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2012 IL App (3d) 100938-U

Order filed July 26, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the Circuit Court
) of the 14th Judicial Circuit,
Plaintiff-Appellee,) Whiteside County, Illinois,
)
v.) Appeal No. 3-10-0938
) Circuit No. 09-CF-327
JASON J. UKENA,)
) Honorable
Defendant-Appellant.) Stanley B. Steines,
) Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Holdridge and Lytton concurred in the judgment.

ORDER

- ¶ 1 *Held:* The evidence, when examined in the light most favorable to the State, was sufficient to convict defendant of aggravated battery and resisting a peace officer. In addition, the trial court did not improperly enhance defendant's sentence or abuse its discretion by sentencing defendant to eight years' imprisonment.
- ¶ 2 Defendant, Jason J. Ukena, was convicted of aggravated battery (720 ILCS 5/12-4(b)(18) (West 2008)) and resisting or obstructing a peace officer (720 ILCS 5/31-1(a)) (West 2008)). He was sentenced to concurrent terms of eight and three years' imprisonment, respectively. On

appeal, defendant argues: (1) the evidence was insufficient to convict him, (2) the trial court improperly imposed an extended-term sentence, and (3) the trial court abused its discretion by imposing an eight year sentence for aggravated battery. We affirm.

¶ 3

FACTS

¶ 4 Defendant was charged with one count of aggravated battery. The information alleged that on July 17, 2009, defendant knowingly caused bodily harm to Michael Henry, a peace officer engaged in the execution of his official duties. In addition, defendant was charged with three counts of resisting or obstructing a peace officer, and one count of criminal damage to property for an incident which took place at Champs Sport Bar & Grill (Champs) in Sterling, Illinois.

¶ 5 The testimony at trial established that at approximately 11:30 p.m. on July 17, 2009, a bar patron informed Jared Strader, the manager of Champs, that defendant was attempting to start fights with other customers outside the bar. Strader spoke to defendant and informed him he would not be allowed to enter Champs. Defendant replied he intended to enter the bar through the second entrance. Consequently, Strader approached Jason Gasso, the bouncer stationed at the second entrance of the bar, and instructed him to stop defendant from entering the bar that evening. Thereafter, Gasso removed defendant from the bar. However, defendant attempted to re-enter the bar and this time, took a swing at Strader, over Gasso's shoulder. Gasso responded by lifting defendant in order to "roll" him out the door, which caused damage to the door during this process. Another customer, Jose Tapia, called the police to report he saw defendant "getting physically assaulted by one of the bouncers."

¶ 6 The first officer to respond to Tapia's report was Sergeant Robert Allen, who was joined by two other officers, Michael Henry and James Sanders. All of the officers were wearing full

police uniforms, with badges, identifying patches, name tags, and duty belts with weapons.

Upon arrival, Officer Sanders immediately attempted to speak with defendant to calm him down.

Meanwhile, Strader told Officer Allen he wanted defendant arrested for the damaged door.

¶ 7 Officers Allen and Henry then approached defendant from behind to arrest him. Allen, Sanders, and Henry all testified that defendant was advised by the officers that he was under arrest. However, neither Strader nor Gasso remembered hearing the officers announce defendant was under arrest.

¶ 8 Allen and Henry each grabbed one of defendant's arms from behind causing defendant to stiffen and try to pull away. The officers moved defendant to the wall of another bar. Defendant continued to struggle, and bystanders urged defendant to stop resisting. Next, Sanders placed defendant in a "vertical neck restraint," otherwise known as a "choke hold," after defendant was placed on the ground. According to the officers, defendant continued to struggle and flipped over on his back. Defendant was looking "right at" Henry when he kicked Henry twice in the right leg on the inside of the knee. Eventually, the officers managed to turn defendant over and handcuff him. After being handcuffed, defendant went limp and was physically carried to the squad car.

¶ 9 Defendant advised the jury that, after a bouncer at one entrance told him to leave, he went to a second entrance where Strader told him to "get out." Defendant agreed to leave, but then learned the police were on their way because defendant had damaged the door to the business. Even though the bouncer told defendant to "run and leave," defendant refused because he was on probation and wanted to "clear [his] name."

¶ 10 Defendant explained that when he tried to tell Allen his side of the story that night, the

officer was not interested in anything defendant had to say. Instead, defendant was grabbed from behind and slammed into the wall. Next, defendant felt himself being placed in a choke hold, and he panicked. According to defendant, he did not know who was grabbing him from behind, and he did not remember what he did after he was put into the choke hold. He denied intentionally kicking any of the officers.

