2014 IL App (1st) 121165-U

FIFTH DIVISION
JUNE 13, 2014

No. 12-1165

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 07 CR 24470
	)	
JAMES WRIGHT,	)	The Honorable
	)	William J. Kunkle,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Justices McBride and Palmer concurred in the judgment.

O R D E R

¶ 1 *Held*: The State presented sufficient evidence to support defendant's conviction for disorderly conduct for falsely reporting that a criminal offense had occurred.

¶ 2 Following a bench trial, defendant James Wright was convicted of one count of felony disorderly conduct for falsely reporting a criminal offense. The trial court sentenced defendant to one year of probation and ordered defendant to pay fees and costs of $670. On appeal, defendant contends his conviction should be reversed because the evidence at trial established

that when he called to report the incident, he had a reasonable basis to believe that a Chicago police officer tried to rob him. In the alternative, defendant argues this court should remand for a new trial because the trial judge did not correctly recall all of the evidence. We affirm defendant's conviction but modify the amount of fees owed.

¶ 3 Defendant was charged with one count of disorderly conduct pursuant to section 26-1(a)(4) of the Criminal Code of 1961 (the Code) (720 ILCS 5/26-1(a)(4) (West 2006)), which alleged that defendant knowingly reported to a peace officer, public officer or public employee that an offense had been committed while knowing at the time that no reasonable ground existed to believe such offense took place. That offense is a Class 4 felony. 720 ILCS 5/26-1(b) (West 2006).

¶ 4 At defendant's trial in 2011, Chicago police officer Erich Rashan testified that in the early morning hours of November 12, 2007, he and his partner, Chicago police officer Silas Gates, were patrolling in an unmarked vehicle near 91st Street and Dobson in Chicago. Rashan, who was a passenger in the police vehicle, testified they observed defendant driving. Rashan said the officers pursued defendant's vehicle because the area was known as a corridor for stolen vehicles. The officers followed defendant's car as it turned into an alley because they suspected defendant could be trying to elude them or abandon the car. Rashan testified that when the officers saw defendant back the car into a garage at 9110 South Dobson, they realized the car was not stolen.

¶ 5 Rashan testified that as Gates began to back out of the alley, defendant rolled down the passenger window of his own car and shouted to the officers, who were about three houses away from his garage. Rashan said he asked defendant what was going on. Defendant responded that "6th District officers" were always harassing him and he did not appreciate it. Rashan testified

that defendant then said his "mom worked for OPS and that he was going to get a complaint on me." Rashan testified he waved his right hand in a dismissive gesture, and the officers drove away.

¶ 6 About five minutes later, Rashan heard a radio dispatch requesting a supervisor in the location of 9110 South Dobson. Because Rashan believed that call was about the incident with defendant, Rashan called his supervisor, Chicago police sergeant John Cannon, and told him the radio request involved him and Gates.

¶ 7 Rashan testified at trial that he had no prior interaction with defendant and denied threatening defendant or trying to rob him. Rashan said he and his partner did not get out of their vehicle or have any physical contact with defendant. On cross-examination, Rashan stated that when defendant complained about his treatment by "6th District officers," he told defendant they were from the 4th District, not the 6th District.

¶ 8 Melody Karpp Delatorre testified that she was a public employee and worked as a 911 operator on November 12, 2007, when she received defendant's call requesting a supervisor. A recording of the 911 call was entered into evidence and was played for the court. [1] In the call, which was made a few seconds before midnight, defendant reported that two tactical officers, "one black and one white," spoke to him as he pulled into his garage. Defendant said he asked the officers why they were following him, and one officer responded, "F— you, mother—" and threatened to kill him. Defendant said one of the officers tried to rob him. Defendant reported the officers told him they were assigned to the 4th District, not the 6th District, and defendant made a reference to his mother. Defendant gave his name as Kevin Wright and stated a cell

[1] The record on appeal contains a recording of the 911 call, which this court has reviewed.

phone number and his address. Defendant asked to lodge a formal complaint and asked that a sergeant be sent to his house.

