2012 IL App (1st) 102869-U

FOURTH DIVISION
FEBRUARY 23, 2012

No. 1-10-2869

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 MC2 4948
	)	
GREGORY KOGER,	)	Honorable
	)	Marguerite A. Quinn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

O R D E R

¶ 1 *Held*: Misdemeanor jury convictions for criminal trespass, battery, and resisting arrest affirmed; sentence on criminal trespass reduced where it exceeded statutorily allowable term; remaining sentences affirmed.

¶ 2 Following a jury trial, defendant Gregory Koger was found guilty of criminal trespass to real property, battery, and resisting a peace officer, then sentenced to concurrent terms of 300 days in the Department of Corrections. On appeal, defendant contends that the State failed to prove him guilty of these offenses beyond a reasonable doubt and that the trial court abused its discretion in sentencing.

¶ 3 The charges against defendant arose out of an altercation that occurred on November 1, 2009, at the Ethical Humanist Society (EHS) Center in Skokie, Illinois. Defendant, a videographer for Sunsara Taylor, a self-avowed communist, continued to film Taylor inside the Center after being warned that continuing to film would result in his removal or arrest for criminal trespass. As Skokie police officers attempted to escort him from the premises, defendant shoved one of them, cursed at them, and grabbed an elevator door frame.

¶ 4 At trial, Matthew Cole, the former president of the Board of EHS, testified that he saw defendant recording inside the auditorium at the Center using a professional-style camera and asked him to stop. Defendant continued to record and Cole asked him to stop a second time. Defendant did not respond to either request and Cole summoned off-duty Skokie police officer Baldo Bello, who was working at the Center as a security guard and dressed in plain-clothes.

¶ 5 Cole further testified that he saw Officer Bello approach defendant and talk to him, after which defendant put his camera down. Officer Bello then returned to the rear of the auditorium and moments later, defendant started filming again, this time with his cell phone. Cole advised Officer Bello of the situation, and he and a uniformed Skokie police officer walked over to defendant, put their arms to his side and walked him out of the auditorium. Cole lost sight of defendant, but heard a commotion outside of the auditorium and heard someone scream out "you motherf**kers."

¶ 6 David Hardesty, an EHS member, testified that he was near the front of the auditorium and saw defendant point a small electronic device at Taylor. After two police officers approached defendant and asked him to leave the auditorium, defendant "shoved" one of the officers in the chest and "tussled" with the officers in the aisle leading out of the auditorium. Defendant physically struggled with the officers as they attempted to escort him from the auditorium and Hardesty heard defendant say "motherf**kers," then saw him grab hold of an

elevator door frame outside the auditorium.

¶ 7 Officer Bello testified that he had been hired by EHS to work as a plainclothes security guard that day. He was situated in the rear of the auditorium when he noticed Cole speaking in a "semi-aggressive manner" to defendant, who was filming with a professional style camera. Cole told Officer Bello that defendant had been told that he was on private property and that he needed to stop filming. After Officer Bello asked defendant to step outside with him, defendant did not respond, but put the camera down. Officer Bello then showed defendant his badge, "leaned into" him, asked him to stop filming and step outside, or he would be escorted out and arrested for criminal trespass. Defendant responded "f**k off" or "f**k you."

¶ 8 Officer Bello walked toward the rear of the auditorium and waited for his backup, Officer Mendoza. Shortly after Officer Mendoza arrived, he saw defendant filming with an iPhone. The officers approached defendant and told him "you're leaving right now with us." Officer Bello put his hand on defendant's back and "gestured" defendant toward the rear of the auditorium.

¶ 9 When defendant failed to respond, Officer Bello became "a little more forceful" with defendant and advised him that he was under arrest for trespass. At this point, defendant became "irate," pushed Officer Bello in the chest, "tensed up" on Officer Martinez, and cursed "constantly." As the officers attempted to get defendant out of the auditorium, defendant grabbed an elevator doorframe.

¶ 10 The officers handcuffed one of defendant's hands and struggled to handcuff the other. Officer Bello warned defendant to stop struggling or he would be pepper-sprayed, and when he failed to comply with their orders, the officers sprayed defendant and forced him to the ground as more backup officers arrived in the lobby. During the struggle, Officer Bello received two cuts to his fingers; and defendant ripped his shirt and suffered cuts and bruises.

¶ 11 Officer Lacarion Mendoza corroborated Officer Bello's testimony as to the struggle with

defendant. He added that defendant was warned that he would be pepper-sprayed, then yelled out "okay, motherf**kers, spray me."

¶ 12 Jill McLaughlin testified for defendant that she had seen defendant filming the previous day and on the morning in question. She also saw Cole approach defendant and "aggressively" grab the camera lens and say " 'You can't have that camera on.' " Defendant replied " 'on what basis are you telling me this?' " and put the camera down. Moments later a police officer asked defendant to come with him and defendant questioned his authority to do so. She did not hear defendant swear at the officer, but did hear him tell the officer "it's off."