¶ 11 The jury found defendant guilty of aggravated battery and all three counts of resisting or obstructing a peace officer. The jury found defendant not guilty of criminal damage to property.

¶ 12 The Pre-Sentence Investigation report (PSI) prepared pursuant to court order indicated defendant had a previous 2008 conviction for aggravated battery involving a peace officer, a Class 2 felony, and a previous conviction for threatening a public official, a Class 3 felony. The PSI also documented defendant had some behavioral problems while serving in the military from February 18, 2005 to February 12, 2007, and he had been diagnosed by Dr. Aaron A. Brodski in December 2006 with "Major Depressive Disorder, Single Episode, Mild."

¶ 13 Defendant's sentencing hearing took place on August 30, 2010. The court stated the aggravated battery charge was a "class two felony non-probationable [*sic*] subject to an extended term." When announcing the sentence for aggravated battery, the court noted defendant had "mental health issues" but stated there was a concern about defendant's "dangerousness not necessarily not [*sic*] only to himself certainly but more so to society." The court sentenced defendant to eight years' imprisonment for aggravated battery and three years imprisonment for resisting a peace officer. Defendant filed a timely notice of appeal.

¶ 14 ANALYSIS

¶ 15 On appeal, defendant argues the evidence was insufficient to convict him for the aggravated battery and resisting arrest. He also alleges the trial court impermissibly used his

prior felony conviction to doubly enhance his sentence for aggravated battery. Finally, he contends his sentence was an abuse of discretion.

¶ 16 On appeal, defendant argues the evidence demonstrated he did not intentionally hit any of the police officers because he was placed in a choke hold and he was unaware of his actions.

When a defendant challenges the sufficiency of the evidence supporting his conviction, a reviewing court must determine whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). Upon review, the trier of fact remains responsible for making determinations regarding the credibility of witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence.

People v. Ross, 229 Ill. 2d 255, 272 (2008). A defendant's conviction will be set aside only when the evidence was insufficient or so improbable or unsatisfactory that a reasonable doubt exists as to the defendant's guilt. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001).

¶ 17 In order to prove defendant guilty of aggravated battery under section 12-4(b)(18) of the Criminal Code of 1961, the State had to prove defendant knowingly made physical contact of an insulting or provoking nature with Henry, and he knew Henry was a police officer engaged in the execution of his official duties. 720 ILCS 5/12-4(b)(18) (West 2008).

¶ 18 Although defendant denied intentionally striking any of the officers, Henry testified defendant was looking straight at him when defendant kicked him twice in the knee. In addition, the record establishes all three officers, including Henry, were in full uniform. Thus, after viewing the evidence in the light most favorable to the State, we conclude a reasonable jury could find beyond a reasonable doubt that defendant intended to make physical contact with

Henry, whom he knew was a police officer engaged in his official duties, based on the officers' testimony in this case.

¶ 19 To sustain a conviction for resisting or obstructing a peace officer, the State was required to prove defendant knowingly resisted or obstructed a peace officer in the execution of any authorized act within his official capacity. 720 ILCS 5/31-1(a) (West 2008). The statute "prohibits a person from *** committing a physical act of resistance or obstruction—a physical act that impedes, hinders, interrupts, prevents or delays the performance of the officer's duties, such as going limp, forcefully resisting arrest, or physically helping another party to avoid arrest." *People v. McCoy*, 378 Ill. App. 3d 954, 962 (2008). Case law provides, "[t]he acts of struggling or wrestling with a police officer are physical acts of resistance that will support a conviction for resisting a peace officer, even if the underlying attempted arrest is unwarranted." *Id.*

¶ 20 Defendant argues the State did not prove he knew he was under arrest when he began struggling with the officers. Defendant believed he was being assaulted by Strader and Gasso after he was grabbed from behind. However, each officer testified that defendant was informed he was under arrest. Furthermore, during the ensuing struggle, defendant flipped over on his back and was facing the officers themselves who were wearing full police uniforms, and bystanders repeatedly told defendant to stop resisting. Even though defendant offered a conflicting version of what occurred, "it was for the trier of fact to determine which version of events to believe." *People v. Agnew-Downs*, 404 Ill. App. 3d 218, 228 (2010). Evidently, the trier of fact found the State's witnesses to be more credible than defendant in this case. After reviewing the testimony in the light most favorable to the State, we agree a rational fact finder

could find beyond a reasonable doubt that defendant intentionally resisted the officers as they placed him under arrest.

