2016 IL App (1st) 143553-U

SIXTH DIVISION
August 19, 2016

No. 1-14-3553

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
	)	
v.	)	13 MC2 004468
	)	13 MC2 004469
	)	
MICHAEL CHMILENKO,	)	Honorable
	)	Paul Pavlus,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

Held: Judgment on jury verdict finding defendant guilty of disorderly conduct and resisting a peace officer affirmed where none of the issues defendant raises on appeal merit reversal of his convictions or sentence.

¶ 1 Defendant Michael Chmilenko appeals from final judgments of conviction entered in the circuit court of Cook County. In case number 13 MC2 004468, defendant was charged with disorderly conduct based on his actions and conduct toward Robert Castle. In case number 13 MC2 004469, he was charged with resisting a peace officer and assault based on his actions toward Niles police officer Sergeant Tom Davis.

¶ 2 Following a jury trial, defendant was found guilty of the charges of disorderly conduct and resisting a peace officer, but found not guilty of assault. Defendant was sentenced to 18 months' probation along with 100 hours of community service, and he was assessed costs of $419. Defendant was also ordered not to have any contact with any of the complaining witnesses. Defendant raises a number of issues on appeal, none of which merit reversal of his convictions or sentence.

¶ 3 FACTUAL AND PROCEDURAL BACKGROUND

¶ 4 Prior to trial and over defense counsel's objections, the trial court allowed the State to amend its disorderly conduct complaint to include an allegation that the defendant had hung a sign outside of his apartment window reading "Robert Castle is a cock face." The court also allowed the State to amend its assault complaint to reflect that the defendant struck Sergeant Davis' squad car with his hands.

¶ 5 Following *voir dire*, and again over defense counsel's objections, the trial court granted the State's pretrial motion *in limine* barring defendant from entering into evidence an audio recording defendant made of an alleged conversation between himself and Castle. The State argued that the audio recording was inadmissible because Castle was unaware he was being recorded by the defendant. The trial also granted the State's pretrial motion *in limine* barring

defendant from introducing an audio recording of a 911 call he placed to the Niles police department. The trial court agreed with the State's argument that defendant would be unable to lay a proper foundation for admission of the audio recording because there were voices of unidentified individuals on the recording who would not be present to testify in court.

¶ 6 At trial, Castle testified that he is the owner of Morrison's Roadhouse bar and tavern located at 7355 N. Harlem Avenue, in Niles, Illinois. Defendant lives in a six-unit apartment building located directly across the street from the bar. Castle and defendant have known each other for approximately thirty years. Defendant was formerly a regular patron of the bar.

¶ 7 In 2013, defendant started coming around the bar taking pictures and videotapes of bar patrons and employees as they entered and exited the bar. Castle testified that defendant began calling him a "Jew," and started questioning bar patrons as to why they were supporting a "Jew," and questioning bar employees as to why they were working for a "Jew." Castle claimed that defendant once screamed out of his apartment window to a landscaper employed by the bar asking him why he was working for a Jew. Castle testified that on some nights, defendant would walk back and forth in a nearby alley scaring people.

¶ 8 Castle testified that police officers came to the bar on numerous occasions in response to anonymous phone calls reporting riots in the bar's parking lot, excessive noise, people smoking marijuana and drinking beer outside the bar and causing problems. On each occasion, there would be no one outside the bar causing any problems.

¶ 9 Castle testified that on December 22, 2013, at approximately 11:00 a.m., he was preparing to open the bar for business and as he opened the front door and stepped outside he saw defendant speaking with the owner of a next-door business. Defendant and the business owner were standing about seventy-five feet away from Castle. Castle told defendant, "this has

been going on for a while," and "we were advised to contact our attorney to have a letter to the defendant that if this continues, he could be arrested for harassment." According to Castle, defendant responded by grabbing his crotch and saying "fuck you, fuck face," and told Castle that if he sued him for harassment, he would kill Castle. Castle called the police.

