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2012 IL App (3d) 110211-U

Order filed August 17, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the 10th Judicial Circuit
)	Peoria County, Illinois
Plaintiff-Appellee,)	
)	Appeal No. 3-11-0211
v.)	Circuit No. 09-CF-1404
)	
SANJAY BHATIA,)	Honorable
)	Stephen Kouri
Defendant-Appellant,)	Judge Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Trial court should have granted defendant's motion *in limine* to exclude an edited DVD into evidence where the unedited version was never provided to defendant or his counsel; (2) Defendant was not denied effective assistance by his counsel's failure to pursue a motion to sever where there was ample evidence to support the charge of resisting a peace officer.

¶ 2 Defendant, Sanjay Bhatia, was charged with retail theft and resisting a peace officer. Prior to trial, defendant filed a motion *in limine* seeking to bar the State from presenting as evidence an edited DVD of surveillance footage related to the theft charge. Defendant also filed a motion to

sever the charges against him. The trial court denied defendant's motion *in limine* and never ruled on his motion to sever. At defendant's trial, the edited DVD was played for the jury. The jury found defendant guilty of both charges. On appeal, defendant argues that (1) the trial court erred in denying his motion *in limine*, and (2) he was denied effective assistance of counsel when his attorney failed to pursue his motion to sever. We agree with defendant's first argument and, thus, reverse and remand his retail theft conviction. We affirm his conviction for resisting a peace officer.

¶ 3 The State filed a two-count indictment against defendant. Count I charged defendant with retail theft (720 ILCS 5/16A-3(a) (West 2006)) for stealing a television from Sam's Club on October 6, 2007. Count II charged defendant with resisting a peace officer (720 ILCS 5/31-1(a) (West 2006)) on October 30, 2007. In response to defendant's motions for discovery, the State disclosed that it had in its possession "Sam's Club surveillance videotapes from 10-6-07." The trial court ordered the State to provide copies of the videotapes to defendant. The videotapes, which contained one-and-a-half hours of footage, were sent to the Illinois State Police for copying.

¶ 4 Thereafter, the State provided defendant with a DVD created by the Illinois State Police. The DVD contained only four-and-a-half minutes of surveillance footage from Sam's Club taken on October 6, 2007. Defendant filed a motion *in limine*, seeking to prevent the State from introducing the DVD into evidence because it "has been edited and therefore is not a true depiction of the events occurring on October 6, 2007."

¶ 5 A hearing was held on defendant's motion *in limine*. At the hearing, the prosecutor explained that there was no way of playing the original videotapes because they were encoded and could no longer be viewed on Sam's Club's equipment. Defense counsel explained that he had only seen the DVD created by State Police. The trial court asked the prosecutor to find out if it was possible to

convert the entirety of the original videotapes into a DVD or other viewable format.

¶ 6 Two days later, the parties returned to court. The prosecutor told the court that decoding the videotapes so that they could be played and copied in their entirety "would be very time intensive, to say the least, and I don't know how you get someone to be able to do all that." The court denied defendant's motion *in limine*, ruling that the DVD was admissible.

¶ 7 Prior to trial, defendant's original attorney filed a motion to sever the charges against him. That attorney withdrew, and defendant obtained new counsel. Defendant's new counsel never sought a ruling on the motion to sever.

¶ 8 At defendant's trial, Janelle Duncan testified that she was the Operations Assistant Manager for Sam's Club in October 2007. At that time, an audit showed that a television, costing \$2,478.68, was missing from the electronics department. An audit performed prior to October 6, 2007, showed that the television was not missing.

¶ 9 The audit team discovered that the same type of TV as the one that was missing was sold on October 6, 2007. As a result, Duncan decided to watch the surveillance tapes from that date. In October 2007, Sam's Club had a multiplexer video surveillance system that recorded onto VHS videotapes. The multiplex surveillance system was operational and gave Duncan a fair and accurate portrayal of the events that occurred on that day. When Duncan played the tape from October 6, 2007, she concluded that two TVs were taken out of the store that day by defendant, "one being paid for and one not."