¶ 21 Next, defendant argues the trial court erred by using his prior felony conviction for a Class 2 aggravated battery to support the finding that: (1) defendant was ineligible for probation and (2) defendant was eligible for an extended-term sentence. 730 ILCS 5/5-5-3(c)(2)(F) (West Supp. 2009); 730 ILCS 5/5-5-3.2(b)(1) (West 2008). Defendant relies on our supreme court's decision in *People v. Hobbs*, 86 Ill. 2d 242, 246 (1981), which held it was improper for the trial court to use the same prior felony conviction to increase defendant's crime from a misdemeanor to a felony and then to extend defendant's sentence.

¶ 22 The State argues no double enhancement occurred because the trial court did not use the prior conviction to *enhance* the classification for defendant's aggravated battery from a misdemeanor to a felony. The State distinguishes *Hobbs* by arguing that, in the instant case, defendant's conviction for aggravated battery was already a Class 2 felony as charged, and therefore defendant's prior conviction was not used to enhance the classification of the instant crime.

¶ 23 We need not resolve the dispute because, even assuming *arguendo* that defendant's sentence was doubly enhanced, the court in *People v. Dycus*, 291 Ill. App. 3d 14, 16 (1997), found that such action by the trial court was a permissible double enhancement because the legislature intended such a result. Specifically, the court noted that, under sections 5-5-3(c)(2)(F) and 5-5-3.2(b)(1) of the Unified Code of Corrections (the Code), a single felony conviction could make a defendant both ineligible for probation and could subject a defendant to an extended-term sentence. *Id.* at 17. In fact, if a defendant is found statutorily ineligible for probation under

section 5-5-3(c)(2)(F) of the Code, as occurred in this case, that same defendant is necessarily eligible for an extended term under 5-5-3.2(b)(1). *Id.* The legislature surely had to be aware of this result, but nonetheless decided a single felony conviction could subject a defendant to an extended-term sentence. *Id.* We agree with the *Dycus* court and hold that, even if the trial court's actions constituted double enhancement, the double enhancement was permissible based on the legislature's intent.

¶ 24 Defendant's final argument on appeal is that his eight year sentence was excessive and constituted an abuse of discretion. Defendant asserts that, because of his need for mental health treatment, the sentence in this case fails to adequately address the constitutional objective of restoring defendant to useful citizenship. Ill. Const. Art 1, § 11.

¶ 25 Upon review, the trial court's sentencing decision is entitled to great deference because the trial court is in a better position than the reviewing court to determine appropriate sentences (*People v. Stacey*, 193 Ill. 2d 203, 209 (2000)) and to balance the need to protect society with the rehabilitation of the defendant (*People v. Spencer*, 303 Ill. App. 3d 861, 871 (1999)).

Consequently, the trial court's sentencing determination will not be reversed absent an abuse of discretion. *Id.* A sentence that falls within the statutory range is not an abuse of discretion unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *Stacey*, 193 Ill. 2d at 209. In addition, there is a presumption that the sentencing court considered mitigating evidence before it, and that presumption will not be overcome without explicit evidence from the record that the trial judge did not consider mitigating factors. *People v. Flores*, 404 Ill. App. 3d 155, 158 (2010).

¶ 26 The record demonstrates the trial court specifically considered defendant's mental health

when imposing his sentence. Moreover, the trial court had to weigh defendant's rehabilitative potential against the danger defendant posed to society. *Spencer*, 303 Ill. App. 3d at 871. Based on defendant's history, the court found defendant to pose a danger to society.

¶ 27 Defendant was also eligible for an extended-term sentence on the aggravated battery charge, a Class 2 felony, due to the fact that his prior felony conviction was also a Class 2 felony and had occurred within the past 10 years. 730 ILCS 5/5-5-3.2(b)(1) (West 2008). The extended-term sentencing range for aggravated battery was 7 to 14 years. 730 ILCS 5/5-4.5-35(a) (West 2008). Therefore, defendant's sentence of eight years was well within the sentencing range and did not constitute an abuse of discretion.

¶ 28 **CONCLUSION**

¶ 29 For the foregoing reasons, the judgment of the circuit court of Whiteside County is affirmed.

¶ 30 Affirmed.