No. 3--09--0510

Order filed February 15, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 9th Judicial Circuit,
Plaintiff-Appellee,	)	Knox County, Illinois.
	)	
v.	)	No. 08-CM-622
	)	
LARRY W. MATHERS,	)	Honorable
	)	James B. Stewart,
Defendant-Appellant.	)	Judge, Presiding

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices McDade and Wright concur in the judgment.

ORDER

Held: The trial court's failure to admonish the defendant as required by Supreme Court Rule 401(a) before allowing him to represent himself was reversible error. A re-trial would not expose the defendant to double jeopardy because a rational jury could have convicted him of disorderly conduct based upon the evidence presented during his trial. Thus, the defendant's conviction is reversed and the matter is remanded for a new trial, before which the defendant must be given the admonishments required by Rule 401(a).

The State charged the defendant, Larry W. Mathers, with disorderly conduct for yelling an obscenity at one of his neighbors. Following a jury trial, the circuit court of Knox County convicted the defendant. For the following reasons, we reverse and remand for a new trial.

FACTS

At defendant's disorderly conduct trial, the State elicited testimony from Eugene Mendez. Mendez testified that he lived five houses south of the defendant when the incident at issue occurred in July 2008. Mendez had recently testified against the defendant in a lawsuit between the City of Galesburg (the City) and the defendant concerning the condition of the defendant's property. During the defendant's criminal trial, Mendez opined that the witnesses in the case between the defendant and the City were afraid to testify against the defendant. Mendez testified that the defendant lost the suit with the City.

One or two days later, Mendez was sitting in his own backyard with his grandchildren. His wife had just exited the home to tell him that lunch was ready when he saw the defendant stop his vehicle in the front and just south of Mendez's home. Mendez was walking into his home for lunch when he heard defendant yell "Fuck you." Mendez came to the front of his house and saw defendant driving into his own driveway.

Mendez testified that both he and his wife were upset by the incident. Mendez called the Public Safety Building to report the incident. Officer Huff of the Galesburg police department came to Mendez's home, and Mendez told Huff the whole story. Mendez also testified that after he testified against the defendant in the lawsuit between the defendant and the city, the defendant had driven by Mendez's home continuously honking his car horn. Mendez testified further that the defendant had been honking the horn and yelling at him for the past 11 or 12 years. The

defendant has yelled "Mexican *** you don't belong here," yelled obscenities at Mendez, and has made rude comments to Mendez when he walks by defendant's house.

Officer Huff testified that he interviewed the defendant and Mr. and Mrs. Mendez about the incident. Although the defendant admitted to yelling obscenities while working on his vehicle in his driveway, he denied directing any obscenities to Mendez. Huff arrested the defendant for disorderly conduct.

At the defendant's first appearance in August 2008, the trial court appointed a public defender to represent him. In December 2008, the defendant's court-appointed attorney filed a motion to withdraw. During a hearing on the motion to withdraw, the defendant expressed his desire to represent himself. The court explained to the defendant its belief that an attorney could benefit the defendant and expressed its opinion that it was not a good decision for the defendant to proceed *pro se*. The defendant explained his reasons for wanting to proceed *pro se*, and the court granted the motion to withdraw. The trial court never admonished the defendant in accordance with Supreme Court Rule 401(a) (Ill. S. Ct. R. 401(a) (eff. July 1, 1984)).

The defendant took the stand on his own behalf. He showed the jury a videotape and photographs of his home and of his vehicle in his driveway. The defendant argued to the jury that Mendez could not have heard him using obscenities in his own driveway. He provided no further testimony. The jury found the defendant guilty of disorderly conduct. The circuit court of Knox County sentenced defendant to serve thirty days in jail and one year of probation and ordered him to undergo a mental health evaluation. The court also ordered the defendant to have no contact with Mendez.

This appeal followed.

ANALYSIS

Supreme Court Rule 401(a) requires that a trial court must give certain admonishments to a criminal defendant before the defendant may be found to have knowingly and intelligently waived counsel. Ill. S. Ct. R. 401(a) (eff. July 1, 1984); *People v. Haynes*, 174 Ill. 2d 204, 235-36 (1996). Specifically, Rule 401(a) provides that

> "The court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:
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> (1) the nature of the charge;
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> (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and
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> (3) that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court." Ill. S. Ct. R. 401(a) (eff. July 1, 1984)

Compliance with Rule 401(a) is required for an effective waiver of counsel. *Haynes*, 174 Ill. 2d at 236. Technical compliance with the Rule is not always required, however; "substantial compliance" will be sufficient to effectuate a valid waiver "if the record indicates that the waiver was made knowingly and voluntarily, and the admonishment the defendant received did not prejudice his rights." *Haynes*, 174 Ill. 2d at 236. The substance of the Rule 401(a)

admonishments "must be provided at the time the court learns that a defendant chooses to waive counsel, so that the defendant can consider the ramifications of such a decision." *People v. Jiles* 364 Ill. App. 3d 320, 329 (2006).

