FOURTH DIVISION
September 3, 2015

No. 1-13-2290

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. 12 CR 11925
	)	
NICKEY McGHEE,	)	Honorable
	)	Sharon M. Sullivan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Palmer and Reyes concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's conviction for aggravated battery of a merchant upheld over his contention that the State failed to show that his conduct did not qualify for the affirmative defense of necessity.

¶ 2 Following a bench trial, defendant Nickey McGhee was found guilty of aggravated battery of a merchant and sentenced to two years' imprisonment. On appeal defendant contends that the evidence was insufficient to sustain his conviction where the State failed to show beyond a reasonable doubt that his conduct did not qualify for the affirmative defense of necessity.

¶ 3 Defendant was charged with robbery and aggravated battery of a merchant in relation to an incident that occurred on May 25, 2012, at a Walgreens located on the north side of Chicago. Surveillance video reflects that around 9 a.m. that day, defendant took colostomy bags from the store without paying for them, and, in the process of leaving, had an encounter with Renee Penn-Nichols, a store employee, which resulted in Penn-Nichols falling to the ground.

¶ 4 At trial, Penn-Nichols testified that she works as a health care consultant in the home care department at the Walgreens located at 7510 North Western Avenue. On the morning of May 25, 2012, she saw a man, who she identified in court as defendant, standing in an aisle tearing open colostomy bags, so she approached him and offered her assistance. Defendant refused her help, so she informed him that he had to pay for the bags or go through his insurance with a prescription. Shortly thereafter, the store manager approached and told her to "ring [defendant] up." As Penn-Nichols walked to the register, however, she remembered a rule that prevented her from selling colostomy bags to defendant due to his insurance and his lack of a prescription.

¶ 5 When Penn-Nichols explained to defendant why she could not sell him the colostomy bags, defendant told her that he needed the bags and then snatched them out of her hand. She tried to get the bags back from him, but defendant pushed her in the face, causing her body to move back, but not fall, and her nose to bleed. Penn-Nichols walked around the counter and tried to grab the colostomy bags from defendant, but he pushed her, causing her to fall on a rack of canes and hit her head on the wall. Defendant then ran out of the store with the colostomy bags, which were worth $60, and she reported the incident to the police. The State played a surveillance video depicting the events that transpired at the store at the time of the incident, and Penn-Nichols testified that the video accurately reflected the events from that day.

¶ 6 Penn-Nichols further testified that she recognized defendant because he had been visiting the store approximately every two weeks since January 2012. On each of those occasions, defendant sought colostomy bags, but did not have a prescription for them and refused the staff's offers to allow him to call his doctor from the store to obtain one. At first, Penn-Nichols and the other store staff were more sympathetic to defendant, and gave him some colostomy bags to tide him over until he obtained a prescription. Although defendant was repeatedly told that he needed a prescription for the colostomy bags, and he told store staff that he would submit one, he never did so. Several days before the incident, defendant entered the store and asked Penn-Nichols to give him colostomy bags. She told him that she could not do so, and suggested that he call his doctor from the store and request a prescription. Defendant refused and became very volatile, telling her that he was going to "kick [her] ass and beat [her] down." Defendant left the store when the assistant manager threatened to call the police.

¶ 7 Penn-Nichols further testified that she is bound by certain rules. She specified that "the State of Illinois states that if a person has Medicaid they are considered indigent, that we cannot sell them products if Medicaid paid for them. So we would never sell them to them. We tell them they need a prescription. We will process it. Then if they qualify, we will give it to them." Due to this rule, she would not be able to sell colostomy bags to someone with Medicaid if they did not have a prescription on file.

¶ 8 On cross-examination, Penn-Nichols testified that she is aware that a person in need of a colostomy bag can bleed and get an infection without one. On the day of the incident, defendant lifted his shirt and Penn-Nichols saw that he was wearing an ostomy bag, not a colostomy bag. At that time, defendant was not bleeding and there was no blood on the floor. She further testified that defendant pulled out his wallet as if he was going to pay, but did not do so because

she informed him that she could not take his money because of Medicaid rules. Penn-Nichols testified that defendant would have had to plan ahead because even if he had provided a prescription on the day of the incident, she would not have been able to give him colostomy bags at that time because the prescription would take several days to process. She acknowledged that no other employees who sold colostomy bags were on duty at the time of the incident. On re-direct examination, Penn-Nichols testified that although store employees provided defendant with free colostomy bags in the past, they let defendant know that they would no longer be able to do so because they would "get in trouble."

¶ 9 The State then rested and the parties stipulated that, if called, Dr. Khalid Malik would testify that defendant visited the emergency room clinic at Weiss Memorial Hospital on April 22, 2012, and complained of a bleeding colostomy and requested a prescription for colostomy bags. The parties also stipulated to the foundation for the emergency room records from that visit, and agreed to admit them into evidence. The State clarified that the records in their entirety would be admitted, including a page which reflects that defendant was not given a prescription on April 22, 2012, and that the box for Arvey Clinic at Weiss Hospital was marked for after-care instructions.

