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2012 IL App (3d) 100749-U

Order filed May 29, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the Circuit Court
) of the 12th Judicial Circuit,
Plaintiff-Appellee,) Will County, Illinois,
)
v.) Appeal No. 3-10-0749
) Circuit No. 07-CF-719
KULDIP NAG,)
) Honorable
Defendant-Appellant.) Edward Burmila, Jr.,
) Judge, Presiding.

JUSTICE O'Brien delivered the judgment of the court.
Justice Holdridge concurred in the judgment.
Justice McDade dissented.

ORDER

¶ 1 *Held:* The evidence, when examined in the light most favorable to the State, was sufficient to convict the defendant of resisting a police officer.

¶ 2 Following a bench trial, the defendant, Kuldip Nag, was convicted of resisting a peace officer. 720 ILCS 5/31-1(a) (West 2006). He was sentenced to 12 months' conditional discharge, 100 hours of community service, and costs. On appeal, he argues that the State failed to prove him guilty of the offense beyond a reasonable doubt. We affirm.

¶ 3

FACTS

¶ 4 The defendant was charged with resisting a peace officer in that, on March 30, 2007, he allegedly "struggled with Benjamin Grant as he was being handcuffed." The defendant raised the affirmative defense of self-defense necessity.

¶ 5 At the defendant's bench trial, Officer Benjamin Grant testified that on March 30, 2007, he observed a van parked in the driveway of the defendant's home with a license plate sticker that had expired two months earlier. Grant examined the van and noticed that the vehicle identification number (VIN) associated with the license plate number was not the same as the VIN on the van. As Grant examined the van, the defendant came outside. Grant explained to the defendant that the police department had received a complaint about the van having expired license plates. The defendant appeared angry and told Grant that the van was not being used. The defendant raised his voice and stepped between Grant and the van. Grant told the defendant that he would have to place a sticker on the van, but the sticker was not a ticket and would not cost any money. As Grant walked toward the van with a clipboard and sticker, the defendant "pushed [Grant's] arm away." At that point, Grant attempted to take the defendant into custody.

¶ 6 Grant testified that he told the defendant that he was under arrest and tried to place the defendant's hands behind his back "just to handcuff him." When Grant tried to pull the defendant's right arm behind his back, the defendant prevented him from doing so by pulling his arm in the opposite direction. Grant attempted a "takedown" maneuver, wherein he tried to pull on the defendant's right arm and simultaneously push the defendant toward the ground, but the maneuver did not work. Grant then attempted to get the defendant to the ground by striking the defendant's right thigh with his knee, but was unsuccessful in getting the defendant's hands

behind his back. Grant let go of the defendant and sprayed him with pepper spray. Initially, the pepper spray did not seem to have any effect on the defendant, and Grant was still unable to get the defendant to the ground. The defendant went down on one knee but would not place his arms behind his back. Grant struck the defendant in the upper arm twice with his police baton to loosen the defendant's muscles to get his arm behind his back.

¶ 7 Throughout the incident Grant repeatedly told the defendant that he was under arrest and instructed him to place his hands behind his back. During the incident, the defendant asked why Grant was beating him. At some point during the incident, Grant called for backup and indicated that the defendant was fighting him.

¶ 8 Matthew Jurewicz testified that as he drove by the defendant's home during the incident, he observed "some scuffling going on" between Grant and the defendant. It appeared as if Grant was trying to take the defendant to the ground and the defendant was resisting. The defendant was trying to get up, move away from Grant, and push Grant down.

¶ 9 Thomas O'Connor testified that on the day of the incident, he was outside his home, which is three houses down and across the street from the defendant's home. O'Connor observed Grant attempting to detain the defendant while the defendant was "struggling back." Grant had his hand on the defendant's shirt, and the defendant was "trying to pull away and flailing about trying to get away." The defendant tried to get away by pushing off Grant, grabbing at Grant's hand, and backing away from Grant. Grant yelled at the defendant to get down and at the defendant's wife to stay back. O'Connor recalled hearing Grant tell the defendant to place his hands behind his back. O'Connor did not hear Grant say anything inappropriate or make any racial slurs.

¶ 10 Lieutenant Edgar Gregory testified that he heard a dispatch from Grant for assistance at the defendant's address because the defendant refused to be handcuffed. Upon arriving at the scene, Gregory observed the defendant lying on his stomach with his hands cuffed behind his back. Gregory flushed the defendant's eyes with a water bottle.

¶ 11 Police officer Amy Chochola testified that when she arrived on scene, Gregory was helping the defendant off the ground and walking him to a police car. The defendant was agitated and wanted to know why he was being arrested. Grant appeared out of breath and sweaty. While Chochola drove the defendant to the police station, the defendant was coughing. At the police station, she washed the pepper spray from the defendant's face. The defendant began shaking and vomiting, and was taken to the hospital.

