2015 IL App (3d) 130685-U

Order filed October 29, 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 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-13-0685 Circuit No. 09-CF-1669
JOSEPH P. MESSINA,	)	Honorable Sarah F. Jones,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justice Carter concurred in part and dissented in part.
Presiding Justice McDade specially concurred in part and dissented in part.

ORDER

¶ 1 *Held*: The improper *ex parte* communication between the State and the trial court gave the appearance of impropriety and requires that the conviction be vacated and the matter remanded for a new trial.

¶ 2 Defendant Joseph Messina was convicted in a bench trial of three counts of aggravated battery and sentenced to a 30-month term of probation and 180 days in the county jail subject to a motion to vacate at the end of the probation term. Messina appealed his conviction. We reverse and remand.

¶ 3 FACTS

¶ 4 In July 2009, defendant Joseph Messina was celebrating his birthday with a group of friends that included Shaun Plarski, Michael Glielmi, Steven Raymond, Andy Paver, and Lauren Grenda. Messina's group was waiting outside a nightclub with another group that included Anna Minette, Tony Minette, Kevin Dalman, and the victim, Eric Bartels. Messina was involved in a verbal and physical altercation with Bartels. Messina shoved Bartels and allegedly punched him. Bartels fell to the ground and hit his head. Messina then allegedly punched Bartels again. Messina was charged with three counts of aggravated battery: insulting and provoking at a public place of accommodation (counts 1, 3); great bodily harm (count 2). The third count concerned a second punch, inflicted while Bartels was laying on the ground. A bench trial took place.

¶ 5 Anna Minette testified that on July 24, 2009, she went out with her brother, Tony; her cousin, Dalman; and her friend, Bartels. Around 12:30 a.m., they were waiting outside a bar called 191 South for Anna's sister to pick them up. Another group was also waiting outside the bar and included Messina. Bartels and Messina began arguing. Anna heard a loud crack and then saw Bartels was laying in the parking lot on his back, with blood pooling around his head. Anna did not see who punched Bartels. She picked Messina out of a photo lineup at the police station.

¶ 6 Tony Minette testified that he had more than five mixed drinks on July 24. He was familiar with Messina before that night. While waiting outside the bar, he heard Bartels exchange words with Messina. He ducked when he saw Messina swing. He then heard two loud pops and "it kind of went a little crazy." He saw Bartels on the ground. Tony did not see Messina punch Bartels. He picked Messina out of a photo array and identified him in court.

¶ 7 Kevin Dalman testified that he was standing four to five feet from Bartels and saw a punch that came from Eric's right. He did not know who threw the punch and could not identify Messina in a photographic lineup.

¶ 8 Steven Kowalchyk testified. On July 24, 2009, he was working for Paddywagons, a service that transports intoxicated drivers from area taverns. He and his coworker, Jason Siegert, were parked approximately 15 feet from the front doors of 191 South. They noticed two groups having a verbal argument. He saw a muscular man punch a tall man, who went limp and fell to the ground. The muscular man punched him again. After Messina was pulled from the van and handcuffed, Kowalchyk identified him as the man who threw the punches.

¶ 9 Jason Siegert was working with Kowalchyk on July 24. He testified he saw Bartels get punched, fall to the ground, and land on his head. Siegert saw the assailant stand over Bartels, punch him again, and raise his arm in victory. Siegert identified Messina as the assailant.

¶ 10 Jody Sisco, the security manager at 191 South, testified. He was working on July 24, 2009. He saw a tall man's head jerk back and the man fall to the ground. Sisco did not see who threw the first punch but saw a man in front of Bartels in a white t-shirt with black graphics. The man hit Bartels again as he was falling to the ground. Sisco identified Messina as the assailant but admitted he lost sight of Messina when he went into the van.

¶ 11 Detective Greg Selin testified. He booked Messina, took Messina's booking photograph and then took pictures of Messina, including his clothes and hand. At this point, the trial stopped. Neither the State nor the defense was aware of the hand photo and the trial court recessed the trial and ordered Selin to look for the photograph. The trial court noted that both parties were surprised by Selin's testimony and found that there was no bad faith involved on the State's part. No photograph was discovered after a thorough search and, according to the State,

there was no record of the photograph's existence. Messina moved for a mistrial and a hearing took place on his motion. The trial court denied Messina's motion for a mistrial, finding there was no evidence the State failed to exercise due diligence concerning the photograph. The court stated, "This is a situation where we saw him taking the photo and it does not exist." It found the State tendered what it had and that the issue went to the credibility of Selin, who said he took a photo that did not exist.

