

2014 IL App (2d) 130404-U
No. 2-13-0404
Order filed December 24, 2014

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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 Stephenson County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 12-CM-325
	)	
RONNIE L. ALLEN,	)	Honorable
	)	James M. Hauser,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant showed plain error in the trial court's failure to instruct the jury that he could not be convicted of disorderly conduct if he merely used profanity that did not reach the level of fighting words: evidence supported defendant's theory that he merely used such profanity, and the pattern instructions were insufficient to preclude a conviction if the jury subscribed to that theory.

¶ 2 Following a jury trial in the circuit court of Stephenson County, defendant, Ronnie L. Allen, was found guilty of disorderly conduct (720 ILCS 5/26-1(a)(1) (West 2010)). Defendant was sentenced to a one-year term of conditional discharge and was ordered to pay a \$200 fine

and serve 30 days in the county jail. As explained below, we conclude that plain error occurred in instructing the jury and that defendant is therefore entitled to a new trial.

¶ 3 The complaining witness, Autumn Love, testified that, on April 20, 2012, she and her aunt, Pamela Martz, were working at a garage sale at Love's grandmother's house in Freeport. Defendant visited the garage sale a couple of hours after it opened and spoke to Martz about purchasing a table. Defendant asked if Martz and Love would hold the table for 15 to 20 minutes while he got some money to pay for it. Martz and Love agreed and placed a sign on the table indicating that a sale was pending. An hour or so passed and defendant did not return, so Love and Martz sold the table to someone else. As they were loading the table into the purchaser's vehicle, defendant returned, accompanied by his girlfriend. Defendant appeared upset that the table had not been held for him. His voice sounded angry, but he was not yelling at that point.

¶ 4 Defendant left once more, but returned about 15 or 20 minutes later. Martz was inside the house and Love was in the driveway. Love testified that defendant stepped out of his vehicle. Defendant walked toward Love and was yelling at her. According to Love, defendant was "charging" at her "with an angry manner." As he did so, Love backed away from him into the garage. Defendant called Love a "fucking cunt." He also said "'fuck you' " to Love and told her that she was "going to get what was coming to [her] and that he would kill [her]." Love yelled for Martz to come outside and told defendant to leave the property. Love jumped over a three-foot-high baby gate between the garage and a breezeway connecting the garage to the house. She did so to get between her 1½-year-old daughter and defendant. Love was very scared that defendant would try to hurt her or her daughter. Love testified that defendant tried to

get over the baby gate but stopped when Martz came out along with her son and another man. Meanwhile, Love called the police. Defendant left before the police arrived.

¶ 5 Martz testified that she had agreed to hold the table for defendant for 15 or 20 minutes while defendant went to get money. She testified that defendant was upset but not angry when he returned and the table had been sold to someone else. After defendant left again, Martz went back into the house, where she and two men had been installing carpeting. She encountered defendant again between 20 and 45 minutes later. Martz explained that, while inside the house, she heard Love holler her name. Martz went outside and saw defendant and Love exchange words. They were separated by the baby gate, and Love's daughter was with her. Martz stepped between defendant and Love. Martz testified that Love was upset and scared and that defendant appeared to be angry, but was not screaming. The men who had been helping Martz install carpeting came outside. Defendant left when Love called the police. Martz testified that before going outside she could hear Love arguing with defendant, but Martz could not make out what they were saying. She never saw defendant attempt to get past the baby gate. She did not hear either Love or defendant cursing.

¶ 6 Vicki Benoodt testified that she knew Love and was a friend of Love's grandmother. Benoodt visited the garage sale. As she arrived, she heard defendant "cussing" at Love in the garage by the door leading to the house. According to Benoodt, defendant was "cussing at her and threatening to kill her and all that, using fowl [*sic*] language." Benoodt added that defendant was "calling [Love] names and calling her B-words and stuff." Benoodt spoke to a police officer after the incident. She testified that she told the officer that she heard defendant threaten to kill Love. However, Freeport police officer Catherine Ludewig testified for the defense that she interviewed Benoodt at the scene and that Benoodt did not report that defendant had threatened

to kill Love. Benoodt also told Ludewig that she could not see what had been going on in the garage. Benoodt told Ludewig that she heard swear words, but she did not indicate what specific words she heard.

¶ 7 Defendant's girlfriend, Amy Daly, testified for the defense that she and defendant arrived at the garage sale at about 8:30 a.m. and purchased a blanket. Love had said that the blanket would cost \$30, but Martz sold it to them for just \$3. Martz also agreed to sell a table to them for \$15, but they needed to get more money. Martz put a "sold" sign on the table and told them to come back with the money. Defendant and Daly returned about 45 minutes later and discovered that the table had been sold to someone else. Defendant and Daly asked Love if there was another table for sale. Love told them to talk to Martz, who would be back in about 15 minutes. While they waited, defendant talked with the individual who had purchased the table. Daly testified that "they were just laughing and having a good time." Daly and defendant left briefly. When they returned, defendant walked up the driveway while Daly waited in their truck. Daly heard defendant speaking in a loud voice, but not yelling. Defendant wanted to talk to Love's aunt. Love was yelling at defendant to leave the property. Daly testified that defendant did not threaten Love. Defendant did not testify.

