2012 IL App (1st) 111039-U

THIRD DIVISION
October 24, 2012

No. 1-11-1039

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. 10 CR 180171
	)	
REVAR HARRELL,	)	Honorable
	)	Arthur Sullivan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Steele and Sterba concurred in the judgment.

O R D E R

¶ 1 *Held:* Conviction of aggravated battery to a police officer affirmed over defendant's challenge to the sufficiency of the evidence; sentences imposed not excessive or abuse of discretion; defendant forfeited for review claim that trial court erred in imposing extended term sentences on his criminal damage to property convictions; judgment affirmed.

¶ 2 Following a bench trial, the defendant, Revar Harrell, was convicted of aggravated battery to a police officer, criminal damage to government supported property, and criminal damage to property. He was then sentenced to concurrent, respective terms of eight, six and six years' imprisonment. On appeal, defendant challenges the sufficiency of the evidence to prove him guilty of aggravated battery, and the propriety of the sentences imposed on his convictions.

¶ 3 At trial, Piyrushkumar Mehta testified that on September 24, 2010, he owned the Cicero Food and Liquor Store located at 1636 North Cicero Avenue in Chicago. At 11:50 that evening, defendant came to the store and started yelling. Mehta told defendant to stop, but defendant went "crazy wild," before leaving. Mehta then heard a loud noise. When he went outside, he saw defendant jumping on Mehta's car, a black Lexus, which was parked in front of the store. Mehta told defendant to stop, and threatened to call police, but defendant continued to jump on the car, and refused to get off of it. Mehta called police, and when they arrived, defendant tried to flee. He was caught immediately and brought back to the front of the store still cursing. Mehta further testified that defendant cracked a light and caused dents in the roof and the back of the trunk of his car, which cost him $4,234.30 to repair.

¶ 4 Mehta further testified that defendant "tried to spit" on him, but missed. Mehta also testified that defendant spat on the left hand of Chicago police officer Jairam Ramkumar, and kicked a police car causing a dent. The police then placed defendant in a squad car.

¶ 5 The video surveillance tape from Mehta's store showed defendant outside jumping on the Lexus, and later, when defendant is out of view of the camera, it shows an officer looking down at his left arm, then walking just out of sight of the camera. Mehta explained that this part of the video shows Officer Ramkumar looking down at his arm just after defendant spat on him.

¶ 6 Officer Ramkumar testified that when he arrived on the scene, he observed Officer Casey with defendant in handcuffs. Defendant was being verbally aggressive, and Officer Ramkumar tried to calm him down. Defendant then "spat at" Mehta, missing him. Officer Ramkumar told defendant not to spit again, and he then "spat at" him, hitting him on the left forearm. The officers then moved defendant to a squad car, but before they got him inside, defendant kicked the passenger side of the car and dented it.

¶ 7 Officer Ramkumar further testified that the video surveillance from the victim's store showed him looking down at his left forearm after defendant, who was out of view at that point, spat on him. Officer Ramkumar noted that his report indicated that defendant "spat on" the victim, but that was incorrect because defendant missed the victim when he spat "in his direction."

¶ 8 The parties stipulated that Detective Conley would testify that he interviewed Mehta right after the incident. Mehta told him that as police were walking defendant to the squad car, defendant turned and "spat on him and an officer."

¶ 9 Emma Lopez testified that defendant was the brother of her boyfriend, and that she has known him for 10 years. On the night in question, she was walking with her boyfriend by the Cicero Avenue liquor store when she saw defendant with police and his back against the wall of the store. He was not handcuffed at this time and was talking to two officers. Lopez then saw defendant turn his head, and look as if he was gagging for air or something, and she thought he was going to throw up but "guess[ed] that's when he spit." Lopez further testified that the spittle did not land on anyone and was not done in the direction of police.

¶ 10 Ray Harrell, defendant's brother, acknowledged that he had a prior conviction for possession of a controlled substance. Harrell then testified that he was walking with Lopez on the night in question by the Cicero Avenue liquor store when he saw the defendant with his back against the wall of the store. He also saw defendant "exchanging words [with police] and he [was] like gagging for air like he was intoxicated and he turned his head to the left and like spit or puked," and was then "rushed" by police. Harrell testified that defendant did not spit on anyone, but "tussled" with police, and was "not actually resisting" police.

¶ 11 At the close of evidence, the circuit court found defendant guilty of aggravated battery to a police officer, criminal damage to property, and criminal damage to government supported property. In doing so, the court found that the video clearly showed that defendant was highly intoxicated,

swearing and yelling inside and outside the liquor store, and he was jumping on top of Mehta's vehicle for a lengthy period of time. The court found that Mehta and Officer Ramkumar "testified credibly," and that the defense witnesses' testimony was "discredit[ed]" by the video which showed that defendant was not apprehended against the wall of the liquor store. The court also found that defendant kicked the police vehicle. Defendant subsequently filed a motion for a new trial which the trial court denied.

