beyond a reasonable doubt defendant's claims of valid citizen's arrest and necessity: the trial court was entitled to find that defendant's "arrest" involved excessive force and that defendant was not without blame in occasioning the confrontation and had reasonable alternatives available. We affirmed the trial court's judgment.

¶ 1 Following a bench trial, defendant, Tim Kristy, was convicted of two counts of battery (720 ILCS 5/12-3(a)(1), (a)(2) (West 2010)) and one count of attempted unlawful restraint (720 ILCS 5/8-4(a), 10-3(a) (West 2010)) and was sentenced to one year of court supervision. Defendant appeals, arguing that the trial court erred in (1) concluding that defendant was not making a valid citizen's

arrest and (2) finding that the State disproved his affirmative defense of necessity. For the reasons that follow, we affirm.

¶ 2

BACKGROUND

¶ 3 Defendant was charged with three counts of battery (720 ILCS 5/12-3(a)(1), (a)(2) (West 2010)). Counts I and IV alleged that defendant hit David Little in the head, and count V alleged that defendant sprayed Little with pepper spray. Defendant was also charged with one count of attempted unlawful restraint (count II) (720 ILCS 5/8-4(a), 10-3(a) (West 2010)) and one count of attempted false personation of a peace officer (count III) (720 ILCS 5/8-4(a), 32-5.1 (West 2010)).

¶ 4 At the bench trial, Little gave the following testimony. At approximately 10 a.m. on January 10, 2011, he was walking to the Christian Science Reading Room in Elmhurst to meet Janet Richrath, defendant's aunt, for lunch. As he approached the Reading Room, defendant pulled up in a black car, got out of the vehicle, and told Little that he was an Elmhurst police officer and that Little was under citizen's arrest. Defendant then sprayed mace in Little's face, causing his eyes to burn. Defendant also struck Little in the forehead with a flashlight. Little began to back away from defendant and ran to a bank parking lot across the street. Defendant followed and was able to grab onto Little's shirt. Defendant pulled Little back by his shirt and grabbed Little's arm. Defendant placed a handcuff on one of Little's wrists. Little began to fall and, as he was going down, defendant struck him in the back of the head with the flashlight. Once Little was on the ground, defendant placed a handcuff on his other wrist. A crowd began to gather. Defendant repeatedly told the crowd that he was making a citizen's arrest and that the police should be called. Defendant also told Little that he was placing Little under arrest for taking money from Richrath. Once the police arrived, two

of them pulled defendant off of Little. Defendant's blow to the back of Little's head caused a laceration that had to be closed with staples.

¶ 5 As of January 2011, Little had known Richrath for approximately three years. He met her at the Reading Room, and the two of them began a relationship. At some point, he moved into Richrath's house and stayed there until August 2010 when Richrath obtained an order of protection against him. Little moved to InTowne Suites in Villa Park. Between August 2010 and January 2011, Little did not work and Richrath provided him with financial assistance by paying his rent, buying him food and cigarettes, and giving him cash for cabs.

¶ 6 In 2000, Little was convicted of forgery.

¶ 7 Officer Steve Mandat of the Elmhurst police department gave the following testimony. On the morning of January 10, 2011, he responded to a call at a city parking lot near Bank One. When he arrived on the scene, he observed defendant and Little. Little had cuts on his right wrist, was bleeding from the back of his head, and had swollen eyes. Defendant did not appear to have any injuries. Defendant told Mandat that he lived in Alaska and had traveled to Elmhurst to effect a citizen's arrest of Little. Defendant observed Little outside of the Reading Room, approached Little, and told him that he was under arrest. Little had his hands in his pockets and removed them, at which point defendant sprayed Little with pepper spray. Little ran across the street, and defendant chased him and twice hit him in the head with a flashlight.

