2015 IL App (1st) 133181-U

SECOND DIVISION
December 29, 2015

No. 13-3181

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Respondent-Appellee,	)	
	)	
v.	)	12 C4 40118
	)	
JACOB FLINCHUM,	)	
	)	Honorable Carol A. Kipperman
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Justices Neville and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in finding defendant guilty of aggravated battery of a peace officer where defendant lacked the required intent to commit the offense. Defendant's conviction for aggravated battery of a peace officer is reduced to the lesser included offense of reckless conduct.

¶ 2 Following a bench trial, defendant, Jacob Flinchum, was convicted of aggravated battery of a peace officer and sentenced to 18 months of probation. Defendant, who was 17 years old at the time of the offense, appeals his conviction and sentence. For the following reasons, we reduce defendant's conviction for aggravated battery of a peace officer to the lesser included offense of reckless conduct.

¶ 3 BACKGROUND

¶ 4 Defendant was charged by indictment with six counts of aggravated battery of a peace officer and one count of resisting or obstructing a peace officer, firefighter, or correctional institution employee, following the events that took place on January 9, 2012.

¶ 5 At trial, Brookfield Police Officer Hartnett ("Hartnett") testified to the following facts. On the evening on January 9, 2012, he was driving alone in a marked squad car on routine patrol and wearing a full uniform. Hartnett was near 9211 Broadway Street in Brookfield when he saw defendant riding his bicycle on the sidewalk. Hartnett stated that he knew that riding a bicycle on the sidewalk constituted an ordinance violation. He drove past defendant, turned north onto Maple Street and parked his car about 100 feet from the intersection where he exited the vehicle to talk to defendant. Hartnett stated that he knew defendant from previous drug arrests for drug possession, and that particular area was known for drug activity.

¶ 6 Hartnett testified that he and defendant made eye contact as defendant was coming in his direction, but defendant changed direction after making eye contact. Defendant cut across traffic westbound on Maple Street and entered a parking lot. Hartnett got back in his car, made a U-turn on Maple Street and saw defendant get off his bike and entered a laundromat called Broadway Coin and Laundry. Hartnett drove past the laundromat, parked the car, exited the car, and entered the laundromat. Hartnett testified that the laundromat was not crowded and that defendant did not have any laundry with him at that time.

¶ 7 Defendant was by a pop machine within a few feet of the front door. Hartnett was standing 2-3 feet away from defendant. Hartnett testified that he asked defendant why he was trying to avoid him. Detecting a strong odor of cannabis emanating from defendant, Hartnett

asked defendant if he had any cannabis on him and defendant responded "You can't pull me over." Defendant never responded whether he had cannabis on him.

¶ 8 Hartnett testified that he asked defendant to put his hands on the laundromat's glass window so that he could do a pat-down search of defendant based on the cannabis odor. Defendant protested that he had not done anything and that Hartnett had no right to search him. Defendant then took a step back. Hartnett again asked defendant to place his hands on the glass and reached for one of defendant's wrists, but defendant pulled his hand away. Hartnett again grabbed defendant's arm, with defendant's back leaning into a table and Hartnett leaning into defendant. Hartnett told defendant "Don't do this, put your hands behind your back." Defendant responded, "You can't fucking do this, you can't pull me over." Hartnett's hands were around defendant's shoulder upper chest area. They were standing chest to chest and Hartnett tried to pull defendant around to get his arms behind his back, but defendant pulled away and spun, so they traded places, but they were still facing each other. They were walking backwards and grabbing at each other, and Hartnett "felt a strike" on the left side of his jaw. Hartnett testified that he did not see the blow, but he felt knuckles because the blow felt as though it was "bone-on-bone." Hartnett testified that, since he did not actually see the fist, defendant could have also struck him with his shoulder, elbow or head. Hartnett then wrestled defendant to the ground to gain control.

¶ 9 Hartnett and defendant were face-to-face on the ground. Hartnett told defendant to turn around and place his hands behind his back, but defendant remained in a defensive posture. Hartnett then drew his Taser and again told defendant to place his hands behind his back. Hartnett testified that defendant did not comply. Then, Hartnett deployed his Taser on

defendant's upper left shoulder and ordered him to turn around and place his hands behind his back. At that point, defendant complied. Hartnett then handcuffed defendant.

