2015 IL App (4th) 130629-U

NO. 4-13-0629

FILED
April 17, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
RENEE K. MISLICH,	)	No. 11CM439
Defendant-Appellant.	)	
	)	Honorable
	)	Robert M. Travers,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Pope and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed defendant's convictions on the offenses of disorderly conduct and one count of reckless conduct, reversed her convictions on two counts of endangering the life or health of a child and one count of reckless conduct, and remanded for a new trial.

¶ 2 In November 2012, the trial court found defendant, Renee K. Mislich, guilty of disorderly conduct, two counts of endangering the life and health of a child, and two counts of reckless conduct. In May 2013, the court sentenced defendant to probation.

¶ 3 On appeal, defendant argues (1) defense counsel was ineffective, (2) her convictions must be reversed, and (3) her conviction for the lesser offense of reckless conduct should be vacated. We affirm in part, reverse in part, and remand for a new trial.

¶ 4 I. BACKGROUND

¶ 5 In October 2011, the State charged defendant with one count of disorderly

conduct (count I) (720 ILCS 5/26-1(a)(1) (West 2010)), alleging she followed Briana Grieff in close proximity while on a public highway, after which she confronted Grieff in such an unreasonable manner as to alarm and disturb Grieff and provoke a breach of the peace. In April 2012, the State charged defendant with one count of reckless driving (count II) (625 ILCS 5/11-503(a) (West 2010)), two counts of endangering the life or health of a child (counts III and IV) (720 ILCS 5/12-21.6(a) (West 2010)), and two counts of reckless conduct (counts V and VI) (720 ILCS 5/12-5(a) (West 2010)).

¶ 6 In count II, the State alleged defendant committed the offense of reckless driving by operating a motor vehicle, at a time during which she had minor children as passengers, in dangerously close proximity to another vehicle or vehicles. In count III, the State alleged defendant committed the offense of endangering the life or health of a child by willfully causing or permitting the health of A.M., under the age of 18 years, to be endangered, in that she operated a motor vehicle in dangerously close proximity to another vehicle at a time during which the minor was a passenger in her car. Count IV alleged defendant committed the offense of endangering the life or health of a child by willfully causing or permitting A.M.'s health to be endangered in that she operated her vehicle in dangerously close proximity to another vehicle while changing lanes while the minor was a passenger in her car.

¶ 7 In count V, the State alleged defendant committed the offense of reckless conduct in that she endangered the bodily safety of A.M., while acting in a reckless manner, by operating her vehicle dangerously close to another vehicle on the roadway at a time during which A.M. was a passenger. In count VI, the State alleged defendant committed the offense of reckless conduct in that she endangered the bodily safety of Grieff, while acting in a reckless manner, by operating her vehicle dangerously close to Grieff's vehicle.

¶ 8 Defendant pleaded not guilty to all of the charges. In September 2012, defendant's bench trial commenced. Brianna Grieff testified she is employed at Mislich Brothers, Inc. On October 14, 2011, she was at Elliott's Corner Junction restaurant with Jay Mislich and Mike Elliott. She left in the company BMW to pick up paperwork at S&R Auto, which she did. After getting back into the car and preparing to drive, she saw defendant and defendant's son in the rearview mirror. While driving on the street, Grieff noticed defendant following her "very closely," so close Grieff could not see defendant's license plate or headlights. Grieff stated she swerved into another lane to get away, but defendant "would bypass cars to cut them off to get behind me again." Grieff called her acquaintances at the restaurant and proceeded in that direction. She stated she looked in her rearview mirror and saw "a child jumping around without a seatbelt or anything on."

¶ 9 Once Grieff parked at the restaurant, defendant exited her vehicle and starting "pounding on the window" of Grieff's vehicle. After defendant stopped, Grieff saw her taking pictures with a camera. After Grieff saw Mike Elliott exiting the building, she felt safe enough to exit her vehicle. Thereafter, a yelling defendant walked toward her and swung a camera in her face.