¶ 8 Mandat placed defendant under arrest and transported him to the police station. While at the station, defendant provided Mandat with additional details about his encounter with Little. He told Mandat that he came to arrest Little because he believed that Little was financially exploiting Richrath in that Little was forcing Richrath to give him money. When defendant approached Little

outside of the Reading Room, Little had his hands in his pockets. Little removed his hands from his pockets in a nonthreatening manner and asked what he was under arrest for. Defendant then sprayed Little in the face with the pepper spray. Defendant did not indicate to Mandat that he believed Little to be armed. After he sprayed Little with the pepper spray, Little began to swing his arms and ran across the street to the parking lot. Defendant chased him and Little turned around to look at defendant. Little was still swinging his arms, so defendant struck him above his right ear with a metal flashlight. Little fell onto his back, and defendant attempted to roll him over onto his stomach to handcuff him. Little continued to struggle, so defendant again hit him in the head with the flashlight. Little managed to get up and run away again. Defendant chased after him and Little tripped and fell to the ground where defendant was able to handcuff him.

¶ 9 Officer Laurel Panico of the Elmhurst police department gave the following testimony. On January 10, 2011, in response to a call, she went to a parking lot in Elmhurst. There she observed Little lying face down on the ground and defendant kneeling on top of Little. Little was yelling that he had been struck in the head with a flashlight, and defendant was yelling that Little was under arrest for extortion. Panico approached the men and told defendant to get off of Little and step back. Defendant complied. When defendant got off of Little, Panico observed that Little's hands were handcuffed behind his back.

¶ 10 Defendant testified as follows. He lived in Wasilla, Alaska, with his wife since 2003. Richrath was his 71-year-old widowed aunt who lived in Elmhurst. Richrath had two children—Scott and Bonnie—neither of whom lived in Illinois. Richrath was an active member in the Elmhurst Christian Science church and met Little at the Christian Science Reading Room. Based on conversations he had with Richrath, defendant believed Little to be an unemployed convicted

murderer whom Richrath was trying to help get back on his feet. Richrath would buy Little meals and allowed Little to live in her home from August 2009 until March 2010 while Little was unemployed. Little moved out of Richrath's house following a physical altercation with Robert, another tenant. Little had assaulted Richrath, and Robert had intervened on behalf of Richrath. Richrath took out an order of protection against Little, brought Little to a hotel, and paid for his room. By January 2011, the order of protection was no longer in effect.

¶ 11 On January 2, 2011, defendant and his wife arrived in Illinois to visit Richrath. At that time, two other people—Robert and Roseann—lived in Richrath's house with her. That day, defendant's wife attended church with Richrath. When they returned, defendant's wife told him that, when the church services ended, Little was in the entry of the church. Little appeared unkempt and reeked of alcohol. Richrath and Little spoke in private for approximately 10 or 15 minutes before Richrath and defendant's wife took him to Kentucky Fried Chicken and dropped him off at his hotel.

¶ 12 Throughout the day, an ongoing conversation regarding Little took place between the occupants of Richrath's house. Robert told defendant that Little smoked crack cocaine and was a pathological liar. Roseann told defendant that while Little lived with Richrath he would always follow Richrath around and be in her ear. Roseann felt that Little's contact with Richrath was abusive. Roseann also told defendant that over Christmas 2009 Richrath went out of town and made arrangements for Robert, Roseann, and Little to stay elsewhere. She gave Little a ticket to visit family in Mississippi, but Little did not go to Mississippi. Instead, he would disappear on a daily basis and then return to Richrath's house with someone. When the others returned to the house, they found drug paraphernalia in the house. Richrath was present for the conversations defendant had

with Robert and Roseann, and she agreed with what they told defendant, except that she did not believe that Little currently smoked crack cocaine.

¶ 13 On the morning of January 3, 2011, Little called Richrath. When Richrath got off the phone, she told defendant that she had to bring Little cigarettes and that she would like defendant to accompany her. Defendant and Richrath walked to the Shell station approximately three blocks away. As they approached the station, they encountered Little pacing back and forth on the sidewalk. Richrath introduced defendant to Little, who appeared agitated and jittery. Little told Richrath that he needed to borrow \$25 for cab fare to go check on a job. The three of them proceeded to the Shell station, where Richrath bought coffee for defendant and cigarettes for Little. Richrath then took \$20 out of the ATM and gave it to Little. Little did not thank her or make any arrangements to repay the money. The three of them exited the station, and Little headed one direction while defendant and Richrath headed the other direction toward Richrath's house.

