2020 IL App (4th) 170839-U

NO. 4-17-0839

FILED
April 28, 2020
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
JOSHUA SPECK,	)	No. 17CF625
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas E. Griffith Jr.,
	)	Judge Presiding.

PRESIDING JUSTICE STEIGMANN delivered the judgment of the court.
Justices Knecht and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court reduced defendant's conviction for aggravated battery of a disabled person to simple battery.

¶ 2 In September 2017, following a bench trial, the trial court found defendant, Joshua Speck, guilty of aggravated battery (a battery committed upon a person who has a physical disability) based upon defendant's beating of Cody Alexander, who the court found had a physical disability. 720 ILCS 5/12-3.05(d)(2) (West 2016). In November 2017, the court sentenced defendant to three years in prison.

¶ 3 Defendant appeals, arguing the State failed to prove beyond a reasonable doubt that (1) Alexander in fact had a physical disability and (2) defendant had knowledge of the disability. The State responds that the evidence was sufficient, but even assuming it was not, this court should exercise its discretion and reduce defendant's conviction to simple battery. See Ill.

S. Ct. R. 615(b)(3) (eff. Jan. 1, 1967). We agree with (1) defendant's second argument and (2) the State's suggestion as to how we should proceed under these circumstances. Accordingly, we reduce defendant's conviction to simple battery.

¶ 4 I. BACKGROUND

¶ 5 A. The Charges

¶ 6 In May 2017, the State charged defendant with three counts of aggravated battery. Count I alleged that "defendant, in committing a battery, *** knowingly, and without legal justification, struck Cody Alexander, a person with a physical disability, causing bodily harm." See 720 ILCS 5/12-3.05(d)(2) (West 2016). Count II alleged defendant caused great bodily harm for hitting Alexander, causing him to fall and break his arm. *Id.* § 12-3.05(a)(1). Count III alleged defendant caused great bodily harm by knocking out one of Alexander's teeth. *Id.*

¶ 7 B. The Bench Trial

¶ 8 1. *The State's Case*

¶ 9 In September 2017, the trial court conducted a bench trial. The State began by calling Alexander and asking him about his physical disability, as follows:

> "Q. Okay. Cody, do you regularly wear leg braces?
>
> A. On and off. I wear them when I go out and stuff.
>
> Q. Okay.
>
> A. Not so much at home.
>
> Q. Okay. But when you were out, do you usually wear them?
>
> A. Yes.
>
> Q. And why do you need those leg braces?
>
> A. They just help make me feel more secure, more stability.

Q. Okay. And do you have a condition that makes your stability an issue?

A. Yes.

Q. And what is that?

A. Osteogenesis imperfecta.

Q. Okay. And you said that that causes issues with your stability. So it kind of causes you problems with walking, is that fair?

A. It affects the whole body; but for the majority of my life, it's been mainly my legs.

Q. Okay. And is it noticeable when you walk?

A. Yes."

¶ 10 In opening statements, the State described osteogenesis imperfecta as "brittle bone disease." Alexander testified that his girlfriend, Heather Roe, lived next door to defendant. On April 29, 2017, Alexander and Roe went to defendant's residence to hang out with defendant and defendant's father, Vincent Sparks. Alexander stated that everyone was drinking alcohol and listening to music. In the evening, Alexander and Roe went back to Roe's house, where she told Alexander that defendant had "tried to kiss her and touch on her [*sic*] and stuff."

¶ 11 Alexander testified that he returned to defendant's house to confront him about what happened. During the ensuing argument, defendant punched Alexander in the face, knocking him to the ground. Defendant continued to punch Alexander in the head, between 10 and 15 times. Alexander stated he went to the hospital for his injuries, which included a broken arm, a missing tooth, and fractures on his face. The State offered photos of Alexander taken by the police on the night of the incident depicting the injuries, which the trial court admitted.

¶ 12 On cross-examination, Alexander acknowledged that everybody was drinking and

he was intoxicated. Alexander stated defendant made sexual comments about Roe to him, but he acknowledged he did not remember ever telling anyone else about these comments. Alexander agreed that after he went home with Roe, he decided to return to defendant's residence to confront him. Alexander explained that he "didn't have any intentions *per se* of doing anything physical; but, yes, I went over there to confront him about it." Alexander acknowledged that he was angry and that it was possible he could have "physically confronted" defendant. Alexander testified that he went back to defendant's house just five minutes after he got to Roe's house.