¶ 10 Hartnett searched defendant and found a pack of cigarettes, a scale with cannabis residue on it, cannabis, a pocket knife and a lighter. Hartnett stated that defendant never displayed the knife to Hartnett or tried to use it. Defendant was transported to Loyola Hospital to have his shoulder checked. Defendant's father arrived at the scene and agreed that defendant be transported to the hospital. Hartnett suffered redness, swelling, tenderness and clicking of the jaw as a result of the blow to his face. The next morning, Hartnett received medical treatment and was given Tylenol with codeine for his pain.

¶ 11 Officer Coffelt testified that he was called to assist Officer Hartnett on January 9, 2012. He saw Officer Hartnett when he arrived at the scene and noticed redness on his left cheek area. Officer Coffelt identified People's Exhibit 1 as a photograph he took of Officer Hartnett's cheek and jaw right after the incident and People's Exhibit 4 as a photograph he took of Officer Hartnett's uniform. The parties stipulated that the substance found on defendant tested positively for 2.2 grams of cannabis, and that a proper chain of custody was maintained at all times.

¶ 12 The trial court found defendant guilty of count 4, which charged defendant with aggravated battery for knowingly making physical contact by striking a police officer in the head, knowing that the officer was in the midst of performing his official duties. Defendant's motion for a new trial was denied. The trial court, noting defendant's lack of criminal background, sentenced him to 18 months of probation with 5 days in the Sheriff's Work Alternative Program. This appeal followed.

¶ 13 ANALYSIS

¶ 14 On appeal defendant argues that: (1) his conviction and sentence should be reversed because the State failed to prove that defendant intentionally or knowingly struck Officer Hartnett, or, in the alternative, his conviction should be reduced to the lesser included offense of reckless conduct, and (2) this court should vacate certain fees that were erroneously imposed by the trial court. Defendant also included an issue on appeal asserting that defendant was denied his constitutional right to equal protection of the law by the prospective application of an amendment to the Juvenile Court Act, 705 ILCS 405/5-120 (West 2012). Defendant, however, expressly withdrew the issue from consideration in his reply brief, and, accordingly, we do not address it further.

¶ 15 Defendant argues that the State's evidence was insufficient to support defendant's conviction for aggravated battery of a police officer. Specifically, defendant contends that the State failed to prove the mental state required for aggravated battery when Hartnett testified that it may not have been defendant's fist that hit him, but, instead, defendant's shoulder, elbow or head that struck him as they were struggling. Defendant further asserts that the State failed to prove beyond a reasonable doubt that defendant's conduct was knowing or intentional and not accidental or reckless. Based on the foregoing, defendant maintains that his conviction should be reversed, or in the alternative, reduced to reckless conduct.

¶ 16 The due process clause of the fourteenth amendment to the United States Constitution requires that a person may not be convicted in state court "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *People v. Cunningham*, 212 Ill. 2d 274, 278, (2004). When we review a claim that the evidence was insufficient to sustain a conviction, “the question is ‘whether, after reviewing 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.) *Cunningham,* 212 Ill. 2d at 278–79, quoting *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). "The *Jackson* standard applies in all criminal cases, regardless of the nature of the evidence." *Cunningham,* 212 Ill. 2d at 279. In applying this standard, "a reviewing court must allow all reasonable inferences from the record in favor of the prosecution. *Id*. at 280.

¶ 17 The essential elements of aggravated battery of a peace officer are found in the descriptions of both battery and aggravated battery. *People v. Phillips*, 392 Ill. App. 3d 243, 257-58 (2009). A person commits a battery if he or she, "intentionally or knowingly without legal justification," causes bodily harm or makes physical contact of an insulting or provoking nature. 720 ILCS 5/12–3 (West 2004). If a person commits a battery against an individual whom he or she knows to be "a peace officer" while that individual is "engaged in the execution of any official duties," it constitutes an aggravated battery. 720 ILCS 5/12–4 (b)(6) (West 2004). Defendant concedes that he tussled Hartnett and does not argue that he was unaware that Hartnett was a peace officer. Rather, defendant challenges that he lacked the requisite mental state and that his conduct was accidental, or, in the alternative, reckless.