¶ 14 When defendant and Richrath returned to the house, more conversation took place between the occupants regarding Little. Defendant learned that on one occasion Little put his fist through the digital display of Richrath's car. On another occasion, sometime during the summer or fall of 2010, while Richrath was driving Little somewhere, he was intoxicated and grabbed the steering wheel. Richrath called the police and had Little arrested after that incident. Roseann told defendant that, after learning that Little also went by Gerald Tate, she went to the courthouse to look up Little's criminal history. She showed defendant Little's records, which showed that Little had been arrested for resisting a police officer and forgery.

¶ 15 That evening, defendant, his wife, and Richrath went to visit some friends. There, while discussing Little, defendant learned that while Little lived in Richrath's house he had assaulted

Richrath. On the way home from that visit, defendant's wife asked Richrath why she continued to give Little money and assistance given all that he had done to her. Richrath responded that, if she did not, Little would "blaze" her house. When asked what that meant, Richrath stated that Little would burn down her house. Based on what he had learned, defendant believed that, so long as Richrath did what Little wanted, Little would be nice to her. If she did not, however, he would become aggressive and mean. As a result, defendant was concerned for Richrath's physical and financial safety.

¶ 16 On January 4, defendant returned to Alaska. That evening, he spoke with Richrath's daughter, Bonnie, about Richrath's relationship with Little. Bonnie told defendant that the Elmhurst police had been called on several occasions but that Richrath refused to testify against Little. The next day, defendant spoke with Richrath's son, Scott, about Little. Scott detailed all of his efforts to deal with Little legally. Scott had contacted attorneys to look into guardianship or conservatorship of Richrath and into having the people staying with Richrath evicted. Scott also told defendant that the Elmhurst police had called him on multiple occasions due to issues between Little and Richrath. By the time defendant and Scott spoke, Scott felt that he had exhausted his options.

¶ 17 On January 8, defendant spoke with Bonnie about Bonnie's trip to Elmhurst that day. Bonnie went to the Reading Room to visit Richrath and encountered Little. Bonnie told Little that he needed to leave Richrath alone and quit taking her money. Little responded that it was Richrath's fault for enabling him.

¶ 18 Defendant performed some internet research to see whether Little was committing any ongoing crimes against Richrath. Based on his research, defendant believed that Little was committing theft by deception, intimidation, stalking, aggravated stalking, and financial exploitation

of an elderly person. Defendant also researched the legality of citizen's arrests in Illinois. Based on his research, defendant developed a plan of action—effecting a citizen's arrest of Little. In preparation, he purchased a plane ticket to Illinois, handcuffs, and pepper spray.

¶ 19 On January 10, 2011, defendant flew to Chicago, obtained a rental car, and proceeded directly to the Reading Room in Elmhurst. He went to the Reading Room first because that was where Richrath worked, and defendant believed that he would find Little there. When defendant arrived at the Reading Room, he observed Little pacing back and forth in front of it. Defendant later learned that Richrath was, in fact, inside the Reading Room at that time. Defendant believed that Little was outside the Reading Room in an attempt to make sure Richrath kept giving him money. Defendant drove past Little and parked the car a couple of blocks away. With the flashlight in his belt, the handcuffs in his pocket, and the pepper spray in his left hand, defendant made his way to the Reading Room. As he approached, defendant observed Little in the parking lot across the street from the Reading Room, speaking to a person in a car. Little then came back toward the Reading Room, where defendant was standing approximately 15 or 20 feet away from the entrance. When Little got within five feet of him, defendant told Little that he was under arrest. Little asked what he was under arrest for and defendant told him extortion. Little took two steps back and appeared to be having difficulty getting his hands out of his pockets. Defendant was concerned that Little might be attempting to pull a weapon. Defendant's fear was based on Richrath's comments that Little often carried a gun. Defendant then sprayed Little in the face with the pepper spray. Little ran toward the parking lot across the street, and defendant followed. When they reached the parking lot, Little turned around and began to swing his fists wildly in defendant's direction. Wanting to avoid getting hit, defendant pulled the flashlight out of his belt and hit Little in the head. Little backed up, tripped