¶ 13 On redirect, Alexander stated defendant hit him several times while he was on the ground, but "I pretty much got right back up after it stopped. I would say it wasn't very long." Alexander reported that he "kept saying, all right, all right, you know, that's enough. And, basically, after a moment [defendant] stopped."

¶ 14 Eric Havens, an officer with the Decatur Police Department, testified that he was dispatched to defendant's address "in reference to" a fight. Havens stated he met with Roe first, who said that a fight was occurring in the trailer next door. Havens heard a lot of "noise and yelling coming from *** next door." He went over there where he encountered Alexander, who had lumps on his face, was missing teeth, and his arm "clearly was bent in a direction that would lead me to believe that it was broken." Havens photographed Alexander's injuries.

¶ 15 Havens testified that he went to defendant's residence and spoke with defendant while his father, Sparks, was in the room. Defendant relayed that Alexander "had come over yelling at him and had struck him first in the face." Havens noted that the only injuries defendant appeared to have were bloody knuckles and there were blood droplets all over the living room, which he photographed.

¶ 16 On cross-examination, Havens testified that Alexander told him "he went over to

ask the defendant if he had made sexual comments toward the girlfriend," and Alexander denied ever hitting defendant. Havens reported that only defendant said Alexander had hit him; Sparks did not tell Havens that despite Havens' asking him directly if Alexander hit defendant first.

¶ 17 The trial court asked Havens about how intoxicated everyone was. Havens stated that "[t]hey were clearly intoxicated; but *** they were all speaking just fine. No stumbling. We didn't have to help anyone walking."

¶ 18 The State rested, and defendant moved for a directed verdict on the grounds that Alexander was the aggressor and defendant acted in self-defense. Defendant did not argue that the State failed to produce evidence that defendant knew Alexander was disabled. The trial court denied the motion, concluding that there was sufficient evidence to make a *prima facie* showing that defendant's degree of force was not reasonable.

¶ 19 2. *Defendant's Case*

¶ 20 Defendant called Roe, who testified that she was defendant's neighbor and Alexander's girlfriend. Roe stated that on April 29, 2017, she and Alexander went over to defendant's house to drink and party "because [defendant] had just gotten out of prison so they had a big party for him or whatever." Roe and Alexander were at the party "[f]or a few hours" and went home at the end of the night when everyone went to bed.

¶ 21 Roe said they were home for "[n]ot even ten minutes" when Alexander left. Roe explained, "He had intentions of going over there and starting the fight with [defendant]. He left with his braces on to go over there and like—I wasn't there, but I just know that he went over there with those intentions." Roe added, "It was not [defendant's] fault." Roe stated she pleaded with Alexander not to go but "[h]e was on a rampage" and "was just not hearing any sense [*sic*] of anything."

¶ 22 Sparks testified that he was defendant's father and was actually the owner of the home where the incident took place. Sparks stated he had people over on April 29, 2017, including Alexander and Roe, who were there from around noon to 10 p.m. Sparks said that everyone had been drinking some beer throughout the day and was "a little tipsy." Alexander returned about 10 or 15 minutes after he left and started yelling at defendant. Sparks described that "[t]he next thing I know [Alexander] gets a crazy look on his face and swings at my son and charges him, and they both go down to the floor." They wrestled on the floor for seven or eight seconds before Alexander said, "I am done," and Sparks helped Alexander off of defendant. Alexander hurt his arm and had a bloody mouth. Sparks gave Alexander a cloth for the blood, and Alexander walked off on his own. A couple of minutes later, the police arrived.

¶ 23 On cross-examination, Sparks denied ever telling the police that Alexander fell and hurt himself or that Sparks had to pull defendant off of Alexander. Defendant rested, and the State recalled Havens in rebuttal to impeach Sparks. Havens testified that Sparks did, in fact, make those statements.

¶ 24 3. *Closing Arguments*

¶ 25 The State argued that Alexander was disabled and defendant knew that: "he had osteogenesis imperfecta, uh, which should have been obvious to the defendant at the time. It affects his gait. You could see it when he was walking into court here today." The State further argued that Alexander was more believable and defendant punched him first. Even if defendant did not, defendant continued to hit Alexander when he was on the ground, so his use of force was unreasonable and not self-defense.