¶ 10 Mike Elliott testified he saw the vehicles driven by Grieff and defendant from the window of the restaurant. He used his phone to take pictures of the vehicles. Elliott stated it appeared defendant was in pursuit of Grieff. Once defendant exited her vehicle, she appeared "very excited, angry, upset, [and] beside herself." Elliott observed defendant's vehicle and noticed "a couple of kids in it."

¶ 11 Pontiac police officer Markus Armstrong testified he responded to the restaurant but did not speak to any suspects at that time. Later that day, Armstrong spoke with defendant.

She wanted to report that she had a court order that only certain people were supposed to be driving a vehicle that belonged to her and Jay Mislich, and Mislich was supposed to have returned the vehicle to her. Defendant stated she saw a 20-year-old female driving the car and demanded that she be arrested. Armstrong responded by stating no criminal offense had taken place.

¶ 12 The State rested its case. Thereafter, defense counsel moved for a directed finding. The trial court dismissed count II for failure to state a cause of action but allowed the remaining counts to stand.

¶ 13 The defense began its case with the testimony of A.M., defendant's son. After the State questioned A.M.'s competency, the trial court asked defense counsel to question A.M. to determine if he was competent to testify. Thereafter, defense counsel elicited that A.M. was 11 years old and knew the difference between telling a lie and the truth. After the court found A.M. competent to testify, A.M. stated defendant picked him and a friend up after school and went to Dairy Queen. While in the drive-thru lane, A.M., seated in the front passenger seat and wearing his seatbelt, stated "we saw the BMW go by." Defendant proceeded to S&R. After seeing the BMW, defendant followed it to see who was inside. A.M. testified he never felt unsafe, and he and his friend kept their seatbelts fastened. The BMW eventually stopped at the restaurant and defendant stopped on the other side of the parking lot. A.M. stated defendant exited the vehicle and took a picture. Defendant returned to the car, and they went home.

¶ 14 Defendant testified she drove A.M. and his friend to Dairy Queen. While in the drive-thru lane, she saw the BMW. She eventually found the BMW at S&R and then began to follow it. She stated the boys were wearing their seatbelts the entire time. Defendant was able to pull up to the side of the BMW and saw that Grieff was driving. Eventually the cars stopped,

and defendant exited to take a picture of Grieff in the BMW. Once Grieff exited the BMW, defendant told her she was not authorized to drive it. Defendant returned to her car and left.

¶ 15 The defense rested, and the State called Officer Armstrong in rebuttal. Following closing arguments, the trial court found defendant guilty on counts I, III, IV, V, and VI.

¶ 16 In December 2012, defendant filed a posttrial motion, asking the trial court to vacate the guilty findings. In February 2013, the court denied the motion. In May 2013, the court conducted the sentencing hearing. The court merged count III into count IV. The court concluded counts V and VI constituted separate offenses and declined to merge them. The court entered judgment on counts I, IV, V, and VI, and sentenced defendant to one year of probation and ordered her to pay mandatory costs.

¶ 17 In June 2013, defendant filed a motion to reconsider and reduce her sentence. In July 2013, the trial court denied the motion. This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 A. Assistance of Counsel

¶ 20 Defendant argues defense counsel was ineffective for establishing an element of the offense of endangering the life and health of a child by eliciting the fact that defendant's son was 11 years old at the time of the offense, where that was the only evidence of his age and where counsel introduced this evidence after the State rested its case.

¶ 21 In its brief, the State argues defense counsel was not objectively unreasonable in asking A.M. his age because the State objected to his competency prior to his testimony. In her reply brief, defendant acknowledges A.M.'s age came out during the competency hearing and therefore withdraws the issue. Accordingly, we need not address it further.

¶ 22 B. Findings of Guilt

¶ 23 Defendant argues the findings of guilt entered by the trial court on two counts of endangering the life and health of a child (counts III and IV) and two counts of reckless conduct (counts V and VI) possess mutually inconsistent culpable mental states, requiring reversal of her convictions for all four of these offenses and remand for a new trial. We agree as to counts III, IV, and V, but not as to count VI.