¶ 10 Later that same day, Castle went outside the bar and looked across the street toward the defendant's apartment window and observed a large cardboard sign hanging outside the window which read, "Rob Castle is a cock face." A photograph of the sign hanging outside the apartment window was published to the jury.

¶ 11 On cross-examination, Castle acknowledged that approximately eight months prior to the window-incident, defendant had complained to him about the noise level coming from the bar. Castle told defendant he would try to do whatever he could to lessen the noise level. The bar was open from 11:00 a.m. to 4:00 a.m. Tuesdays through Saturdays, and 11:00 a.m. to 2:00 a.m. Saturdays and Sundays.

¶ 12 Castle testified that on multiple occasions he observed defendant harassing his patrons by yelling at them and taking pictures of them and their license plates. Castle testified that on numerous occasions he asked defendant to stop the harassment. Castle claimed he never called the police until defendant personally threatened him.

¶ 13 Sergeant Davis testified that on December 22, 2013, at approximately 12:00 p.m. in the afternoon, the Niles police department received a call requesting that a police officer respond to the area of Morrison's Roadhouse bar to meet with a complainant in front of the bar. Sergeant Davis testified he was aware that the police department had received numerous unfounded complaints about the bar from an individual who lived across the street from the bar. Sergeant

Davis, who was in full uniform and driving a marked squad car, decided to respond to the call himself so he could personally speak with the complainant.

¶ 14 When the police sergeant arrived at the bar, he did not see anyone standing out front, so he drove across the street to a gas station and parked in the parking lot. A short time later, Sergeant Davis observed defendant exit the gangway of his apartment building and walk across the street to the bar where he stood on the sidewalk in front of the bar. Sergeant Davis testified that defendant glanced over at him smiling and began taking his foot and stepping onto the edge of the bar's property. Defendant then stepped onto the property and began walking around in little circles while staring at Sergeant Davis and laughing. Defendant continued this conduct for approximately forty-five seconds and afterwards began walking across the street toward Sergeant Davis who was still seated in his squad car.

¶ 15 Defendant approached the squad car, with both of his hands in his pockets. Sergeant Davis yelled at defendant to remove his hands from his pockets. The police sergeant then asked defendant to explain why he conducted himself like he did in front of the bar. Defendant became irate and started cursing at the police sergeant. According to Sergeant Davis, defendant stated, "You fucking guys don't do anything. I'm tired of this shit. You guys are a bunch of pussies." The police sergeant responded "if you're not going to talk to me, then you know I'm done here," and then rolled up the window of his squad car. Defendant put his face up to the window of the squad car and started yelling profanities at the police sergeant. Defendant shook his fists and put his hands on the window of the squad car.

¶ 16 Sergeant Davis opened the car door and stepped out of the vehicle. Defendant jumped back towards the front of the vehicle. The police sergeant told defendant to go home and stay off the bar's property, otherwise he would be arrested. Defendant responded "I'll kick your ass too,"

at which point the police sergeant told defendant "Well, that's all I need. You're under arrest." The defendant said "fuck you," and ran toward the bar and then to his apartment building.

¶ 17 Sergeant Davis jumped into his squad car and drove toward the bar. He stopped his vehicle in the middle of Harlem Avenue in an attempt to cut defendant off from the apartment building. The police sergeant exited his vehicle and proceeded to chase defendant on foot around the apartment building. The police sergeant discontinued his pursuit when he saw defendant run into a side entrance of the building. Sergeant Davis explained he discontinued his pursuit because he was by himself and he had heard that defendant was living with a pregnant woman and he did not want to cause any commotion in the building by pursuing defendant into the building.

¶ 18 As Sergeant Davis was walking back to his squad car, defendant stuck his head out a second-floor apartment window and started yelling profanities at the officer. Defendant yelled that Sergeant Davis could not do anything to him because the incident was not videotaped. The police sergeant ignored defendant and got into his squad car and drove off. Sergeant Davis testified that he planned on discussing the incident with his superiors to determine if it would be possible to obtain a warrant to arrest defendant for assault.

