2018 IL App (3d) 150615-U

Order filed June 13, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 13th Judicial Circuit,
	)	La Salle County, Illinois.
Plaintiff-Appellee,	)	
	)	Appeal No. 3-15-0615
v.	)	Circuit No. 15-CM-247
	)	
ROBERT A. GROMM,	)	The Honorable
	)	Cynthia M. Raccuglia,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices O'Brien and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Because the State failed to disprove the defendant's affirmative defense of reasonable parental discipline to a domestic battery charge, the defendant's conviction was reversed. In addition, while the evidence supported a finding that the defendant committed two distinct acts of resisting and/or obstructing a peace officer, application of the plain-error doctrine to a question regarding the admission of certain evidence at trial required the reversal of the defendant's two convictions for resisting/obstructing a peace officer and a remand for a new trial on only those two charges.

¶ 2 The defendant, Robert A. Gromm, was convicted of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2014)) and two counts of resisting/obstructing a peace officer (720 ILCS 5/31-1(a) (West 2014)) and was sentenced to 300 days in jail after he slapped his fiancée's 12-year-old daughter in the face. On appeal, Gromm argues, *inter alia*, that: (1) the State failed to disprove his affirmative defense of reasonable discipline; (2) one of his convictions for resisting arrest should be vacated on one-act, one-crime grounds; and (3) he was denied a fair trial because the State elicited irrelevant and incendiary evidence regarding a statement posted to Facebook that was allegedly authored by Gromm. We reverse Gromm's domestic battery conviction outright, reverse his convictions for resisting/obstructing a peace officer, and remand for a new trial on the two resisting/obstructing a peace officer charges.

¶ 3 FACTS

¶ 4 On March 23, 2015, the State charged Gromm with one count of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2014)) and two counts of obstructing/resisting a peace officer (720 ILCS 5/31-1(a) (West 2014)). The first count alleged that Gromm, "knowingly and without legal justification, caused bodily harm to C.E.S., a family or household member of [Gromm], in that [he] struck C.E.S. on the face with an open handed [*sic*] slap." The second count alleged that Gromm obstructed Officer Aaron Buffo by refusing to place his hands behind his back when informed he was under arrest. The third count alleged that Gromm resisted Officers Buffo and Mark Manicki by repeatedly pulling his arms away from the officers as they were attempting to place him in handcuffs.

¶ 5 On June 22, 2015, the circuit court held a jury trial at which Gromm represented himself. In his opening statement, the prosecutor stated, *inter alia*, that the case was "about a defendant who has hatred for the police, who looks for opportunities to fight with the police."

¶ 6 C.T. testified that he had just finished eighth grade and that Gromm was his stepdad who lived with him. In the afternoon on March 20, 2015, C.E.S. had been watching television in the living room when Gromm came downstairs and slapped her. C.T. then called 911, even though he did not want Gromm arrested. When the police arrived, C.T. already had the door open, and the officers walked in.

¶ 7 C.E.S. testified that Gromm was her mother's boyfriend who lived with them. She was 12 when the incident occurred. She was watching television in the living room when Gromm came downstairs and told her to turn the volume down. She did, and then said that the television had been at the same volume all day. Gromm told her not to run her mouth. She could not recall what she said next, but Gromm then said that if she ran her mouth, he was going to slap her. She said, "do it." He then slapped her and went back upstairs.

¶ 8 One of the officers took a picture of the left side of C.E.S.'s face which, along with her ear, was red. Her face hurt for about 20 minutes after the slap. She said that the police gave her the option of leaving the house, but she told them that she felt safe. She then agreed that she knew Gromm was being taken from the house, which made her feel safe.

¶ 9 On cross-examination, C.E.S. said that the slap was open-handed, that Gromm did not have to be separated from her, that her eyes were red from the mace that was sprayed in the house by the police, and that she described the contact in her police statement as a light smack.