¶ 12 At the sentencing hearing, the court noted that it wanted to "make it clear if [defendant] is Class X by background." The court explained that defendant had a prior 1996 Class 2 conviction for manufacture and delivery of cocaine for which he received three years' imprisonment. The court further noted that defendant also had a 2005 Class 4 drug conviction for which he received 18 months' imprisonment, and another 2007 Class 1 drug felony conviction for which he received 4 years' imprisonment.

¶ 13 In aggravation, the State noted that defendant had two prior obstruction of justice convictions which were "telling of his character towards the police," and argued that defendant had a complete and total lack of respect for police. The State then requested the court to sentence defendant to a term commensurate with the crime, with his attitude toward police, and the knowledge that this was not the first time he had done something to obstruct justice.

¶ 14 In mitigation, defense counsel noted that defendant has been employed by his sister as a janitor for the last 10 years, and that his criminal history primarily consisted of drug cases. Counsel noted that the video showed defendant very intoxicated, and that, "[y]es, he did spit on a police officer. However, he did not punch a police officer." Counsel acknowledged that defendant's actions were inexcusable, but maintained that the appropriate sentence was six years' imprisonment.

¶ 15 In allocution, defendant apologized to Mehta and the officer for being disrespectful and intoxicated in public, and stated the evidence presented in the courtroom was "not me as a human

being." He noted that he was under the influence of alcohol and lost control, and that he is the father of five children who depend on him. Defendant also stated that he did not spit on anyone, and that all he recalls from the evening in question is pulling up to the liquor store and waking up at the police station.

¶ 16 The court subsequently sentenced defendant to eight years' imprisonment on the aggravated battery count. In doing so, the court commented that it was going to take defendant that long to sober up and think about what causes his problems, and that the sentence imposed was reasonable given defendant's background as set forth in the presentence investigation report (PSI). The court also sentenced defendant to six years' imprisonment on the remaining criminal damage to property counts (Mehta's vehicle and the police vehicle), ordered all sentences to run concurrently, and mandated that defendant receive substance abuse treatment because it believed that his substance abuse was the cause of the incident.

¶ 17 Defendant filed a motion to reconsider his sentence maintaining that it was excessive and that the court failed to give sufficient weight to the mitigating factors. The court denied the motion, and in his appeal from that judgment, defendant first contends that the evidence was insufficient to prove him guilty of aggravated battery of a police officer beyond a reasonable doubt.

¶ 18 Where, as here, defendant challenges the sufficiency of the evidence to sustain his conviction, our duty is to determine whether all of the evidence, direct and circumstantial, when viewed in the light most favorable to the prosecution, would cause a rational trier of fact to conclude that the essential elements of the offense have been proven beyond a reasonable doubt. *People v. Wiley*, 165 Ill. 2d 259, 297 (1995). A criminal conviction will be reversed only if the evidence is so unsatisfactory or improbable that it leaves a reasonable doubt of defendant's guilt. *Wiley*, 165 Ill. 2d at 297. For the reasons that follow, we do not find this to be such a case.

¶ 19 To sustain a conviction of aggravated battery to a police officer the State was required to prove beyond a reasonable doubt that defendant intentionally or knowingly made physical contact of an insulting or provoking nature with an individual defendant knew to be a peace officer and such officer was engaged in the performance of his official duties. 720 ILCS 5/12-4 (West 2010). Defendant does not dispute that he knew Officer Ramkumar to be a peace officer engaged in the performance of his duties, but challenges the sufficiency of the evidence to prove the contact element of the offense. He maintains that the testimony of Mehta and Officer Ramkumar regarding the spitting incident was inconsistent and incredible where they testified at trial that defendant did not spit on Mehta, and had reported, within hours of his arrest, that he did spit on Mehta. We observe, initially, that defendant's argument relates to the credibility of the witnesses, a matter within the purview of the trier of fact. *People v. Berland*, 74 Ill. 2d 286, 305-06 (1978). Here, the trial court specifically found Mehta and Officer Ramkumar credible and the record before us provides no reason to second-guess that determination. *People v. Hernandez*, 278 Ill. App. 3d 545, 551, 553 (1996).

¶ 20 Mehta testified that he observed defendant spit on Officer Ramkumar, who was trying to calm defendant, and the officer testified that defendant spat on his left arm. In addition, the video of the activity outside the store showed an officer looking down at his left arm at one point while defendant is out of view of the camera, and Officer Ramkumar testified that he was the one depicted there after defendant spat on him. In addition, the parties stipulated that Mehta told Detective Conley after the incident that defendant had spat on him and on an officer.

