2012 IL App (2d) 110996-U
No. 2-11-0996
Order filed December 11, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ROY P. McLEAN, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of De Kalb County. No. 10-CM-1114 Honorable Alan W. Cargerman, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The State proved defendant guilty beyond a reasonable doubt of battery: the trial court was entitled to credit the State's evidence that defendant was the aggressor instead of defendant's evidence that he acted in self-defense.

¶ 2 Defendant, Roy P. McLean, was found guilty of battery (720 ILCS 5/12-3(a)(1) (West 2010)) following a bench trial. He was sentenced to 12 months' probation, restitution, and other fees. On appeal, defendant argues that the State failed to prove him guilty beyond a reasonable doubt. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with battery for knowingly causing bodily harm to John Wicker by punching Wicker in the face on August 14, 2010. On March 25, 2011, the matter proceeded to trial, with Wicker testifying first for the State. Wicker testified that he was at Lord Stanley's Bar with some friends, including Jason Shered and Greg Finnigan. Sometime after midnight, Wicker and his friends were outside the rear entrance of the bar, smoking cigarettes, when defendant came outside and said, "one of you guys bumped into my girlfriend and you need to stop walking around like you own the place." Wicker turned around and told defendant that he did not know what he was talking about. As he turned back toward his friends, defendant hit him in the back of the head. Wicker took a few steps back, put his hands up in defense, and backed away from defendant. The next thing Wicker recalled was sitting on the curb with a bloody nose, and police standing around him. Wicker testified that he sustained a broken nose and minor trauma to his head, neck, and back. On cross-examination, Wicker admitted he was inside the bar earlier in the night, celebrating a friend's birthday. He admitted that he consumed approximately five 12-ounce bottles of beer, beginning around 9 or 10 p.m. He denied bumping into any girl at the bar. Wicker admitted he was formerly in the Navy but was never a Navy Seal.

¶ 5 Jason Shered testified that he was outside the bar with Wicker and other friends when defendant came out saying something about someone bumping into his girlfriend. Defendant began directing his threats at Wicker, and Wicker tried to diffuse the situation. As Wicker began to turn away from defendant, defendant punched Wicker, hitting the side of his face and the back of his head. According to Shered, Wicker then tried to square up to defendant, and defendant threw three or four more punches. Wicker fell to the ground, and defendant put him in a chokehold. Shered testified that Wicker never swung at defendant or made any advances toward him. On cross-

examination, Shered denied that the group was celebrating anyone's birthday but agreed that they arrived at the bar around 9 p.m. He admitted that he consumed one beer but denied bumping into defendant's girlfriend. Shered testified that he saw Wicker consume three or fours shots of whiskey, but he was not sure how many beers Wicker consumed.

¶ 6 Gregory Finnigan testified he knew Wicker from high school, but was "friends" with him for only the past 1 to 1 ½ years. He testified consistently with Shered, with the exception that when Wicker was on the ground, Finnigan testified defendant repeatedly punched him. Finnigan testified that he consumed a pitcher of beer, or approximately four pints, and a shot of tequila that night. He did not see Wicker until about midnight that night when the group was outside. Therefore, he did not see Wicker consume any alcohol. He believed that Wicker had been celebrating a friend's birthday that night, appeared a "little tipsy," and was a "happy drunk."

¶ 7 Mark Tehan, a De Kalb police officer, testified that he spoke to Wicker and defendant the night of the altercation. Defendant admitted to Tehan that he fought with Wicker after he confronted Wicker outside and told him he should have apologized for shoving defendant's girlfriend in the bar. Defendant stated to Tehan that Wicker threw a punch at him, but missed, and that defendant then punched Wicker in the face. Tehan testified that defendant approached him as he walked around to the back of the bar and that defendant said "you guys are probably looking for me." Tehan observed no injuries to defendant and observed Wicker with blood on his face and scrape marks. Tehan admitted that Wicker smelled of alcohol, but he did not notice any other signs of intoxication, such as slurred speech or swaying.