¶ 26 Defendant argued that the testimony demonstrated that (1) Alexander intended to start a fight, (2) Alexander stated he may have hit defendant first, (3) defendant told police

Alexander charged him and hit him first, and (4) defendants actions in self-defense were reasonable.

¶ 27 4. *The Trial Court's Findings*

¶ 28 The trial court began by noting that defendant had raised the issue of self-defense. The court believed "it clearly was initially at least a mutual fight." The court recognized that Alexander went home, got upset, and decided to return to confront defendant, and "[t]he court believes that the victim may have even threw the initial punch." However, the court explained that "the defendant knew the victim was disabled. Apparently, [he] wears leg braces most of the time[,]" and defendant continued to hit Alexander on the ground and the evidence showed Alexanders injuries were substantial. The court concluded by finding "that the defendant's use of force was not proportional to what he was facing in this particular instance."

¶ 29 Accordingly, the trial court found defendant guilty of aggravated battery of a disabled person. The court found defendant not guilty on the remaining counts of aggravated battery because the State did not present any medical evidence that Alexander suffered broken bones, and missing teeth did not amount to great bodily harm.

¶ 30 C. Posttrial Proceedings

¶ 31 1. *The* Krankel *Hearing*

¶ 32 In October 2017, defendant *pro se* filed a motion for a new trial, alleging he received ineffective assistance of counsel because defense counsel did not argue that defendant lacked knowledge of Alexander's disability. Later in October, the trial court conducted a hearing pursuant to *People v. Krankel*, 102 Ill. 2d. 181, 464 N.E.2d 1045, on defendant's *pro se* claims of ineffectiveness. We note that defendant does not raise any *Krankel* issues on appeal, and we include only information relevant to the issues in this case.

¶ 33 Defendant argued that he was unaware of Alexander's disability, had met him only on the day of the incident, and spent only a couple of hours with him. Despite telling his attorney this, defense counsel did not argue at trial that defendant lacked knowledge. Defense counsel conceded that he did not make the argument, "but there's no question that I probably should have argued that fact because I think that's true." The trial court commented as follows:

> "It was clear from looking at the victim that he was disabled to some extent. So the Court was very well aware of the fact. *** I guess it was something the Court assumed that you knew at that time, [defendant], because apparently you'd spent the day around the victim, live next door to the victim, and I assumed you could—were able to tell about the victim's disability by simply being able to look at the victim in this particular case. ***
>
> * * *
>
> *** It was very obvious to the Court that [Alexander] had a disability. *** Alexander testified that he had a disability. [Defendant], you certainly should have known that Mr. Alexander had a disability."

¶ 34 The trial court declined to appoint new counsel and continued the matter for sentencing.

¶ 35 2. *The Sentencing Hearing*

¶ 36 In November 2017, defendant, through counsel, filed a motion to reconsider, asserting that the State failed to prove that defendant knew Alexander had a disability. Later that month, the trial court conducted a sentencing hearing. The court began by denying defendant's motion, again explaining that "it was the victim's testimony that he was disabled, that he knew the defendant, the defendant knew he was disabled." Defendant then presented evidence in

mitigation, and the parties made arguments and recommendations. The court sentenced defendant to three years in prison followed by a one-year term of mandatory supervised release.

¶ 37 This appeal followed.

¶ 38 II. ANALYSIS

¶ 39 Defendant appeals, arguing the State failed to prove beyond a reasonable doubt that (1) Alexander in fact had a physical disability and (2) defendant had knowledge of the disability. The State responds that the evidence was sufficient, but even assuming it was not, this court should exercise its discretion and reduce defendant's conviction to simple battery. See Ill. S. Ct. R. 615(b)(3) (eff. Jan. 1, 1967). We agree with (1) defendant's second argument and (2) the State's suggestion as to how we should proceed under these circumstances. Accordingly, we reduce defendant's conviction to simple battery.

¶ 40 A. Sufficiency of the Evidence

¶ 41 Defendant argues the evidence against him was insufficient on two separate grounds. First, defendant claims the State failed to prove beyond a reasonable doubt that Alexander had a physical disability under the statute. Second, defendant contends that even if Alexander was disabled, the State failed to prove defendant had knowledge of the disability. We agree with defendant's second argument and therefore do not reach the first.