on a curb, and fell backward to the ground. Defendant got on top of Little, and Little continued swinging. Defendant hit him in the head with the flashlight again in an attempt to restrain him. Little managed to get away again. Defendant chased after him again and, after a scuffle, Little fell forward onto the ground and defendant came down on top of him. Defendant was then able to handcuff Little. As defendant was handcuffing Little, defendant told the gathered bystanders to call the police. When the police arrived, defendant complied with their instructions.

¶ 20 As of January 10, 2011, defendant did not feel there was an immediate threat to Richrath's physical safety. He was, however, concerned for Richrath's long-term physical, emotional, and financial well being. He acknowledged that he did not contact a lawyer or the police before commencing his plan for a citizen's arrest of Little.

¶ 21 The trial court took judicial notice of several aspects of Little's criminal history, including petitions to revoke probation filed in 2007 and 2010 based on drug tests indicating the use of cocaine, a conviction of attempted obstruction of justice, a conviction of forgery, and orders of protection against Little and in favor of Richrath.

¶ 22 Following closing arguments by the parties, the trial court stated that it found Little's credibility to be lacking. In fact, the trial court stated that the only things that it believed of Little's testimony were his name, his aliases, that defendant hit him twice in the head with a flashlight, that Little had a relationship with Richrath, that Little tried to get away from defendant, and that defendant handcuffed him. The trial court further found that defendant sprayed Little with pepper spray after Little removed his hands from his pockets but that, based on defendant's beliefs regarding Little's history, defendant could have believed that Little's action of removing his hands from his pockets was threatening. Accordingly, the trial court found defendant not guilty of count V. The

trial court also found defendant not guilty of count III. The trial court, however, found defendant guilty of counts I, II, and IV. Based on the facts that defendant brought handcuffs, a flashlight, and pepper spray with him after traveling from Alaska and that there were other alternatives available to defendant, the trial court found defendant's defense of necessity to be unsubstantiated. Without elaboration, the trial court also found that the elements of a valid citizen's arrest were not present.

¶ 23 The trial court sentenced defendant to one year of court supervision on count I and a concurrent year of court supervision on count II. Count IV merged with count I.

¶ 24 Defendant then brought this timely appeal.

¶ 25 ANALYSIS

¶ 26 On appeal, defendant contends that the trial court erred when it (1) concluded that he was not making a valid citizen's arrest and (2) found that the State disproved his affirmative defense of necessity. Both a private person's use of force in effecting an arrest and necessity are affirmative defenses. 720 ILCS 5/7-6, 7-13, 7-14 (West 2010). Accordingly, once those affirmative defenses were raised at trial, the State was required disprove them beyond a reasonable doubt in addition to proving the elements of the offense beyond a reasonable doubt. *People v. Washington*, 326 Ill. App. 3d 1089, 1092-93 (2002). In examining whether the State carried its burden, we review the evidence to determine “ ‘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.’ ” (Emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

¶ 27 Defendant first argues that his convictions should be reversed because he was effecting a valid citizen's arrest of Little for stalking (720 ILCS 5/12-7.3(a) (West 2010)) and intimidation (720

ILCS 5/12-6(a) (West 2010)). Section 107-3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/107-3 (West 2010)) provides: “Any person may arrest another when he has reasonable grounds to believe that an offense other than an ordinance violation is being committed.” The use of force in effecting such an arrest may serve as a defense to a charged offense under the following circumstances:

“A private person who makes, or assists another private person in making a lawful arrest is justified in the use of any force which he would be justified in using if he were summoned or directed by a peace officer to make such arrest, except that he is justified in the use of force likely to cause death or great bodily harm only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or another.” 720 ILCS 5/7-6(a) (West 2010).

