2015 IL App (3d) 130323-U

Order filed February 25, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 9th Judicial Circuit, Knox County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-13-0323 Circuit No. 12-CF-71
DEBRA L. KIMMITT,	)	Honorable Paul L. Mangieri,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices Lytton and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State proved beyond a reasonable doubt that defendant made physical contact of an insulting or provoking nature with the victim. (2) Defendant is entitled to a $30 refund on money paid toward fines.

¶ 2 Defendant, Debra L. Kimmitt, was charged with aggravated battery (720 ILCS 5/12-3.05(d)(1) (West 2010)). The information alleged that defendant knowingly made contact of an insulting or provoking nature with a victim 60 years of age or older. Following a bench trial, defendant was found guilty and convicted on the lone charge. Defendant appeals, arguing that

the State failed to prove certain elements of the offense beyond a reasonable doubt. Defendant also takes issue with the monetary credit she earned as a result of her time spent in jail. We affirm, and remand so that the clerk may issue a refund to defendant in the sum of $30.

¶ 3 FACTS

¶ 4 On February 13, 2012, the State charged defendant with aggravated battery (720 ILCS 5/12-3.05(d)(1) (West 2010)). The State alleged that defendant "knowingly made contact of an insulting or provoking nature with James L. Webber, an individual of 60 years of age or older, in that she struck James L. Webber in the face with her hand[.]" The matter proceeded to a bench trial commencing on January 17, 2013.

¶ 5 The State's first witness was Rick Pecsi, an investigator for the Knoxville police department. On February 10, 2012, Pecsi was dispatched to Good Samaritan nursing home, where he spoke to Linda Cook, who wanted to report a battery. Pecsi learned that the victim of the battery was James Webber, an 82-year-old resident of the nursing home. Over the course of his investigation, Pecsi also spoke to Patrick Fegan, Brandy Reed, and defendant.

¶ 6 Pecsi testified that he spoke with defendant at the police station, after she had been read and indicated that she understood her *Miranda* rights. Defendant described the incident to Pecsi. Defendant explained that Webber had been found on his hands and knees out of his bed, and defendant was summoned by Reed to assist getting Webber back into the bed. During the process of getting Webber back into the bed, Webber spit in defendant's face. Defendant told Pecsi that as a reaction to Webber spitting, she used an open hand to turn Webber's head away from her. Defendant did not indicate that Webber made any further contact with her. Pecsi testified that defendant related that she did not want to provide a written statement.

¶ 7 The State called Fegan as its next witness. Fegan testified that on February 10, 2012, he

was employed as a maintenance man at Good Samaritan nursing home. Fegan recalled that on that date he was in a hallway when he heard "screaming and hollering" coming from Webber's room. Fegan described what he saw as he arrived at Webber's room: "I enter the room and [defendant is] sitting in front of him with some medicine, said something about, you know, I need you to take your medicine, Jim, and he looked at her and said, fuck you, and spit in her face, and she smacked him." Reed was also in the room at the time.

¶ 8 On cross-examination, Fegan testified that Webber was a large man, approximately six feet three inches tall. He admitted that Webber's behavior had been problematic in the past, describing Webber as "a handful." When asked to describe the contact that defendant made with Webber, Fegan replied that she "[s]macked him." Fegan was approximately three feet away from them when this happened. Webber was sitting on the bed, and defendant was standing in front of him. Fegan did not recall Webber striking defendant, but he admitted that, in a written report provided to Pecsi, he stated that Webber struck defendant.

¶ 9 Reed was the final witness for the State. Reed testified that she worked as a certified nurse's assistant at Good Samaritan nursing home on the date in question. On that date, she discovered Webber on his hands and knees in his room. She called for assistance and was in the room when defendant arrived. Reed described the events that ensued once Webber was back onto his bed:

> "Words were exchanged. I don't know if [defendant] was trying to get [Webber] to do something for her. He ended up spitting in her face. She ended up smacking him across the face. He in turn spit in her face again. She then smacked him again and then he smacked her and that's when [Fegan] and I said, that's enough, just go ahead and leave, and we kind of just laid him down and let

him cool down."

Reed testified that Webber was "known to hit[,]" and this information was in the nursing notes.