In this case, although the defendant was advised of the charges against him and the possible penalties during his initial appearance, he was not given anything resembling the required Rule 401(a) admonishments at the time he expressed a desire to waive counsel and represent himself more than four months later. Accordingly, his conviction must be reversed. See, *e.g.*, *People v. Campbell*, 224 Ill. 2d 80, 87 (2006) (a trial court's failure to advise a defendant of his rights under Rule 401(a) is an error that "compel[s] the reversal of defendant's conviction"); *Jiles*, 364 Ill. App. 3d at 329-30 (reversing defendant's conviction because trial court failed to give Rule 401(a) admonishments at the time that defendant chose to waive counsel and ruling that a defendant "cannot be expected to rely on admonishments given months earlier, when he was not requesting to waive counsel"). The State concedes the trial court committed reversible error in failing to admonish defendant in accordance with Supreme Court Rule 401(a) and admits that defendant's conviction must be reversed on those grounds.

We now address the issue of whether the defendant may be retried without being exposed to double jeopardy. The double jeopardy clause prohibits retrial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to present in the first proceeding. *Burks v. United States*, 437 U.S. 1, 11 (1978); *People v. Macon*, 396 Ill. App. 3d 451, 458 (2009). It does not, however, preclude retrial where a conviction has been set aside because of an error in the proceedings leading to the conviction. *People v. Mink*, 141 Ill. 2d 163, 173-74 (1990); *Macon*, 396 Ill. App. 3d at 458. Therefore, to prevent the risk of exposing defendant to

double jeopardy, we must consider whether the State presented sufficient evidence to prove defendant guilty beyond a reasonable doubt. *People v. Morris*, 135 Ill. 2d 540, 549-51 (1990); *Macon*, 396 Ill. App. 3d at 458. In evaluating the sufficiency of the evidence, we view the evidence "in [the] light most favorable to the State" and we must remand for a new trial if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Macon*, 396 Ill. App. 3d at 458-59, citing *People v. Brooks*, 187 Ill. 2d 91, 132 (1999).[1]

The defendant argues that a new trial would be improper because the evidence is insufficient to support a conviction for disorderly conduct. The governing statute provides, in pertinent part, that a person commits disorderly conduct when he knowingly "[d]oes 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 2006). The offense of disorderly conduct " 'embraces a wide variety of conduct serving to destroy or menace the public order and tranquility," and may include the mere utterance of " 'words likely to produce violence in others.' [Citation.]" *People v. Brant*, 394 Ill. App. 3d 663, 674 (2009), quoting *In re B.C.,* 176 Ill. 2d 536, 552 (1997). However, where the alleged offense is based on words alone, the words used must constitute

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[1] The defendant argues that "*de novo* review is appropriate" here because the defendant "does not contest the facts of the incident as recounted by the State's witnesses." During the trial, however, the defendant tried to establish that Mendez could not have heard the defendant yelling obscenities from his driveway. Thus, because "the jury had to resolve factual conflicts between the accounts of eyewitnesses and draw reasonable inferences from those accounts," the deferential standard of review applied in *Brooks* and *Macon* is appropriate. See, *e.g.*, *People v. Slater*, 393 Ill. App. 3d 977, 981 (2009).

"fighting words." *People v. Redwood*, 335 Ill. App. 3d 189, 192 (2002). "Fighting words" are "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen v. California*, 403 U.S. 15, 20, 29 (1971); see also *People v. Allen*, 288 Ill. App. 3d 502, 507 (1997). Such words "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Allen*, 288 Ill. App. 3d at 507. Although the defendant concedes that his actions were offensive to Mendez, he disputes the sufficiency of the evidence to prove beyond a reasonable doubt that he uttered "fighting words" which provoked a breach of the peace within the meaning of the statute.

