

No. 1-11-3584

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 M3 2615
)	
ROBERT SALAZAR,)	Honorable
)	Alfred L. Levinson,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Harris and Simon concurred in the judgment.

ORDER

¶ 1 **Held:** Where witness saw defendant move his hand on his penis in an apartment building courtyard, evidence was sufficient to support public indecency conviction despite defendant's testimony to the contrary, and defendant was not denied the assistance of counsel in post-trial proceedings; the judgment of the trial court was affirmed.

¶ 2 Following a jury trial at which defendant Robert Salazar represented himself, he was convicted of public indecency and was sentenced to 180 days in jail. On appeal, defendant contends his conviction must be reversed because the testimony of the sole witness to the offense was not credible and was contradicted by his own account. Defendant also asserts he was denied his constitutional right to counsel when he requested an attorney to assist him in preparing post-trial motions and no such counsel was appointed. We affirm as modified.

¶ 3 After defendant was charged in 2011, he waived his right to an attorney and also waived discovery. On the day of trial, defendant filed a motion to compel evidence, seeking "evidence, pictures, movies, sound recordings, demonstrations and material facts." The trial judge denied defendant's motion.

¶ 4 At trial, Jose Cortez testified that on June 26, 2011, he observed defendant urinating and masturbating in the yard outside his apartment complex in Schaumburg. Cortez testified that at about 8 p.m., he was in the kitchen of a first-floor apartment where he and his parents lived. He could see outside through glass doors that overlooked tennis courts and a small pond.

¶ 5 Cortez testified he saw a man wearing a red shirt and pants standing next to a tree. Cortez was about 25 feet away from the man and could see clearly because it was still daylight and the blinds on the glass doors were fully open. Cortez observed defendant urinating while facing the tennis courts. He said defendant's "pants were all the way down to the middle of his thighs" and defendant's entire rear was exposed as he relieved himself. Cortez closed the blinds because he did not want his parents to see defendant.

¶ 6 Five minutes later, Cortez opened the blinds again and saw defendant still standing near the tree with his pants "down halfway" and his rear still visible. Cortez testified defendant "had his hand on the tree and he was at an angle where you could actually see his penis and he was fully erect and he was masturbating." When asked by the prosecutor to elaborate, Cortez testified: "I saw his right hand moving eventually from slow to a faster pace and eventually finish taking care of his business and he stopped doing what he was doing and pulled his pants up." Cortez said defendant's hand moved for 10 to 20 seconds and during that time, defendant faced the direction of a group of children playing with a basketball. Cortez identified defendant in court as the person he saw near the tree.

¶ 7 Cortez closed the blinds and called Schaumburg police. He then went outside and told a neighbor what he had seen. Cortez walked to the back of the building to see if defendant was still at his earlier location, and he saw defendant sitting nearby. Cortez walked past defendant and returned to the front of the building, and defendant followed and got into a car parked nearby. As defendant drove away, Cortez noted his license plate number and gave that information to police when they arrived.

¶ 8 On cross-examination by defendant, Cortez said it took the police 15 minutes to arrive at the scene. Cortez said there were between four and six children playing outside and that no bushes blocked the tennis courts from view. On redirect, Cortez said the property where defendant's actions took place was part of the apartment complex; however, defendant was in public view.

¶ 9 Schaumburg police officer Kendra Zibell testified that at about 8:20 p.m. on the night in question, she responded to a call of public indecency at Cortez's location. After interviewing Cortez, Zibell returned to the Schaumburg police department, where defendant already was being held after being detained by another officer. Defendant was wearing red pants and a white shirt.

¶ 10 Defendant was informed of his *Miranda* rights and verbally waived those rights. Zibell asked defendant if he knew why he was in custody and "he advised that he thought it had something to do with urinating in public. I asked him if he had urinated in public and he said he had."

¶ 11 Zibell asked defendant to describe his activity that evening and he responded he had been driving around Schaumburg to different apartment complexes and "he liked to sit by the water."