¶ 10 Defendant testified on her own behalf. She testified that Reed was not present in Webber's room when she and Fegan arrived. When Reed walked in, defendant asked her to retrieve a gait belt to help lift Webber up. However, defendant and Fegan were able to assist Webber back into his bed without the gait belt. Defendant testified that Webber then spit in her face twice, at which point she instinctively moved her hand toward him in some fashion. "As I did that," defendant remarked, "it smacked his nostril." Defendant maintained that she only made contact with Webber once, with the tip of her amputated finger. She testified that Webber then slapped her twice in the head and punched her in the stomach.

¶ 11 The next afternoon, defendant was called to the Knoxville police department. Defendant testified that she related to Pecsi that Webber had spit on her twice and punched her numerous times. She claimed that Pecsi was not telling the truth when he testified that she had told not him these facts.

¶ 12 The bench trial continued on February 14, 2013, when the State called Reed and Pecsi in rebuttal. Reed reiterated that Webber spit on defendant, defendant then "smacked" Webber, Webber spit on defendant once more, and defendant again smacked Webber. She testified that Webber never struck defendant. Pecsi reiterated that defendant never told him that she had been struck by Webber, and defendant refused his offer to provide a written statement. Defendant testified in surrebuttal, claiming that she conveyed to Pecsi that Webber had repeatedly struck her.

¶ 13 In closing arguments, defense counsel argued that defendant did not have the requisite *mens rea* to be found guilty of the offense. He described the contact as unintentional and

reflexive.

¶ 14 The court found defendant guilty of aggravated battery. In delivering its verdict, the court touched upon each element of the offense. With reference to the requirement that contact be of an insulting or provoking nature, the court found the following:

> "The testimony then is after she slapped him in the face he spit in her face again and then she slapped him again. Clearly in the trier of fact's mind, without words being spoken, this is almost the textbook perfect case of how you could establish I think contact of an insulting and provoking nature without words being spoken. Someone gets slapped in the face after they spit in somebody's face, they spit on them again. Certainly, I think if we're to accept that testimony, we can draw the reasonable inference from the fact that the slap to Mr. Webber's face caused him to spit a second time in the face. That would be contact of an insulting and provoking nature."

¶ 15 The court sentenced defendant to a term of 24 months' probation. The court also ordered defendant to pay a $200 drug testing fee, a $250 domestic violence assessment, and the monthly probation fee of $25. Box 18 on the sentencing order reads "VCVAF, CAC, TC, DC." According to the clerk's cost sheet, located elsewhere in the record, these notations apparently refer to the "Victim of Violent Crime" fee, "Child Advocacy Center" fee, teen court fee, and drug court fee, respectively. The parties do not dispute that the court ordered defendant to pay those assessments. The sentencing order also mandates that defendant serve six days in jail, and credits her for six days already served. The cost sheet makes clear that defendant has paid all assessments in full, and does not indicate that she received any monetary credit for time served.

¶ 16 Defendant appeals her conviction, arguing that the State failed to prove beyond a

reasonable doubt that her contact with Webber was of an insulting or provoking nature. Defendant also contends that she should receive monetary credit toward her fines for the six days she spent in the Knox County jail.

¶ 17 ANALYSIS

¶ 18 I. Sufficiency of the Evidence

¶ 19 When a challenge is made to the sufficiency of the evidence at trial, we review to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056; *People v. Collins*, 106 Ill. 2d 237 (1985). In making this determination, we review the evidence in the light most favorable to the prosecution. *Baskerville*, 2012 IL 111056.

¶ 20 It is not the purpose of a reviewing court to retry a defendant. *People v. Milka*, 211 Ill. 2d 150 (2004). Instead, great deference is given to the trier of fact. See, *e.g.*, *People v. Saxon*, 374 Ill. App. 3d 409 (2007). All reasonable inferences from the record in favor of the prosecution will be allowed. *People v. Bush*, 214 Ill. 2d 318 (2005). " 'Where evidence is presented and such evidence is capable of producing conflicting inferences, it is best left to the trier of fact for proper resolution.' " *Saxon*, 374 Ill. App. 3d at 416 (quoting *People v. McDonald*, 168 Ill. 2d 420, 447 (1995)). The trier of fact is not required to accept or otherwise seek out any explanations of the evidence that are consistent with a defendant's innocence; nor is the trier of fact required to disregard any inferences that do flow from the evidence. *People v. Sutherland*, 223 Ill. 2d 187 (2006); see also *Saxon*, 374 Ill. App. 3d 409.

