2015 IL App (2d) 130621-U
No. 2-13-0621
Order filed March 4, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kendall County.
Plaintiff-Appellee,	)	
v.	)	Nos. 10-CM-756 10-TR-9773
ROBERT NESBITT,	)	Honorable Timothy J. McCann,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: We could not hold that the trial court erred in excluding evidence, as defendant did not make an offer of proof.

¶ 2 Following a jury trial, defendant, Robert Nesbitt, was convicted of driving with a suspended license (625 ILCS 5/6-303 (West 2010)) and resisting a peace officer (720 ILCS 5/31-1(a) (West 2010)). The trial court sentenced him to 24 months' court supervision and 24 months' probation. He appeals, contending that the trial court erred by excluding the content of a 911 call he made during the events leading to his arrest. We affirm.

¶ 3 Before trial, the State moved *in limine* to bar defendant from introducing a recording of a 911 call he made during the incident that ended with his arrest. The prosecutor argued that the evidence was not relevant and that defendant wanted to play the recording to elicit sympathy, given that his son could be heard in the background complaining about having been pepper-sprayed. The prosecutor represented that defendant could be heard on the tape saying that he was being arrested for no reason. Defense counsel argued that the recording was relevant to show that defendant lacked the *mens rea* for resisting. In other words, defendant did not understand that he was being arrested and thus he could not have knowingly resisted arrest. The trial court granted the motion, barring defendant from playing the recording.

¶ 4 At trial, Kendall County deputy John Cady testified that he was on patrol on July 19, 2010, when he saw defendant riding a motorcycle on Winrock Road. Cady ran a computer check and learned that defendant's driver's license was suspended.

¶ 5 About an hour later, Cady again saw defendant riding the motorcycle. Cady pulled up behind and attempted to make a traffic stop. Defendant pulled into his driveway and into a detached garage. Cady walked up the driveway to meet defendant. A man, a woman, a child, and two unchained pit bulls were in the back yard. Cady asked defendant to come to the front of the house to be away from the dogs, but defendant refused.

¶ 6 Cady told defendant that his license was suspended and that he would be arrested for driving with a suspended license. Defendant responded, "this is bullshit," took out his cell phone, and walked toward a rear door to the house. Cady followed him, told him that he was under arrest, and attempted to take him into custody by grabbing his arm as he walked through the doorway. Defendant continued to walk into the house, with Cady on his back and Cady's

feet off the floor. Cady again told defendant that he was under arrest and ordered him to stop resisting.

¶ 7 Cady was able to pull defendant back outside and place his right hand behind his back. As Cady reached for his handcuffs, defendant pulled his right arm away. Defendant ran around a patio table in the back yard so that Cady and defendant were facing each other across the table. Cady took out his pepper spray and showed it to defendant. He ordered defendant to stop resisting and get on the ground or he would be sprayed. Defendant then ran for the door of the house. Cady ran after him, grabbing his arm as he crossed the threshold. Defendant pulled away, and his shirt ripped. Cady then sprayed defendant in the face. Cady was affected by the spray and backed out of the house. Defendant returned to the house and locked the door.

¶ 8 Defendant testified that he had met Cady before. In April 2010, defendant heard a dog fight in his yard. He looked outside and saw a dog on a leash being attacked by an unchained pit bull. Defendant went outside and offered to help, then called 911. Cady responded.

¶ 9 About a week later, the owner of the unchained pit bull came to defendant's house and attempted to start a fight. Defendant called 911 and Cady again responded. According to defendant, Cady was disrespectful and "very cocky" toward him. Defendant asked Cady what he was doing wrong and the latter responded, "nothing at this time, but I'll get you."

¶ 10 On July 19, 2010, Cady came to defendant's back yard and said that he wanted to talk to him. Due to their prior conflicts, defendant said that he did not want to speak with him. Cady told defendant that he thought defendant's license might be suspended. Defendant told him to "come back when you know I'm suspended." Defendant did not believe that his license was suspended. He started toward the house to get the documentation that he thought would prove that his license was not suspended.

¶ 11 As defendant opened the door, Cady grabbed his arm and tried to pull him out of the house. Defendant was calling 911 because, due to the prior incidents with Cady, he wanted other officers to come to the scene "to be witness [*sic*] to anything that would happen." He was maced within five seconds after Cady grabbed his arm. Defendant's five-year-old son was hit with the pepper spray. When other deputies arrived, defendant left the house voluntarily and was arrested. Defendant testified that Cady never told him that he was under arrest. In rebuttal, Cady denied threatening defendant during their previous encounters.