¶ 10 Manicki testified that he was one of four officers who initially responded to the house after the 911 call. Manicki stated that typically only two officers respond to a domestic call, but more officers responded because they had knowledge of a Facebook post authored by Gromm that was on their officer safety board. Gromm's post was in response to comments about two New York police officers that had been shot; Gromm allegedly posted that the only problem with

the situation was that more police officers had not been killed. Manicki stated that the information was posted on the officer safety board "so if you deal with him, that you know that he doesn't necessarily care for law enforcement."

¶ 11 Manicki stated that he went to the east side of the house while Buffo approached the front door. Buffo was speaking with a male juvenile when Denise Arbuckle, the children's mother, showed up and "stormed" toward the front door and Buffo's back. Manicki went to assist, and Buffo entered the residence. Manicki told Arbuckle to give Buffo some space; she swore at him and said she would go wherever she wanted to go. She then entered the residence right behind Buffo, and Manicki followed. Manicki further stated that the house was not well lit.

¶ 12 Buffo began speaking with Gromm, who said that he was not going to speak to them. Manicki then went to speak to C.E.S., who was sitting in the poorly lit living room and who told him that Gromm hit her. Manicki observed redness on the side of C.E.S.'s face.

¶ 13 Buffo then told Gromm he was under arrest, but Gromm would not comply with the request to put his hands behind his back. Buffo grabbed Gromm's left arm and Manicki grabbed his right arm. Gromm continued to flex his arms to prevent them from being placed behind his back, and he refused to comply with several requests from both officers to cease resisting. Manicki testified that he then felt Gromm make "an explosive move" and drop to one knee. Buffo then used pepper spray on Gromm, which allowed the officers to get him down on both knees and then his stomach. However, he continued to clasp his hands to prevent them from being placed behind his back. Buffo hit Gromm in the wrist area several times, which had no effect. Another officer came to help and warned Gromm that he would be tasered if he did not comply. Gromm continued to resist, so he was tasered, which allowed him to be handcuffed.

¶ 14 Buffo testified that when he arrived, he spoke with C.T., who had placed the 911 call. C.T. told the officers that his stepdad had just slapped his sister in the face. C.T. opened the door to the screened-in porch and identified Gromm and C.E.S. through the front door, which was already open. C.E.S. was sitting on the couch and Gromm was standing next to the couch about five or six feet away, and they were arguing. Buffo and Manicki entered the house and Buffo separated Gromm and C.E.S. so they could be spoken to separately. Then, Arbuckle entered the house and yelled at the officers, using profanities, to get out of the house because they did not have a warrant. Manicki turned to confront Arbuckle. Gromm began walking away from Buffo, who told him to stop. Gromm yelled at Buffo and told him he could not tell Gromm what to do in his own house.

¶ 15 Gromm sat on a bench in a small room between the kitchen and living room and told Buffo he was not going to talk to them. When Officer Buffo informed Gromm he was under arrest, he grabbed Gromm's left arm and told him to place his arms behind his back. Gromm "immediately tensed up and kept his arms flexed and tried to pull away from [Officer Buffo's] grasp." Officer Manicki then grabbed Gromm's right arm. Regarding the remaining circumstances surrounding the arrest, Buffo's testimony largely corroborated Manicki's testimony.

¶ 16 Arbuckle testified that the officers were going into the house when she arrived. She stated the officers acted in a bullying fashion toward Gromm. Officer Buffo told Gromm several times that he would be arrested if he did not speak to them.

¶ 17 Arbuckle also testified that she had given Gromm permission to discipline the children, including corporal punishment. Gromm had known the children for their entire lives. Arbuckle also stated that Gromm was her fiancé and that they planned to get married.

¶ 18 In his closing argument, the prosecutor stated, "while [Arbuckle] thinks she can sign away, it's okay, go ahead and spank my kids, you know different. It's not in the law. She can't." The prosecutor also stated that the case was "about a guy who doesn't like the police" and that the "hatred" that Gromm had for police had impacted C.T., which was evident when C.T. called the police pigs once Arbuckle entered the house.

¶ 19 In his closing argument, Gromm stated, *inter alia*, that his slap of C.E.S. was corporal punishment. In rebuttal, the prosecutor again stated that Gromm was not allowed to corporally punish C.E.S. because she was not his daughter.