¶ 9 Sergeant Cannon testified that in response to defendant's request for a supervisor, he and two officers went to 9110 South Dobson. Cannon identified defendant in court as the person with whom he spoke that night. Defendant said he made the call to 911 requesting a supervisor, and Cannon asked if defendant had reported that two officers attempted to rob him. Defendant denied saying that but said the two officers pointed a gun at him and called him a motherf—. Defendant was arrested after a computer check revealed two active warrants for driving under the influence.

¶ 10 After transporting defendant to the police station, Cannon listened to defendant's 911 call. He testified the recording played in court accurately represented the contents of the call he heard that night. Cannon spoke to defendant at the police station, and the officers who accompanied Cannon to defendant's house also were present for that conversation.

¶ 11 Cannon told defendant he had listened to the 911 call and asked about defendant's statement that two police officers attempted to rob him. Cannon testified defendant "initially said [the call] was not true and then he said the only reason he made it was to get the police there faster, that the only thing they had done to him was point a gun at him" and swear at him. Cannon said defendant admitted his report that the officer tried to rob him was false. The State rested.

¶ 12 Defendant testified he was 34 years old and employed as an operations manager at Mobile Sport. On the night in question, he was driving home alone from his girlfriend's house in a black 2006 Infiniti G-35 coupe. He noticed an unmarked police car following him on 91st Street. The car followed defendant for five blocks, at which point defendant turned into an alley

that led to his garage. As defendant backed his car into his garage, he noted the officer driving the police car had turned the car's lights off and pulled to the edge of his garage. As defendant exited his car and stood in his garage, the police car stopped. Defendant testified the driver, an African-American officer, got out and asked defendant why he was in the neighborhood "driving a vehicle like I was." Defendant responded that he lived there.

¶ 13 Defendant testified the officer "came into the garage and turned me around and proceeded to go through my pockets and asked me where the drugs and guns were." Defendant responded that he worked for a living and did not sell drugs and was not a "gang banger." The officer removed a money clip and identification from his pocket and threw them on the ground. The officer pulled his gun and turned defendant around and told him he was a "smart ass" and that if he "pulled the trigger, he would be justified." Defendant said his own hands were in the air, and he asked the officer what he did wrong. Rashan, who stood nearby, laughed at defendant. The African-American officer called defendant a mother— and a "real smart ass," and the officers left.

¶ 14 Defendant testified Sergeant Cannon arrived 5 or 10 minutes later. Defendant told Cannon he thought the officers robbed him because he did not have his "money or anything." Defendant said the officers "pulled a gun on me and cussed me out." Cannon asked for defendant's identification, and defendant was arrested on his outstanding warrants. Defendant said he did not speak to Cannon at the police station and denied telling Cannon that he reported a robbery to gain a faster response to his 911 call. He said that when he called 911, he believed the officers attempted to rob him.

¶ 15 On cross-examination, defendant said the officers took his wallet out of his pocket and threw it; he said it was not thrown near him. Defendant said that after he called 911, Maria

Hanson, a friend who was at his house, retrieved his belongings from the yard. He acknowledged that he told the 911 operator his name was Kevin Wright.

¶ 16 In closing argument, defense counsel asserted his client's innocence but asked that if the court found defendant had committed a crime, he should be convicted under section (a)(12) of the disorderly conduct statute (720 ILCS 5/26-1(a)(12) (West 2006)), which describes the Class A misdemeanor offense of calling 911 for the purpose of making a false complaint and reporting information while knowing no reasonable ground existed for making the call. The prosecutor responded that defendant accused the officers of armed robbery while knowing that offense did not occur, and moreover, defendant later recanted the version of events memorialized in the recording of the 911 call.

¶ 17 The court began by contrasting section (a)(4) of the disorderly conduct statute with section (a)(12), noting the latter offense generally involves a request for aid from police or fire departments or other emergency response units. The court's ruling continued as follows:

> "[T]he charge here deals only with the issue of charging that the officers robbed or attempted to rob him. Even if one takes the defendant's testimony as true, which I do not, but if I did, it would be that the African American officer had a gun on him at some point, but clearly at some point he patted him down and/or went through his pockets, took out a money clip with money in it and a wallet that contained his identification, and according to his testimony, threw them to the floor of the garage or the ground, if they were in front of the garage. It's a little unclear exactly where they are standing at that point, but one or the other.