¶ 18 The State must prove beyond a reasonable doubt, as an essential element of battery, that defendant's conduct was knowing or intentional and not accidental. *People v. Phillips*, 392 Ill. App. 3d 243, 258 (2009). A person "acts knowingly" if "he is consciously aware that his conduct is of such nature" that it is "practically certain" to cause the result proscribed by the offense. 720 ILCS 5/4–5 (West 2004); *People v. Moore,* 358 Ill. App. 3d 683, 688, (2005). A person "acts intentionally" if the "conscious objective or purpose is to accomplish the result." 720 ILCS 5/4–4 (West 2004). In contrast, "a person acts recklessly" if "he consciously

disregards a substantial and unjustifiable risk." 720 ILCS 5/4–6 (West 2004). Reckless conduct is a lesser included offense of aggravated battery. *People v. Perry*, 19 Ill. App. 3d 254, 257 (1974). The elements of both offenses are substantially similar, with the only element of difference relating to the degree of culpability. *Id.*

¶ 19 Where, as here, defendant denies intent, the State may prove defendant's intent through circumstantial evidence. *People v. Begay*, 377 Ill. App.3d 417, 421, (2007); *People v. Barnes*, 364 Ill.App.3d 888, 896 (2006). For instance, intent may be inferred (1) from the defendant's conduct surrounding the act, and (2) from the act itself. *People v. Phillips*, 392 Ill. App. 3d at 259.

¶ 20 In the instant case, Hartnett's testimony and the surrounding circumstances indicate that defendant's blow was not intentional or purposeful. Rather, the evidence at trial established that defendant disregarded a substantial risk that his actions in flailing his limbs and resisting the search might have caused Hartnett an injury. Specifically, Hartnett testified that he smelled a strong odor of cannabis emanating from defendant and asked defendant if he had any cannabis on him. He asked defendant to place his hands on the wall so that he could search him. Defendant refused to comply and stepped back from Hartnett. Hartnett tried to grab defendant but defendant continued evading Hartnett by moving his body out of reach. A struggle between defendant and Hartnett ensued.

¶ 21 Hartnett testified that while struggling with defendant, he "felt a strike" on the left side of his jaw but he did not see the blow. Hartnett thought he felt knuckles because the blow felt as though it was "skin-on skin, bone-on bone." Hartnett testified that they were both moving and that he was trying to roll defendant over at that time. However, Hartnett admitted that it may not have been defendant's knuckles that hit him, but instead may have been defendant's shoulder,

elbow or head that struck him as they were both struggling. At best, the testimony only proves that Hartnett was uncertain as to whether the blow was intentional or resulted from defendant's moving and struggling while trying to evade the search.

¶ 22 Therefore, based on evidence presented at trial, the State failed to prove beyond a reasonable doubt that defendant intended to cause bodily harm to Hartnett. Instead, the evidence showed that that defendant disregarded a substantial risk that his actions in flailing his limbs and resisting the search might have caused Hartnett an injury. Accordingly, we find that the evidence presented at trial supports a conviction of reckless conduct and not a conviction for aggravated battery because defendant lacked the required intent to cause bodily harm for an aggravated battery conviction. The issue of this court reducing the degree of offense under Illinois Supreme Court Rule 615(b)(3) was addressed by our supreme court in *People v. Kennebrew*, 2013 IL 113998, ¶ 21:

> "Supreme Court Rule 615(b)(3) provides that '[o]n appeal the reviewing court may * * * reduce the degree of the offense of which the appellant was convicted.' Ill. S. Ct. R. 615(b)(3). Under Rule 615(b)(3), '[a] reviewing court has the authority to reduce the degree of the offense of which a defendant was convicted when the evidence fails to prove beyond a reasonable doubt an element of the greater offense.' *People v. Rowell*, 229 Ill. 2d 82, 98 (2008). '[S]tate and federal appellate courts have long exercised the power to reverse a conviction while at the same time ordering the entry of a judgment on a lesser-included offense.' *People v. Knaff*, 196 Ill. 2d 460, 477–78 [(2001). Furthermore, '[t]he authority to order the entry of judgment on the lesser-included offense is both statutory and based

on the common law; the constitutionality of the practice has never been seriously questioned.' *Id.* at 478." *People v. Kennebrew*, 2013 IL 113998, ¶ 21.