¶ 10 Michael Plotts testified that he is on the Sam's Club audit team. He worked with the multiplex machine in October 2007. To his knowledge, the machine was working on October 6, 2007, and was fairly and accurately depicting things that were occurring in Sam's Club. He

identified People's Exhibits 1 and 2 as the VCR tapes that he took out of Sam's Club's multiplex machine from October 6, 2007. He provided them to the State's Attorney's office.

¶ 11 The parties stipulated that if Steve Hankel were called to testify, he would state that (1) he is employed as a special agent with the Illinois State Police Technical Investigation's Unit, (2) People's Exhibits 1 and 2 are multiplex surveillance videos that cannot be viewed by a standard VCR, (3) he forensically processed video footage from People's Exhibits 1 and 2 and compressed them onto a playable DVD, and (4) the video footage contained on the DVD marked as People's Exhibit 3 is a fair and accurate depiction of the video footage from People's Exhibits 1 and 2.

¶ 12 The State moved to admit People's Exhibits 1 through 3 into evidence. Defendant did not object, and the exhibits were admitted. The State then asked to broadcast the images from People's Exhibit 3. Defendant did not object.

¶ 13 Plotts testified that by watching the surveillance tapes, he discovered that defendant took a TV from the store without paying for it. The State then played Exhibit 3. It showed defendant at a cash register paying for a Sony Bravia 46-inch TV at 3:36 p.m. on October 6, 2007. Defendant was next seen leaving through the exit doors at 3:42 p.m. with a TV on a flatbed cart. Fifteen minutes later, defendant returned to the store pulling an empty flatbed. At 4:42 p.m., defendant was in the electronics area talking to a manager. At 4:50 p.m., defendant was seen with a flatbed cart with a TV on it. Defendant attempted to exit through the entrance door with the flatbed cart but was stopped by a store employee. Defendant was then seen exiting through the exit door with the TV on his cart.

¶ 14 Plotts testified that the video was a fair and accurate portrayal of the images he saw on People's Exhibits 1 and 2. He testified that the DVD played for the jury showed the relevant portions

of the surveillance footage from October 6, 2007.

¶ 15 Margaret Moon testified that she was working at Sam's Club on October 6, 2007, near the cash registers. Defendant approached her and asked her to get down a TV in the electronics department that was on a high shelf. Defendant asked that the TV be left in the aisle in his cart. Moon called a forklift driver and later saw the TV in the cart in the aisle. After that, she saw defendant with the TV in his cart.

¶ 16 Aaron Zaborac, a detective with the Peoria Police Department, testified that he and a fellow detective, Roger Martin, went to defendant's home on October 30, 2007, to talk to him about the stolen TV from Sam's Club. Zaborac knocked on the door, and defendant answered. Zaborac identified himself and asked defendant to step outside and come to the police station with him. Defendant refused. Zaborac then told defendant that he was going to be placed under arrest and needed to turn around and put his hands behind his back. Defendant did not comply, so Zaborac grabbed defendant's left hand. Defendant "started thrashing about" and pulled away from Zaborac. According to Zaborac, defendant "was making movements to get back into the apartment." Zaborac and Martin told defendant numerous times that he was under arrest and to "[s]top resisting." Finally, Zaborac and Martin had to take defendant to the ground in order to handcuff him.

¶ 17 Martin testified that on October 30, 2007, he went with Zaborac to defendant's house. Defendant answered the door and came outside. Defendant was told that he was under arrest and had to put his hands behind his back. Defendant started pulling away and struggling. Zaborac and Martin were continuously telling defendant to stop resisting and to put his hands behind his back. Defendant was not complying. He and Zaborac were eventually able to get defendant's arms behind his back and handcuff him.

¶ 18 Defendant testified that on October 6, 2007, he went to Sam's Club between 2:45 and 3:00 p.m. to purchase a TV that he had researched on the Internet. He saw the TV that he found on the Internet, a 46-inch black Sony Bravia, 1080p. He also saw a gray Sony Bravia TV that was a previous model and \$600 cheaper.

¶ 19 After a store employee helped defendant load the black TV onto a cart, defendant went to the cash register and paid for the TV with a credit card. Defendant then walked to the exit door. He pulled his car up and loaded the TV into his car. After that, he began having "buyer's remorse" and went back inside Sam's Club and inquired about the cheaper gray TV. Moon told him that she could help him, but it would take about half an hour. Defendant went back to his car and ran some errands.