> In either case, it does not describe a robbery. There is no taking with intent to permanently deprive. There is no retention. It's not a robbery and it's not an attempt robbery. He has the ID when he is talking to the sergeant later. His testimony is that a lady named Maria was the one who recovered his wallet and money clip and money from the place, as he says, was thrown by the officers [*sic*]. That's all his testimony. He knows at the time that he makes this call that it was not a robbery. He has no reasonable belief to belief that it was a robbery. The other aspects of the call are not on trial here. The other aspects of the complaint are not on trial here."

¶ 18 The court recited the charge against defendant and stated that was "exactly what happened." Defendant's counsel argued defendant had reported the officer tried to rob him, not that a robbery had been completed. The court responded that attempted robbery would occur if the officers approached defendant but defendant had no property the officers could take. Defense counsel asserted that defendant actually reported an attempted robbery, not an actual robbery, and the court stated that was a "distinction without a difference." The court found defendant guilty of disorderly conduct as charged and sentenced him to one year of probation.

¶ 19 On appeal, defendant contends his conviction should be reversed because the evidence showed that, at the time he called 911, he had a reasonable basis to believe he had been robbed by the officer. In the alternative, defendant argues this court should reverse and remand for a new trial where the record demonstrated the court based its credibility determination on an incorrect recollection of the evidence.

¶ 20 Defendant concedes these issues were not raised by counsel in a post-trial motion but contends his arguments can be reviewed under the plain error doctrine. That rule allows review of an issue affecting substantial rights despite forfeiture in either of two circumstances: (1) when the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). However, in considering the applicability of plain error, we must first consider whether any error occurred at all, by engaging in a substantive review of the issue. See *People v. Hudson*, 228 Ill. 2d 181, 191 (2008).

¶ 21 The due process clause of the fourteenth amendment to the United States Constitution provides that an accused defendant may not be convicted of a crime "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged." *People v. Carpenter*, 228 Ill. 2d 250, 264 (2008); see also *People v. Brown*, 2013 IL 114196, ¶ 52 ("the State bears the burden of proving beyond a reasonable doubt each element of a charged offense and the defendant's guilt.")

¶ 22 However, as this court has often noted, it is not our function to retry a defendant when reviewing whether the evidence at trial was sufficient to sustain a conviction. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000). Rather, when a defendant challenges the sufficiency of the evidence to sustain his conviction, the proper standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056, ¶ 31. This standard of review applies to bench trials as well as jury trials. *People v. Ehlert*, 211 Ill. 2d 192, 202 (2000).

¶ 23 It is the responsibility of the trier of fact to determine the credibility of witnesses and the weight to be given their testimony, resolve conflicts in testimony, and draw reasonable inferences therefrom. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). A conviction will not be reversed "simply because the evidence is contradictory" or "because the defendant claims that a witness was not credible." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 229 (2009). A criminal conviction will be reversed only where the evidence is so unreasonable or improbable that it raises a reasonable doubt as to the defendant's guilt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011).

¶ 24 As relevant to this case, a person commits disorderly conduct when he "[t]ransmits or causes to be transmitted in any manner to any peace officer, public officer or public employee a report to the effect that an offense will be committed, is being committed, or has been committed, knowing at the time of such transmission that there is no reasonable ground for believing" the offense will be, is or has been committed. 720 ILCS 5/26-1(a)(4) (West 2006). Defendant argues the evidence established that when he called 911, he had a reasonable basis to believe he had been robbed by one or both police officers because, as he testified at trial, the officers confronted him in his garage and one officer took his wallet and money out of his pocket and threw it into the grass. He argues there was no proof that he knew the elements of robbery or attempted robbery were not met when he called 911 because he had a reasonable belief the officers took his items when they left. The State responds it presented credible evidence that defendant had no reasonable grounds to believe a robbery occurred.