¶ 8 The jury was instructed in accordance with Illinois Pattern Jury Instructions, Criminal, No. 19.08 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 19.08) that to obtain a conviction of disorderly conduct the State was required to prove beyond a reasonable doubt "[t]hat the defendant knowingly performed an act in such an unreasonable manner as to alarm or disturb another and provoke a breach of the peace." At the jury-instructions conference, the following exchange took place:

“MR. FULLER [defense attorney]: *** [Y]our Honor, it’s become apparent to me that the jury ought to be instructed to a rather important point of law, and I think—

THE COURT: Do you have the proposed instructions?

MR. FULLER: Well, I will suggest one. After hearing the evidence, it’s going to be my argument to the jury that there may have been profane languages [*sic*], but there was no act and no breaching of the peace, and the law that I have quickly researched, I think, clearly supports my position that vulgar or offensive language in itself is not disorderly conduct.

THE COURT: What are you looking at?

MR. FULLER: Your Honor, I’m going to—

THE COURT: Do you have a copy for me?

MR. FULLER: Yeah. I’ve got—Here, he and I can look at this.

Looking under the profane language sub heading [*sic*]. This is the annotated code, your Honor, and I haven’t jeopardized [*sic*] the legal president [*sic*], but I’m certain that the holding or point of law is indeed good law that profane or vulgar language in and of itself does not constitute disorderly conduct.

You must also have an act or you must breach the peace, or an act that breaches the peace. Essentially the important part of all this is that curse words, inoffensive [*sic*] or vulgar language is not disorderly conduct unless you breach the peace in some way, inciting a riot, for example.

THE COURT: Do you have a proposed instruction that you would like me to consider, Mr. Fuller?

MR. FULLER: I think I could draft one rather quickly that, essentially, mirrors—

THE COURT: Is there a pattern instruction that addresses that issue?

MR. FULLER: I am not aware of one. There may be. I could check very quickly, but I doubt very seriously there is.

THE COURT: All right. The position of the Court is we do have profane language, but we also have other acts from your client, and there are patterned [*sic*] jury instructions that presumably are in the People's requested instructions. Those are what are going to be given to *** the jury.

We have more in this case than just swearing. We have aggressive conduct. We have a young woman who testified that she was concerned for the safety of her child. We have a young mother who was also, if my memory is correct, was very upset and to the point where she called for her aunt to come help her and ultimately called for the police to come assist in the situation. ***"

¶ 9 In his written motion for a new trial, defendant contended that the trial court "erred by *** refusing to give to the jury certain instructions proposed by the defense." At the hearing on the motion, defendant's attorney offered no argument. The trial court denied the motion and this appeal followed. Appellate counsel moved to withdraw pursuant to the procedure set forth in *Anders v. California*, 386 U.S. 738 (1967), and *People v. Jones*, 38 Ill. 2d 384 (1967). We denied the motion and ordered appellate counsel to file a brief addressing the adequacy of the instructions given to the jury.

¶ 10 Defendant argues that the jury was not properly instructed on the circumstances under which a disorderly-conduct conviction may be predicated on abusive or profane language. As noted, defendant argued during the jury-instructions conference that the jury should be instructed on the defense theory that, although defendant might have used profane language, he did not

thereby provoke a breach of the peace. However, defendant failed to tender a written instruction on this point and the State contends that any error in the jury instructions is therefore forfeited. See, e.g., *People v. Anderson*, 325 Ill. App. 3d 624, 636 (2001) (“no party may raise on appeal the failure to give any instruction unless he tendered it to the court”). The State further argues that defendant forfeited any instructional error because he did not raise it with sufficient specificity in his posttrial motion. Without conceding that the issue is forfeited, defendant argues that, even if it were, it would nonetheless be reviewable under the plain-error rule.

¶ 11 Illinois Supreme Court Rule 451(c) (eff. Apr. 8, 2013) provides, in pertinent part, that “substantial defects [in jury instructions] are not waived by failure to make timely objections thereto if the interests of justice require.” This rule, which is coextensive with the plain error rule (*People v. Herron*, 215 Ill. 2d 167, 175 (2005)), “crafts a limited exception to the general rule to correct ‘grave errors’ and errors in cases ‘so factually close that fundamental fairness requires that the jury be properly instructed’ ” (*id.* (quoting *People v. Hopp*, 209 Ill. 2d 1,7 (2004))). In *Herron*, our supreme court offered the following explanation of how these principles operate:

“We recently held that a jury instruction error rises to the level of plain error only when it ‘creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial.’ [Citations.] The seriousness of the risk depends upon the quantum of evidence presented by the State against the defendant. The defendant need not prove that the error in the instruction actually misled the jury. If the defendant carries the burden of persuasion and convinces a reviewing court that there was error and that the evidence was closely balanced, the case is not cloaked with a presumption of prejudice. The error is

actually prejudicial, not presumptively prejudicial. We deal with probabilities, not certainties; we deal with risks and threats to the defendant's rights. When there is error in a close case, we choose to err on the side of fairness, so as not to convict an innocent person." *Id.* at 193.