¶ 12 The trial resumed. Other officers who were involved in the investigation in some capacity testified. The medical personnel from Silver Cross Hospital, where Bartels was transported, testified. The emergency room doctor said Bartels was non-responsive with a laceration to the side of his head. A CAT scan revealed bleeding in the brain. The neurosurgeon who performed surgery on Bartels said there was a fracture on the right side of Bartels' head, above his ear. One forensic biologist and two forensic scientists from the Illinois Crime Laboratory testified that test results revealed that drops of Bartels' blood were found on Messina's shirt and pants.

¶ 13 The defense presented its case. Andrew Lanagan, a Mokena police officer, testified that Messina's friends, Plarski and Paver, told him at 191 South that someone other than Messina punched Bartels. A Mokena police sergeant, Jason Louthan, testified that Glielmi's name came up during the investigation, that he went to Glielmi's house to interview him, but Glielmi's father would not allow him to speak to law enforcement.

¶ 14 Glielmi was called as a witness. Glielmi's attorney informed the trial court that Glielmi would invoke the fifth amendment and exercise his right not to testify. The trial court questioned Glielmi's attorney, who said that he had spoken to his client and it was his understanding there was a possibility Glielmi could be prosecuted if he testified. The State agreed that prosecution

was possible. After Glielmi and his attorney stepped out of the courtroom, defense counsel presented an offer of proof regarding the questions he would ask Glielmi. As another offer of proof, the defense proffered that it would call Steven Raymond, who would testify that he saw Glielmi punch Bartels. The trial court asked the parties to brief the issue.

¶ 15 The trial resumed. Raymond testified he saw Glielmi punch Bartels. The trial again recessed and resumed the following morning. The trial court further questioned Glielmi's attorney regarding his client's fifth amendment right. The trial court ruled that Glielmi was appropriately exercising his fifth amendment right against self-incrimination and excused him as a witness. Raymond's testimony continued. He saw Glielmi push Bartels and "as Eric was turning, Mike wound up and hit him right in the face."

¶ 16 Andy Paver testified. Paver was intoxicated and did not see who punched Bartels. Shaun Plarski testified he left the bar with Messina, and while they were waiting for their ride, a pushing match took place between Messina and Bartels. He saw Messina get pushed or punched, and thrown off balance. He caught Messina and saw Bartels laying on the ground. He did not see Messina punch anyone.

¶ 17 The parties rested. The trial court issued a ruling on January 3, 2013, finding Messina guilty of all three counts aggravated battery. A hearing date for sentencing was scheduled for March 6, 2013. Also on January 3, the Will County State's Attorney office sent an *ex parte* email to the trial judge. The email had a subject line, "Messina case" and stated: "Judge Jones, Jim wanted you to see a copy of his statement that went out regarding the Joseph Messina case." It was signed by the State's Attorney's executive assistant. Attached to the email was a press release. The press release stated:

> "This was a senseless and unprovoked act of aggression on the part of Joseph Messina that literally destroyed Eric Bartels' life. The defendant's conduct – striking the victim while he lay helpless on the ground and then cheering victoriously over him – reflects the culture of violence woven into every aspect of our entertainment and media," said State's Attorney James Glasgow. "Fortunately, Judge Jones found him guilty after weighing the totality of the evidence as well as the credibility of the defense witnesses. She wisely saw through the fraudulent statements made by a defense witness, who changed his story in order to blame someone else three years after the crime."

¶ 18 The trial judge immediately notified the State that the communication was improper. On February 1, the defense filed a motion to reconsider, or in the alternative, for a new trial. The hearing on that motion was scheduled for March 6, 2013. The trial court did not notify Messina about the *ex parte* communication until the beginning of the hearing on March 6, 2013.

¶ 19 At that time, the trial court informed Messina of the existence of the improper email. She further advised the parties that she had not read the attached press release. She then commenced the hearing on Messina's motion to reconsider, which was subsequently denied. Messina thereafter filed a motion to recuse and for a new trial. That motion was heard and denied. Sentencing took place and the trial court sentenced Messina to a 30-month term of probation and 180 days in the county jail, subject to a motion to vacate upon completion of probation. Messina appealed.

¶ 20 ANALYSIS

¶ 21 Messina raises a number of issues on appeal, but because we find the circumstances surrounding the improper *ex parte* communication between the trial judge and the State's Attorney give rise to the appearance of impropriety, a new trial is required, thus making it unnecessary to address the other issues raised by Messina in this appeal.