Accordingly, the use of force by a private person effecting an arrest is subject to the same constraints as an arrest effected by a police officer.

¶ 28 Claims that law enforcement officers have used excessive force in the course of an arrest of a free citizen are analyzed under the fourth amendment to the United States Constitution and its “reasonableness” standard. *Graham v. Connor*, 490 U.S. 386, 395 (1989). Because the fourth amendment test of reasonableness is not capable of precise definition or mechanical application, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *Graham*, 490 U.S. at 396. The “reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision

of hindsight. *Graham*, 490 U.S. at 396. “[H]owever, the ‘reasonableness’ inquiry in an excessive-force case is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” *Graham*, 490 U.S. at 397.

¶29 Here, none of Little’s alleged offenses against Richrath was particularly serious. Further, and relatedly, though defendant might have had reason to believe that Little was a threat to Richrath, the threat was clearly not so “immediate” that a prompt (and violent) arrest was required. Finally, although Little actively resisted defendant and fled, the trial court still could have reasonably found that, in light of all the circumstances, defendant was not entitled to strike Little in the head multiple times with a metal flashlight. Illinois law specifically provides that the use of force likely to cause great bodily harm is justified only when it is necessary to prevent great bodily harm or death. 720 ILCS 5/7-6(a) (West 2010). Although defendant testified that his blows to Little were in response to Little’s swinging of his fists, Little’s swinging fists were not necessarily likely to cause great bodily harm, while defendant’s blows to Little’s head with a metal flashlight were, as evidenced by a laceration from one of the blows, which required closing with staples. Moreover, force of that kind has been properly deemed extraordinary, and the trial court was free to find it disproportionate here. See *Shoultz v. State*, 735 N.E.2d 818, 824-25 (Ind. App. 2000) (noting police department guideline prohibiting the use of a metal flashlight as a nightstick, and all blows to the head, unless “ ‘absolutely necessary’ ”). Accordingly, the trial court could have found that defendant’s use of force exceeded the bounds of reasonableness (even assuming that defendant’s arrest of Little was otherwise justified) and, thus, did not relieve defendant of liability for his actions.

¶ 30 Defendant also contends that, even if the trial court did not err when it concluded that his actions were not justified as a valid citizen's arrest, his convictions should be reversed because the State failed to disprove his affirmative defense of necessity. "Conduct which would otherwise be an offense is justifiable by reason of necessity if the accused was without blame in occasioning or developing the situation and reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct." 720 ILCS 5/7-13 (West 2010). Defendant's conduct must have been the "sole reasonable alternative available to the defendant under the circumstances." *People v. Kravotil*, 351 Ill. App. 3d 1023, 1034 (2004).

¶ 31 We disagree with defendant's contentions that Little was solely responsible for creating the situation and that defendant was without any other recourse because Richrath's children had already contacted attorneys and spoken with the police. Although Little might have been responsible for defendant's and his family's aggravation, defendant was the one who collected pepper spray, handcuffs, and a metal flashlight, flew to Illinois from Alaska, and instituted a confrontation with Little. In addition, although Richrath's children contacted attorneys, spoke with defendant, and were called by the Elmhurst police department, defendant himself never contacted the police or other authorities for assistance or guidance before physically confronting Little. From this evidence, the trial court could have found, as it did, that defendant was neither without blame in creating the situation nor acting on the sole reasonable alternative available to him. See *People v. Perez*, 97 Ill. App. 3d 278, 280-81 (1981) (the defendant's affirmative defense of necessity to a charge of unlawful use of a weapon was rejected where the defendant participated in an ongoing feud with gang

members, drove around the gang members' territory instead of avoiding it, and stopped his vehicle to get out and engage in a gun fight).

¶ 32

CONCLUSION

¶ 33 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 34 Affirmed.