¶ 13 McLaughlin further testified that a few minutes later, Taylor stood up to make a statement and defendant started filming her with his iPhone. At this point, the undercover officer and a uniformed officer "grabbed" defendant from behind and "dragged" him from the auditorium, "pulling" and "tugging" at him. On cross-examination, McLaughlin acknowledged that defendant was told that he could not film in there, that she is a friend of defendant's and did not want to see him get into any trouble.

¶ 14 Joann Shapiro, a 78-year-old friend of an EHS member, testified that she saw defendant filming with a small device that "must have been" a video camera. Later, she saw two men "grab" defendant in a "very physical" manner and "pull" and "drag" him from the auditorium into a vestibule where a "swarm" of police officers arrested him. On cross-examination, Shapiro stated that she did not see Cole or Officer Bello approach defendant the first time and that she did not see anybody talk to defendant. She only saw the two men come up from behind and grab defendant, but did not see them take him out of the room.

¶ 15 Martha Conrad, an attorney, testified that she was at the police station when defendant was arrested. She identified pictures of defendant after his arrest and confirmed that he had a gash above his eye and on his neck, as well as a bruise on his face and on his neck. His eye was

red and tearing from the pepper spray. Conrad took defendant to the hospital, where he was treated and released that day. On cross-examination, Conrad stated that defendant chose not to be treated at the Skokie police department, even though there was a paramedic at the station.

¶ 16 Defendant rested, and after the parties presented closing arguments, the court instructed the jury on the elements of the charged offenses and the related law. The jury returned guilty verdicts on all counts.

¶ 17 At the sentencing hearing, defendant presented several mitigation witnesses and a number of letters written on his behalf. In announcing its sentence, the trial court noted that it had considered the remarks of defendant's witnesses, the letters, and a petition circulated on his behalf.

¶ 18 The court then noted that it had considered all available penalties, as well as the aggravating and mitigating evidence, and observed that defendant "chose a path of violence," and turned a "peaceful meeting" into "a volatile situation." The court opined that a sentence of conditional discharge would "deprecate" the seriousness of the offense and defendant "absolutely deserve[d]" the maximum sentence of 364 days in prison. However, based on the mitigating witnesses, the court sentenced defendant to three concurrent terms of 300 days' incarceration.

¶ 19 On appeal, defendant challenges the sufficiency of the evidence to sustain his convictions. In the face of such a challenge, we must determine whether, upon viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). The trier of fact is responsible for determining the credibility of the witnesses and the weight to be given to their testimony, resolving conflicts in the evidence, and drawing reasonable inferences therefrom. *People v. Tenney*, 205 Ill. 2d 411, 428 (2002). We will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a

reasonable doubt as to defendant's guilt. *Beauchamp*, 241 Ill. 2d at 8.

¶ 20 We, initially, observe that defendant has attached to his brief a disk purported to be a recording made on the day in question at the EHS Center. Although reference is made to a recording in the record, it is well-settled that attachments to briefs that have not been made part of the record are not properly before this court and will not be considered. *People v. Lutz*, 103 Ill. App. 3d 976, 979-80 (1982). Since the disk at issue was only attached as an appendix to defendant's brief and there is no indication that it was certified and made part of the record on appeal, it will not be considered.

¶ 21 Defendant first contends that the State failed to prove him guilty beyond a reasonable doubt of criminal trespass. An offender commits criminal trespass to real property when he enters into property of another knowing such entry is forbidden or remains on property after being told to leave, even if initial entry was lawful. 720 ILCS 5/21-3(a)(3) (West 2008); *People v. Kraft*, 277 Ill. App. 3d 221, 225 (1995).

¶ 22 In this case, the parties do not contest that the EHS Center was private property, that defendant was present at the Center that morning, and that his initial entrance was lawful. At issue is whether defendant remained on the premises after he had been told to leave.

¶ 23 The record shows that multiple witnesses testified that defendant had been told not to record in the auditorium. The record also shows that Officer Bello told defendant he would be escorted from the building and arrested for criminal trespass if he did not stop, and that defendant did not heed these warnings and continued to film after he had been told to stop doing so.

¶ 24 Although defendant's witnesses questioned whether defendant was ever told to stop recording, the verdict shows that the jury found the State's witnesses more credible in this matter. It is not our prerogative to question the credibility findings of the jury and the weight they assigned to the evidence (*Tenney*, 205 Ill. 2d at 428), particularly where, as here, the testimony of

the State's witnesses was sufficient to sustain defendant's conviction for criminal trespass and the testimony of defendant's witnesses could be found wanting given their close relationship to defendant (*People v. Reed*, 80 Ill. App. 3d 771, 781 (1980)).

¶ 25 Defendant, nonetheless, raises several challenges to the sufficiency of the notice element. Although there is no evidence that Cole ordered defendant to leave the building, Officer Bello told defendant that he would be escorted out and charged with trespass if he did not stop recording. Since Officer Bello was acting on behalf of EHS, the fact that this notice did not come directly from Cole is of no moment. *People v. Gudgel*, 183 Ill. App. 3d 881, 884 (1989). Similarly, defendant's arguments that the lack of signage failed to inform him of the prohibition of recording and the presence of another individual who was recording that day have no merit, particularly where defendant acknowledges that he was told to stop recording and there was ample evidence of that fact.