¶ 22 The dispositive issue is whether the trial court erred when it denied Messina's motion for recusal or a new trial based on the State's *ex parte* communication with the trial judge. Messina maintains the *ex parte* communication created the appearance of impropriety, necessitating recusal of the trial judge, or in the alternative, a new trial.

¶ 23 A judge should recuse herself where necessary to protect an accused's right to trial and to assure the public that justice is fairly administered. *People v. Bradshaw*, 171 Ill. App. 3d 971, 975-76 (1988). A judge should disqualify herself where her impartiality might be reasonably questioned. *People v. Kliner*, 185 Ill. 2d 81, 169-70 (1998). The receipt of an improper *ex parte* communication does not in itself create the appearance of impropriety. *In re Marriage of Wheatley*, 297 Ill. App. 3d 854, 859 (1998). Where the judge does not read the communication and discloses it to the parties as soon as practicable, the appearance of impropriety may be avoided. *Wheatley*, 297 Ill. App. 3d at 859. The judge is in the best position to determine her impartiality. *Kliner*, 185 Ill. 2d at 169. A trial court's decision whether to grant a motion for recusal is reviewed for an abuse of discretion. *Kliner*, 185 Ill. 2d at 169.

¶ 24 Our legal system depends on public confidence. The public must be able to trust that the decisions rendered by judges are based on a fair assessment of the law and the facts as they are applied to each case without any fear of a decision being improperly influenced by people or things that have not been made a part of the record. Illinois judges are bound by the Judicial Code of Conduct to "avoid impropriety and the appearance of impropriety in all of the judge's

activities." Ill. S. Ct. Code of Jud. Cond. R. 62, canon 2. Further, no judge "shall initiate, permit, or consider *ex parte* communications *** concerning a pending or impending proceeding." Ill. S. Ct. Code of Jud. Cond. R. 62A (eff. Jan. 1, 1987), R. 63A(5) (eff. July 1, 2013).

¶ 25 At the start of the hearing on Messina's posttrial motion, the trial judge said that she wished to make a record and stated:

> "On January 3rd, 2013, at 4:36 p.m., I received the following email: 'Subject Statement, Messina case; Judge Jones, Jim wanted you to see a copy of his statement that went out regarding the Joseph Messina case,' signed Sherry, who is Sherry Johnson, Mr. Glasgow's Executive Assistant. I did not read that.
>
> I opened it the next – on January 4th at 11 a.m. My response was as follows: "Please do not send me any other press releases. This case is still before me for sentencing. Thank you. Judge Jones.' "

The trial court stated, "I did not read that press release."

¶ 26 The trial court received the email on January 3. After receiving the email, the trial judge promptly informed the sender to stop sending communications but she did not bring it to the parties' attention until March 6. The judge considered Messina's claims in his motion to recuse and determined that her impartiality was not affected by receipt of the email. Although the email was received after the guilt phase of the trial was over, it could still be perceived as having influenced the judge's consideration of the motion to reconsider and the sentencing. The State's Attorney's praise of the trial court's guilty finding could sway the trial court to impose a harsher sentence than she might otherwise have done or to disregard the defendant's arguments in his

motion to reconsider. When we compare the content of the press release with the content of Messina's motion to reconsider and in the alternative for a new trial, we note that Messina is seeking a review of some of the very judicial findings which are lauded in the press release. A reasonable person could easily think that the press release, if read, may have influenced the trial judge's consideration of the posttrial motions.

¶ 27 The State insists there was no impropriety because the trial judge did not read the press release, notified the State's Attorney not to send further communications, and determined that receipt of the press release did not affect her impartiality. The issue is not whether the judge's impartiality has actually been affected, but rather if the circumstances give rise to an objective appearance that the judge's impartiality may have been compromised. Although the trial judge maintained that she was not biased as a result of the email, the mere receipt of it may create the appearance of impropriety. The dissent criticizes our analysis, relying on *Wheatley* for the proposition that "mere receipt of an improper *ex parte* communication does not, in and of itself, create an appearance of impropriety." *Wheatley*, 297 Ill. App. 3d at 859. The dissent misreads the majority order. Contrary to the dissent's view, the majority order does not violate the proposition the dissents cites. As discussed in length below, we do not consider the fact that the judge merely received the email to be dispositive. Rather, it was the receipt of the email, combined with her failure to timely notify both parties, which created the appearance of impropriety. The *Wheatley* court considered that the appearance of impropriety could be avoided if a judge refused to read the improper communication and disclosed its receipt "as soon as practicable." *Wheatley*, 297 Ill. App. 3d at 859. Because the judge here did not disclose the communication to the parties "as soon as practicable," she did not avoid the appearance of impropriety.

