FOURTH DIVISION
October 20, 2016

No. 1-14-2038

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. 13 C3 30893
	)	
PERRY COLEMAN,	)	Honorable
	)	Bridget Jane Hughes,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice Burke concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's conviction for aggravated battery reversed where the evidence was insufficient to show that defendant knowingly made physical contact with a firefighter in an insulting or provoking nature. We order the mittimus and fines and fees order corrected.

¶ 2 Following a bench trial, defendant Perry Coleman was convicted of two counts of aggravated battery (720 ILCS 5/12-3.05(d)(4) (West 2012)) and sentenced to concurrent terms of

five years in the Illinois Department of Corrections, and two years of mandatory supervised release. Count one resulted from the aggravated battery of firefighter Keith Kopecky, while count two resulted from the aggravated battery of firefighter-paramedic Anthony Laurie. On appeal, defendant contends that the evidence was insufficient to prove him guilty beyond a reasonable doubt on count one, aggravated battery of firefighter Keith Kopecky. Defendant further contends that the trial court improperly assessed the $250 DNA analysis fee and $5 Electronic Citation fee and failed to apply his $5-per-day presentence custody credit towards creditable fines. We reverse defendant's conviction, vacate his sentence on count one, and order the mittimus and the fines and fees order corrected.

¶ 3 Firefighter Keith Kopecky testified that on August 18, 2013, firefighters and paramedics (collectively "responders") were dispatched to Drink nightclub to treat a woman with an injured ankle. Kopecky wore uniform pants and a uniform polo with the Schaumburg Fire Department logo above his left breast. Responders assisted the injured woman onto a cot and transported her to the waiting ambulance. When responders reached the back of the ambulance with the injured woman, defendant approached responders and repeatedly stated that the injured woman was his cousin. Kopecky testified that defendant was standing between himself and the ambulance, and that he asked defendant to stay out of the way because defendant was "being drunk, belligerent, obnoxious, and interfering."

¶ 4 Shortly thereafter, defendant grabbed the rail of the cot to prevent responders from loading it into the ambulance. Kopecky testified that he again requested that defendant stay out of the way, but defendant ignored his request and continued pulling the cot. Responders

eventually overpowered defendant's grip on the cot, and defendant "came flying back out" with his hands in the air and struck Kopecky's arm.

¶ 5 Kopecky testified that responders finally loaded the cot onto the ambulance, and he called police because defendant continued to interfere with responders performing their duties. Defendant later forced his way into the back of the ambulance and punched firefighter-paramedic Anthony Laurie.

¶ 6 On cross-examination, Kopecky testified he considered defendant's contact with his arm "incidental" and did not take medical leave or receive medical treatment due to the contact.

¶ 7 Firefighter-paramedic Anthony Laurie testified that he asked defendant multiple times to step away from the ambulance and that defendant was "excited and agitated." Once responders loaded the cot into the ambulance, defendant entered the ambulance acting "under the influence, intoxicated, out of control," and failed to follow responders' requests to exit the ambulance. Laurie testified that he grabbed defendant's belt loop to assist him out of the ambulance and defendant responded by punching Laurie in the face. Defendant subsequently fell or was removed from the ambulance and hit the ground. Defendant apologized for punching Laurie and Laurie assisted defendant to his feet.

¶ 8 James Kolofer, a door host at Drink nightclub in Schaumburg, testified that on August 18, 2013, he recorded a video of an injured woman outside of the nightclub. While Kolofer was recording, an ambulance pulled up to the nightclub, and paramedics began treating the injured woman. Kolofer observed defendant board the ambulance and yell at the paramedics. Paramedics subsequently removed defendant from the ambulance and he fell to the ground. Drink nightclub employees restrained defendant temporarily. Kolofer testified that after the Drink employees

released defendant, he walked away and did not approach the paramedics again. The State introduced the video taken by Kolofer into evidence and it was viewed by the court.

¶ 9 Following closing arguments, the trial court found defendant guilty of both counts of aggravated battery for his contact with Kopecky's arm and for punching Laurie.

¶ 10 Defendant filed a posttrial motion for reconsideration and a new trial, alleging the State failed to prove him guilty beyond a reasonable doubt on the aggravated battery count involving Kopecky. Specifically, defendant argued that he did not knowingly make contact with Kopecky. The trial court reviewed the transcript before denying the motion, and sentenced defendant to concurrent terms of five years in the Illinois Department of Corrections for the aggravated batteries of Kopecky and Laurie, two years of mandatory supervised release (MSR) for the battery of Kopecky, and one year of MSR for the battery of Laurie. The court also assessed various fines and fees. This appeal followed.