¶ 12 We need not decide whether defendant properly preserved the claimed instructional error for appellate review. For the reasons set forth below, even assuming, *arguendo*, that defendant forfeited the error (as the State contends), we conclude that plain error occurred and that defendant is therefore entitled to a new trial before a properly instructed jury.

¶ 13 Under the definition of the offense of disorderly conduct applicable here, one commits that offense when he or she knowingly "[d]oes any act in such unreasonable manner as to alarm or disturb another *and to provoke a breach of the peace.*" (Emphasis added.) 720 ILCS 5/26-1(a)(1) (West 2010). In *People v. Allen*, 288 Ill. App. 3d 502, 506 (1997), the Fourth District observed as follows:

"The term 'breach of the peace' defies easy definition.

"The term 'breach of the peace' has never had a precise meaning in relation to specific conduct. Yet from its early common law origin to the present it has received a fairly well defined gloss. "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." [Citation.] The term connotes conduct that creates consternation and alarm. It is an indecorum that incites public turbulence; yet violent conduct is not a necessary element. The proscribed conduct must be voluntary, unnecessary, and contrary to ordinary human conduct. On the other

hand, the commonly held understanding of a breach of the peace has always exempted eccentric or unconventional conduct, no matter how irritable to others. It seems unnecessary to add that whether a given act provokes a breach of the peace depends upon the accompanying circumstances, that is, it is essential that the setting be considered in deciding whether the act offends the mores of the community.’ *United States v. Woodard*, 376 F.2d 136, 141 (7th Cir. 1967).”

¶ 14 This broad definition must be applied in conjunction with first-amendment principles, under which offensive speech may not be criminalized *simply because it is offensive*. *Id.* The definition may be constitutionally applied, however, to “fighting words,” that is words that are not merely offensive, but that “by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). “[F]ighting words by definition provoke a breach of the peace, such that they satisfy a necessary element of disorderly conduct.” *Allen*, 288 Ill. App. 3d at 507. The term “fighting words” is often attached to personally abusive epithets that are inherently likely to provoke a violent reaction from an ordinary citizen. *Id.* However, it has been held that “vulgarity and epithets do not suffice to trigger the State’s prosecutorial powers and criminal sanctions” unless the words in question “contain either an explicit or implied threat.” *People v. Redwood*, 335 Ill. App. 3d 189, 193 (2002); accord *People v. Bradshaw*, 116 Ill. App. 3d 421, 422 (1983) (evidence that defendant called a bartender “ ‘all kinds of obscene names’ ” for 10 to 15 minutes did not support conviction of disorderly conduct, given that the defendant did not threaten anyone or incite others to behave in a threatening manner).

¶ 15 The State maintains that the pattern jury instructions given to the jury were sufficient to safeguard defendant against a conviction based on constitutionally protected speech. The State

further contends that the instruction proposed (although never reduced to writing) by defendant would have added nothing to those that were actually given. Before proceeding, we note that the salient question is whether the instructions given here were so inadequate as to rise to the level of plain error. If so, defendant would have been entitled to relief even if he had registered no objection to the instructions given by the court. Defendant should not be in a less favorable position—*i.e.*, barred from seeking relief from defective instructions—by virtue of the fact that, during the proceedings below, he recognized a problem with the instructions but failed to propose an appropriate nonpattern instruction. Therefore, our analysis will focus not on whether the instruction defendant proposed was appropriate or “added anything” to the pattern instructions, but on whether the jury was properly instructed and, if not, whether the absence of a proper instruction was plain error.

¶ 16 The thrust of the State’s argument is that the jury was properly instructed inasmuch as it was informed that the State was required to prove that defendant’s act provoked a breach of the peace. However, that information was clearly insufficient without further instruction on the first-amendment principles that limit the State’s power to punish speech that might otherwise fit the broad definition of “breach of the peace.” As noted, at common law the term “breach of the peace” reached “ ‘indecorum that incites public turbulence’ ” (*Allen*, 288 Ill. App. 3d at 506 (quoting *Woodard*, 376 F.2d at 141.)), a category of conduct that, unless further qualified, could embrace constitutionally protected expression. The jury could not have gleaned the constitutional gloss that differentiates fighting words from mere profanity.

¶ 17 Based on the evidence, as described above, there was a serious risk that the jurors convicted defendant based on evidence that he used profanity that did not reach the level of fighting words. There was conflicting evidence as to whether defendant threatened Love. The

only witness who corroborated Love's testimony that she was threatened was seriously impeached. The evidence on this critical point is close enough to require that we err on the side of fairness. *Herron*, 215 Ill. 2d at 193.

¶ 18 We now address the issue of double jeopardy and determine that it has not attached. The evidence is sufficient to support a judgment of guilt beyond a reasonable doubt by a rational trier of fact. However, this determination is not binding on retrial and is not intended to express an opinion concerning defendant's guilt or innocence. See *People v. Macon*, 396 Ill. App. 3d 451, 458-59 (2009).

¶ 19 For the foregoing reasons, we reverse the judgment of the circuit court of Stephenson County and remand for a new trial.

¶ 20 Reversed and remanded.