¶ 19 On cross-examination, Sergeant Davis testified that the reason the incident with defendant was not videotaped was because the vehicle he was driving that day was a supervisor's squad car, which is not typically outfitted with a videocamera. The police sergeant testified that after he related the facts of the incident to detectives and his superiors, another officer actually wrote out a report summarizing the incident, which he subsequently reviewed.

¶ 20 Defendant testified on his own behalf. Defendant testified that on December 22, 2013, at approximately 11:00 a.m., he was standing outside of a janitorial supply company located next

door to the bar talking with the owner of the supply company when Castle emerged from the bar. Defendant claimed that Castle waved his arms and told him "watch your mail mother fucker. I am suing you. Watch your mail for certified mail for harassing the bar. Keep harassing the bar and I'm fucking suing you." Defendant responded by grabbing his crotch and calling Castle "a cock face."

¶ 21 According to defendant, as Castle was just about to go back inside the bar, he turned around to defendant, who was still talking with the owner of the supply company, and stated "Hey, you threatened me. That's a threat." Defendant testified that he never threatened Castle. Defendant testified that he called 911 because he had a heart condition and did not want to be arrested and possibly tasered for being falsely accused of threatening Castle. Defendant testified that he told the 911 dispatcher about his fear of being arrested due to his heart condition.

¶ 22 Defendant testified that shortly thereafter, about four or five squad cars arrived in the area near the bar. None of the officers approached defendant. Eventually, all but one of the squad cars left the area. Defendant testified that since none of the officers approached him or seemed to respond to his 911 call, he decided to approach Sergeant Davis who was sitting in his squad car parked in a parking lot across the street from the bar. Defendant testified that he walked up to the squad car and leaned in to look into the car at which point Sergeant Davis said "Get your fucking hands out of your pockets." Defendant testified, in response to defense counsel's question, that the outside temperature that day was about 20 to 30 degrees. According to defendant, Sergeant Davis cursed and warned him about the potential dangers of walking up on an occupied police car with his hands in his pockets. The police sergeant told defendant to stay away from the bar and to go home.

¶ 23 Defendant took his hands out of his pockets and told Sergeant Davis that he was the person who placed the call to police and that he had been waiting outside to talk with the police. Defendant testified that he decided to approach Sergeant Davis because he did not want to be arrested right before Christmas. Defendant asked the police sergeant if he was going to be arrested and stated he would like to contact his attorney and turn himself in because "This has been an ongoing thing for over a year with the bar, and we've got a petition going." Defendant told the police sergeant that he had not been on the bar's property and that he had "every right to walk on the sidewalk, around and videotape everything and anything that I want."

¶ 24 Defendant testified that he never touched the officer's squad car and he never made any verbal threats or gestures toward the police sergeant. Defendant claimed that Sergeant Davis never told him he was under arrest. Defendant testified that after the police sergeant cursed and again told him to stay off the bar's property and to go home, he told the officer, as he was walking away, "You're as worthless as your bosses and everybody else at night. You can go to hell, too."

¶ 25 Defendant testified that he walked away from the officer and had made it across the street to the corner and was about to cross Harlem Avenue, when he heard the engine of the police car and saw the car pass him and then screech to a stop and turn sideways almost in front of the bar. Defendant ran across Harlem Avenue as he heard the police sergeant yelling at him. Defendant claimed he ran because he feared the police sergeant would physically hurt him.

¶ 26 Defendant ran upstairs to his apartment and looked out of the window. He testified that he asked Sergeant Davis why the officer was chasing him since he told him to go home. Sergeant Davis responded by saying something about court and then left the scene.

