

No. 1-13-2451

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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. 13 MC1 186854
)	
PEDRO ROSARIO,)	Honorable
)	Thomas J. Byrne,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Simon and Justice Liu concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Defendant's reckless conduct conviction is reversed because the State failed to prove defendant's guilt either individually or on an accountability theory.
- ¶ 2 Following a bench trial, defendant, Pedro Rosario, was convicted of reckless conduct and sentenced to 18 months' conditional discharge. He appeals, asserting the evidence was insufficient to sustain his conviction because the State failed to show that he threw bricks or that he endangered anyone's safety. For the following reasons, we reverse.

¶ 3 Defendant was tried in a simultaneous and joint bench trial with codefendants Luis Vasquez, George Tapia, and Samuel Gonzalez¹, who were also found guilty but are not parties to this appeal. At trial, all four defendants were represented by the same defense counsel and only two witnesses testified, Officer Matthew Hoyas and Officer Romero Martinez. When the officers testified, the questions posed and the answers given most often were phrased in the collective reference to "the defendants." Officer Hoyas identified each of the four defendants in open court.

¶ 4 At trial, Chicago police officer Matthew Hoyas testified that at about 10:15 p.m. on April 5, 2013, he and his partner, Officer Romero Martinez, drove an unmarked police vehicle to the vicinity of 3113 West Wabansia Avenue in response to several calls received by police. As he drove westbound on Wabansia Avenue, Officer Hoyas saw a group of 10 men, including "the defendants," standing in the middle of the street two blocks away² at the intersection of Wabansia and Albany Avenues. From this distance, Officer Hoyas observed that all of the men in the group were holding bricks and throwing bricks and bottles into the street at passing vehicles while yelling gang slogans. When he was 10 to 15 feet away from the group, Officer Hoyas saw the men throw bricks at two passing cars that were being driven northbound on Albany Avenue, about 3 to 5 feet from the group. He did not see any bricks hit either car, but saw the bricks land "within feet" of the cars. Officer Hoyas also observed three pedestrians walking westbound on Wabansia Avenue, and when they were about 10 feet from the corner of

¹ We reversed codefendant Samuel Gonzalez's conviction. See *People v. Gonzalez*, 2015 IL App (1st) 132452.

² We take judicial notice that a Chicago city block measures either 330 feet or 660 feet, depending on whether it is being measured from north to south or east to west. www.gapersblock.com. Because the officers were traveling westbound, each block would measure 660 feet.

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Albany Avenue where the group of men were throwing bricks, they turned around and walked away heading eastbound.

¶ 5 Officers Hoyas and Martinez drove to within five feet of the group, exited their vehicle, approached the men, who were all holding bricks, and told them to come to the vehicle. All of the men dropped their bricks to the ground, "the defendants" approached the police vehicle, and the other six men fled. Officer Hoyas observed numerous bricks on the ground, in the middle of the street, and on the sidewalk. "The defendants" were then taken into custody. At the police station, defendants told the officers that they were out there "so deep" because the Folks posted on Facebook that they were coming to retaliate. Officer Hoyas acknowledged that the police report of the incident did not include a specific statement that defendants were throwing bricks, but rather, that they were in the street with rocks, bricks and bottles.

¶ 6 Officer Hoyas further acknowledged that he knew "the defendants" from having prior contact with them, and had previously told them to stay away from that area. Defense counsel then asked "did you actually see the four throw a brick at a car," and Officer Hoyas replied "[n]o, I didn't." Thereafter, Officer Hoyas testified that he saw "the defendants" throwing bricks when he was approximately two blocks away from them, and that he could see their faces from that distance at night.

¶ 7 Chicago police officer Romero Martinez testified substantially the same as Officer Hoyas regarding their response to the call about a gang disturbance, and his observation of a group of 10 men standing in the middle of the street holding bricks. He further testified that the area was well lit, and that he saw the men flashing gang signs and yelling gang slogans at one vehicle that going northbound on Albany Avenue. Officer Martinez also saw three or four pedestrians

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walking westbound on Wabansia Avenue toward the group of men, and saw them turn around and walk eastbound when they were 10 to 15 feet away from the men.

¶ 8 Officer Martinez further testified that as he and Officer Hoyas approached the group, all of the men dropped their bricks to the ground, and "the defendants" came to the police car while the other six men ran inside a building around the corner. At the police station, codefendant Gonzalez stated that the reason "they were out there so deep was that the folks posted on Facebook that they were going to come treat them due to a recent shooting." Officer Martinez did not see anyone throw any bricks, nor did he see any bricks strike the passing car. He acknowledged that he did not see anyone holding bottles, but wrote in his police report that they were holding bottles because there were several bottles on the ground and defendants were standing near them. He also saw numerous bricks in the street in addition to the bricks the men were holding.

¶ 9 The trial court summarized the evidence, specifically noting that Officer Hoyas saw the men throwing bricks, but that Officer Martinez saw them holding the bricks. The court found that the men were "yelling in the middle of the street where pedestrians were and changed directions based on – from the court's finding of the facts based on the conduct they observed." The court pointed out that the people inside the cars did not come forward to describe whether or not they felt endangered, but found that it was reasonable to presume that they were trying to get away from the area where the defendants were standing in the street with bricks. The trial court found defendant guilty of reckless conduct and sentenced him to 18 months of conditional discharge and 5 days in the Sheriff's Alternative Program.