¶ 8 Kelly Apostolos, defendant's girlfriend, testified that she and defendant were at the bar ordering a drink, when a man bumped into her. They then took two stools at the bar, and the man

pushed her from behind. Defendant said something to the man, alluding to the fact that he could have excused himself or apologized. The man laughed with his friends. Apostolos and defendant continued their conversation, and the man pushed her a third time. Apostolos and defendant got up and moved to another location in the bar after the third encounter. Apostolos testified that defendant consumed only a few sips of beer. Later, he left the table to go outside to smoke a cigarette. Upon his leaving the bar, police were present near the back entrance. Defendant went over to the police to talk to them.

¶ 9 Defendant testified that he and Apostolos arrived at the bar around 12:30 a.m. Defendant identified Wicker as the man who bumped into Apostolos three times while they were inside the bar. He and Apostolos moved to another area of the bar. Later, defendant went outside to smoke a cigarette and observed Wicker with a group of his friends. Wicker began walking toward defendant and said that defendant was "tough" when he was around his girlfriend. Defendant told Wicker that, if he bumped into someone, it would be nice if he apologized. Wicker then shoved defendant, knocking defendant off balance. Wicker told defendant that he was about to get his ass kicked by a Navy Seal. Defendant then punched Wicker in the face. Defendant turned toward the door, and Wicker shoved him again. Defendant punched him in the face again. Wicker then went for defendant's legs to try to get him off his feet. Defendant reached down and grabbed Wicker's head and put him in a front headlock. Defendant testified that he was afraid that Wicker's friends were going to attack him, so he used Wicker as his shield. Wicker's friends then asked defendant to let Wicker go, which he did. Defendant then walked back into the bar. Defendant was informed that police were there, and so he went and approached an officer. He denied striking Wicker while he was on the ground in a headlock.

¶ 10 The trial court summarized the question in the case as whether defendant struck Wicker twice in the face in self-defense. The trial court did not believe that defendant went outside to "settle the score." The stories of all witnesses were fairly consistent with the exception that defendant claimed he struck Wicker after Wicker shoved him, and Wicker contended that defendant punched him first. The trial court stated that the case boiled down to whether the State convinced it beyond a reasonable doubt that Wicker moved forward so as to lead defendant to reasonably believe that he had to hit him and then, when Wicker came back, hit him again. The trial court stated that it was convinced beyond a reasonable doubt that defendant was guilty.

¶ 11 II. ANALYSIS

¶ 12 On appeal, defendant argues that the State failed to prove him guilty beyond a reasonable doubt because Wicker was highly intoxicated at the time of the altercation and his story was unconvincing and improbable. According to defendant, his version of events was congruent with the idea that Wicker was the belligerent drunk. Defendant's testimony that Wicker said he was a Navy Seal was partly corroborated by the fact that Wicker testified he was formerly in the Navy. Defendant argues that Wicker's claim that he was attacked, without provocation, by a sober man, who was alone amongst Wicker and a group of his friends, was highly improbable. Defendant argues, therefore, that the trial court erred in finding him guilty beyond a reasonable doubt.

¶ 13 A criminal conviction will not be overturned unless the evidence is so improbable or unsatisfactory that it creates reasonable doubt as to the defendant's guilt. *People v. Givens*, 237 Ill. 2d 311, 334 (2010). When presented with a challenge to the sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant. *Id.* The relevant question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have

found the essential elements of the crime beyond a reasonable doubt. *Id.* Under this standard, the reviewing court must allow all reasonable inferences from the record in favor of the State. *Id.* The critical inquiry is whether the evidence reasonably supports the defendant's conviction regardless of whether the evidence is direct or circumstantial or whether the trial was by bench or jury. *People v. Kotlinski*, 2011 IL App (2d) 101251, ¶ 38. It is the responsibility of the trier of fact to assess the credibility of the witnesses and the weight of their testimony, resolve conflicts in the evidence, and draw reasonable inferences from the evidence. *People v. Martin*, 408 Ill. App. 3d 891, 894 (2011). This court will not substitute its judgment for that of the trier of fact on these matters. *Id.*