¶ 10 Defendant testified that on the day of the incident he desperately needed to obtain colostomy bags because he had run out of them and his ostomy area was bleeding. The colostomy bag he had been wearing came off in the middle of the night, so he was wearing a plastic grocery bag until he could get more colostomy bags. He went to this particular Walgreens because it was the only store on the north side of Chicago that he knew of where he could obtain the specific type of bags that he needed. Upon arriving, he found the colostomy bags and proceeded to the register with them, but Penn-Nichols told him that that it was "not time for

Medicare or Medicaid to pay." Defendant told her that he would pay for them himself because he was bleeding and needed the bags. He pulled his driver's license and debit card out of his wallet and placed them on the counter, however, Penn-Nichols told him that she did not want to sell the bags to him. Defendant pulled up his shirt and showed her that he was wearing a plastic grocery bag on his ostomy and told her that this store was the only place he could obtain the bags he needed. He was still bleeding at that time and there was blood on the floor of the store, but Penn-Nichols again told him that she did not want to sell the bags to him. Defendant then picked up his license and debit card, as well as three colostomy bags, and ran out of the store. He went to the bathroom in a nearby Starbucks and put on one of the colostomy bags.

¶ 11 Defendant further testified that he obtained a prescription for colostomy bags on April 22, 2012, at Weiss Memorial Hospital and gave it to the employees at Walgreens. That prescription was valid for six months and for five refills. On every other occasion he went to that particular Walgreens, the employees, except for Penn-Nichols, gave him colostomy bags. On the day of the incident, he feared that he might bleed to death or get a serious infection if he did not obtain a colostomy bag.

¶ 12 On cross-examination, defendant testified that he did not realize that he was out of colostomy bags when he went to bed the night before the incident. He denied that he ever pushed Penn-Nichols, and, when asked if he had any physical contact with her, he responded, "I wouldn't say I had physical contact with her. I'd say she had it with me. I did not touch her." Defendant testified that he could not recall what Penn-Nichols told him when he tried to purchase the colostomy bags, but acknowledged that she did not tell him, "I don't want to sell them to you." Defendant denied that Penn-Nichols repeatedly told him that he needed a prescription for colostomy bags, but acknowledged that he knew that he needed one in order to

obtain them. Defendant testified that he obtained a prescription at Weiss Hospital during his April 22, 2012 visit and that later that same day he gave that prescription to a store clerk at Walgreens. That prescription was on file at the store on the day of the incident, but he did not tell Penn-Nichols about it because she already knew who he was and did not want to sell the bags to him because she did not like him.

¶ 13 Defendant further testified that he did not try to obtain colostomy bags from other store employees that day because none of them worked in the home section. Defendant acknowledged that there were other locations in Chicago, including the hospital emergency room, where he could have obtained colostomy bags, but testified that the Walgreens he visited was the closest location to him. Defendant was then asked about the prescription he testified he obtained on April 22, 2012. When asked whether he obtained it at the emergency room at Weiss Hospital or at the Arvey Clinic, defendant testified that he could not recall whether he visited the Arvey Clinic that day, but that he "got [a prescription], whoever gave it to [him.]" On re-direct examination, defendant testified that he took the colostomy bags on the day of the incident because he was in fear for his life. In rebuttal, the State introduced defendant's 2002 conviction for burglary.

¶ 14 During closing arguments, defense counsel argued that defendant "did what he had to do" because it was clear that physical harm could have occurred if he did not get the colostomy bags, and, accordingly, that he had proven the defense of necessity. In rebuttal, the State argued that defendant created the emergency situation by not planning ahead and by not listening to directives that had been given to him.

¶ 15 Following closing arguments, the trial court found defendant guilty of aggravated battery of a merchant, and not guilty of robbery. In doing so, the court stated that it found that Penn-

Nichols was "very credible" and that the surveillance video clearly showed that defendant pushed Penn-Nichols. The court further stated that the medical records pertaining to defendant's hospital visit on April 22, 2012, reflect that defendant was examined and evaluated at the emergency room, that he was to follow up at the Arvey Clinic, and that the portion of the records designated for prescriptions was marked "void."

¶ 16 On appeal, defendant argues that the evidence was insufficient to sustain his conviction because the State failed to prove beyond a reasonable doubt that his conduct did not qualify for the affirmative defense of necessity.

¶ 17 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). This standard applies to all criminal cases, whether the evidence is direct or circumstantial, and acknowledges the responsibility of the trier of fact to determine the credibility of witnesses, to weigh the evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence. *People v. Campbell*, 146 Ill. 2d 363, 374-75 (1992). A reviewing court will not reverse a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 18 Here, defendant does not contest that the State proved the elements of the offense of aggravated battery of a merchant (720 ILCS 5/12-3.05 (d)(9) (West 2012)) beyond a reasonable doubt. Rather, he argues that the State failed to show beyond a reasonable doubt that his conduct did not qualify for the affirmative defense of necessity.