¶ 21 Initially, we acknowledge that defendant disputes this standard of review. Citing to *People v. Smith*, 191 Ill. 2d 408 (2000), defendant argues that *de novo* review is appropriate where the facts are not in dispute. Our supreme court has noted that the deferential standard

discussed above, known as the *Collins* standard, "gives 'full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' " *People v. Jackson*, 232 Ill. 2d 246, 281 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). " 'Even if the facts are not disputed, if reasonable persons could draw different inferences from them, it is left to the trier of fact to resolve those questions.' " *People v. Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 12 (quoting *People v. Brown*, 345 Ill. App. 3d 363, 366 (2003). Because the issue of whether defendant's conduct was insulting or provoking in nature required inferences to be made by the trier of fact, the *Collins* standard is appropriate here.

¶ 22 Section 12-3.05 of the Criminal Code of 1961 states:

> "A person commits aggravated battery when, in committing a battery, other than by discharge of a firearm, he or she knows the individual battered to be any of the following:
>
> (1) A person 60 years of age or older." 720 ILCS 5/12-3.05(d)(1) (West 2010).

A battery is committed when a person "knowingly without legal justification and by any means *** (2) makes physical contact of an insulting or provoking nature with an individual." 720 ILCS 5/12-3(a) (West 2010). Defendant argues that the State's evidence was insufficient to prove beyond a reasonable doubt that her physical contact with Webber was of an insulting or provoking nature.

¶ 23 Proof that contact was of an insulting or provoking nature does not require direct testimony from the victim to that effect. See, *e.g.*, *People v. Fultz*, 2012 IL App (2d) 101101. Instead, that fact may be inferred from, *inter alia*, the victim's reaction to the contact. *People v.*

Nichols, 2012 IL App (4th) 110519. In the present case, this is precisely the type of inference that the trial court made. Because Webber apparently spit in defendant's face in response to her slapping him, the court reasoned that the slap was provocative.

¶ 24 On appeal, defendant does not renew her argument that she lacked the requisite *mens rea* to commit the offense of aggravated battery. Nor does she argue that her contact with Webber was a matter of self-defense or otherwise legally justified. The justifiable use of force is considered to be an affirmative defense, and was not raised as a defense in this case. See *People v. Sambo*, 197 Ill. App. 3d 574 (1990). She argues merely that the fact that Webber spit in defendant's face prior to her slapping him renders the State's evidence insufficient. In essence, defendant argues her actions may not be considered insulting or provoking simply because she was struck first.

¶ 25 In certain situations, a contact that might otherwise be considered a battery may be justified based upon the actions that preceded it, as in the case of self-defense (see, *e.g.*, *People v. Woods*, 81 Ill. 2d 537 (1980)) or reflexive actions (*e.g.*, *City of Pekin v. Ross*, 81 Ill. App. 3d 127 (1980)). However, defendant has cited no cases that support the proposition that physical contact may be rendered noninsulting or nonprovocatory simply because it was preceded by a battery itself. Here, the trial court rationally inferred that defendant made contact of a provoking nature. We decline to retry defendant, and instead defer to the trier of fact. Accordingly, we find that the State's evidence was sufficient to prove beyond a reasonable doubt that defendant made physical contact of an insulting or provoking nature with Webber.

¶ 26 II. Credit for Time Served

¶ 27 Section 110-14 of the Code of Criminal Procedure provides that "[a]ny person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on

conviction of such offense shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant." 725 ILCS 5.110-14(a) (West 2010). A defendant may seek that credit for the first time on appeal. *People v. Woodard*, 175 Ill. 2d 435 (1997). Aggravated battery is a bailable offense. See 725 ILCS 5/110-4 (West 2012).

¶ 28 As defendant served six days in jail, she would be entitled to a $30 credit to be applied toward her fines. The $30 Knox County Child Advocacy Center "fee" is, in fact, a fine. *People v. Jones*, 397 Ill. App. 3d 651 (2009). Because defendant has already paid that fine in full, she is entitled to a $30 refund. The State concedes that this remedy is appropriate. We therefore remand for the issuance of a refund.

¶ 29 CONCLUSION

¶ 30 The judgment of the circuit court of Knox County is affirmed. The matter is remanded for the issuance of a $30 refund to defendant.

¶ 31 Affirmed and remanded.