¶ 20 After deliberations, the jury returned guilty verdicts on all counts. On July 29, 2015, the circuit court entered judgments of conviction on all three counts and sentenced Gromm to 300 days in jail. Gromm appealed.

¶ 21 ANALYSIS

¶ 22 Gromm's first argument on appeal is that the State failed to disprove his affirmative defense of reasonable discipline.

¶ 23 Section 12-3.2(a)(1) of the Criminal Code of 2012 provides that "[a] person commits domestic battery if he or she knowingly without legal justification by any means *** [c]auses bodily harm to any family or household member." 720 ILCS 5/12-3.2(a)(1) (West 2016).

¶ 24 "A parent's 'right' to corporally punish his or her children is derived from the right to privacy, which is viewed as implicit in the United States Constitution. This right to privacy encompasses the right to care for, control, and discipline one's own children. 'Discipline' has been interpreted by the courts to extend to *reasonable* corporal punishment. A parent who utilizes corporal punishment exceeding the boundaries of reasonableness may, depending on the circumstances, be subject to prosecution for [various crimes including domestic battery]."

(Emphasis in original.) *In re F.W.*, 261 Ill. App. 3d 894, 898 (1994). Thus, the right to corporally punish one's children must be balanced against the State's interest in protecting children from mistreatment. *People v. Green*, 2011 IL App (2d) 091123, ¶ 14.

¶ 25 The right to corporally punish one's children is not a statutory affirmative defense; however, this common law defense serves as a legal justification for what may otherwise be a criminal act. *Id.* ¶ 16. Accordingly, it is the State's burden to disprove this defense beyond a reasonable doubt—*i.e.*, that the accused's conduct exceeded reasonableness standards. *Id.* Reasonable doubt challenges are reviewed according to the standard our supreme court promulgated in *People v. Collins*, 106 Ill. 2d 237, 261 (1985): we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the essential elements proven beyond a reasonable doubt. *Id.* In doing so, we are prohibited from retrying the defendant or substituting our judgment for that of the fact-finder. *Id.*

¶ 26 Initially, we note that Gromm correctly asserts that the defense of reasonable parental discipline was available to him in this case. Our supreme court has recently stated:

> "the doctrine of *in loco parentis* focuses on whether the nonparent intentionally assumes parental status. A person who stands *in loco parentis* to a child has put himself or herself in the place of a legal parent by fully assuming all obligations incident to a parent-child relationship without going through the necessary formalities of a legal adoption. The rights, duties, and liabilities of such a person are the same as those of the legal parent." *In re Scarlett Z.-D.*, 2015 IL 117904, ¶ 40.

Indeed, it has been the law of Illinois since at least 1890 that *reasonable* corporal punishment may be administered to a child by a parent or by a person standing *in loco parentis*. *Wegener v. People*, 36 Ill. App. 164, 165 (1890); see also *People v. Koch*, 64 Ill. App. 3d 537, 546 (1978) (holding that "Illinois has long recognized the right of a parent to use reasonable force when disciplining a child"); *People v. Green*, 2011 IL App (2d) 091123, ¶ 16 (holding that when an individual has been charged with domestic battery and "a claim of parental right has been asserted, the State must also prove beyond a reasonable doubt that the discipline used exceeded the standards of reasonableness").

¶ 27 Here, the evidence clearly established that, because he was a functioning member of the household and had assumed responsibility for the children, including for guiding their conduct, Gromm stood *in loco parentis* to C.E.S. The State does not contest this fact. Rather, the State essentially claims that because the jury found Gromm guilty, the jurors had decided that the discipline was unreasonable and that they, as rational triers of fact, had found his defense disproven beyond a reasonable doubt. This argument by the State is unpersuasive for two reasons. First, twice in closing argument, the prosecutor specifically told the jury, contrary to Illinois law, that the reasonable parental discipline defense was not available to Gromm because he was not the parent of C.E.S. Second, this misstatement of the law was exacerbated because the jurors were not instructed[1] that the State had the burden of proving the discipline meted out by Gromm, standing *in locos parentis*, exceeded reasonableness standards.