¶ 42 1. *The Applicable Law*

¶ 43 "When considering a challenge to the sufficiency of the evidence, a reviewing court must determine whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the required elements beyond a reasonable doubt." *People v. Newton*, 2018 IL 122958, ¶ 24, 120 N.E.3d 948. This court does not retry the defendant, and we draw all reasonable inferences from the evidence in favor of the prosecution. *Id.* A trial

court's judgment will be reversed only if "the evidence is so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *Id.*

¶ 44 Section 12-3.05(d) of the Criminal Code of 2012 provides that "[a] person commits aggravated battery when, in committing a battery, *** he or she knows the individual battered to be *** [a] person who *** has a physical disability." 720 ILCS 5/12-3.05(d)(2) (West 2016). The plain language of the statute requires the defendant to know at the time of the battery that the person is physically disabled. See *People v. Jasoni*, 2012 IL App (2d) 110217, ¶ 16, 974 N.E.2d 902 (interpreting the portion of the aggravated battery statute that applies to victims over the age of 60). "Person with a physical disability" is defined as "a person who suffers from a permanent and disabling physical characteristic resulting from disease, injury, functional disorder, or congenital condition." 720 ILCS 5/12-0.1 (West 2016).

¶ 45 " '[K]nowledge may be, and ordinarily is, proven circumstantially.' " *People v. Matthews*, 2017 IL App (4th) 150911, ¶ 28, 93 N.E.3d 597 (quoting *People v. Ortiz*, 196 Ill. 2d 236, 260, 752 N.E.2d 410, 425 (2001)). "To prove knowledge by circumstantial evidence, the State must present sufficient facts from which an inference of knowledge can be made." *People v. Slabon*, 2018 IL App (1st) 150149, ¶ 35, 112 N.E.3d 1019. Defendant's knowledge "may be established by evidence of the acts, statements, or conduct of the defendant, as well as the surrounding circumstances." *People v. Smith*, 2015 IL App (4th) 131020, ¶ 44, 44 N.E.3d 1202. "The evidence must sufficiently support an inference of knowledge based on established facts rather than pyramided on intervening inferences." *Id.*

¶ 46 2. *This Case*

¶ 47 The State argues it presented sufficient evidence at trial to prove defendant knew Alexander was disabled. The State notes that (1) defendant and Alexander spent a significant

portion of the day together, (2) Roe testified that Alexander was wearing his braces when he went to confront defendant, and (3) the trial court stated at a posttrial hearing, "It was clear from looking at the victim that he was disabled." Accordingly, the State contends the trial court could have easily inferred defendant was aware of Alexander's disability. We disagree.

¶ 48 To begin, the record does not contain any description or evidence of (1) what Alexander's braces looked like or (2) whether they could be seen at all times. Roe stated Alexander had his braces on when he returned to defendant's home, but it is unclear if Alexander had been wearing them all day. Even assuming he had, the State never asked Alexander or any other witness to describe them. It is entirely unclear how large the braces were, whether they could be (or, in fact, were) worn underneath clothing, what color they were, how noticeable they were, and whether they appeared to be something similar to an athletic brace (suggesting temporary injury) or were far more substantial (suggesting a permanent disability). For all we know, defendant may never have seen the braces at all because Alexander could wear them under his pants.

¶ 49 Second, although the trial court stated at a later hearing that it could tell based on the way Alexander walked that he had a disability, the State never laid any foundation for the court's clear inference that Alexander walked in court the same way that he walked on the night of the accident. The State could have and should have cleared this up with a single question: "Do you walk today in the same manner as you did on the day of the battery?" We note that the record contains no description of the way Alexander walked. For all we know it could have looked like he had a small but noticeable limp. Without this critical piece of information, the court's finding becomes a pyramid of inferences, namely, that Alexander walked in exactly the same manner in court as he did on the day of the battery, and defendant observed Alexander

walking and could tell it was from a disability as opposed to a quirk or temporary injury.