¶ 21 The testimony of Officer Ramkumar alone was sufficient to sustain defendant's conviction (*People v. Loferski*, 235 Ill. App. 3d 675, 682 (1992)), and here the officer's testimony was corroborated by Mehta's testimony and the circumstantial evidence provided in the video which showed him looking down at his left arm and his further confirmation that he was the subject of the

contact. Accordingly, we find that this evidence was more than sufficient to allow the trial court to conclude that defendant was proved guilty of aggravated battery of a police officer beyond a reasonable doubt. See *People v. Shelton*, 401 Ill. App. 3d 564, 577-78 (2010).

¶ 22 In reaching this conclusion, we necessarily find without merit defendant's claim that the State's witnesses, Mehta and Officer Ramkumar, were incredible because they initially reported that defendant had spit on Mehta, but then testified at trial that defendant spit at Mehta, but missed. Minor inconsistencies in testimony collateral to the central issue of whether defendant spat on the officer, do not compel this court to find that the evidence was so unsatisfactory as to raise a reasonable doubt as to his guilt. *People v. Bofman*, 283 Ill. App. 3d 546, 553 (1996). As noted, the trial court found the testimony of the State's witnesses credible, and that evidence was not undermined by any minor inconsistency regarding the post-incident reports on whether defendant also spat on Mehta. *People v. Reed*, 80 Ill. App. 3d 771, 781-82 (1980). The minor variation cited by defendant does not compel this court to upset the trial court's credibility determination or to find the evidence so unsatisfactory as to raise a reasonable doubt as to defendant's guilt. *People v. Scott*, 152 Ill. App. 3d 868, 872 (1987). Accordingly, we find no reason to disturb the court's finding of guilt on the aggravated battery to a police officer offense. *Bofman*, 283 Ill. App. 3d at 553.

¶ 23 Defendant next contends that the trial court abused its discretion in imposing a sentence above the minimum for his conviction of aggravated battery to a police officer. He maintains that the sentence the trial court imposed is excessive in light of the multiple mitigating factors in his case. He claims that the court was mandated to consider the mitigating factor that the battery did not cause or threaten serious physical harm to another, and should also have considered his alcoholism as a mitigating factor instead of as an aggravating factor.

¶ 24 The parties agree that the eight-year prison term imposed on the aggravated battery to a police officer conviction fell within the statutory range (730 ILCS 5/5-4.5-25 (West 2010)) and there is no

question that he was eligible to be sentenced as a Class X offender (730 ILCS 5/5-5-3(c)(8) (West 2008) now codified under 730 ILCS 5/5-4.5-95(b) (West 2010)), based on his criminal history. Under these circumstances, we may not disturb the sentence imposed by the court absent an abuse of discretion. *People v. Bennett*, 329 Ill. App. 3d 502, 517 (2002). For the reasons that follow, we find none here.

¶ 25 We observe, contrary to defendant's contention, that defendant's history of alcoholism may be considered as evidence that his conduct is likely to recur, and as such, may be considered in aggravation. *People v. Scott*, 225 Ill. App. 3d 938, 941-42 (1992). That said, the record does not show that the court considered defendant's alcoholism in aggravation, but merely observed that it would take that long for defendant to sober up and realize the cause of his problems. In addition, the record shows that the court considered the PSI report which allows us to presume that it took into account defendant's potential for rehabilitation. *People v. Powell*, 159 Ill. App. 3d 1005, 1011 (1987). It is not our prerogative to reweigh the factors presented to the sentencing court and independently conclude that the sentence is excessive. *People v. Burke*, 164 Ill. App. 3d 889, 902 (1987). We find no abuse of discretion in the eight-year term imposed by the court in this case, and thus have no basis for interfering with the court's sentencing determination. *People v. Almo*, 108 Ill. 2d 54, 70 (1985).

¶ 26 Defendant finally contends that the court erred in sentencing him to an extended-term for his criminal damage to property convictions because "[a]ggravated battery was the most serious offense charged and the only one potentially subject to an extended sentence." The State initially responds that defendant waived this issue for review because he did not raise it in the trial court.

¶ 27 To preserve a sentencing issue for review, defendant must raise it at the sentencing proceeding and in his post-sentencing motion. *People v. Kitch*, 392 Ill. App. 3d 108, 118 (2009). Defendant did neither here.

¶ 28 As a consequence, we may review this claim of error only if *defendant has established* plain error. (Emphasis added.) *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Defendant, however, has only claimed in his reply brief that a reviewing court may invoke the plain error rule to review waived errors concerning fundamental rights, but has failed to present argument on how either of the two prongs of the plain error doctrine is satisfied. Accordingly, he has forfeited plain error review of this sentencing contention, and we honor his procedural default. *Hillier*, 237 Ill. 2d at 545-47.

¶ 29 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 30 Affirmed.