¶ 27 The next morning, defendant learned that a warrant had been issued for his arrest. That morning defendant was outside getting ready to walk his dog when three squad cars pulled up near his apartment building and police officers jumped out their vehicles and started running toward defendant. Defendant ran back into the apartment building and up to his apartment. He looked out of his window and spoke with the officers who informed him that a warrant had been issued for his arrest. For the following three days, police officers attempted to arrest defendant each time he went outside his apartment building. Defendant testified that he avoided being arrested because he wanted to be with his pregnant wife and other family members over the Christmas holiday. On December 26th, defendant turned himself over to a judge at the Skokie courthouse.

¶ 28 Defendant testified about some of his and his neighbors' ongoing issues with the bar, namely the noise level, drug activity, late-night fights, littering and urinating in the street. Defendant denied making anti-Semitic remarks toward Castle. Defendant admitted yelling out of his apartment window at bar employees in response to alleged bar fights which had moved to his side of the street. Defendant claimed he made the derogatory cardboard sign because he was mad at Castle for calling the police and threatening to sue him. Defendant testified the cardboard sign hung outside his apartment window for approximately four or five hours before his wife told him to take it down.

¶ 29 ANALYSIS

¶ 30 Defendant first contends the evidence was insufficient to prove him guilty of disorderly conduct beyond a reasonable doubt. This contention is meritless.

¶ 31 A criminal conviction will not be set aside on grounds of insufficient evidence unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of defendant's guilt.

People v. Jackson, 232 Ill. 2d 246, 280 (2009). When reviewing the sufficiency of the evidence in a criminal case, we must determine "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." *People v. Cooper*, 194 Ill.2d 419, 430-31 (2000). In reviewing a challenge to the sufficiency of the evidence, it is not a reviewing court's role to retry the defendant; rather, it is for the trier of fact to determine credibility of the witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence. *People v. Enis*, 163 Ill. 2d 367, 393 (1994).

¶ 32 Defendant was charged under section 26-1(a)(1) of the Criminal Code of 1961 (Code), which provides that a person commits the offense of disorderly conduct when he knowingly "does any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace." 720 ILCS 5/26-1(a)(1) (West 2012). Defendant contends the State failed to prove his conduct provoked a breach of the peace. Defendant argues the State failed to prove that a breach of the peace occurred or that anyone, especially the alleged victim, Castle, was alarmed or disturbed by defendant's actions. We disagree.

¶ 33 The complaint alleged that defendant committed the offense of disorderly conduct in that he "knowingly grabbed his crotch area, told Robert Castle that he would 'kill him,' and hung a sign in front of his apartment that read 'Robert Castle is a cock face,' in such an unreasonable manner as to alarm and disturb Robert Castle, and provoking a breach of the peace."

¶ 34 Case law recognizes that " ' " The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others." ' " *People v. Allen*, 288 Ill. App. 3d 502, 507 (1997) (quoting *United States v. Woodard*, 376 F.2d 136, 141 (7th Cir. 1967)

(quoting *Cantwell v. State of Connecticut*, 310 U.S. 296, 308 (1940)). "Language that is vulgar or offensive does not necessarily breach the peace." *Allen*, 288 Ill. App. 3d at 507. However, fighting words and true threats are separate categories of speech. Fighting words are "personally abusive epithets which, when addressed to an ordinary citizen, as a matter of common knowledge, are inherently likely to provoke violent reaction." *People v. Heinrich*, 104 Ill. 2d 137, 146 (1984) (citing *Cohen v. California*, 403 U.S. 15, 20 (1971)). "[F]ighting words by definition provoke a breach of peace, such that they satisfy a necessary element of disorderly conduct. *** [W]ords need only be *likely* to incite violence, not actually produce violence, to qualify as fighting words." (Emphasis in original.) *Allen*, 288 Ill. App. 3d at 507. In order to determine whether particular speech or expressive conduct constitutes fighting words, courts consider the language or conduct in light of the actual circumstances in which it was used and if the words or conduct are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942)).

