

2012 IL App (2d) 110358-U
No. 2-11-0358
Order filed February 3, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

| | | |
|-------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE |) | Appeal from the Circuit Court |
| OF ILLINOIS, |) | of Lake County. |
| |) | |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | No. 10-CM-328 |
| |) | |
| VINCE TESTA, |) | Honorable |
| |) | George D. Strickland, |
| Defendant-Appellant. |) | Judge, Presiding. |

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Bowman concurred in the judgment.

ORDER

Held: (1) The State proved defendant guilty beyond a reasonable doubt of battery and resisting a peace officer, as neither a videotape nor tangential inconsistencies required the jury to discredit the officers' testimony that defendant committed the offenses; (2) the State's assertion in closing argument that defendant's family had shot the video to aid them in a possible lawsuit was a reasonable inference from relevant evidence as to defendant's motive for the offenses. We affirmed the trial court's judgment.

¶ 1 Following a jury trial, defendant, Vince Testa, was convicted of battery (720 ILCS 5/12-3(a)(2) (West 2010)) and two counts of resisting a peace officer (720 ILCS 5/31-1(a) (West 2010)).

Defendant appeals, contending that (1) he was not proved guilty beyond a reasonable doubt and (2) the prosecutor's closing argument was improper. We affirm.

¶ 2 The charges arose out of an altercation that occurred after Lake County sheriff's deputies arrived at defendant's home to serve an arrest warrant on his son, Carl Testa. At trial, deputy Ashley Pomazal testified that on January 19, 2010, she and deputy Jacob Klatka went to a residence in Libertyville to serve an arrest warrant on Carl Testa.

¶ 3 The deputies knocked on the door, and defendant's wife, Kathleen Testa, answered. She went to check whether Carl was home and she closed the door. Kathleen Testa did not return, but eventually defendant opened the door and asked the deputies "what the fuck" they were doing there. He said, "Get the fuck off my property, you are not talking to my son." They attempted to talk to defendant about the warrant, but he kept interrupting by telling them to get off his property. The conversation ended when defendant slammed the door.

¶ 4 Klatka knocked on the door a second time. Defendant answered, told them to "get the fuck off of his property," said that they were being videotaped, and pointed to a camera mounted on the garage door. He then slammed the door again.

¶ 5 The deputies then attempted to discover for themselves whether Carl Testa was in the house. While Klatka walked around the house, Pomazal shone a flashlight in the front window. A white male came to the window, and Pomazal asked whether he was Carl. He said, "No, that's my brother," but said that he would go get him.

¶ 6 Pomazal and Klatka were still standing outside the house when defendant came to the door a third time. Defendant repeated that the house was private property and that the deputies needed to leave. He slammed the door again. Pomazal then called her sergeant.

¶ 7 Sergeant Tim Jonites responded to the scene. He knocked on the door, and defendant answered. Jonites explained why he was there. Defendant continued to protest and began to close the door. Jonites stuck his foot in the door to prevent defendant from closing it. At that point, defendant pushed Jonites in the chest.

¶ 8 Jonites told defendant, “Now you’re going to jail.” Jonites and Pomazal entered the house. They told defendant that he was going to jail and to place his hands behind his back. Defendant resisted putting his hands behind his back. They told defendant several times to stop resisting and to get on the ground, but he refused to do so. Defendant locked his arms in front of him and was flailing his arms upward. At some point, Pomazal tased defendant, and he was taken into custody.

¶ 9 As this was going on, Pomazal saw Kathleen Testa recording the scene with a video camera. During the confrontation, Carl Testa entered the room. As defendant was being escorted to a squad car, someone—either Carl Testa or defendant—was threatening to sue the city.

¶ 10 The video was played for the jury. It begins with defendant answering the door and politely asking the officers what he can do for them. Jonites explains that he is the other officers’ supervisor and that they have a warrant to arrest defendant’s son. Defendant asks to see the warrant and Jonites explains that they do not have a copy of it. At some point, defendant begins to close the door. Jonites starts to move forward as if to prevent defendant from closing the door. Defendant extends his forearm toward Jonites. Because defendant is between Jonites and the camera, it is difficult to tell whether or to what extent defendant makes contact with Jonites, and it is difficult to tell whether or to what extent Jonites is pushed backward.

¶ 11 Jonites says, “Now you’re going to jail.” Jonites struggles with defendant as Pomazal enters the house and attempts to grab defendant from behind. As they move inside the house, defendant

and Pomazal are briefly out of view, but Jonites can be seen struggling with defendant. During this time, Pomazal can be heard yelling, “Get on the fucking ground!” Jonites yells that defendant is resisting arrest, and Pomazal warns defendant twice that he will be tased. The camera then pans right as defendant pulls away from Pomazal, who is struggling with defendant’s arms behind his back while reaching for her Taser. As she reaches for the Taser, defendant brings his arms back around in front of him and spreads them out wide, whereupon he is tased. Defendant is then taken to the ground and handcuffed.

¶ 12 Defendant’s wife screams that the officers are trying to kill defendant, and a young man (presumably Carl Testa) can be heard cursing at the officers. He then says that he was hiding and that “they” (presumably his parents) had no idea that he was there. The officers escort defendant out of the house.

¶ 13 As defendant is led down the driveway, Katherine Testa says, “I’m testifying against them too, this is ridiculous.” Carl Testa threatens to sue the officers.

¶ 14 Klatka and Jonites testified consistently with Pomazal. Jonites testified that he “wasn’t injured” by defendant’s push, but that he felt it. As Jonites entered the house, defendant was flailing his arms and struggling to pull away from him for about five seconds. After that, defendant held his hands out straight. Defendant presented no evidence.