¶ 28 We find *People v. Bradshaw*, 171 Ill. App. 3d 971 (1988), to be instructive on this point. In *Bradshaw*, the appearance of impropriety was created when a sheriff's deputy passed a note to the trial judge and the trial judge recessed court and entered into his chambers with the deputy. *Bradshaw*, 171 Ill. App. 3d at 975-76. The trial judge said he terminated the conversation as soon as he ascertained the deputy was the mother of a victim in Bradshaw's case, but the appellate court found the appearance of impropriety had already been created. *Bradshaw*, 171 Ill. App. 3d at 976.

¶ 29 The appearance of impropriety was compounded in *Bradshaw* because the trial judge did not immediately disclose the improper communication to the parties, but instead waited until *Bradshaw* made a motion for substitution of judge based on information received from witnesses in the courtroom when the note was passed. *Bradshaw*, 171 Ill. App. 3d at 974. Like the reviewing court in *Bradshaw*, we consider the time between the receipt of the email and the disclosure of the receipt of the email to Messina significant. While the trial judge immediately recognized the communication was improper and took steps to notify the sender of the impropriety, she waited more than 60 days to notify the party that would suffer prejudice as a result of the improper communication.

¶ 30 The dissent states that the judge notified Messina at the "very next hearing." It cites to Rule 63 of the Code of Judicial Conduct and *Kamelgard v. American College of Surgeons*, 385 Ill. App. 3d 675 (2008) as support for its determination that the time delay between the judge's receipt of the improper communication and her notification of it to the parties did not affect the appearance of impropriety. Rule 63(A)(5)(a)(ii) (eff. April 16, 2007)) requires the judge to "promptly" notify the parties about the *ex parte* communication. The trial judge did not promptly notify Messina of the improper communication but waited more than 60 days to inform him,

even though Messina was seeking reconsideration of the judge's rulings and continued to file motions and schedule court dates. The lack of timely notice in this context could easily give the impression of impropriety.

¶ 31 In *Kamelgard*, the *ex parte* communications between the judge's clerk and one party occurred on a Friday and again the following Monday. *Kamelgard*, 385 Ill. App. 3d at 677-78. The parties appeared at a status hearing two days later, when the defendant learned of the *ex parte* communication. *Kamelgard*, 385 Ill. App. 3d at 678. The proceedings took place in Cook County and were governed by the Cook County court rules, including Rule 17.2, which requires the trial court disclose improper *ex parte* "at the next hearing." *Kamelgard*, 385 Ill. App. 3d at 679. See Cook Co. Cir. Ct. R. 17.2 (eff. Feb. 1, 1985). The rule required that if the hearing was not scheduled within two days of the improper communication, the party initiating the communication must send a summary of its contents to all parties. *Kamelgard*, 385 Ill. App. 3d at 679. See Cook Co. Cir. Ct. R. 17.2 (eff. Feb. 1, 1985).

¶ 32 Will County has no comparable rule regarding disclosure. *Kamelgard* does not aid the dissent's position. The more than 60 days the trial judge waited to tell Messina about the improper email is in direct contrast to the timing in *Kamelgard*, where less than a week passed between the clerk's *ex parte* communication and the hearing where it was disclosed to the petitioner. The delayed disclosure of the improper communication to Messina, coupled with the nature of the communication, created the appearance of impropriety. Therefore, we find that it was error for the trial judge not to recuse herself.

¶ 33 Because this case is remanded, we must determine whether the evidence was sufficient to sustain Messina's conviction for aggravated battery. When an appellate court reverses a defendant's criminal conviction and remands the case without deciding the sufficiency of the

evidence, it risks subjecting the defendant to double jeopardy. *People v. Taylor*, 76 Ill. 2d 289, 309 (1979) (citing *Burks v. United States*, 437 U.S. 1, 11 (1978)). Based on our review of the record, we find the State presented sufficient evidence that a rational trier of fact could find Messina guilty beyond a reasonable doubt of aggravated battery.

¶ 34 For the foregoing reasons, the judgment of the circuit court of Will County is reversed and the cause remanded for further proceedings consistent with this order.