¶ 35 In this case, the jury heard evidence that when Castle told defendant he might sue him for harassment, defendant responded by grabbing his crotch and saying "fuck you, fuck face," and then told Castle that if he sued him for harassment, he would kill Castle. We find little difficulty concluding that the defendant's statements constituted fighting words in the context in which they were uttered. Therefore, the jury was entitled to consider the statements in determining whether the defendant committed disorderly conduct.

¶ 36 The evidence was sufficient to enable the jury to rationally find beyond a reasonable doubt that the defendant's words constituted fighting words likely to cause a breach of the peace. The fact that Castle properly exercised restraint by calling the police and refraining from

retaliating in a violent manner to the insults and threat does not alter the fact that the defendant's words were inherently likely to provoke a violent reaction.

¶ 37 Defendant correctly points out there was conflicting testimony as to whether he actually threatened to kill Castle. Although this testimony was conflicting, it was for the jury to evaluate the testimony of the witnesses and determine their credibility. See *People v. Luckett*, 339 Ill. App. 3d 93, 103 (2003). The jury obviously did not find defendant's testimony on this issue to be credible. We will not second-guess its credibility determination.

¶ 38 We also reject defendant's related argument that his conviction for disorderly conduct violated his rights to freedom of speech embodied in the First Amendment to the United States Constitution (U.S. Const., amend. I) and in Article 1, Section 4 of the Illinois State Constitution (Ill. Const.1970, art. 1, § 4). Defendant argues the charging instrument violated his rights to freedom of speech by including allegations he hung a cardboard sign outside his apartment window reading "Rob Castle is a cock face," and that he "knowingly grabbed his crotch." We reject these arguments for the same reasons we rejected them with respect to the defendant's sufficiency of the evidence argument.

¶ 39 The First Amendment to the United States Constitution, made applicable to the states through the due process clause of the Fourteenth Amendment, prohibits governmental action that denies or abridges freedom of speech (U.S. Const., amends. I, XIV). *People v. Jones*, 188 Ill. 2d 352, 356 (1999). "Generally speaking, the first amendment prevents the government from proscribing speech or expressive conduct because of disapproval of the ideas expressed." *City of Chicago v. Poo Bah Enterprises, Inc.*, 224 Ill. 2d 390, 407 (2006). However, the protections afforded by the First Amendment are not absolute. *Virginia v. Black*, 538 U.S. 343, 358 (2003). Free speech protections do not extend to certain categories or modes of expression such as

obscenity, defamation, and fighting words. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992). Defendant's speech and conduct clearly fall within the categories of unprotected speech.

¶ 40 Defendant next contends the State failed to prove beyond a reasonable doubt that he committed the offense of resisting a peace officer. The jury found defendant guilty of resisting a peace officer pursuant to section 31-1(a) of the Code. This section of the Code provides that: "A person who knowingly resists or obstructs the performance by one known to be a peace officer or correctional institution employee of any authorized act within his official capacity commits a Class A misdemeanor." 720 ILCS 5/31-1(a) (West 2008). The statute prohibits a person from committing a physical act of resistance or obstruction – a physical act that impedes, hinders, interrupts, prevents, or delays the performance of the officer's duties, such as running away from an officer after being told he was under arrest. See, *e.g.*, *People v. Carroll*, 133 Ill. App. 2d 78, 80 (1971).

¶ 41 Defendant argues the State failed to prove beyond a reasonable doubt that he committed the offense of resisting a peace officer because the State failed to establish that he ever knew he was under arrest. We disagree. The relevant inquiry is an objective one, *i.e.*, whether, under the circumstances, a reasonable person in defendant's position would have understood he was being arrested. See *Commonwealth v. Maguire*, 87 Mass. App. Ct. 855, 859-60, 35 N.E.3d 424, 429 (2015).

¶ 42 In the instant case, Sergeant Davis testified that he told defendant to go home and stay off the bar's property, otherwise he would be arrested. Defendant responded "I'll kick your ass too," at which point the police sergeant told defendant "Well, that's all I need. You're under arrest." The defendant said "fuck you," and ran toward his apartment building. This evidence was

sufficient to enable the jury to find beyond a reasonable doubt that a reasonable person in the defendant's position would have known that Sergeant Davis was attempting to arrest him.