¶ 12 The defendant's wife testified that the defendant had asked Grant why he was on the driveway, and stated that he was going to call Grant's supervisor. Grant sprayed the defendant with pepper spray and tried to pull his left hand back. Grant kicked the defendant and beat him in the head, leg, and back with a baton. The officer swore and screamed at the defendant.

¶ 13 The defendant testified that he respectfully asked Grant why he was on his property. Grant indicated that the license plates on the van were expired and he would have the van towed. Grant did not mention a sticker. The defendant told Grant that he could not be on his private property without a warrant or proper documentation, and asked to speak with Grant's supervisor. Grant immediately sprayed the defendant with pepper spray in the eyes. The defendant covered his face, and Grant twisted the defendant's left hand and started kicking and beating the defendant with a baton. The pain was unbearable. The defendant could not see and tried to protect himself from "wherever [Grant] was hitting [him]" with his hands.

¶ 14 According to the defendant, Grant never told the defendant to place his hands behind his back or to get on the ground. The defendant acknowledged that Grant was attempting to place his hands behind his back, but "the pain was so much that [the defendant] could not bear it." After the defendant was hit with the baton, he fell to the ground and was handcuffed. The defendant was taken to the police station, where he started to vomit. He was brought to the hospital. One of the defendant's treating physicians testified that at the hospital the defendant was diagnosed with a concussion and bruising to his knees, shoulder, and testicles.

¶ 15 On rebuttal, Grant testified that the defendant never asked to speak with his supervisor. Grant told the defendant to place his hands behind his back approximately 10 times.

¶ 16 The trial court found the defendant guilty of resisting a peace officer and sentenced him to 12 months' conditional discharge, 100 hours of community service, and costs. The defendant appealed.

¶ 17 ANALYSIS

¶ 18 On appeal, the defendant argues that the evidence was insufficient to convict him of resisting a peace officer. Specifically, he contends that the State's evidence only proved that he initially argued with Grant and then acted to protect himself in self-defense from excessive force.

¶ 19 When a defendant challenges the sufficiency of the evidence supporting his conviction, a reviewing court must determine whether, when 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. *People v. Collins*, 214 Ill. 2d 206 (2005). Upon review, the trier of fact remains responsible for making determinations regarding the credibility of witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence.

People v. Ross, 229 Ill. 2d 255 (2008). We will set aside a defendant's conviction only when we find the evidence was insufficient or so improbable or unsatisfactory that a reasonable doubt exists as to the defendant's guilt. *People v. Ortiz*, 196 Ill. 2d 236 (2001).

¶ 20 Section 31-1 of the Criminal Code of 1961 provides that "[a] person who knowingly resists or obstructs the performance by one known to the person to be a peace officer *** of any authorized act within his official capacity commits a Class A misdemeanor." 720 ILCS 5/31-1(a) (West 2006). The statute does not prohibit a person from verbally resisting or arguing with a police officer about the validity of an arrest or other police action. *People v. Raby*, 40 Ill. 2d 392 (1968). The statute prohibits a person from committing a physical act of resistance or obstruction, which is a physical act that impedes, hinders, interrupts, prevents or delays the performance of the officer's duties, such as going limp, forcefully resisting arrest, or physically helping another party to avoid arrest. *Raby*, 40 Ill. 2d 392; *People v. McCoy*, 378 Ill. App. 3d 954 (2008). "[S]truggling or wrestling with a police officer are physical acts of resistance that will support a conviction for resisting a peace officer, even if the underlying attempted arrest is unwarranted." *McCoy*, 378 Ill. App. 3d at 962.

¶ 21 An arresting officer need not retreat or desist from efforts to make a lawful arrest because of resistance to the arrest. 720 ILCS 5/7-5(a) (West 2006). Generally, an officer is justified in using any force he reasonably believes is necessary to effectuate the arrest. 720 ILCS 5/7-5(a) (West 2006). An arrestee is not authorized to use force to resist an arrest, which he knows is being made by a peace officer, even if he believes that the arrest is unlawful and the arrest in fact is unlawful. 720 ILCS 5/7-7 (West 2006). A determination of whether the defendant physically resisted or obstructed a police officer is to be made by the trier of fact. *McCoy*, 378 Ill. App. 3d

954.

¶ 22 Here, the evidence, viewed in the light most favorable to the State, indicates that Grant told the defendant that he was under arrest and repeatedly asked him to place his hands behind his back. The defendant struggled against Grant as Grant attempted to subdue the defendant by placing his hands behind his back so that he could be handcuffed. Grant called for backup, indicating that the defendant was resisting arrest. Two neutral eyewitnesses testified that the defendant appeared to be struggling against Grant. We acknowledge that the defendant claims that Grant used excessive force during the incident. However, the State's evidence established that the defendant knowingly resisted the attempts of Grant to arrest him before Grant used pepper spray or the baton. The defendant was not authorized to act in self-defense even though the amount of force that Grant believed was necessary to make the arrest escalated after the defendant began resisting. *People v. Haynes*, 408 Ill. App. 3d 684 (2011) (providing that a self-defense instruction should only be given in a resisting arrest case when a defendant resists arrest after the officers resorted to excessive force). Therefore, we conclude that a rational fact finder could find the defendant guilty of resisting a peace officer beyond a reasonable doubt.