¶ 11 On appeal, defendant does not dispute the witnesses' accounts of the facts. Instead, defendant contends that the State failed to prove his guilt of aggravated battery with respect to firefighter Kopecky beyond a reasonable doubt. Defendant argues that the State failed to prove he *knowingly* made insulting or provoking contact with Kopecky.

¶ 12 As an initial matter, defendant contends that the facts are undisputed and therefore *de novo* review applies to determine whether sufficient evidence supports his conviction. See *In re Ryan B.*, 212 Ill. 2d 226, 231 (2004). We disagree and note that while the facts are undisputed, defendant contests the inferences drawn from the evidence, thereby creating questions of fact. See *People v. Lattimore*, 2011 IL App (1st) 093238 ¶35 ("If divergent inferences could be drawn from undisputed facts, a question of fact remains.").

¶ 13 When assessing sufficiency of the evidence claims, we inquire " '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 crime beyond a reasonable doubt.' " (Emphasis omitted.) *People v. Davison*, 233 Ill. 2d 30, 43 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In so doing, we draw all reasonable inferences in favor of the prosecution. *Id.* We will not overturn a criminal conviction "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *People v. Givens*, 237 Ill. 2d 311, 334 (2010).

¶ 14 To prove aggravated battery, the State must first establish that the defendant committed a battery. 720 ILCS 5/12-3.05(d) (West 2012). A defendant "commits battery if he *** knowingly without legal justification by any means *** makes physical contact of an insulting or provoking nature with an individual." 720 ILCS 5/12-3(a)(2) (West 2012). The State may enhance battery to aggravated battery if it establishes that the defendant knew that the victim was a firefighter. 720 ILCS 5/12-3.05(d)(4) (West 2012).

¶ 15 Defendant contends that his contact with Kopecky was not knowing. Rather, defendant argues that it was involuntary and the result of responders pulling the cot from his grasp, which caused his arm to "flail" and reflexively make contact with Kopecky. A defendant acts knowingly when he is "consciously aware" that a result is "practically certain to be caused by his conduct." 720 ILCS 5/4-5(b) (West 2012). Where the defendant denies intent in an aggravated battery case, the State may prove intent using circumstantial evidence. *People v. Phillips*, 392 Ill. App. 3d 243, 259 (2009).

¶ 16 Here, the testimony established that the firefighters overpowered defendant's grasp on the cot and that the contact occurred when defendant lost his grip and his arms bent upward "mov[ing] back out to either side," causing defendant's arms to "flail" and strike Kopecky's arm. This testimony indicates that defendant's contact with Kopecky was not made knowingly and was instead reflexive. Reflexive contact is insufficient to establish knowing conduct. See *People v. Martino,* 2012 IL App (2d) 101244 ¶13 ("Acts that result from a reflex *** are *** considered involuntary acts for which the defendant cannot be held accountable.")

¶ 17 Moreover, we are not persuaded by the State's argument that defendant's argument "defies the laws of physics" because defendant would have been carried forward by the firefighters' overpowering his grasp on the cot. This argument ignores both the testimonial and video evidence that the ambulance was raised two to three feet off of the ground. Due to the raised rear, the forcing of the cot would have propelled defendant into the rear of the ambulance, and thus recoil backward, or at least would have halted his forward progress, at which point he made contact with Kopecky. Accordingly, we conclude that no reasonable person could have found defendant knowingly made contact with Kopecky.

¶ 18 Defendant additionally claims the evidence failed to establish beyond a reasonable doubt that his contact with Kopecky was insulting or provoking. To support his claim, defendant points out that Kopecky referred to the contact as "incidental." In determining whether a contact is insulting or provoking, the trier of fact may consider the context in which a defendant's contact occurred. *People v. Fultz,* 2012 IL App (2d) 101101, ¶ 49. Insulting or provoking contact does not require that the victim suffer harm or sustain injuries. *People v. DeRosario,* 397 Ill. App. 3d 332, 334 (2009). The victim's reaction at the time of the contact may enable the trier of fact to

infer the victim was insulted or provoked. *Fultz,* 2012 IL App (2d) 101101, ¶ 49 (citing *People v. Wrencher*, 2011 IL App (4th) 080619, ¶ 55).