¶ 24 Initially, we note the State argues defendant has forfeited review of this issue by failing to object at trial or raise it in a posttrial motion. As defendant concedes, defense counsel failed to raise this issue in the trial court. Thus, defendant has forfeited this issue on appeal. See *People v. Hestand*, 362 Ill. App. 3d 272, 279, 838 N.E.2d 318, 324 (2005) (a defendant must object at trial and raise the issue in a posttrial motion to preserve the issue for review).

¶ 25 Defendant, however, asks this court to consider the issue as a matter of plain error. The plain-error doctrine allows a court to disregard a defendant's forfeiture and consider unpreserved error when either:

> "(1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Wilmington*, 2013 IL 112938, ¶ 31, 983 N.E.2d 1015.

¶ 26 Under both prongs of the plain-error analysis, the burden of persuasion remains with the defendant. *Wilmington*, 2013 IL 112938, ¶ 43, 983 N.E.2d 1015. As the first step in the analysis, we must determine whether any error occurred at all. *People v. Taylor*, 2011 IL 110067, ¶ 30, 956 N.E.2d 431. "If error did occur, we then consider whether either prong of the

plain-error doctrine has been satisfied." *People v. Sykes*, 2012 IL App (4th) 111110, ¶ 31, 972 N.E.2d 1272.

¶ 27 In the case *sub judice*, the State alleged defendant committed two counts of endangering the life or health of a child in that she "willfully caused or permitted the health of A.M." to be endangered by operating a motor vehicle in dangerously close proximity to another vehicle (count III) and by operating a motor vehicle in dangerously close proximity to another vehicle while changing lanes (count IV).

¶ 28 In addition, the State alleged defendant committed two counts of reckless conduct in that she "endangered the bodily safety of a minor person, A.M., while acting in a reckless manner," by operating a vehicle dangerously close to another vehicle (count V) and endangered the bodily safety of Grieff, "while acting in a reckless manner," by operating a vehicle in dangerously close proximity to Grieff's vehicle (count VI).

¶ 29 Defendant argues the mental state of willfulness is inconsistent with the mental state of recklessness.

> " 'Legally inconsistent verdicts occur when an essential element of each crime must, by the very nature of the verdicts, have been found to exist and to not exist even though the offenses arise out of the same set of facts.' [Citation.] When offenses involve mutually inconsistent mental states, a determination that one mental state exists is legally inconsistent with a determination of the existence of the other mental state. [Citation.]" *People v. Price*, 221 Ill. 2d 182, 188, 850 N.E.2d 199, 202 (2006).

Whether a trial court's guilty findings are legally inconsistent presents a question of law that we

review *de novo*. *Price*, 221 Ill. 2d at 189, 850 N.E.2d at 202.

¶ 30 Section 4-8 of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/4-5 (West 2010)) defines "knowledge," in part, as follows:

> "A person knows, or acts knowingly or with knowledge of:
>
> (a) The nature or attendant circumstances of his or her conduct, described by the statute defining the offense, when he or she is consciously aware that his or her conduct is of that nature or that those circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that the fact exists.
>
> (b) The result of his or her conduct, described by the statute defining the offense, when he or she is consciously aware that that result is practically certain to be caused by his conduct.
>
> Conduct performed knowingly or with knowledge is performed willfully, within the meaning of a statute using the term 'willfully', unless the statute clearly requires another meaning."

¶ 31 In contrast, in defining recklessness, section 4-6 of the Criminal Code (720 ILCS 5/4-6 (West 2010)) states "[a] person is reckless or acts recklessly when that person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense, and that disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation."