¶ 43 Moreover, the fact that defendant was found not guilty of the underlying assault charge that precipitated the arrest does not change our analysis. "Our supreme court has found no legal inconsistency 'in verdicts of acquittal and conviction upon charges of crimes composed of different elements, but arising out of the same state of facts.' " *People v. Taylor*, 36 Ill. App. 3d 898, 900 (1976) (quoting *People v. Hairston*, 46 Ill. 2d 348, 362 (1970)). "Juries need not return logically consistent verdicts so long as their verdicts are not legally inconsistent." *Taylor*, 36 Ill. App. 3d at 900; see *People v. Pickett*, 34 Ill. App. 3d 590, 602-03 (1975) (jury's acquittal of battery charge not inconsistent with conviction of charge of resisting arrest).

¶ 44 Defendant next contends the trial court erred by allowing trial testimony that he made anti-Semitic remarks. Defendant argues he was prejudiced by the testimony because the trial took place in Skokie, which he claims has a substantial Jewish population.

¶ 45 The admissibility of evidence rests within the sound discretion of the trial court, and its decision will not be disturbed absent an abuse of that discretion. *People v. Pikes*, 2013 IL 115171, ¶ 12. A trial court abuses its discretion only when its ruling is arbitrary, fanciful or unreasonable or where no reasonable man would take the view adopted by the trial court. *People v. Anderson*, 367 Ill. App. 3d 653, 664 (2006). We find no such abuse in the instant case.

¶ 46 Generally, evidence is admissible if it is relevant and material to an issue. *People v. Mitchell*, 35 Ill. App. 3d 151, 163 (1971). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan.1, 2011). "[R]elevant evidence is inadmissible only if the prejudicial effect of admitting that

evidence *substantially outweighs* any probative value." (Emphasis in original.) *People v. Pelo*, 404 Ill. App. 3d 839, 867 (2010). Prejudicial effect in this context means that the evidence in question will somehow cast a negative light upon a defendant for reasons having nothing to do with the case on trial. *Id*.

¶ 47 In this case, testimony concerning defendant's anti-Semitic remarks came out during the direct examination of Castle, who was the primary victim of the defendant's disorderly conduct. Castle's testimony was made in the context of explaining the reasons why he believed defendant's conduct amounted to harassment. His testimony was relevant for the purpose of establishing a possible motive for the defendant's conduct.

¶ 48 Moreover, defendant's contention that he was prejudiced simply because the trial took place in Skokie is disingenuous to say the least. The record shows that the jurors who served on the jury lived throughout Cook County. And more importantly, any reasonable juror, regardless of their ethnicity or religious beliefs, would find that the defendant's anti-Semitic remarks were highly offensive. We find no error in the trial court's admission of Castle's testimony concerning defendant's anti-Semitic remarks.

¶ 49 Defendant next argues the trial court erred and deprived him of a fair trial by granting the State's pretrial motion *in limine* barring him from entering into evidence an audio recording he made of a conversation between himself and Castle. Defendant maintains the audio recording captured a conversation in which Castle told him that the police had approached Castle and encouraged him to make complaints against defendant because the police had become annoyed by the defendant's frequent complaints about the bar.

¶ 50 Even assuming the trial court erred in refusing to admit the audio recording into evidence, the error was harmless because the evidence was not relevant to the issue of

defendant's pre-complaint behavior toward Castle. A nonconstitutional evidentiary error is harmless if there is no reasonable probability the jury would have acquitted the defendant absent the error. *People v. Stull*, 2014 IL App (4th) 120704, ¶ 104. In this case, a review of the record shows that the incident which ultimately caused Castle to call the police complaining about defendant, and which gave rise to the disorderly conduct charge, occurred prior to the audio recording. Therefore, we conclude that there is no reasonable probability the jury would have acquitted defendant had the audio recording been admitted into evidence.