¶ 26 Defendant's argument that he intended to leave the premises is immaterial to his criminal trespass conviction and finds no support in the record. A conviction under section 5/21-3(a)(3) of the Code requires proof that an offender remained upon the land of another after receiving notice to depart. 720 ILCS 5/21-3(a)(3)(West 2008). The jury heard testimony that defendant continued to record in the EHS Center after being told to stop, then failed to respond to the security guard's request to stop and step outside, which was followed by his complete resistance to leaving as well as his arrest. From this evidence, the jury could reasonably infer that defendant remained on the premises after he had clearly been informed that he had overstayed his welcome and was to leave; thereby, satisfying the elements of criminal trespass. *People v. Mortenson*, 178 Ill. App. 3d 871, 876 (1989). The evidence of his further actions, such his struggling with the officers and his abusive language, clearly satisfied the elements to prove him guilty of resisting arrest.

¶ 27 Defendant also asserts that the complaint presented to the jury and the State's closing argument were misleading as to the elements of criminal trespass. We initially observe that defendant has failed to comply with the supreme court rules governing appellate briefs for his failure to provide citation to legal authority to support his arguments, and, therefore, they are waived. *People v. Johnson*, 385 Ill. App. 3d 585, 608 (2008). Nonetheless, even if defendant had preserved these issues, we find them without merit where the record shows that the jury was instructed by the trial court as to the appropriate elements of the charged offenses, was admonished that the law comes from the trial court, was given a written version of those instructions, and any alleged errors in the State's argument were not a material factor in defendant's conviction or result in prejudice to him. *People v. Jimerson*, 404 Ill. App. 3d 621, 633 (2010).

¶ 28 Defendant next challenges the sufficiency of the evidence to convict him of battery. A person commits battery when he knowingly and without legal justification makes contact of an insulting or provoking nature with an individual. 720 ILCS 5/12-3 (West 2008). In this case, the State was allowed to amend the battery charge from bodily harm to contact of an insulting or provoking nature. At trial, Officer Bello testified that defendant became angry and pushed him in the chest as he escorted him from the auditorium. Hardesty testified that he saw defendant shove an officer at the front of the auditorium. The record, therefore, shows that the State presented sufficient evidence to sustain his battery conviction.

¶ 29 Defendant argues, nonetheless, that the discrepancy in the location of where the battery occurred between the testimony of Bello and Hardesty makes it "clear" that he did not batter Officer Bello. Discrepancies in testimony do not warrant reversal and minor discrepancies only affect the weight of the witnesses' testimony. *People v. Garmon*, 394 Ill. App. 3d 977, 981 (2009). Here, the discrepancy in the exact location of where the physical contact took place does

not detract from the otherwise unimpeached testimony of two witnesses that the unlawful contact was made (*People v. Berland*, 74 Ill. 2d 286, 306 (1978)) or create a reasonable doubt as to his guilt (*Garmon*, 394 Ill. App. 3d at 981) of this offense.

¶ 30 In his reply brief, defendant claims for the first time that his arrest and the State's theory of prosecution in this case have a chilling effect on free speech. We note, however, that points not argued in the original brief are waived and shall not be raised in the reply brief. Ill. Sup. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 31 Finally, defendant contends, and the State concedes, that defendant's sentence of 300 days in jail for his criminal trespass conviction is excessive. We agree with the parties that defendant's sentence of 300 days for criminal trespass, a Class B misdemeanor, exceeds the six months that is statutorily permitted. 730 ILCS 5/5-4.5-60(a) (West 2008). Pursuant to Supreme Court Rule 615(b)(4) (eff. Aug. 27, 1999), we, therefore, reduce defendant's sentence for criminal trespass to six months' incarceration.

¶ 32 Defendant further contends that the trial court abused its discretion during sentencing when it failed to consider his rehabilitative potential and referred to acts of violence. We observe that the trial court has broad discretionary powers in choosing the appropriate sentence and this court has the power to disturb that sentence only where the trial court abused its discretion. *People v. Csaszar*, 375 Ill. App. 3d 929, 947-48 (2007). Where mitigating evidence is before the court, it is presumed that the trial court considered it, absent some contrary evidence. *People v. Davenport*, 301 Ill. App. 3d 143, 155 (1998).

¶ 33 Here, the record specifically shows that the trial court considered the mitigating evidence presented to it. The court heard several mitigation witnesses, referred to the letters written in mitigation, and also noted defendant's criminal history and that he "chose a path of violence." Defendant's assertion is, thus, refuted by the record and offer no basis for relief.

¶ 34 Accordingly, we reduce defendant's sentence for criminal trespass to six months' incarceration, and affirm the judgment of the circuit court of Cook County in all other respects.

¶ 35 Affirmed as modified.