¶ 12 The jury found defendant guilty of driving with a suspended license and resisting. The trial court sentenced him to 24 months' court supervision and 24 months' probation, respectively. Defendant timely appeals.

¶ 13 Defendant contends that the trial court erred by not allowing him to play the recording of his 911 call. He argues that it was relevant to show that he did not realize that Cady was arresting him and thus he could not knowingly have resisted arrest. See 720 ILCS 5/31-1(a) (West 2010) (person is guilty of resisting if he or she "knowingly resists or obstructs the performance by one known to the person to be a peace officer *** of any authorized act").

¶ 14 The State responds that defendant has forfeited this issue because he neither made an offer of proof in the trial court nor included the recording or a transcript thereof in the record on appeal. We agree with the State.

¶ 15 An adequate offer of proof is the key to preserving a trial court's error in excluding evidence. *People v. Thompkins*, 181 Ill. 2d 1, 10 (1998). "The two primary functions of an offer of proof are to disclose to the trial judge and opposing counsel the nature of the offered evidence, enabling them to take appropriate action, and to provide the reviewing court with a record to determine whether exclusion of the evidence was erroneous and harmful." *Id.*

¶ 16 We are unable to decide the merits of defendant's issue, as we do not know specifically how the excluded evidence would have supported his theory that he did not know that Cady was arresting him. We have only his vague assertion that something on the recording would have allowed the jury to conclude that defendant did not believe that he was being arrested. However, defendant has never pointed to any specific statement on the recording that would tend to prove this.

¶ 17 Defendant's testimony at trial does not appear to support his contention. He testified that, due to his prior conflicts with Cady, he called 911 in order to have other officers dispatched "to be witness [*sic*] to anything that would happen." Nothing in this testimony implies that defendant mentioned during the 911 call that he did not think that he was being arrested. Moreover, although defendant testified that Cady never *said* that he was arresting him, he never testified that he did not surmise from the circumstances that Cady was arresting him. We note that Cady testified without contradiction that he told defendant that his license was suspended, attempted to grab his arm at least twice, once while reaching for his handcuffs, and pepper-sprayed him. A reasonable person in defendant's position would have understood that Cady was trying to effect an arrest. We fail to see how the recording would prove otherwise.[1]

¶ 18 Defendant cites *Dillon v. Evanston Hospital*, 199 Ill. 2d 483 (2002), for the proposition that "an offer of proof is not required where it is apparent that the trial court clearly understood

[1] If, as the prosecutor asserted, defendant said that he was being arrested for no reason, the recording would prove that defendant did know Cady's intentions. That defendant believed that the arrest was "for no reason" would not be a defense to resisting. See 720 ILCS 5/7-7 (West 2010) ("A person is not authorized to use force to resist an arrest *** even if he believes that the arrest is unlawful ***").

the nature and character of the evidence sought to be introduced." *Id.* at 495. However, it is not clear from the record that the trial court did understand the nature of the evidence. The court merely granted the State's motion without elaboration. It is entirely possible that the court granted the motion precisely because the defense did not show why the evidence was relevant.

¶ 19 Moreover, *Dillon* is readily distinguishable. There, the objection was that the evidence was cumulative of that provided by another witness. Thus, having heard the previous witness testify, the trial court necessarily understood the nature of the evidence.

¶ 20 In any event, defendant's argument does not address the second reason an offer of proof is required: to allow this court to meaningfully review the trial court's decision. Without knowing what was said during defendant's conversation with the 911 operator, we cannot decide whether the trial court abused its discretion in excluding the evidence. Indeed, even if it had been presented to the trial court, neither the recording itself nor a transcript of it is in the record on appeal. It is the appellant's burden to present a sufficiently complete record of the proceedings below to support his or her claim of error and, in the absence of such a record, we presume that the trial court's decision was legally and factually correct. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Defendant's vague assertion that the recording would contain evidence favorable to him does not convince us that the trial court erred. See *People v. Bowman*, 2012 IL App (1st) 102010, ¶ 39 (reviewing court would not find error in exclusion of evidence about victim's reputation for violence, given that "the record [did] not indicate what evidence would have been presented").

¶ 21 On this record, defendant cannot point to any specific statement during the call that would have supported his defense that he did not understand that Cady was arresting him. Accordingly, the trial court did not abuse its discretion in excluding the evidence.

¶ 22 The judgment of the circuit court of Kendall County is affirmed.

¶ 23 Affirmed.