¶ 51 Defendant finally contends the trial court deprived him of a fair trial by not admitting audio recordings of 911 calls he placed to the Niles police department. We disagree.

¶ 52 It is well established that the admission of evidence is left to the sound discretion of the trial court. *People v. Rojas*, 359 Ill. App. 3d 392, 401 (2005). A trial court abuses its discretion only when its ruling is arbitrary, fanciful, or where no reasonable person would take the view adopted by the court. *People v. Rivera*, 2013 IL 112467, ¶ 37. Here, we find no abuse of discretion.

¶ 53 Prior to trial, the State moved to bar defendant from admitting the audio recordings into evidence. The State argued that defendant would be able to lay an adequate foundation for admission of the audio recordings because there were voices of unidentified individuals on the recordings who would not be present to testify in court. Alternatively, the State argued that many of the defendant's recorded statements were self-serving. The trial court found the State's self-serving argument unpersuasive, however the court agreed with the State's argument that the defendant would be unable to lay a proper foundation for admission of the audio recordings.

¶ 54 Sound recording that is otherwise competent, material and relevant is admissible into evidence if a proper foundation has been laid to assure the authenticity of the recording and its

consequent reliability. *Elder on Behalf of Finney v. Finney*, 256 Ill. App. 3d 424, 427 (1993). Generally, a sound or audio recording is authenticated by a witness who can testify to the fact that the recording accurately portrays what that witness heard. *People v. Minnifield*, 2014 IL App (1st) 113778-U, ¶ 29 (2015). Further, an adequate foundation is laid when a party to the taped conversation or a person who heard the conversation while it was taking place identifies the voices of the persons in the conversation and testifies that the tape accurately portrays the conversation. *People v. Cochran*, 174 Ill. App. 3d 208, 212, (1988).

¶ 55 The 911 tape at issue is comprised of audio recordings from numerous conversations and calls, including: Castle's 911 call; defendant's multiple 911 calls; and various conversations between several unidentified parties. In reaching its decision to bar the 911 tape, the trial court reasoned:

> "—that when there are other voices and you had the opportunity to subpoena those individuals to lay the foundation and what was said and who said those things, if there is more than one voice on that tape, and those individuals aren't here to testify as to who they are, the 911 tape will stay out also."

¶ 56 We would be inclined to agree with the trial court's analysis had defendant sought to admit the entire 26-minute tape or conversations where defendant was not a party. However, the record reflects that defendant sought admission of his 911 calls.

¶ 57 The 911 tape is overwhelmingly comprised of conversations between various unidentified parties, and the only 911 calls on the tape are made by the defendant or by Castle. In opposition to the State's motion *in limine*, defendant referred only to his 911 calls and asserted his ability to testify to the accuracy of what he said and what was said to him, recognize the sound of his own voice and testify to the time when he placed the 911 calls. At no point did

defendant reference conversations between unidentified parties or Castle. As a result, it was likely the defendant would have been able to lay an adequate foundation for his 911 calls and they should have been admitted.

¶ 58 Notwithstanding the trial court's decision, we cannot conclude that excluding the 911 calls deprived defendant of a fair trial. Defendant sought to admit the 911 calls to demonstrate he had no knowledge that Sergeant Davis was attempting to arrest him. However, as we have previously determined, the evidence indicated that a reasonable person in the defendant's position would have known that the police sergeant was attempting to make an arrest. As a result, the trial court's exclusion of the 911 calls had no effect on the outcome of this case and was harmless. See, *e.g.*, *Cochran*, 174 Ill. App. 3d at 212 (The trial court's refusal to admit recorded conversations was harmless because the recordings did not support the defendant's theory and ample evidence was presented supporting defendant's conviction).

¶ 59 For the reasons stated above, we affirm the trial court's judgment on the jury verdict finding defendant guilty of disorderly conduct and resisting a peace officer.

¶ 60 Affirmed.