¶ 15 In closing argument, the prosecutor urged the jury to consider “the last statement made on that videotape: ‘I’m going to sue the police department.’ ” After defendant’s objection was overruled, the prosecutor continued:

“And, or course, knowing full well that camera [was] placed there this last time, he goes up to the door and [says], ‘What can I do for you guys?’ Do you think that’s consistent

with how he answered the door the first four [*sic*] times. Of course it's not. He knows full well he's being videotaped, and he knows full well what he's hoping to use the videotape for."

¶ 16 The jury found defendant guilty of battery and two counts of resisting. The trial court sentenced him to one year of conditional discharge. Defendant timely appeals.

¶ 17 Defendant first contends that he was not proved guilty beyond a reasonable doubt. Defendant contends that the videotape "indicates clearly" that defendant did not make any physical contact with Jonites and did not resist arrest.

¶ 18 When a defendant challenges on appeal the sufficiency of the evidence, we ask only 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). As a reviewing court, we may not substitute our judgment for that of the trier of fact on questions involving the weight of the evidence, the witnesses' credibility, or the resolution of conflicting testimony. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009).

¶ 19 Defendant's principal contention is that the video clearly shows that, contrary to the officers' testimony, he neither pushed Jonites nor resisted arrest. We disagree.

¶ 20 As noted, the video shows defendant extending his forearm toward Jonites as the latter attempted to enter the house. Because defendant was between Jonites and the camera, it is difficult to tell whether defendant actually made contact. However, we cannot say that the video clearly shows that defendant did *not* make contact. Thus, the jury could reasonably credit the testimony of Jonites and Pomazal that defendant pushed Jonites.

¶ 21 We agree with defendant that the video does not show Jonites moving backward. It is possible that he did, but, in any event, pushing him backward was not an element of battery. Any contact, however slight, can be sufficient to show insulting or provoking contact. See *People v. Dunker*, 217 Ill. App. 3d 410, 415 (1991) (defendant's poking son's teacher with his finger was insulting or provoking contact).

¶ 22 The video is even less clear with regard to the resisting charge. The entire scene is chaotic and lasts only a few seconds. Moreover, defendant is not in view of the camera the entire time. In any event, the video does not clearly contradict the officers' testimony that defendant resisted their attempts to handcuff him.

¶ 23 Defendant points out various other claimed inconsistencies between the officers' testimony, the video, and the police reports. For example, Jonites testified that defendant greeted them profanely during the fourth encounter (the only one for which Jonites was present), while the other officers testified that defendant greeted them profanely the first three times but was polite during the videotaped encounter. The video confirms that defendant greeted them politely. When confronted with this point, Jonites speculated that the video must have been altered.

¶ 24 While Jonites's testimony is odd, it does not render all of the officers' testimony unworthy of belief. See *People v. Brisbon*, 106 Ill. 2d 342, 360 (1985) (minor inconsistencies in the testimony do not, of themselves, create a reasonable doubt of guilt). The remaining inconsistencies that defendant points out are similarly minor and do not undermine the jury's verdict.

¶ 25 Almost certainly, the increasing prevalence of video cameras in our society will cause us to rethink the deference traditionally paid to jury verdicts. Where, for example, a video recording completely contradicts a witness's testimony, it would be difficult to entertain the argument that we

should defer to a jury finding that the witness was credible. See *People v. Kladis*, 2011 IL 110920 ¶ 28. This, however, is not such a case. We must keep in mind that the video captured only a portion of the entire encounter, and several key points in the taped portion were not clearly shown. Thus, the jury was entitled to rely on the officers' testimony in addition to what was or was not shown on the video.

¶ 26 Defendant next contends that the prosecutor's closing argument, suggesting that defendant and his family had created the video to aid in a possible lawsuit against the sheriff's department, was irrelevant and served only to prejudice the jury against defendant. We agree with the State that this was a reasonable inference from the evidence and that evidence of defendant's motive was relevant.

¶ 27 "Prosecutors are afforded wide latitude in closing argument." *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). They may comment on the relevant evidence as well as any fair and reasonable inferences therefrom. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). A prosecutor's remarks will not warrant a new trial unless they are so prejudicial to the defendant that, absent those remarks, there is doubt as to whether the jury would have rendered a guilty verdict. *People v. Nieves*, 193 Ill. 2d 513, 532-33 (2000).

¶ 28 Although the State introduced the video during its case-in-chief, it was shot by defendant's wife, apparently at his insistence. On it, defendant's wife and son can be heard exclaiming that the officers were "killing" defendant and trampling the Constitution. The inference that the video was a staged attempt to manufacture a case against the police was certainly reasonable.

¶ 29 Moreover, although defendant characterizes this argument as "bizarre," the prosecutor's suspicions were apparently not without foundation. At sentencing, it was brought out that defendant had previously sued the Village of Mundelein following a similar incident. We granted the State's

motion to cite as additional authority *Testa v. Village of Mundelein*, 89 F.3d 443 (7th Cir. 1996).

As the court describes the facts, defendant became involved in an argument with Mundelein police officers, who eventually arrested him for obstruction and disorderly conduct. After he was acquitted, he sued the village and was ultimately awarded a small amount. *Id.* at 444. It was not unreasonable to infer that defendant's success in the earlier litigation might inspire him to try again.

¶ 30 Further, contrary to defendant's assertion, evidence of defendant's motive was relevant. Although the prosecution is not obligated to prove motive, the State may introduce evidence that tends to show that an accused has a motive for the crime. See *People v. Buck*, 361 Ill. App. 3d 923, 938 (2005). Thus, the prosecutor's comment on defendant's motive was proper.

¶ 31 We affirm the judgment of the circuit court of Lake County.

¶ 32 Affirmed.