¶ 25 At trial, Officer Rashan testified he and his partner spoke with defendant near his garage and drove away and that defendant was irritated with the officers for "harassing" him. Rashan's

trial testimony, which was largely unimpeached, was consistent with the version of events in the 911 call.

¶ 26 In that recording, defendant told the operator the officers tried to rob him. Defendant reported that the officers spoke to him as he pulled into his garage, and he complained he was being followed. He said the officers threatened to kill him. The officers told defendant they were assigned to the 4th District, not the 6th District, and defendant made a reference to his mother. Defendant told the operator his name was "Kevin Wright." At trial, however, defendant offered additional details, testifying that the officers threw his money and identification in the yard. Defendant's account as described in the 911 call is more aligned with Rashan's version of the encounter than with his own trial testimony.

¶ 27 Sergeant Cannon's testimony also cast doubt on defendant's credibility. According to Cannon, defendant denied stating in the 911 call that officers attempted to rob him. However, the recording of the call refutes defendant's denial because it includes defendant's statement to that effect. Furthermore, Cannon testified defendant told him he reported a robbery to get a faster response to his call, a statement that defendant later denied at trial.

¶ 28 The trier of fact is not required to disregard inferences that flow normally from the evidence. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). The court was free to conclude that defendant intentionally provided a different story at trial than occurred on the night in question. The court was not required to lend more weight to the defendant's testimony than the contents of the 911 call or the accounts of Rashan and Cannon. The trial court heard evidence to support its conclusion that defendant knew when he reported the incident that defendant had no reasonable ground to believe he had been robbed.

¶ 29 Defendant nevertheless contends this court should not defer to the trial court's credibility determinations because the court misstated evidence in making its ruling. Defendant cites *People v. Williams*, 2013 IL App (1st) 111116, ¶ 104, in which this court held *de novo* review was warranted where the record establishes that the trial court "made an affirmative mistake in its decision-making process."

¶ 30 Defendant points out that, in finding him guilty of the charged offense, the court found that Hanson had retrieved defendant's items from the yard and returned them to defendant before he called 911, when defendant in fact had testified his property was returned to him after his 911 call. The State concedes the court inaccurately recalled the point at which defendant's belongings were recovered but argues that remark did not negate the court's overall rejection of defendant's version of events.

¶ 31 The record shows that the court clearly rejected defendant's testimony. The court made clear that even if defendant's testimony was to be believed, the officers did not take his property with the intent to permanently deprive him of it. Additionally, a *de novo* review of the evidence, with no deference to the findings of the trial court, does not change the outcome of this appeal. The accounts of Officer Rashan and Sergeant Cannon indicated defendant had a verbal exchange with the officers. The State played the 911 recording, in which defendant said the officers tried to rob him, and defendant attempted to recant that statement while at the police station that night. At trial, defendant presented a version of the encounter in which he provided key details that were not included in the 911 call or in his statement to Cannon immediately after the alleged offense. Even applying *de novo* review, the evidence establishes that defendant knew when making the 911 call that no reasonable ground existed to believe an offense had occurred.

¶ 32 Defendant's remaining contention on appeal challenges the assessment of a $5 court systems fee and a $5 electronic citation fee. The State agrees these charges should be vacated. The court systems fee (55 ILCS 5/5-1101(a) (West 2010)) applies to convictions under the Illinois Vehicle Code, and defendant was not charged with a violation of that statute. In addition, the electronic citation fee (705 ILCS 105/27.3e (West 2010)) is imposed in traffic, misdemeanor, municipal ordinance and conservation cases where the defendant is issued an electronic citation. That charge also is not applicable to defendant, who was convicted of a felony and was not issued an electronic ticket. Because this court may correct a mittimus without remand pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999) (see *People v. Rivera*, 378 Ill. App. 3d 896, 900 (2008)), we order the fines and fees order to be corrected to vacate those two $5 fees, for a corrected total amount of $660.

¶ 33 Accordingly, defendant's conviction and sentence are affirmed. We correct the mittimus to reflect fees and costs of $660.

¶ 34 Affirmed as modified.