¶ 35 Reversed and remanded.

¶ 36 JUSTICE CARTER, concurring in part and dissenting in part.

¶ 37 I concur with the decision that there was sufficient evidence to find defendant guilty beyond a reasonable doubt. In addition, I would affirm on all of the other issues raised.

¶ 38 However, I respectfully dissent from the majority's decision regarding the *ex parte* communication for the reasons that follow. Unlike the majority, I would find that the circumstances surrounding the unsolicited *ex parte* communication from the State to the trial judge did not give rise to actual, or the appearance of, impropriety. I would, therefore, affirm the trial court's denial of defendant's motion for recusal or new trial based upon the improper communication. I would also affirm as to all of the other issues raised by defendant on appeal and would ultimately affirm defendant's conviction of aggravated battery.

¶ 39 Specifically, as to defendant's motion for recusal or new trial, under the circumstances of the present case, I would find that the trial judge was not required to recuse herself or to grant defendant a new trial. The trial judge received the unsolicited email from the State's Attorney's Office late in the afternoon on January 3, 2013, opened it the following day, and immediately notified the State's Attorney's Office not to send her any further press releases. The trial judge did not read the press release. On the very next hearing date, March 6, 2013, the trial judge

brought the matter to defendant's attention. In so doing, the trial judge specifically stated that "[she] did not read that press release." The trial judge determined that her impartiality was not affected by the receipt of the unread email.

¶ 40 Illinois Supreme Court Rule 63(C)(1) (eff. April 16, 2007) requires disqualification when a reasonable person might question the trial judge's ability to rule impartially. The rule creates an objective test in the mind of a reasonable person. *Barth v. State Farm Fire & Casualty Co.*, 228 Ill. 2d 163, 176 (2008). The test is the objective reasonable person standard. See *id*. That standard mandates recusal when a reasonable person might question the trial judge's ability to rule impartially. *Id*. I respectfully suggest that under the circumstances of the instant case, an objectively reasonable person would conclude that the receipt of the unsolicited unread communication did not create actual, or an appearance of, partiality or impropriety.

¶ 41 In this case, the mere receipt of the unsolicited and unread communication does not demonstrate a reasonable likelihood or appearance that it prejudiced or actually biased the court. In fact, I would respectfully suggest that under the majority's analysis, the easiest way to obtain a substitution or change of judge would be to send an *ex parte* communication to the trial judge, which would, according to the majority, result in a presumption of prejudice and the need for disqualification. But see *Wheatley*, 297 Ill. App. 3d at 859.

¶ 42 I also disagree with the majority's position that the fact that the trial judge waited more than 60 days to inform defendant of the *ex parte* communication coupled with the communication itself created the appearance of impropriety. Under Canon 3 of the Code of Judicial Conduct, a judge must promptly notify all other parties of the substance of the *ex parte* communication and allow the parties an opportunity to respond. Ill. S. Ct. R. 63(A)(5)(a)(ii) (eff. April 16, 2007); *Kamelgard v. American College of Surgeons*, 385 Ill. App. 3d 675, 680 (2008)

(if an *ex parte* communication occurs, the judge must disclose the circumstances and substance of it at the next hearing). In this case, at the very next hearing, albeit more than 60 days later, the trial judge informed defendant of the existence of the unread improper email before ruling on the motion to reconsider and the motion to recuse or for new trial and before sentencing. A reversal is not necessary because there is no showing or appearance of bias or prejudice of the trial judge and any alleged error is harmless. *Cf. Kamelgard*, 385 Ill. App. 3d at 683; *Bauer v. Memorial Hospital*, 377 Ill. App. 3d 895, 912 (2007). In addition, even if the trial judge had read the communication, I would not find a reversal would not be necessary in this case when the *ex parte* communication of the prosecution's press release was received after the guilt phase of the trial and there is no showing or appearance of bias or prejudice of the trial judge. See *id.*

¶ 43 In this case, I would find no objective demonstration of a reasonable likelihood that defendant had been prejudiced as a result of the trial judge's receipt of the unsolicited and unread *ex parte* communication, press release. The disclosure of the communication to all of the parties at the next hearing was sufficient to avoid recusal under the circumstances of this case. I would find that the trial judge's decision to deny the motion for recusal was not an abuse of discretion for the above reasons. I, therefore, dissent from the majority's recusal analysis.

¶ 44 PRESIDING JUSTICE McDADE, specially concurring in part, dissenting in part.