¶ 20 Defendant came back to Sam's Club about 45 minutes later. He pulled his car to the front of the store and saw a Sam's Club employee. The employee took the TV in through the main entrance and left it by customer service. Defendant then looked for Moon. She said she was unable to get him the gray TV. Defendant then went to customer service and retrieved his original black TV. He decided to leave through the entrance doors since the entrance greeter saw the TV come in that way. The entrance greeter told him he had to leave through the exit doors, so he did.

¶ 21 On October 30, 2007, Defendant invited Zaborac to talk to him at his house. Zaborac and Martin arrived thereafter. Zaborac asked defendant to come to the police station, and he refused. The next thing he knew, Zaborac grabbed his arm "and there was all kinds of commotion that happened after that." Defendant denied resisting arrest.

¶ 22 The jury found defendant guilty of both charges. Defendant filed a motion for a new trial, arguing, in part, that the trial court erred in denying his motion *in limine*. The trial court denied the motion. At sentencing, the trial court ordered defendant to pay \$22,000 in fines, costs and restitution

for his retail theft conviction and imposed conditional discharge and 100 hours of public service for his resisting a peace officer conviction.

¶ 23

I. Motion *in Limine*

¶ 24 Defendant first argues that the trial court erred in denying his motion *in limine* to exclude the DVD as evidence because it was an edited version of the Sam's Club surveillance videotapes, and he was never provided a complete copy of the videotapes. The State responds that defendant waived the issue by failing to object to admission of the DVD at trial. Alternatively, the State contends that the court did not err in denying defendant's motion *in limine*.

¶ 25 In a criminal case, a defendant preserves an issue for appeal if (1) there has been an objection at trial or the issue has been raised in a motion *in limine*, and (2) the issue is also raised in a posttrial motion. *People v. Hudson*, 157 Ill. 2d 401, 434-35; *People v. Bocclair*, 129 Ill. 2d 458, 476 (1989). Here, defendant filed a motion *in limine* seeking to exclude the DVD at trial and included the issue in his posttrial motion, so the issue is preserved for appeal.

¶ 26 Having found that defendant did not waive his objection to admission of the DVD, we must determine if the trial court properly denied his motion *in limine*. A trial court's decision to grant or deny a motion *in limine* is generally reviewed for an abuse of discretion. *People v. Armbrust*, 2011 IL App (2d) 100955, ¶ 6. However, when the only issue before the court involves a question of law, the standard of review is *de novo*. *Id.* We find that this issue is governed by an Illinois supreme court rule and, therefore, apply *de novo* review.

¶ 27 Illinois Supreme Court Rule 412 requires the State, upon written motion, to disclose to defense counsel the existence of surveillance footage and any and all material that the State intends to use at trial. See Ill. S. Ct. R. 412(a)(vi), (b) (eff. March 1, 2001). Rule 412 further obligates the

State to "use diligent good-faith efforts to cause such material to be made available to defense counsel." Ill. S. Ct. R. 412(g) (eff. March 1, 2001). When the State violates Supreme Court Rule 412, reversal is required where the information not disclosed is "material," meaning that it undermines confidence in the verdict. See *People v. Preatty*, 256 Ill. App. 3d 579, 589 (1994).

¶ 28 Here, the State had in its possession two videotapes from Sam's Club's surveillance equipment. Pursuant to a court order, those videotapes were to be copied and provided to defendant. Instead of providing defendant with complete copies of the videotapes, which were one-and-a-half hours in length, the State provided defendant with a DVD containing only four-and-a-half minutes of footage. Despite numerous requests, the State never provided defendant with a complete, viewable copy of the videotapes. Under these circumstances, we find that the State failed to comply with Supreme Court Rule 412.

¶ 29 Furthermore, the surveillance tapes were "material," since the edited version of those tapes was heavily relied on by the State at trial to establish defendant's guilt. For instance, one of the State's witnesses, Janelle Duncan, claimed that the DVD established that defendant committed theft since the DVD showed defendant leaving with two televisions and only paying for one. If the DVD had not been shown to the jury, there is a reasonable probability that the result of the trial would have been different because the DVD was the only demonstrative evidence linking defendant to the crime of theft.