The officer further testified:

"During the questioning, [defendant] got to be a little agitated. He stated, 'Yeah, I whipped out my dick to piss. Is that

against the law? ' So I advised him yes it is against the law. He got upset with me again about if this was such a big deal why didn't I pick him up when he was sitting on a bench or had walked across the street at another complex."

¶ 12 Zibell testified she responded they had not been called when he was sitting on the bench. She asked defendant if he has masturbated while standing near a tree, and defendant said he had not and denied ever engaging in that act in public. Defendant was arrested after that questioning.

¶ 13 On cross-examination, Zibell said she arrived at the apartment complex "within a couple of minutes of the call being placed." Defendant was taken into custody at his home by Rolling Meadows police. Zibell acknowledged she did not see defendant commit the offense but said there was a "large wet area" under the tree where Cortez said he saw defendant. Zibell did not see any children in the area.

¶ 14 After the court denied defendant's argument that a verdict should be directed in his favor, defendant testified that he was "scoping out some apartment complexes" for his father on the day he was arrested. Defendant went behind a building and urinated where he thought he could not be seen. He denied that he aroused himself or that his buttocks were exposed. Defendant said he drove back to his apartment, where he was detained by Rolling Meadows police.

¶ 15 On cross-examination, defendant said he was 30 years old and admitted that he removed his penis from his pants to urinate. He denied that he exposed his penis for 10 minutes or that he moved his hand back and forth on his penis. Defendant said he knew that people lived in the apartments nearby but that if they saw him, it would only be "by accident."

¶ 16 The jury found defendant guilty of public indecency. The court sentenced defendant to 180 days in the Cook County Department of Corrections. The court's admonitions to defendant at sentencing are set out later in this order as they relate to the second issue raised on appeal.

¶ 17 On appeal, defendant first contends his public indecency conviction must be reversed because the testimony of Cortez, the sole eyewitness, was not credible and was contradicted by defendant. Defendant points out that Cortez's account represents the only direct evidence against him, and defendant notes his own testimony was unimpeached. Defendant argues the State's evidence did not establish his guilt beyond a reasonable doubt.

¶ 18 A criminal conviction will not be reversed on appeal unless the evidence, viewed in the light most favorable to the prosecution, was so improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009). The question to be decided on appeal is whether, after viewing the evidence in that light, any rational trier of fact could have found the defendant guilty of the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 326 (1979); *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004).

¶ 19 Defendant's assertions on this point involve the credibility of Cortez's testimony. It is well-settled that the credibility of witnesses, the weight of the evidence and the resolution of any conflicts in the evidence are matters for the trier of fact to resolve, and this court does not retry the defendant or substitute its judgment for that of the trier of fact on those points. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). Although defendant points out that Cortez was the only eyewitness, the "positive testimony from a single, credible witness is sufficient to support a conviction." *People v. Stanley*, 397 Ill. App. 3d 598, 611 (2009). That remains true even if, as here, the defendant offers an account that contradicts the account of the sole witness. See *Siguenza-Brito*, 235 Ill. 2d at 228.

¶ 20 A charge of public indecency requires the State to prove that defendant was 17 years of age or older and that, while in a public place, he exposed his body in a lewd fashion with the intent to arouse or satisfy his sexual desire. See 720 ILCS 5/11-9(a)(2) (West 2010). Cortez

testified that he observed defendant remove his penis from his pants and expose his buttocks. After defendant urinated (which defendant admitted doing), Cortez saw defendant move his hand on his penis at a fast pace. That activity occurred in a courtyard of an apartment complex in sight of the windows of Cortez's residence, among other units and also in sight of a nearby group of youths playing. Although defendant asserts on appeal that it would have been difficult for Cortez to assess whether defendant's penis was erect and he was aroused, and that there was an explanation for defendant's conduct that did not involve sexual gratification, the jury was free to find Cortez's testimony more credible than that of defendant. Even considering defendant's assertions that he did not commit a lewd act, Cortez's account is not so improbable as to raise a reasonable doubt as to defendant's guilt. Therefore, defendant's conviction for public indecency is affirmed.