¶ 45 I agree with the decision to vacate the conviction of Joseph Messina on the ground that an appearance of impropriety arose from the trial judge's receipt of an *ex parte* communication from the Will County State's Attorney and the court's failure, for more than 60 days, to disclose the receipt of that communication to the parties. I concur in that part of the decision.

¶ 46 Moreover, as troubling as the delay in disclosure of its receipt is, I believe the content of the press release suggests that the delay in disclosing it may have harmed Messina's due process rights and created actual prejudice. In the press release the State's Attorney is quoted as saying:

> "Fortunately, Judge Jones found him guilty after weighing the totality of the evidence as well as the credibility of the defense witnesses. She wisely saw through the fraudulent statements made by a defense witness, who changed his story in order to blame someone else three years after the crime."

The language of the release and its proximity to the decision permits a not-unreasonable inference that the State's Attorney may have been privy to the judge's weighing of the evidence prior to the announcement of the verdict. Had the disclosure been made immediately, or at least earlier than 30 days following its receipt, the communication might have served as an additional ground for the defendant to argue for recusal and a new trial in a timely motion to reconsider.

¶ 47 The author further finds that there was sufficient evidence to find the defendant guilty beyond a reasonable doubt, thereby removing a possible double-jeopardy bar. Because I find that conclusion to be problematic on the facts of this case, I respectfully dissent from it.

¶ 48 There are two factors in Messina's trial that would lead me to believe there would be no finding of guilt "beyond a reasonable doubt" in a retrial. The first relates to the alleged photo(s) of Messina's hand. Detective Selin, the booking officer, testified that, as part of the booking process, he took pictures of Messina's clothes and hand—a hand that, based on the description of the blows, should have been lacerated or bruised or swollen. There is no testimonial or evidentiary suggestion that Messina was wearing gloves that night, nor, since the incident took

place in July and gives no indication of premeditation, is it likely he was doing so. If he attacked the victim, pictures should have shown a damaged hand.

¶ 49 The majority notes the trial court's assertion that "this is a situation where we saw him taking the photo and it does not exist." The trial court further observed that in instances with such voluminous photo evidence the loss of an image sometimes occurs accidentally. However, under normal circumstances, if relevant evidence is reported to exist and it is not produced at trial, there is a presumption that it was unfavorable to the party that should have produced it. See *Board of Regents of Regency Universities v. Illinois Education Labor Relations Board*, 208 Ill. App. 3d 220, 233 (1991) (citing *Tepper v. Campo*, 398 Ill. 496, 505 (1947)). In this case that presumption would operate against the State. The State failed to produce the photo(s) of Messina's hands, thus the presumption is any such photo did not show any harm to his hands consistent with his having injured the victim. Instead the court opted to treat it as a question of the credibility of the officer testifying that he took the picture. I have seen no indication that any other photos he testified to having taken were missing or assumed never to have existed. With a different judge or in front of a jury, that presumption might come into play.

¶ 50 Second is the matter of Michael Glielmi. There was a fair amount of testimony relating to Glielmi: he was present during the altercation; two witnesses testified that someone not Messina punched the victim; one witness testified that Glielmi was the person striking the victim in the manner described by other witnesses; when police went to his home, they were prevented from speaking with him or seeing him—any of him, including his hands; he was called as a witness at trial but invoked his 5th amendment right not to be compelled to testify against himself; his attorney represented, and the State agreed, that Glielmi could be prosecuted if he

testified;[1] the trial court found Glielmi was appropriately exercising his constitutional right against compelled self-incrimination. I would submit that a reasonable jury presented with this evidence would not find Messina guilty beyond a reasonable doubt.

¶ 51 I would further suggest that the sentence actually imposed on Messina tacitly acknowledges the tenuousness of this conviction. Despite the State's Attorney's characterization of this as a "senseless and unprovoked act of aggression on the part of Joseph Messina that literally destroyed Eric Bartels' life" and his assertion that "the defendant's conduct – striking the victim while he lay helpless on the ground and then cheering victoriously over him – reflects the culture of violence woven into every aspect of our entertainment and media;" Messina was sentenced to a 30 month term of probation to be followed by 180 days in the county jail, subject to be vacated upon completion of probation.

¶ 52 For these reasons, I concur with the decision to vacate Messina's conviction but I respectfully dissent from the decision to remand this matter for a new trial.

[1] We do not know what he might be prosecuted for, but a fair inference may be drawn from the facts and posture of the case that any prosecution could be related to the assault on Bartels.