¶ 30 We reverse defendant's conviction for retail theft and remand for a new trial. On remand, the State may introduce the surveillance footage as evidence only if it provides a complete copy of the viewable videotapes to defendant. Otherwise, the DVD cannot be admitted into evidence.

¶ 31

II. Ineffective Assistance

¶ 32 Defendant also argues that he was denied effective assistance when his counsel failed to seek a ruling on his motion to sever the charges against him. He contends that his conviction for resisting a peace officer should be reversed as a result of his counsel's ineffective assistance.

¶ 33 In order to prevail on an ineffective assistance claim, the defendant must show that his attorney's performance was objectively deficient and that he was prejudiced by the deficiency. *People v. Wayman*, 379 Ill. App. 3d 1043, 1062 (2008). To establish prejudice, the defendant must show that there is a reasonable probability that, but for his attorney's errors, the result of the proceeding would have been different. *Id.* at 1063.

¶ 34 "Two or more offenses may be charged in the same *** indictment *** in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are based on the same act or on 2 or more acts which are part of the same comprehensive transaction." 725 ILCS 5/111-4 (West 2006). If a defendant believes that he will suffer prejudice as a result of joinder of offenses, he may request a severance of the charges in a pretrial motion. See *People v. Leak*, 398 Ill. App. 3d 798, 828 (2010). If it appears that prejudice will result from a joinder of separate charges, the court may order separate trials. 725 ILCS 5/114-8(a) (West 2006).

¶ 35 Generally, defense counsel's decision not to seek severance is regarded as a matter of trial strategy. *People v. Gapski*, 283 Ill. App. 3d 937, 942 (1996). Additionally, a defendant is not prejudiced by the joinder of charges if, had separate trials been given, the defendant would still have been convicted. *People v. Gonzalez*, 339 Ill. App. 3d 914, 922 (2003). A defendant is not prejudiced by joinder if the evidence against the defendant in each case would have been the same if severance were allowed. *People v. Peterson*, 108 Ill. App. 3d 856, 860 (1982).

¶ 36 According to section 31-1 of the Criminal Code of 1961, a person is guilty of resisting a

peace officer if he "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." 720 ILCS 5/31-1(a) (West 2006). The statute prohibits a person from committing a physical act that impedes, hinders, interrupts, prevents or delays the performance of the officer's duties, such as forcefully resisting arrest. *People v. McCoy*, 378 Ill. App. 3d 954, 962 (2008). The act of struggling with a police officer is a physical act of resistance that will support a conviction for resisting a peace officer. *Id.*

¶ 37 "It is the general rule that the testimony of an officer, involved in the arrest, regarding a defendant's behavior at the time of the arrest is sufficient to sustain a conviction of resisting or obstructing a peace officer." *People v. Greenwood*, 39 Ill. App. 3d 898, 901 (1976). The credible testimony of a single witness is sufficient to support a conviction despite contrary testimony by the accused. *People v. Fuller*, 159 Ill. App. 3d 441, 445 (1987).

¶ 38 Here, Detectives Zaborac and Martin both consistently testified that they advised defendant that he was being placed under arrest and requested that he cooperate. They further testified that defendant did not cooperate but pulled away and struggled with them. While defendant denied resisting the officers, the testimony of the Zaborac and Martin was sufficient to establish that defendant was guilty of resisting a peace officer. See *McCoy*, 378 Ill. App. 3d at 962; *Fuller*, 159 Ill. App. 3d at 445; *Greenwood*, 39 Ill. App. 3d at 901.

¶ 39 Because there was sufficient evidence supporting defendant's conviction for resisting a peace officer, there is no reasonable probability that the outcome would have been different if there had been separate trials on the charges of theft and resisting a peace officer. See *Peterson*, 108 Ill. App. 3d at 860. The same evidence regarding defendant's acts of resisting a peace officer would have been admitted if that charge was severed from the retail theft charge. As a result, there was no prejudice

from defense counsel's failure to pursue the motion to sever. Since defendant was not prejudiced by his counsel's performance, defendant was not denied ineffective assistance of counsel.

¶ 40 The order of the circuit court of Peoria County is affirmed in part and reversed and remanded in part.

¶ 41 Affirmed in part and reversed and remanded in part.