¶ 10 The trial court denied defendant's motion for a new trial finding, based on the "credible evidence" presented at trial, that the State proved defendant guilty beyond a reasonable doubt. The court found that the defendants were acting in concert with one another, and thus, the actions of one of the individuals in the group could be attributed to each of them. The court also stated "[t]hose pedestrians reacted to the danger they saw and the reason they reacted was for their own safety. They changed directions to get away from the brick throwing defendants."

¶ 11 This appeal followed.

¶ 12 On appeal, defendant argues the evidence was insufficient to sustain his conviction either individually or under an accountability theory based on the testimony of Officer Hoyas and Officer Martinez, which was the only testimony at trial. He asserts the State failed to show he threw any bricks because the credibility of Officer Hoyas, the sole witness to testify that the defendants threw bricks, was undermined by the police report, Officer Martinez's testimony, the lack of physical evidence, Officer Hoyas' prior contact with the defendants, and Officer Hoyas' testimony on cross-examination. Defendant further claims that the officers' testimony did not establish his guilt based on an accountability theory, as neither Officer Hoyas nor Officer Martinez observed defendant specifically taking any actions to support the person who allegedly threw a brick. Finally, defendant contends the State failed to show he endangered the safety of another.

¶ 13 In resolving a challenge to the sufficiency of the evidence, we must determine whether, considering all of the evidence in the light most favorable to the prosecution, "any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime." *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). In

doing so, our function is not to retry the defendant. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). Rather, in a bench trial, it is for the trial court to determine the witnesses' credibility, to weigh the evidence and draw reasonable inferences therefrom, and to resolve any evidentiary conflicts. *Id.* We will reverse a conviction only "where the evidence is so unreasonable, improbable, or unsatisfactory" as to create a reasonable doubt of defendant's guilt. *Brown*, 2013 IL 114196, ¶ 48.

¶ 14 A defendant commits reckless conduct when, by any means either lawful or unlawful, he recklessly performs an act or acts that cause bodily harm to or endanger the safety of another person. 720 ILCS 5/12-5(a)(1) (West 2012). The misdemeanor complaint in this case reads that defendant committed the offense of reckless conduct when he "performed reckless actions that endangered the safety of another, to wit that [defendant] was throwing bricks while yelling gang slogans to passing vehicles."

¶ 15 A defendant is legally accountable for the conduct of another when, either before or during the offense and with the intent to promote or facilitate the commission of the offense, he solicits, aids, abets, agrees, or attempts to aid the other person in the planning or commission of the offense. 720 ILCS 5/5-2(c) (West 2012). "A defendant's mere presence at the scene of the crime is insufficient to prove accountability, even if the individual has knowledge that a crime is being committed or flees from the scene." *People v. Velez*, 388 Ill. App. 3d 493, 512 (2009).

¶ 16 We agree with defendant that the evidence in this case was insufficient to sustain his conviction, either individually or on an accountability theory. The only witness to testify that the defendant and his codefendants threw bricks was Officer Hoyas. However, the State's questioning of Officer Hoyas consisted of asking about the defendants' actions as a group,

without distinguishing between defendant and any of his codefendants, or between defendant, his codefendants and the six individuals who walked away from the scene. For example, after Officer Hoyas testified that each defendant was holding a brick, the State asked what "they" were doing with the bricks, to which Officer Hoyas responded, "[t]hey were throwing them in the street at passing cars." At no point did the State elicit testimony from Officer Hoyas about defendant's individual actions or involvement in the crime. In fact, some of Officer Hoyas' testimony did not even distinguish between the four defendants and the six other men he saw with them. On cross-examination, he stated that the four defendants and the six other people all had bricks, were all standing three to five feet away from the two cars he saw pass, and were all throwing bricks at the cars.

¶ 17 However, Officer Hoyas' testimony that he saw any of the defendants throwing bricks was completely contradicted by his own testimony on cross-examination. The following exchange occurred:

"[DEFENSE COUNSEL]: Did any of the other three throw a brick at a car?"

[HOYAS]: As we approached, they were throwing bricks.

[DEFENSE COUNSEL]: When you say they—

[HOYAS]: The defendants.

[DEFENSE COUNSEL]: How do you know it was the four that are here and not the six that got away?

[HOYAS]: Based on prior knowledge and contact with the defendants.

[DEFENSE COUNSEL]: So, you assumed it was these four that were throwing the bricks?

[HOYAS]: No.

[DEFENSE COUNSEL]: Well, did you actually see the four throw a brick at a car?

[HOYAS]: No, I didn't."