¶ 28 This court has recently stated:

[1] Gromm, who defended *pro se*, did not tender such an instruction, apparently in reliance on the assurance of the trial judge that, because it was the responsibility of the court to properly instruct the jury, he would be given assistance in selecting appropriate instructions not tendered by the prosecution.

> "In considering whether an act of corporal punishment was reasonable, it is appropriate for the court to consider (1) the degree of physical injury inflicted upon the child, (2) the likelihood of future punishment that may be more injurious, (3) the fact that any injury resulted from the discipline, (4) the psychological effects on the child, and (5) the circumstances surrounding the discipline, including whether the parent was calmly attempting to discipline the child or whether the parent was lashing out in anger." *People v. Parrott*, 2017 IL App (3d) 150545, ¶ 25.

¶ 29 In this case, the evidence indicated that Gromm was engaged to Arbuckle, lived with her and her children, had known those children all their lives, and had permission to discipline the children. On the day of the incident, Gromm came downstairs, entered the living room, and told 12-year-old C.E.S. to turn down the volume on the television. She did, and then told him that the volume had been at the same level all day. Gromm told her not to run her mouth. She said something else she could not recall, and Gromm again told her not to run her mouth or she would get slapped. She responded, "do it." Gromm then slapped her with an open hand on the left side of her face and went back upstairs. The left side of C.E.S.'s face was red, and she stated that her face hurt for about 20 minutes. There was no evidence to indicate that this was a situation in which Gromm was merely lashing out in anger or was doing anything but calmly attempting to discipline C.E.S.

¶ 30 Further, there was no evidence to suggest that C.E.S would be subjected to future punishment that would be more injurious, and any evidence that C.E.S. suffered negative psychological effects was ambiguous at best. She testified that she was given the option to leave

the house, but she felt safe. She later stated that she knew that Gromm was being removed from the house, which made her feel safe.

¶ 31 While a slap in the face may be considered by some parents to be demeaning, the law is well settled in Illinois that parents can corporally discipline their children as long as that discipline does not exceed standards of reasonableness. *Id.* Under the appropriate legal standard and viewing the evidence in the light most favorable to the State, we cannot say that any rational trier of fact could have found that Gromm's conduct exceeded the standards of reasonable parental discipline. See *id.* Accordingly, we reverse Gromm's conviction for domestic battery.

¶ 32 Gromm's second argument on appeal is that this court should vacate one of his resisting/obstructing convictions based on one act, one crime grounds.

¶ 33 Section 31-1(a) of the Criminal Code of 2012 (720 ILCS 5/31-1(a) (West 2014)) provides that "[a] person who knowingly resists or obstructs the performance by one known to the person to be a peace officer *** of any authorized act within his or her official capacity commits a Class A misdemeanor." *Id.* "When a defendant resists numerous police officers who are attempting to arrest him, the defendant can receive multiple convictions commensurate to the number of officers he resisted." *People v. Wicks*, 355 Ill. App. 3d 760, 765 (2005).

¶ 34 Under the one-act, one-crime doctrine, a defendant may be convicted and sentenced only on the most serious offense when multiple charges stem from the same act. *People v. King*, 66 Ill. 2d 551, 566 (1977). An act "is intended to mean any overt or outward manifestation which will support a different offense." *Id.* The following factors may be relevant when determining whether more than one act occurred:

> "(1) whether the defendant's actions were interposed by an intervening event; (2) the time interval between the successive

> parts of the defendant's conduct; (3) the identity of the victim; (4) the similarity of the acts performed; (5) whether the conduct occurred in the same location; and (6) the prosecutorial intent, as shown by the wording of the charging instruments." *People v. Sienkiewicz*, 208 Ill. 2d 1, 7 (2003).