¶ 23 CONCLUSION

¶ 24 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 25 Affirmed.

¶ 26 JUSTICE McDADE, dissenting:

¶ 27 The majority affirms the defendant's conviction for resisting a peace officer. I do not believe that, even viewing the evidence in the light most favorable to the State, the defendant has

been proven guilty of that offense beyond a reasonable doubt. I, therefore, respectfully dissent from the majority decision.

¶ 28 Defendant, Kuldip Nag, was charged by the State with aggravated battery (of a police officer) (720 ILCS 12-4(b)(18) (West 2008)) and resisting arrest (720 ILCS 5/31-1(a) (West 2008)). Following a bench trial, Nag was acquitted of the aggravated battery of Officer Benjamin Grant but convicted of resisting arrest for "struggling" with Grant while being handcuffed. He has appealed the conviction.

¶ 29 The record indicates that Officer Grant went to the defendant's home pursuant to a citizen's complaint of an expired license plate sticker on a van that had been parked in the home's driveway for two months. When Grant arrived at the home, he proceeded uninvited onto the defendant's private property to examine the van. At this time, it was clear that the van was not being driven on a public roadway and equally clear that no crime was being committed.

¶ 30 Nonetheless the incident escalated to the point that the defendant was beaten about his head and body by Grant with his baton, kneed in the thigh, sprayed with pepper spray, and struck when the officer twice attempted and failed to execute a take-down maneuver. Although Grant denied ever striking the defendant's head, the trial court found that his testimony had been impeached by the medical evidence. That is to say, his testimony was untrue. The medical testimony on which the court relied was provided by Dr. Bashar Alzin from Silver Cross Hospital of Joliet. It established that Nag had sustained a brain concussion, multiple bruising of his knees, shoulders, and testicles, and had required treatment and hospitalization for five days from March 30 to April 3, 2007.

¶ 31 In acquitting the defendant on the charge of aggravated battery, the court found that, if there had been any contact at all between the defendant and Grant prior to the officer's declaration of his intent to arrest Nag, it was so slight that it did not even dislodge the clipboard the officer had been holding. To me, this finding indicates the court's belief that any contact by the defendant with Grant at that time was minimal, was not knowing or intentional, but was either in self-defense or unknowing.

¶ 32 The trial court nonetheless found the defendant guilty of resisting a peace officer based on the testimony of Matthew Jurewicz. In so concluding, the court cited *People v. Carroll*, 133 Ill. App. 2d 78 (1971), for the proposition that the "controlling factor" in a resisting arrest case such as this was "the question of whether or not the defendant was placed under arrest before or after the issue of resistance came to light." While I agree with the trial court's general statement of the law, I do not believe that the testimony of Jurewicz can properly support a conviction for resisting arrest.

¶ 33 Specifically, the majority discloses that after Grant informed the defendant that he was under arrest, he attempted to place the defendant's hands behind his back to handcuff him but the defendant pulled his arm in the opposite direction. It was after that point that Grant attempted the take-down maneuver on the defendant, and the defendant then apparently began struggling with Grant. According to Jurewicz's testimony, he did not see the defendant and Grant until after they became engaged in a struggle, that is, at a point when the defendant assertedly believed that he needed to protect himself, and not necessarily at a time the defendant was "resisting" Grant's attempt to arrest him. Thus Jurewicz's testimony was insufficient to negate the defendant's claim of self-defense. Additionally, given the defendant's limited command of

English (his first language is Hindi) and the fact that he had just been awakened by his children with the news that a police officer was in the yard, a simple reflexive action of pulling his arm away – the only action plausibly consistent with resisting arrest after Grant informed the defendant he was under arrest but before Grant's assault on the defendant – is insufficient to support a conviction for resisting arrest beyond a reasonable doubt.

¶ 34 Furthermore, I acknowledge that an officer need not retreat or desist from making an arrest simply because of efforts to resist the arrest. 720 ILCS 5/7-5(a) (West 2008). However, I agree with the trial court's observation that "it apparently never crossed [Grant's] mind to simply give the defendant in this case a written notice[.]" instead of trying to place the sticker on his van. I also note that Grant could have made sure that the defendant understood his explanation and his commands before he attempted the take-down maneuver on the defendant or otherwise battered him to effectuate the arrest. Overall, I believe this was egregious overreaching by the officer for which the defendant – who appears not to have understood what was going on – paid the price in terms of both serious physical injuries and a felony conviction.

¶ 35 For the foregoing reasons, I do not believe that even when this court views the evidence in the light most favorable to the State, the defendant has been proven guilty of resisting a peace officer beyond a reasonable doubt. Consequently, I dissent.