¶ 23 A lesser included offense is one that is "established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged." 720 ILCS 5/2–9(a) (West 2010). There are three methods for determining whether an offense is a lesser-included offense of another: (1) the abstract elements approach; (2) the charging instrument approach; and (3) the "factual" or "evidence" adduced at trial approach. *People v. Kennebrew*, 2013 IL 113998, at ¶ 28. Where the appellate court convicts a defendant of an uncharged offense through the exercise of its authority under Rule 615(b)(3), the charging instrument approach applies. *Id.* at ¶ 53. There are two steps to the charging instrument approach. First, the court determines whether the offense is a lesser-included offense. Next, the court examines the evidence at trial to determine whether the evidence was sufficient to uphold a conviction on the lesser offense. *Id.* at ¶ 30; *People v. Lipscomb*, 2013 IL App (1st) 120530, ¶¶ 10-11.

¶ 24 Clearly, reckless conduct is a lesser included offense of aggravated battery. *People v. Perry*, 19 Ill. App. 3d 254, 257 (1974). As set forth above, the evidence in the record is sufficient to uphold a conviction on reckless conduct, 720 ILCS 5/12-5 (West 2012), when defendant struck Hartnett while swinging his limbs struggling to evade the search. See *People v. Willis*, 170 Ill. App. 3d 638, 639 (1988) (holding that the trial court's refusal to tender instruction to the jury for reckless conduct was erroneous when the victim's testimony that defendant had been "wild and flailing about" was sufficient to create an issue of fact as to whether defendant acted recklessly). Having found that the State failed to prove one of the requisite elements of aggravated battery of a police officer, we exercise our authority under Illinois Supreme Court

Rule 615(b)(3) and vacate the conviction, reduce the degree of the offense of conviction, and enter judgment against defendant on the lesser included offense of reckless conduct, a Class A misdemeanor. 720 ILCS 5/12-5 (West 2012).

¶ 25 The State cites to *People v. Phillips*, 392 Ill. App. 3d at 257, in support of its argument that the surrounding circumstances and the act itself demonstrated that defendant possessed the required intent to commit the battery. In *Phillips*, the defendant was convicted of aggravated battery of a police officer. *Id*. at 245. The defendant, a pre-trial detainee was angry because he did not receive an I-bond, refused to enter his cell and started swinging his arms around. *Id*. at 259. On appeal the defendant argued that the contact with the deputy was inadvertent. *Id*. We affirmed the defendant's conviction based on defendant's conduct prior to the act and based on the act itself because several officers testified consistently that they saw defendant punch the deputy with a closed fist. *Id*.

¶ 26 Unlike *Phillips*, where several eyewitnesses testified that they saw the defendant punch the deputy, here, Officer Hartnett, the only witness to the altercation, testified that he felt a strike on the left side of the jaw. Unlike *Phillips*, where there was substantial evidence that defendant intentionally and purposely struck the deputy, here, Officer Hartnett testified that he did not see the blow and that it could have been defendant's shoulder, elbow or head that struck him as they were struggling at the time. The evidence in the instant case does not support an intentional blow, but merely suggests that the contact to Officer Hartnett's jaw occurred recklessly while struggling to resist the officer's search. Therefore, the State's reliance on *Phillips* is misplaced.

¶ 27 In sum, we vacate defendant's conviction for aggravated battery, we enter a judgment for reckless conduct, and remand the case back to the trial court for resentencing. Because reckless conduct is a Class A misdemeanor, 720 ILCS 5/12-5 (West 2012), and because defendant was

17 years old when he committed the offense, the trial court is instructed to sentence defendant as a juvenile pursuant to the provisions of the Juvenile Court Act, 720 ILCS 5-12-5(b) (West 2012). We note that the Juvenile Court Act in effect in 2012 provided that, for misdemeanor offenses, a minor could be tried and sentenced as a juvenile for offenses committed prior to his 18th birthday. See 720 ILCS 5-12-5(b) (West 2012). Finally, although both defendant and the State agreed that the trial court erroneously imposed certain fees and fines, we instruct the trial court to reconsider the imposition of all the cost and fees in the light of defendant's new conviction.

¶ 28 CONCLUSION

¶ 29 For all the foregoing reasons, defendant's felony conviction for aggravated battery of a peace officer is vacated, and judgment of conviction is entered on the charge of reckless conduct (720 ILCS 5/12-5 (West 2012)).

¶ 30 Vacated in part; judgment modified.