When asked, on redirect, whether he saw the defendants throwing bricks, Officer Hoyas provided a vague response that, "[w]e were approximately two blocks away." On recross-examination, defense counsel asked Officer Hoyas if he could tell, from that distance, who was throwing bricks, and Officer Hoyas responded, "[t]he defendants." Upon further questioning, Officer Hoyas said he also saw the other six men throwing bricks. Officer Hoyas testimony was inconsistent and vague. It is unclear whether he ever saw one of "the defendants" throw a brick. His testimony is even more doubtful when considered in conjunction with Officer Martinez's testimony that he did not see anyone throwing bricks.

¶ 18 Furthermore, defendant argues, that not only did the State fail to prove that he threw any bricks, the State failed to prove that his actions endangered the safety of another person. 720 ILCS 5/12-5(a)(1) (West 2012). The State claims endangerment was proven beyond a reasonable doubt and although Officer Hoyas' testimony was inconsistent, he did say that he saw "the defendants" as well as six other people in a group, all throwing bricks that landed within feet of passing cars. In addition, the State argues that, as the trial court found, endangerment can be implied because the group of pedestrians walking down the street "changed directions to get away from the brick-throwing defendants."

¶ 19 Our review of the record shows that the State failed to present any evidence that anyone's safety was endangered as a result of "the defendants'" alleged actions. One officer, from two

blocks away, saw "the defendants" throwing bricks. Despite the fact that it was 10:15 p.m. in April, he could see where the bricks landed and they were within feet of the cars that passed. He later contradicted himself and said that he did not see "the defendants" throw bricks at cars. Even if we were to accept Officer Hoyas' initial testimony as true, as we presume the trial court did, it does not satisfactorily follow that the bricks thrown endangered anyone's safety. The officers testified that they did not receive any complaints of personal or property damage. There was no testimony that the bricks struck any cars or pedestrians or that they were directed at any person.

¶ 20 Although the trial court inferred endangerment, there was no evidence presented to support a finding that the occupants of the cars felt endangered or were even aware of what was occurring. Without testimony affirmatively showing that any cars were struck by any object, including a brick, we cannot reasonably infer any reaction of any occupant.

¶ 21 Furthermore, no one from the group of pedestrians walking down the street testified that they chose to change course when they encountered "the defendants" or that they believed their safety was endangered. There was no testimony that supports a factual conclusion that any object was thrown in the direction of a pedestrian. While the trial court found that the group of pedestrians were concerned for their "safety" and "changed directions to get away from the brick throwing defendants," it was equally reasonable to infer, based on the testimony, that the pedestrians might have been the rival gang that threatened retaliation and decided to retreat to avoid arrest when they saw the police arrive rather than changing directions out of concerns for their safety. A finding that these pedestrians were endangered is mere speculation and without evidentiary support.

¶ 22 We are mindful that it was the trial court's duty to determine the credibility of the witnesses and that it is not our function to retry the defendant on appeal. *Siguenza-Brito*, 235 Ill. 2d at 228. Nonetheless, it is well-settled that testimony may be found insufficient where the evidence compels the conclusion that no reasonable person could accept the testimony beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). Further, "the fact a judge or jury did accept testimony does not guarantee it was reasonable to do so." *Id.* While we usually defer to the trial judge's resolution of conflicting evidence where, as is the case here, the conflict is created by the same witness, we cannot defer and accept one definite statement of a witness about an important issue and completely ignore the exact opposite definitive statement on that same issue by the same witness. Thus, officer Hoyas' testimony that he observed "the defendants" throwing bricks, simply does not warrant our acceptance and deference when he unequivocally stated he did not see "any defendant" throw any bricks. In light of the inconsistent and vague nature of Officer Hoyas' testimony, including his conclusive statement on cross-examination that he did not see "the defendants" throw any bricks, when combined with the remaining officer's testimony that he did not see the defendant throw any bricks, we find the testimony is so unsatisfactory that the State failed to prove the elements of reckless conduct beyond a reasonable doubt.

¶ 23 We also agree with defendant that, even assuming somebody in the group threw a brick, the State failed to show defendant took any action that would establish his guilt on an accountability theory. The State notes that both Officers Hoyas and Martinez testified they observed defendant holding a brick, which he dropped when they approached, and yelling gang slogans. However, Officer Martinez's testimony about defendant's involvement in the crime

suffered from the same deficiency as Officer Hoyas' testimony, *i.e.*, Martinez only testified about "the defendants" actions as a group and not specifically as to this defendant. Specifically, Officer Martinez said "[t]he defendants" were in the middle of the street flashing gang signs and yelling gang slogans, and each of the defendants and the other men with them were holding bricks that they dropped as the officers approached. As with Officer Hoyas, the State did not ask Officer Martinez about defendant's particular behavior. The State's failure to do so resulted in vague and conclusory testimony about whether defendant specifically took any action to aid or abet any of his codefendants in throwing a brick or endangering the safety of another.

¶ 24 After carefully considering the entire record before us, we find the State failed to prove beyond a reasonable doubt that defendant threw a brick or that his conduct resulted in bodily harm or endangerment. We also find the State failed to prove that defendant engaged in any conduct to support a finding that defendant is legally accountable for conduct that endangered the safety of another.

¶ 25 For the reasons stated, we reverse the trial court's judgment.

¶ 26 Reversed.