¶ 32 In *People v. Fornear*, 176 Ill. 2d 523, 533, 680 N.E.2d 1383, 1388 (1997), the jury found the defendant guilty of both reckless conduct and aggravated discharge of a firearm. The supreme court held the jury's verdicts were inconsistent because the two counts required distinct mental states, *i.e.*, recklessness and knowledge. *Fornear*, 176 Ill. 2d at 534, 680 N.E.2d at 1388. The court noted "recklessness and knowledge are mutually inconsistent culpable mental states." *Fornear*, 176 Ill. 2d at 531, 680 N.E.2d at 1387; see also *People v. Lattimore*, 2011 IL App (1st) 093238, ¶ 43, 955 N.E.2d 1244.

¶ 33 Here, the four counts at issue against defendant allege her single act of driving that took place during the incident was performed both willfully and recklessly. Based on *Fornear*, we find the mental state of willfulness is inconsistent with the mental state of recklessness. Thus, defendant's convictions on counts III, IV, and V were legally inconsistent. Normally, convictions based on inconsistent findings would require reversal of all the convictions and remand for a new trial. *People v. Porter*, 168 Ill. 2d 201, 215, 659 N.E.2d 915, 922 (1995). However, as we shall shortly see, we find count VI need not be reversed.

¶ 34 In *People v. Bustamante*, 334 Ill. App. 3d 515, 516, 778 N.E.2d 344, 344 (2002), the defendant was indicted on one count of criminal damage to government-supported property and one count of reckless conduct, based on the act of throwing a beer bottle at a parked police car. The criminal-damage charge alleged the defendant "knowingly damaged" government property, the rear window of the squad car. *Bustamante*, 334 Ill. App. 3d at 521, 778 N.E.2d at 348. The reckless-conduct charge alleged the defendant endangered the bodily safety of the officer when, " 'while acting in a reckless manner, he threw a beer bottle at the squad car' " driven by the officer, shattered the rear window, and caused glass to fly and hit the officer. *Bustamante*, 334 Ill. App. 3d at 521, 778 N.E.2d at 349. The jury found the defendant guilty on

both counts. *Bustamante*, 334 Ill. App. 3d at 516, 778 N.E.2d at 344.

¶ 35 On appeal, the defendant argued the two verdicts were legally inconsistent and must be reversed. *Bustamante*, 334 Ill. App. 3d at 516, 778 N.E.2d at 344. The Second District found "the criminal damage offense requires a mental state of knowledge while the reckless conduct charge requires a mental state of recklessness, a less culpable mental state." *Bustamante*, 334 Ill. App. 3d at 521, 778 N.E.2d at 349. While citing *Fornear*'s pronouncement on mutually incompatible mental states, the appellate court found that case distinguishable. *Bustamante*, 334 Ill. App. 3d at 521, 778 N.E.2d at 349. The court stated as follows:

> "The record here shows that defendant was charged separately with two crimes, and the jury was instructed as to the mental state for each crime. Based on the evidence presented, the jury rationally could have concluded that defendant acted knowingly in damaging the government-supported property but acted recklessly in causing the consequential endangerment to the safety of the officer as evidenced by the shattered glass spraying the officer. The victims and the harms are clearly separable, and the State intended to charge and prove two separate crimes." *Bustamante*, 334 Ill. App. 3d at 521-22, 778 N.E.2d at 549.

The court concluded "the jury rationally could have found separate crimes supported by separate mental states and that the verdicts were legally consistent." *Bustamante*, 334 Ill. App. 3d at 522-23, 778 N.E.2d at 350.

¶ 36 In this case, counts III and IV (child endangerment) and count V (reckless conduct) involved A.M. Counts III and IV were inconsistent with count V, because defendant

could not have acted willfully as well as recklessly as to A.M. Count VI (reckless conduct), however, involved Grieff. Defendant was not charged with acting willfully as it pertained to Grieff, only recklessly. Thus, count VI can stand alone, as it is not inconsistent with the other counts, and need not be reversed. Accordingly, we reverse defendant's convictions on counts III, IV, and V, and remand for a new trial. Defendant's convictions on counts I and VI shall stand.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we affirm defendant's convictions on counts I and VI, reverse her convictions on counts III, IV, and V, and remand for a new trial. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 39 Affirmed in part, reversed in part, and remanded.