2012 IL App (2d) 110022-U
No. 2-11-0022
Order filed August 15, 2012



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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of Lake County. |
| Plaintiff-Appellee, | ) | |
| v. | ) | No. 10-CM-2132 |
| THOMAS J. STROUD, | ) | Honorable Thomas M. Schippers, |
| Defendant-Appellant. | ) | Judge, Presiding. |

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JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Birkett concurred in the judgment.

**ORDER**

*Held*: The State failed to prove defendant guilty beyond a reasonable doubt of obstructing a peace officer, as his momentarily stepping out of his car did not materially obstruct the officer's investigation. Additionally, there was no plain error in officer's testifying that defendant resisted his arrest.

¶ 1 Following a jury trial, defendant, Thomas J. Stroud, was convicted of resisting a peace officer (720 ILCS 5/31-1 (West 2010)) and obstructing a peace officer (*id.*) Defendant appeals his conviction of obstructing a peace officer. He contends that he was not proved guilty beyond a reasonable doubt because there was no evidence that he had the requisite intent or that the officer

was actually obstructed, *i.e.*, hindered from performing an authorized act. Defendant alternatively contends that the court erred by allowing two police officers to testify repeatedly to the legal conclusion that defendant "resisted" them, thus calling into question his conviction for resisting. We affirm in part and reverse in part.

¶ 2 Evidence at trial showed that Melissa Martin and defendant lived together and had a two-year-old son. On May 4, 2010, at about 2 a.m., Martin drove to pick defendant up at the Hello Folks bar in Fox Lake. Their son was with her. On the way home, Martin stopped briefly at a red light before turning onto Route 12. Believing that Martin did not fully stop at the light, Officer Russell Zander pulled the car over. When Zander asked Martin for her license, she responded that she had forgotten it at home. Zander smelled a strong odor of alcohol coming from the car, but could not tell whether it was coming from Martin or defendant.

¶ 3 At some point, Officer Brandy Henderson approached the passenger's-side window. Zander heard defendant say, "This is bullshit." Zander had Martin get out of the car and walk around to the back of it. While Zander and Martin were behind the car, Henderson remained next to the passenger's-side door. Defendant opened the door and placed one foot outside. Henderson told him to remain in the car for his safety, placing her right hand on the door to close it. Defendant continued to open the door, placing weight on his foot as if to lift himself out of the car. When Henderson again told him to put his foot back in the car, he complied as she was about to close the door.

¶ 4 At the back of the car, Martin gave Zander her identifying information, which he relayed to the dispatcher. Zander saw defendant open the car door and close it. He was keeping an eye on defendant because he appeared angry.

¶ 5 Zander asked Martin why she was out at such a late hour. She explained that she had picked defendant up at a bar and that they were headed home. At this point, Zander saw defendant try to get out of the car a second time. Zander left Martin and went over to defendant, telling him to get back in the car. Henderson pushed on the door to prevent defendant from getting out. Zander told defendant that, if he did not get back in the car, he would be arrested. According to Zander, defendant told him to "Go ahead and fucking arrest me," and continued to push himself out of the car.

¶ 6 Zander told defendant that he was under arrest. Defendant then tried to pull himself back into the car. Zander and Henderson grabbed defendant's arms and tried to pull him out of the car. Defendant continued to resist and Zander pepper-sprayed him. The officers were eventually able to handcuff defendant. Zander issued Martin a citation for disobeying a red light and released her.

¶ 7 The jury found defendant guilty of resisting, based on his pulling away from the officers, and of obstructing, based on the fact that he "refused to stay in the vehicle." The trial court sentenced him to 12 months' probation and 90 days in jail. After the trial court denied his motion to reconsider the sentence, defendant timely appealed. The trial court subsequently granted defendant's motion for early release, reducing his sentence to 80 days in jail with credit for 37 days served.

¶ 8 Defendant first contends that he was not proved guilty beyond a reasonable doubt of obstruction based on his refusal to get back in the car. He argues that the evidence did not show that he intended to obstruct the officers' investigation and that, in any event, the investigation was not actually obstructed. We agree.

¶ 9 Where a defendant challenges on appeal the sufficiency of the evidence, we ask whether, after viewing all the evidence in a light most favorable to the prosecution, a rational trier of fact

could have found all the elements of the offense beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). We may not substitute our judgment for that of the factfinder on questions involving the weight of the evidence, the credibility of the witnesses, or the resolution of conflicting testimony. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992).