¶ 19 Conduct which would otherwise constitute an offense is justifiable by reason of necessity if (1) the person raising the defense was without blame in occasioning or developing the situation, and (2) reasonably believed such conduct was necessary to avoid a greater public or private injury than that which might reasonably have resulted from his own conduct. 720 ILCS 5/7-13 (West 2012); *People v. Janik*, 127 Ill. 2d 390, 399 (1989). Where a defendant proves some evidence in support of the affirmative defense of necessity, the State has the burden of disproving the defense and establishing all elements of the charged offense. *People v. Scott*, 194 Ill. App. 3d 634, 639 (1990).

¶ 20 The State first argues that defendant cannot establish the affirmative defense of necessity because at trial he denied that he ever pushed Penn-Nichols, and thus failed to admit that he committed a battery against her. We need not address this argument because even assuming that defendant properly raised the affirmative defense of necessity at trial, we nevertheless find that the State showed beyond a reasonable doubt that his conduct did not qualify for it.

¶ 21 Penn-Nichols testified that beginning in January 2012, defendant regularly visited the store seeking colostomy bags and that on each visit he was told that he needed to provide a prescription in order to obtain them. Defendant acknowledged that he knew that he needed a prescription in order to obtain colostomy bags, and testified that he provided the store with a prescription on April 22, 2012. However, Penn-Nichols testified that defendant never provided the store with a prescription for colostomy bags, and the medical records from April 22, 2012 reflect a prescription section that is marked as "void." Further, although defendant testified that on the night before the incident he was unaware that he had run out of colostomy bags, Penn Nichols testified that several days prior to the incident defendant visited the store and asked her to give him colostomy bags, and became volatile when she told him that she could not do so. It is

for the trier of fact to weigh the evidence and draw reasonable inferences therefrom (*Campbell*, 146 Ill. 2d at 374-75), and here we find that the trial court could reasonably infer that defendant visited the store in search of colostomy bags several days before the incident because he was aware that he was running out of them. Further, the trial court specifically found Penn-Nichols' testimony to be "very credible," and, given its verdict, it is evident that the trial court resolved evidentiary conflicts in favor of the State. We have no basis for substituting our judgment for that of the trial court on these matters. *Id.* at 389. In viewing the evidence presented in the light most favorable to the prosecution (*Siguenza-Brito*, 235 Ill. 2d at 224), we find that the State showed that defendant was to blame in developing the situation in that he failed to heed instructions to provide the necessary prescription, even when he knew that he was running out of colostomy bags.

¶ 22 In relation to the second element of necessity, it has been held that conduct that would otherwise be illegal is justified by necessity only if the conduct was the sole reasonable alternative available to the defendant under the circumstances. *People v. Kratovil*, 351 Ill. App. 3d 1023, 1034 (2004). When other, less harmful, alternatives are available to defendant, he is not justified in breaking the law. *Id.*

¶ 23 Here, Penn-Nichols testified that even if defendant had provided a prescription for colostomy bags on the day of the incident, she would not have given the bags to him at that time because it takes several days to process a prescription. According to defendant, given this testimony, he had no choice but to push Penn-Nichols and take the colostomy bags because he was wearing a plastic grocery bag, was actively bleeding, and was in fear for his life. However, Penn-Nichols testified that when defendant pulled up his shirt she saw that he was not bleeding, and that although he was not wearing a colostomy bag at that time, he was wearing an ostomy

bag. Based on this evidence, the trial court could reasonably conclude that the situation was not quite as dire as defendant maintained. Further, although it is uncontested that defendant was indeed in need or procuring colostomy bags, the evidence showed that there were less harmful options available to him. For example, although no other employee who sold colostomy bags was on duty at the time of the incident, defendant nevertheless could have sought assistance from another store employee, particularly the store manager who had instructed Penn-Nichols to "ring up" defendant's purchase. Additionally, although defendant testified that the Walgreens he visited was the closest location to him where he could obtain the type of colostomy bags that he needed, he acknowledged that there were other locations in the city, including the hospital, where he could have obtained them. Accordingly, defendant could have left the store and gone to the next closest location where he could obtain the bags. In viewing the evidence in the light most favorable to the prosecution, we find that the State showed that defendant had less harmful alternatives available to him, and, in turn, that his conduct did not qualify for the affirmative defense of necessity. See *People v. Haynes*, 223 Ill. App. 3d 126, 128-29 (1991).

¶ 24 In reaching this conclusion, we have considered defendant's argument that there is no indication in the record that the trial court considered the necessity defense before rendering its verdict. However, a trial court need not give all, or even any, of the reasons for arriving at its verdict. *People v. Curtis*, 296 Ill. App. 3d 991, 1000 (1998). We have also considered his argument that the State failed to cite any cases finding that a defendant was to blame for having a serious medical condition that required medical supplies. In so arguing, defendant misses the crux of the State's position. The State did not argue that defendant was at fault merely because he had a serious medical condition that required medical supplies. Rather, the State argued that it

was his actions, or rather inaction, that developed the situation. Accordingly, defendant's argument fails.

¶ 25 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 26 Affirmed.