¶ 19 In the present case, we find the evidence is also insufficient to establish defendant's contact was insulting or provoking. Although generally the context of the contact may enable a trier of fact to infer the contact was insulting or provoking, (*Fultz,* 2012 IL App (2d) 101101, ¶ 49) here, the record reflects that while the circumstances may have been insulting or provoking, the State failed to prove the contact itself was insult or provoking. The State argues that *DeRosario* and *Fultz* support its contention that the trial court could infer that Kopecky was insulted or provoked by defendant's contact. However, those cases are distinguishable because the defendants initiated the contact, whereas here, defendant did not initiate the *contact,* despite his purposeful *conduct*. Defendant's conduct was disruptive and interfered with the responders' work, but that is not the conduct for which he was charged with a crime. The State charged defendant with knowingly making contact with Kopecky of an insulting or provoking nature. Kopecky's description of the contact as "incidental" supports defendant's contention that the contact fell far short of what is required for insulting or provoking contact. While it is not necessary for the victim to testify that he was insulted or provoked, (*Fultz,* 2012 IL App (2d) 101101, ¶ 49) we note that in this instance, Kopecky's characterization that the contact was "incidental" suggests that he was neither insulted nor provoked. We conclude that no reasonable trier of fact could have inferred defendant's contact with Kopecky was insulting or provoking. While we draw all reasonable inferences in favor of the prosecution, we do not allow unreasonable inferences. *People v. Cunningham,* 212 Ill.2d 274, 280 (2004).

¶ 20 After reviewing the record in the light most favorable to the prosecution, we conclude that the State's evidence was insufficient to prove beyond a reasonable doubt that defendant knowingly made contact of an insulting or provoking nature with Kopecky. Accordingly, we reverse the judgment of the trial court finding defendant guilty of aggravated battery of firefighter Kopecky and order the clerk of the circuit court to modify the mittimus to reflect the correct one-year term of MSR imposed on his remaining conviction of aggravated battery of firefighter-paramedic Laurie. We need not remand for resentencing. *People v. Lee*, 276 Ill. App. 3d 951, 957 (2007) (noting remand for resentencing is unnecessary where "there is no indication in the record that the vacated conviction had any bearing on the remaining sentences.")

¶ 21 Defendant next contends, and the State concedes, that the mittimus inaccurately lists the offense in count two as "aggravated battery of a judge/emt," instead of the convicted offense of "aggravated battery of an emt." The mittimus must accurately reflect the offense of which defendant was convicted. See *People v. DeWeese*, 298 Ill. App. 3d 4, 13 (1998). Here, the trial court convicted defendant of aggravated battery of an emergency medical technician, not aggravated battery of a judge as the mittimus suggests. Therefore, we order the clerk of the circuit court to correct the mittimus to reflect defendant's conviction of aggravated battery of an emergency medical technician.

¶ 22 Next, defendant contends, and the State concedes, that this court must correct the fines and fees order to vacate the $250 DNA analysis fee and $5 Electronic Citation fee, and reflect 76 days' worth of $5-per-day presentence custody credit applied toward his fines.

¶ 23 While Sections 5-4-3(a) and (j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(a) & (j) (West 2012)) require that any person convicted of certain offenses submit to DNA analysis and pay a $250 fee, our supreme court previously held that the fee may not be re-assessed on a defendant that has previously submitted a DNA sample based on a prior conviction. *People v. Marshall*, 242 Ill. 2d 285, 297, 301-02 (2011). Here, defendant was convicted of a felony offense in 2007 that presumably required submission of a DNA sample and payment of the fee as a result of that conviction. Therefore, the $250 DNA analysis fee was erroneously assessed and accordingly, we vacate that fee.

¶ 24 Likewise, we vacate the $5 Electronic Citation fee because defendant was not convicted in "any traffic, misdemeanor, municipal ordinance, or conservation case." See 705 ILCS 105/27.3e (West 2012).

¶ 25 Finally, we agree that defendant's presentence incarceration credit should apply to his $15 State Police Operations fine and the $50 Court System fine. Defendant was incarcerated for 76 days, and under section 110-114(a) of the Code of Criminal Procedure, defendant is entitled to $5-per-day presentence custody credit applied toward his fines. 725 ILCS 5/110-14(a) (West 2012). Both the State Police Operations fine and the Court System fine were previously determined to be creditable fines. See *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31; see also *People v. Ackerman*, 2014 IL App (3d) 120585, ¶ 30. Accordingly, defendant's presentence incarceration credit should be applied to the State Police Operations fine and the Court System fine.

¶ 26 For the foregoing reasons, the judgment of the circuit court of Cook County is reversed as to count one, aggravated battery of a firefighter, and we order the clerk of the circuit court to

modify the mittimus to reflect the correct one-year term of MSR imposed on defendant's remaining conviction of aggravated battery of an EMT. We vacate the $250 DNA analysis fee and the $5 Electronic Citation fee and order the clerk of the circuit court to correct the fines and fees order accordingly as well as apply defendant's presentence incarceration credit to the $15 State Police Operations fine and $50 Court System fine, reducing the fines and fees order to $329. See *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995) (noting that this court has the authority to order the clerk of the circuit court to make necessary corrections to the fines and fees order). We also order the clerk of the circuit court to correct count two of the mittimus to properly reflect that defendant was convicted of aggravated battery of an *EMT*.

¶ 27 Affirmed in part and reversed in part; mittimus and fines and fees order corrected.