¶ 10 Although "resisting" and "obstructing" are often referred to as distinct offenses, they are defined by a single statute, which provides:

> "A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer, firefighter, or correctional institution employee of any authorized act within his official capacity commits a Class A misdemeanor." 720 ILCS 5/31-1(a) (West 2010).

¶ 11 Because the statute does not prohibit any specific conduct, it can be violated in innumerable ways. Deciding whether a given action (or inaction) violates the statute has often bedeviled Illinois courts. Until recently, courts often relied on a purported distinction between "active" and "passive" conduct. This distinction derived from *People v. Raby*, 40 Ill. 2d 392 (1968), where the court stated that the terms "resist" and "obstruct" did not "proscribe mere argument with a policeman *** but proscribe only some physical act which imposes an obstacle which may impede, hinder, interrupt, prevent or delay the performance of the officer's duties." *Id.* at 399. The distinction often proved unworkable, however, as courts recognized that a broad spectrum of conduct fell between "mere argument" and a "physical act." See *People v. Synnott*, 349 Ill. App. 3d 223, 226-28 (2004) (showing difficulty of applying active-passive distinction).

¶ 12 Recently, the supreme court abandoned the active-passive distinction altogether. In *People v. Baskerville*, 2012 IL 111056, the court held that, in deciding whether a defendant is guilty of

obstructing, the proper inquiries are whether the defendant had the requisite intent to obstruct the officer's performance and whether the defendant's conduct in fact did so. *Id.* ¶¶ 34-35. The court held clearly that a conviction of obstruction did not require a physical act. *Id.* ¶ 23. The court explained that *Raby*'s primary concern was that the obstruction statute not be interpreted to prohibit speech protected by the First Amendment and, thus, a conviction based solely on a defendant's statements or a refusal to act is not prohibited. *Id.* ¶ 20.

¶ 13 In *Baskerville*, police officers came to the defendant's house looking for his wife. He initially told them that she was not there but, after going back in the house for a few moments, returned to the door. He said that he did not know what was going on and invited the officers to search the house, but they declined. The court held that the defendant's initial false statement did not thwart the officers' investigation at all and, accordingly, affirmed the appellate court's reversal of his conviction. *Id.* ¶ 35.

¶ 14 Two recent cases from this district are instructive on this issue. In *People v. Kotlinski*, 2012 IL App (2d) 101251, issued four months before *Baskerville*, the defendant was a passenger in a car being driven by his wife. Police stopped the car to investigate the wife for DUI. As they were administering field sobriety tests, the defendant started to get out of the car. An officer ordered him to get back in the car and, according to a video shot by a camera in the squad car, he did so 21 seconds later. The video showed that the defendant did not say anything to the police until he was back inside the car. We noted that the officer made the voluntary decision to interrupt his investigation to deal with the defendant and that the defendant's refusal to get back in the car delayed the investigation for, at most, a few seconds. *Id.* ¶ 50. We then held that the evidence showed that the defendant did not have the intent to disrupt the investigation. Rather, he merely wanted to see

what was going on with his wife, who was being given field sobriety tests behind the car. *Id.* ¶ 57. We thus reversed the conviction.

¶ 15 In *People v. Taylor*, 2012 IL App (2d) 110222, a post-*Baskerville* case, we again reversed a conviction of obstructing. There, Officer Paul Mott saw the defendant, Donnell Taylor, crossing a street. Mott recognized the defendant from previous encounters and knew that there was a warrant for his arrest. The defendant's photo was on the squad car's visor. Mott approached the defendant and asked for identification, as he was not " '100 percent' " sure that the man he saw was the defendant. The defendant initially told Mott that he was Keenan Smith and gave a false birth date. Mott ran this information through his computer and learned that no such person existed. When Mott confronted the defendant with this information, he continued to insist that he was Keenan Smith. This went on for "a few minutes" before Mott said, " 'Hey, Donnell,' " and the defendant replied, " 'Yeah?' " The defendant was convicted of obstruction of justice, but we reversed the conviction.

¶ 16 We held that *Baskerville* means that the relevant issue in weighing a sufficiency-of-the-evidence challenge to an obstruction conviction is whether the defendant's conduct actually "posed a material impediment to the administration of justice." *Id.* ¶ 17. Applying that standard, we held that the defendant's giving a false name did not materially impede Mott. We noted that Mott was always virtually certain that the defendant was Taylor. While his act of running the false information through the computer was "commendable," it did not materially impede the investigation, and he in fact arrested the defendant a few minutes later. *Id*.