Viewing the evidence in the light most favorable to the State, we find it sufficient to support a conviction for disorderly conduct. A rational jury could have concluded that the defendant's verbal abuse of Mendez constituted "fighting words" which constituted a breach of peace under the disorderly conduct statute. When determining whether insulting language rises to the level of "fighting words," courts must "analyze [the defendant's] words in relation to the surrounding circumstances," including any history of conflict between the parties. *Gower v. Vercler*, 377 F.3d 661, 669 (7th Cir. 2004). If a reasonable person in the victim's position would perceive the defendant's words as threatening in light of the defendant's prior behavior toward the victim, they are "fighting words." *Gower*, 377 F.3d at 669-71 (holding that defendant's remarks of "fuck you" and "fat son-of-a-bitch" to his father-in-law were "fighting words" because they were "inflammatory" and "implicitly threatening" when viewed in light of the defendant's prior conduct and the history of conflict between the parties). Such abusive and implicitly threatening language can constitute disorderly conduct under the statute even if there is no threat of "immediate physical harm" at the time the words are spoken. *Allen*, 288 Ill. App. 3d at 508.

Here, the defendant has insulted, provoked, and otherwise disturbed Mendez for over a decade. Specifically, he has repeatedly honked his horn and yelled obscenities and racist insults at Mendez including "Mexican *** you don't belong here," and he has made other rude comments when Mendez walked past the defendant's house. Mendez testified that this harassing conduct escalated after he testified against the defendant in the City's lawsuit. Specifically, Mendez testified that ever since the city called him as a witness, the defendant had been "driving by [Mendez's] house honking the horn continuously." In light of this ten-year pattern of abuse, which was escalating immediately prior to the charged offense, a reasonable person in Mendez's position might well have felt threatened by the defendant's words.

The fact that Mendez never reacted violently during the defendant's ten-year campaign of abuse does not alter our conclusion that the words spoken by the defendant in July 2008 were "fighting words" that were "inherently likely to provoke a violent reaction." The relevant question is not whether the words at issue actually provoked a violent response from the victim, but whether they were likely to provoke such a response from a reasonable person. See, *e.g.*, *Allen*, 288 Ill. App. 3d at 507 ("[W]ords need only be *likely* to incite violence, not actually produce violence, to qualify as fighting words.") (Emphasis in original.); *Gower*, 377 F.3d at 670-71 ("that [the victim] properly exercised restraint by refraining from retaliating in a violent manner to the [defendant's] insults" did "not alter the fact" that those insults were "fighting words"). As noted above, a reasonable person in Mendez's shoes might well have felt threatened by the defendant's final outburst, and our appellate court has held that words that contain an explicit or implicit threat are likely to provoke a violent response or breach of the peace. See, *e.g.*, *Allen*, 288 Ill. App. 3d at 507; *Redwood*, 335 Ill. App. 3d at 193-94; see also *Gower*, 377 F.3d at 669-71. Accordingly, a

rational jury could have concluded that the defendant's words were "fighting words" under the law even though Mendez did not respond violently.[2]

Alternatively, the defendant argues that the words he uttered did not amount to an actual breach of the peace under the disorderly conduct statute. He notes that the statute criminalizes conduct that "actually bring[s] about a breach of the peace, rather than *** conduct which merely tends to do so." *People v. Trester*, 96 Ill. App. 3d 553, 555 (1981). He then argues that because he had already pulled into his own driveway by the time Mendez reached the front of his house, and Mendez only heard the offensive language, no actual breach of peace occurred. We disagree. "[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. Accordingly, because a rational jury could have found that the defendant uttered "fighting words" in this case, it could also have found that he committed a "breach of the peace" under the disorderly conduct statute.

CONCLUSION

We find that the trial court's failure to admonish the defendant as required by Supreme Court Rule 401(a) was reversible error. After considering the surrounding circumstances and viewing the evidence in the light most favorable to the State, however, we conclude that a rational jury could have convicted the defendant of disorderly conduct based upon the evidence presented

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[2] A rule that repeated insults cannot be considered "fighting words" unless they actually produce a violent response would have perverse consequences. It would effectively punish Mendez and others like him for exercising admirable restraint and could encourage future victims of such sustained abuse to resort to self-help. This represents bad policy which contravenes the purposes of the disorderly conduct statute and the "fighting words" doctrine.

during his trial. Accordingly, a re-trial would not expose the defendant to double jeopardy. We therefore reverse the defendant's conviction and remand for a new trial, before which the defendant must be given the admonishments required by Rule 401(a).

Reversed and remanded.