¶ 21 Defendant next contends on appeal that he was denied his right to counsel. He asserts he requested that the court appoint counsel to assist him in preparing post-trial motions, and he contends his case should be remanded for post-trial proceedings at which he is represented by an attorney.

¶ 22 A defendant is guaranteed by the sixth amendment the right to assistance of counsel at all critical stages of a criminal prosecution. *People v. Baker*, 92 Ill. 2d 85, 90 (1982). Sentencing is a critical part of the criminal proceedings, as is the preparation of a post-trial motion. *Id.*; *People v. Abdullah*, 336 Ill. App. 3d 940, 951 (2002).

¶ 23 The right to counsel also affords a defendant the right to represent himself. *People v. Burton*, 184 Ill. 2d 1, 21-22 (1998). Here, the record establishes that defendant expressly waived his right to counsel prior to his trial. A defendant's waiver of his right to counsel applies to all subsequent proceedings unless a defendant later requests counsel or if circumstances suggest the waiver is limited to a particular stage of the proceedings. *People v. Pratt*, 391 Ill. App. 3d 45,

52-56 (2009), citing *Baker*, 92 Ill. 2d at 91-92. Therefore, unless a waiver of counsel is retracted, the waiver is operative throughout the proceedings in the absence of some circumstances indicating a limited waiver or "other facts which would give the trial court reason to conduct a further inquiry." *Baker*, 92 Ill. 2d at 95. Accordingly, even if a defendant proceeds through a trial *pro se*, he may later acquiesce in representation by counsel by vacillating or abandoning an earlier request to proceed as his own counsel. *People v. Burton*, 194 Ill. 2d 1, 23 (1998).

¶ 24 The record establishes that in several court appearances from July to October 2011, before defendant's trial, the court explained to defendant that he had a right to counsel. Defendant repeatedly waived the assistance of counsel and expressed a desire to proceed *pro se*.

¶ 25 Defendant's trial took place on December 7, 2011. After the jury returned its verdict, the court immediately proceeded to sentencing, asking the parties to present factors in aggravation and mitigation. The State presented defendant's criminal history, and defendant addressed the court in mitigation. During those comments, defendant stated as follows:

"I'm not surprised that I was found guilty. If anything I would like to ask for an appeal, however I don't have money for an attorney and I think the same outcome will come out.

The other thing that comes to mind is after I'm sentenced, the only thing I can ask for, reconsidering the sentence. Besides that I don't know and I'm not ashamed. I don't know how to put it."

¶ 26 The court asked defendant: "Is that it?" Defendant responded: "I can go on for days but I think I'll end it here."

¶ 27 The following exchange then occurred as the court imposed sentence:

"THE COURT: 180 days --

DEFENDANT: This is humiliation.

THE COURT: 180 days Cook County Department of Corrections. Mandatory fees and costs.

DEFENDANT: God, please, in the state of our Lord.

THE COURT: You have the right to appeal, however before you can appeal this verdict, you must file with the Clerk of the Court within 30 days a written motion to vacate the judgment and the sentence.

DEFENDANT: You know, I only feel better every time I can come into this f— courthouse.

THE COURT: In the motion you must state all the reasons why you feel there was error in this case. Any reason that you don't put in or any error that you don't put in will be waived for appeal purposes. If I grant your motion, I'll set the verdict aside, set the sentence aside and set your case for a retrial. If I deny your motion you have 30 days from the date of that denial to file a written notice of appeal. Any issue or claim of error not raised in the motion for a new trial or to vacate the sentence, or reconsider the same, will be waived for appeal purposes.

If you're indigent, a copy of the transcript of the proceedings at the time of this conviction and during this trial – this whole trial, and all of the other court appearances that you appeared on, on this case, will be provided to you free of charge and you will be provided an attorney to assist you in the preparation of the motion.

Do you understand your appeal rights?

DEFENDANT: Not fully. If you will grant me an attorney, I will accept him.

THE COURT: Okay. 180 days Cook County Department of Corrections. Mandatory fees and costs.