¶ 17 Although none of the above cases is a perfect analog to this case, they are sufficiently similar that the same result should obtain. As in *Kotlinski*, defendant's momentarily stepping out of the car did not obstruct Zander's investigation of Martin. Zander had already taken Martin behind the car,

and it appeared that he was able to complete the field sobriety tests. That he made the voluntary decision to interrupt his conversation with Martin and deal with defendant—whom Henderson was already watching—did not mean that defendant obstructed the investigation. Even if he did, he did so by no more than a few minutes, a time frame we held insufficient in *Taylor*.

¶ 18 We note that the evidence showed that, unlike in *Kotlinski*, defendant was yelling loudly, to the extent that Zander had to remove Martin from the car because she could not be heard. However, defendant was not charged with obstructing the investigation by yelling. Doing so would arguably have run afoul of *Raby*'s prohibition of "mere argument" as the basis of an obstruction conviction. *Raby*, 40 Ill. 2d at 399. Defendant was charged with obstruction in that he "refused to stay in the vehicle." We cannot find that defendant's mere act of momentarily stepping out of the car materially obstructed the investigation of Martin. Thus, we reverse his conviction of obstructing.

¶ 19 Defendant next contends that the trial court erred by permitting the officers to testify repeatedly to the legal conclusion that defendant "resisted" them. Defendant claims that the officers' testimony that defendant resisted them amounted to improper opinion evidence on the ultimate issue in the case. See *People v. Crump*, 319 Ill. App. 3d 538, 542 (2001). He relies on *People v. Brouder*, 168 Ill. App. 3d 938, 945 (1988). There, the court held that an officer's testimony that the defendant "resisted us" was improper, but that the error was harmless.

¶ 20 Defendant concedes that he did not object at trial to the allegedly improper testimony, but urges us to review the issue for plain error. The plain-error rule is a narrow and limited exception and is applied to ameliorate the harshness of strict application of the forfeiture rule. *People v. Harding*, 2012 IL App (2d) 101011, ¶ 16. Under the plain-error rule, a reviewing court may consider a forfeited claim when: " '(1) a clear or obvious error occurred and the evidence is so closely

balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.' " *Id.* (quoting *People v. Piatkowski,* 225 Ill. 2d 551, 565 (2007).

¶ 21 We decline to find plain error. Defendant objects to multiple references to defendant's acts of resisting. However, had he objected to the first such reference, not only would the trial court have had an opportunity to sustain the objection, it is likely that the subsequent references would not have occurred. Illinois courts have held that application of the forfeiture rule is particularly appropriate when an objection could have easily cured the problem during the trial. *People v. Grenko*, 356 Ill. App. 3d 532, 536 (2005).[1] In any event, the error was not so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process. As noted, *Brouder*, on which defendant principally relies, found the error harmless. The court noted that an error in the admission of evidence is harmless if the same facts are strongly established by other competent evidence. *Brouder*, 168 Ill. App. 3d at 945. Here, both officers testified in detail to defendant's specific actions.

[1]We are aware of Rule 103(a)(1) of the Illinois Rules of Evidence, "Rulings on Evidence" (Ill. R. Evid. 103(a)(1) (eff. Jan.1, 2011)), but we need not consider the effect, if any, of this codification because it took effect on January 1, 2011, and postdates the proceedings in this case. See *People v. Villa*, 2011 IL 110777, ¶ 32.

¶ 22 Defendant contends that this part of *Brouder* is distinguishable because the defendant there apparently presented no evidence while defendant here offered Martin's testimony that defendant was sitting in his seat with his seatbelt on when the officers forcibly dragged him out of the car. *Brouder* holds that the evidentiary error was harmless because the same facts were established by other competent evidence. This would appear to be the case regardless of whether the evidence is closely balanced. In any event, we do not consider the evidence closely balanced merely because Martin's testimony contradicted that of the officers. The officers testified clearly and consistently about how defendant resisted their efforts to take him into custody. Moreover, the undisputed evidence was that, moments before, defendant had been trying to get out of the car while yelling angrily at the officers. Testimony by Martin, defendant's girlfriend, that defendant suddenly got back in the car, fastened his seatbelt, and sat there quietly while the officers forcibly dragged him out of the car, is dubious, and does not render the evidence closely balanced. Thus, we affirm defendant's conviction of resisting.

¶ 23 Affirmed in part and reversed in part.