¶ 50 Our conclusion is bolstered by the trial court's comments at the posttrial hearings. The court stated that it "assumed that [defendant] knew at that time ***, and I assumed you could—were able to tell about the victim's disability by simply being able to look at the victim in this particular case." The court also stated, "It was obvious to the Court that [Alexander] had a disability. *** [Defendant] you certainly should have known that Mr. Alexander had a disability." Even if we replace the word "assumed" with "inferred," the evidentiary deficiency becomes apparent. Without any foundation to support the inference, the court believed everything it observed at the time of trial was substantially similar to what defendant also observed on the day of the battery. Despite scouring the record and looking at all of the evidence in the light most favorable to the State, we conclude that the evidence regarding defendant's knowledge of Alexander's disability is so unsatisfactory that it creates a reasonable doubt.

¶ 51 B. Reduction of Offense

¶ 52 The State urges this court to reduce defendant's conviction for aggravated battery to simple battery. Defendant acknowledges this court has the discretion to reduce the conviction, but he argues vacating the offense is the better remedy because the State chose not to pursue the lesser included offense of battery at trial and because defendant pursued an "all or nothing strategy."

¶ 53 1. *The Applicable Law*

¶ 54 Illinois Supreme Court Rule 615(b)(3) (eff. Jan. 1, 1967) provides that a reviewing court may "reduce the degree of the offense of which the appellant was convicted." A court of review has the authority to utilize Rule 615(b)(3) to reduce the degree of a defendant's conviction, even when a lesser offense was not charged, as long as the offense is a lesser-

included offense of the crime expressly charged. *People v. Clark*, 2016 IL 118845, ¶ 48, 50 N.E.3d 1120, (affirming the lesser offenses of vehicular hijacking and robbery which were set forth in the greater offenses in the indictment). Similarly, a reviewing court may apply Rule 615(b)(3) even if "the State did not request an instruction on the lesser offense at trial." *People v. Figueroa*, 2020 IL App (2d) 160650, ¶ 78. If all inferences are made in favor of the State for a higher offense and those inferences do not support a finding beyond a reasonable doubt of a charged offense, the reviewing court may reduce a defendant's conviction to a lower offense that was proved beyond a reasonable doubt. *People v. Ellison*, 2013 IL App (1st) 101261, ¶ 27, 987 N.E.2d 837. In *People v. Rowell*, 229 Ill. 2d 82, 101, 890 N.E.2d 487, 498 (2008), the Illinois Supreme Court found there was insufficient evidence to support a conviction of felony retail theft and reduced the charge to the lesser included misdemeanor retail theft based on the evidence in the record. The supreme court remanded the case for resentencing in accordance with that lesser charge. *Id.*

¶ 55 2. *This Case*

¶ 56 Here, defendant did pursue an all-or-nothing strategy at trial by asserting a claim of self-defense. The trial court examined the defense and even considered that defendant may not have instigated the fight, but the court found defendant used unreasonable force, thus, committing a battery. Battery is a lesser included offense of aggravated battery. And the type of aggravated battery defendant was charged with specifically included that the State was required to prove defendant committed a simple battery. 720 ILCS 5/12-3.05(d) (West 2016). The offense was aggravated based on (1) the status of the victim and (2) defendant's knowledge of that status. *Id.* § 12-3.05(d)(2). In short, defendant's strategy would have been a complete defense to simple battery as well, and the trial court rejected his defense. Accordingly, pursuant to Rule

615(b)(3), we order defendant's aggravated battery conviction reduced to a conviction on the lesser included offense of battery (720 ILCS 5/12-3(a)(1) (West 2016)). See *Smith*, 2015 IL App (4th) 131020, ¶ 48. We note that defendant received and served a sentence in excess of the maximum jail time for a Class A misdemeanor. Therefore, pursuant to Illinois Supreme Court Rule 615(b)(4), we reduce his sentence to 364 days, with that time to be considered served. See *People v. Lipscomb*, 2013 IL App (1st) 120530, ¶ 12, 997 N.E.2d 932.

¶ 57 III. CONCLUSION

¶ 58 For the reasons stated, we vacate defendant's conviction and sentence for aggravated battery, enter a conviction for the misdemeanor offense of battery, and remand to the trial court for the sole purpose of amending the sentencing order with directions to (1) reduce defendant's conviction to battery, bodily harm (720 ILCS 5/12-3(a)(1) (West 2016)), (2) show defendant received a sentence of 364 days, and (3) show defendant has served that sentence and is accordingly discharged. Other than amending the sentencing order, no further action need be taken or is authorized to be taken by the trial court.

¶ 59 Vacated in part, judgment modified, and cause remanded with directions.