Do you have mandatory fees and costs sheets? There's a judgment on the verdict. The Clerk is ordered to file a notice of appeal on behalf of this man. I don't know who handles misdemeanor appeals.

Okay, he's to be appointed an attorney to represent him. He is to be appointed legal counsel. That's the order. You have to sign the mittimus as soon as it's prepared along with the cost sheets. That's it."

¶ 28 The next day, a notice of appeal was filed by the State Appellate Defender, who represents defendant in this appeal.

¶ 29 Defendant contends that he explicitly indicated to the court he was unable to adequately present his arguments in a post-trial motion, and he argues the court erred in refusing to appoint counsel to assist him in preparing such a motion. However, the record does not reflect that the trial court refused any request by defendant for counsel; in fact, the trial court appointed counsel to assist defendant on appeal.

¶ 30 Indeed, defendant challenges the timing of the court's ruling and the scope of counsel's representation, arguing he should have received counsel to aid in a post-trial motion because his request for counsel came at a "new stage" in the proceedings. Shortly before the court imposed sentence, defendant said he wanted to appeal but could not afford an attorney. Defendant again

indicated he wanted the assistance of counsel after his appeal rights were explained to him and he was asked if he understood those rights. Defendant said he did not understand those admonitions and would "accept" an attorney if the court granted him one. The trial court appointed the State Appellate Defender to represent defendant, and a notice of appeal was filed the following day. Defendant did not ask the court to appoint counsel to assist him in preparing a post-trial motion. We therefore reject defendant's argument that he was denied the assistance of counsel for that purpose.

¶ 31 Defendant compares the facts here to those in *People v. Palmer*, 382 Ill. App. 3d 1151 (2008). In *Palmer*, the defendant represented himself in pre-trial proceedings, at trial and at sentencing and filed a *pro se* motion asking the court to reduce or reconsider his sentence. *Id.* at 1155. The defendant asked for appointed counsel to represent him in relation to that motion, and the trial court denied the request, stating the defendant did not have the right to revoke his waiver at that stage of proceedings and had not shown "good cause" for the court to allow the defendant to withdraw his waiver of counsel. *Id.* On appeal, this court affirmed the defendant's residential burglary conviction but remanded for the appointment of counsel for post-sentencing purposes, stating the defendant's request "occurred at a new stage of the proceedings," namely after he had been sentenced. *Id.* at 1163. This court also determined the trial court erred in ruling that the defendant needed to show good cause for his request for counsel at that stage. *Id.* at 1162. In discussing that issue, this court accepted the State's concession that the trial court erred in refusing to allow the defendant to revoke his waiver of counsel. *Id.*

¶ 32 The facts of *Palmer* are distinguishable from those here. In contrast to *Palmer*, defendant did not file a *pro se* post-sentencing motion and then ask for counsel to assist with that specific motion. Instead, defendant asked for an appeal, the court admonished him of his appeal rights,

defendant indicated he would accept an attorney, and the court immediately appointed an attorney to represent defendant.

¶ 33 Defendant's remaining contention on appeal is that the trial court erred in imposing a \$35 Serious Traffic Violation Assessment (625 ILCS 5/16-104d (2011)), which is imposed for a violation of the Illinois Vehicle Code or a municipal ordinance or for a serious traffic offense. The State correctly concedes defendant was not convicted or placed on court supervision for any such crime. We therefore order the fines and fees order be corrected to vacate that charge. See *People v. Rivera*, 378 Ill. App. 3d 896, 900 (2008) (this court may correct a mittimus without remand by ordering the clerk of the circuit court to make the required change).

¶ 34 In summary, the evidence was sufficient to establish defendant's guilt of public indecency beyond a reasonable doubt. Moreover, defendant was not denied his right to counsel because his waiver of counsel was operable until he requested and received counsel's assistance on appeal. Accordingly, we affirm defendant's conviction and sentence. We vacate the \$35 Serious Traffic Violation Assessment and direct the circuit court to modify the mittimus in that regard.

¶ 35 Affirmed as modified.