¶ 35 Our review of the record reveals that the evidence supported the two convictions for resisting/obstructing a peace officer. When Officer Buffo informed Gromm he was under arrest, he grabbed Gromm's left arm and told him to place his arms behind his back. Gromm did not comply and in fact tried to pull away from Officer Buffo's grasp. Then, Officer Manicki grabbed Gromm's right arm, and a struggle ensued. While the time between Gromm resisting Officer Buffo's initial arrest attempt and then resisting both Officers Buffo and Manicki was minimal, there were two clear acts of resisting/obstructing a peace officer. See *King*, 66 Ill. 2d at 566. Accordingly, we reject Gromm's request to vacate one of his two resisting arrest convictions.

¶ 36 Gromm's third argument on appeal is that he was denied a fair trial because the State elicited irrelevant and incendiary evidence that he had posted on Facebook that the only problem with the shooting of police officers in New York was that more officers were not killed. Gromm acknowledges that he has forfeited this issue for appellate review, but he requests that this court reach the issue via the plain-error doctrine.

¶ 37 The plain-error doctrine bypasses the procedural forfeiture of an issue if error in fact occurred and either (1) the evidence was closely balanced; or (2) the error was so serious that it affected the fairness of the defendant's trial and threatened the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Gromm seeks second-prong review.

¶ 38 Our supreme court's decisions have "equated second-prong plain error with structural error." *People v. Clark*, 2016 IL 118845, ¶ 46. A structural error is a "systematic error which serves to 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.' " *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009) (quoting *People v. Herron*, 215 Ill. 2d 167, 186 (2005)). While six categories of second-prong plain error have been identified by the United States Supreme Court—a complete denial of counsel, a biased trial judge, racial discrimination in the selection of a grand jury, the denial of the right to represent oneself at trial, the denial of a public trial, and a defective reasonable doubt instruction (*Washington v. Recuenco*, 548 U.S. 212, 218 n.2 (2006))—our supreme court has not restricted the second prong to these six types of structural error (*Clark*, 2016 IL 118845, ¶ 46).

¶ 39 The first step in the plain-error analysis is to determine whether error in fact occurred. *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010).

¶ 40 Generally, evidence that is relevant is admissible. Ill. R. Evid. 402 (eff. Jan. 1, 2011). " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan. 1, 2011). However, even if evidence is relevant, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice***." Ill. R. Evid. 403 (eff. Jan. 1, 2011). The admissibility of evidence is a matter within the circuit court's discretion, and we will not disturb the court's admissibility rulings absent an abuse of that discretion. *People v. Morgan*, 197 Ill. 2d 404, 455 (2001).

¶ 41 Gromm initially challenges the relevancy of the Facebook evidence here, but as he quite rightly points out, an analysis of its relevance is unnecessary. Even if it were relevant, the Facebook evidence's prejudicial effect vastly outweighed its probative value. The determination

of whether Gromm resisted and/or obstructed the La Salle police officers was not aided in any way by the Facebook evidence. That evidence did not even show any type of proclivity Gromm may have had to resist and/or obstruct police officers from performing their duties. Its sole purpose was to prejudice the jury against him. While a circuit court has no duty to *sua sponte* reject evidence when no objection to it has been raised (*People v. Driver*, 62 Ill. App. 3d 847, 852 (1978)), we hold that the court should have rejected the Facebook evidence. Thus, we hold that error in fact occurred.

¶ 42 Under the second prong of the plain-error analysis, the error must have been so serious that it compromised the fairness of Gromm's trial and threatened the integrity of the judicial process. *Clark*, 2016 IL 118845, ¶ 42. We believe this standard has been met. The aforementioned Facebook evidence served no other purpose than to prejudice the jury against Gromm regarding his two resisting/obstructing charges. Under these circumstances, we hold that the admission of the Facebook evidence at Gromm's trial was an error of such magnitude that it compromised the fairness of his trial and threatened the integrity of the judicial process. See *id.* Accordingly, we reverse Gromm's two resisting/obstructing convictions and remand for a new trial on only those two charges.

¶ 43 Our aforementioned rulings obviate the need to address Gromm's remaining arguments.

¶ 44 CONCLUSION

¶ 45 The judgments of the circuit court of La Salle County are reversed and the cause is remanded for a new trial on Gromm's two resisting/obstructing a peace officer charges.

¶ 46 Reversed and remanded.