¶ 14 A battery occurs when the defendant knowingly, without legal justification, and by any means causes bodily harm to an individual. 720 ILCS 5/12-3(a)(1) (West 2010). Here, the State alleged that defendant without legal justification punched Wicker, causing him bodily harm. Defendant raised self-defense as an affirmative defense. When a defendant does this, the State must also prove beyond a reasonable doubt that he did not act in self-defense. *People v. Hayes*, 2011 IL App (1st) 100127, ¶ 30. The elements of self defense are: (1) unlawful force was threatened against a person; (2) the person threatened was not the aggressor; (3) the danger of harm was imminent; (4) the use of force was necessary; (5) the threatened person actually believed a danger existed requiring the use of force; and (6) the threatened person's beliefs were objectively reasonable. *Id.*

¶ 15 The trial court in this case stated that it believed the State proved beyond a reasonable doubt that defendant did not act in self-defense and that defendant was guilty of battery. While the trial court did not elaborate on the reasons for its decision, there was undoubtedly sufficient evidence to sustain the conviction. Wicker, Shered, and Finnigan all testified that defendant came out addressing the fact that one of them bumped into Apostolos and that defendant threw the first punch, hitting

Wicker. Shered and Finnigan also testified that defendant struck Wicker again and Shered said that defendant placed Wicker in a chokehold. Further, Wicker had a broken nose and scrapes on his face, and defendant was unharmed. While defendant argues in his brief that Wicker consumed five 32-ounce bottles of beer, Wicker testified that he consumed five 12-ounce bottles of beer that night. Shered testified that he saw Wicker consume three or four shots of whiskey but was unsure about the amount of beer. Finnigan testified he thought Wicker was "tipsy," and Tehan smelled alcohol on Wicker but otherwise did not observe signs of intoxication. Therefore, defendant's argument that Wicker was an unbelievable witness because of his level of intoxication is refuted by the record or at least contradicted by parts of the record. Resolving conflicts in the evidence was in the province of the trial court. *Martin*, 408 Ill. App. 3d at 894. Further, evidence of a witness's use of drugs or alcohol may be used to impeach the witness but the fact finder still must determine the witness's credibility and the weight to be placed on his testimony. See *People v. Foster*, 322 Ill. App. 3d 780, 789-90 (2000). Even if the trial court believed that Wicker and his friends were highly intoxicated, it was still allowed to believe their version of events over defendant's. See *People v. Lee*, 376 Ill. App. 3d 951, 955 (2007) (within province of fact finder to believe drug-using witness over other witnesses).

¶ 16 It was the fact finder's duty to resolve the conflict between the testimony of Wicker, Shered, and Finnigan and the testimony of defendant. While a fact finder's reliance upon eyewitness testimony is not conclusive and does not bind this court, a fact finder's decision to accept testimony is entitled to great deference as it was the fact finder who saw and heard the witnesses. *People v. Everhart*, 405 Ill. App. 3d 687, 704 (2010). The trial court determined that while defendant might

not have gone outside looking for a fight, the State proved that self-defense was not justified and that defendant was guilty of battery. Our role is not to retry defendant or to reweigh the evidence.

¶ 17 Defendant argues that Wicker's version of events does not correlate with normal human behavior because it would not have made sense for him to start a fight with Wicker, who was surrounded by several friends. Again, it is undisputed that defendant was upset with Wicker for bumping into his girlfriend several times. It was not unreasonable for the fact finder to conclude that somehow this dispute escalated and led to defendant punching Wicker first. When presented with a challenge to the sufficiency of the evidence, we are required to look at the evidence in the light most favorable to the State and allow all reasonable inferences in favor of the State. In light of the evidence, a rational trier of fact could have accepted the testimony of Wicker, Shered, and Finnigan, and in conjunction with the injuries sustained, found defendant guilty of battery.

¶ 18 III. CONCLUSION

¶ 19 For the reasons stated, we affirm the judgment of the circuit court of De Kalb County.

¶ 20 Affirmed.