

No. 1-10-3441

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. 09 MC6 10820
)	
JULIAN VERTISON,)	Honorable
)	Valarie E. Turner,
Defendant-Appellant.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant's conviction for resisting a police officer affirmed over his claim that there was insufficient evidence to support it.
- ¶ 2 Following a bench trial, defendant, Julian Vertison, was found guilty of resisting a peace officer (RPO). At sentencing, however, the trial court changed the conviction to attempted RPO, and sentenced defendant to one year of supervision upon hearing that he had no criminal record. On appeal, defendant contends that the evidence was insufficient to support his conviction for

RPO, and that his conviction for attempted RPO must be reversed because he was not charged with that offense.

¶ 3 The record shows that defendant was charged with battery to a peace officer, public intoxication, and RPO in connection with an incident that occurred on July 24, 2009, in Dolton, Illinois. At trial, Sergeant Lacey of the Dolton Police Department testified that about 3 a.m. on July 24, 2009, he and approximately nine other officers were in a parking lot near 144th Street and Chicago Road, where two nearby nightclubs had recently closed for the evening. Over one hundred and fifty people were in the parking lot, and Sergeant Lacey and the other officers were attempting to "clear[] the area[.]" Sergeant Lacey was wearing his full police uniform, bullet proof vest, and police badge.

¶ 4 Sergeant Lacey saw defendant standing in the parking lot with other individuals, and told them that they had to clear the lot. The group "began to move" and Sergeant Lacey resumed his efforts to clear others from the lot. About five minutes later, Sergeant Lacey saw defendant in the parking lot, leaning inside the driver's window of a vehicle and speaking with someone inside. The sergeant approached defendant, and touched him on his shoulder to get his attention. Defendant brought his upper body outside of the vehicle and Sergeant Lacey told him again that he needed to leave. Defendant started to argue with him, but then began walking away. In that process, defendant turned around, told the sergeant that "his ride was on the other side of the parking lot[.]" and began walking towards the sergeant, who moved out of defendant's way to allow him to proceed. As defendant walked by him, he "stopped, turned around, *** flung his hand out, and *** made contact [with] ** the upper part of [Sergeant Lacey's] chest." The force of the contact was "enough to move [Sergeant Lacey] back" and the sergeant told defendant he was under arrest. When the sergeant grabbed one of defendant's arms to place him in custody,

defendant grabbed the upper part of the sergeant's vest and pulled on it, causing the two men to fall to the ground. Other officers intervened, and sprayed defendant with pepper spray.

Defendant released Sergeant Lacey, and the other officers pulled him away and attempted to take defendant into custody. Defendant was "struggling," trying to keep the officers from putting handcuffs on him, and calling Sergeant Lacey "names."

¶ 5 Officer Ganier testified that he was on duty with several officers, including Sergeant Lacey, attempting to clear the parking lot on the night in question. About 3:20 a.m., the officer saw Sergeant Lacey tap defendant on the shoulder, as defendant was leaning inside a vehicle, and tell him that he had to leave. Defendant began to walk away, but then turned around and walked back towards the officers. When defendant walked by Sergeant Lacey, he turned, "flung [his] arm" and hit Sergeant Lacey on the arm and chest. Sergeant Lacey then grabbed defendant near his elbow, and defendant became "combative[.]" "jerking and moving around[.]" Sergeant Lacey and defendant then "tumbled and fell to the ground" and defendant was subsequently taken into custody.

¶ 6 Officer Wallace McMillan of the Dolton Police Department testified that he was present when defendant was arrested. He saw Sergeant Lacey approach defendant, who was leaning inside a vehicle, and the two men exchanged words. He then saw that defendant "moved forward, brushed up against Sergeant Lacey, and *** shoulder[-]bumped into the sergeant[.]" Sergeant Lacey then told defendant that he was under arrest, took defendant's arm, and defendant began to pull away. Officer McMillan testified that a "melee" ensued, and defendant "took down" Sergeant Lacey, Officer McMillan, and one other officer. Officer McMillan could not remember how he was taken to the ground, but testified that the officers went to the ground while trying to "cuff" defendant.

¶ 7 At the conclusion of evidence and argument, the court found defendant guilty of RPO, and not guilty of battery to a police officer and public intoxication. The court found that the officers testified consistently regarding a "pulling away" and a "pulling down" on the vest. It noted that there were "various inconsistencies" with the officers' testimony, but determined that the inconsistencies could be explained by the relative positions of the officers during the incident, and the fact that the incident occurred about a year before trial.

¶ 8 The parties then proceeded directly to sentencing. When the State informed the court that defendant did not have a criminal background, the court responded, "I'm going to change it to attempt resisting. Based on his background, he's capable of getting supervision for attempt resisting." The State objected, and the court confirmed, "I'm going to change it to attempt resisting over your objection-over your valid objection." It then sentenced defendant to one year of supervision.

¶ 9 Defendant subsequently filed a motion to reconsider, contending, *inter alia* that he was not proved guilty of RPO beyond a reasonable doubt, and that the court's finding of guilt on attempted RPO should be vacated because he was never charged with that crime. In denying defendant's motion, the court reiterated that the officers' testimony was credible, and that Sergeant Lacey "testified that the defendant pulled away from him while being taken into custody, grabbed his vest, and struggled with him." As to the attempted RPO conviction, the court stated:

"this Court found the defendant guilty of resisting arrest and then
*** the State stated that defendant had no prior criminal
background.

Based on the knowledge that the crime of resisting arrest cannot receive supervision, *** and based on the fact that defendant does not have any prior criminal background, the Court felt that making the charge an attempt charge would allow a person

who has no prior criminal background, and from the vantage point of this Court, was not proven guilty beyond a reasonable doubt to have committed the other crimes, supervision would be the fair and just sentence.

The determination of whether someone is guilty and what sentence is appropriate requires different analysis by a finding of guilty. My basis for the sentence was based on the lack of criminal history, which is a mitigating factor, and consideration of whether there were any aggravating factors. I believe my analysis is correct for this specific fact pattern and this specific defendant."

¶ 10 On appeal, defendant first contends that the evidence was insufficient to prove him guilty of RPO beyond a reasonable doubt as specifically set out in the charging instrument. He notes that he was charged with RPO, "in that said defendant knowingly resisted the performance of [Sergeant] Lacey *** of an authorized act within his official capacity, being the arrest of [defendant] knowing [Sergeant] Lacey *** to be a peace officer engaged in the execution of his official duties *in that he pulled away and shoved him in the chest.* " (emphasis added). Defendant contends that there was no evidence to show that he "pulled away" or "shoved" Sergeant Lacey in the chest during the course of the arrest, noting that the evidence of "contact between defendant's hand and [Sergeant] Lacey's chest" showed that it occurred prior to Sergeant Lacey's attempt to effectuate an arrest because the State did not seek leave to amend the complaint to comport with the testimony at trial, he claims that the discrepancy between the allegation in the criminal complaint and the evidence produced at trial, must result in a reversal of his conviction.

¶ 11 When reviewing a challenge to the sufficiency of the evidence, a reviewing court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *People v. Lloyd*, 2013 IL 113510, ¶ 42. Under this standard, all reasonable

inferences from the evidence must be allowed in favor of the State. *People v. Baskerville*, 2012 IL 111056, ¶ 31. The trier-of-fact is responsible for evaluating the credibility of the witnesses, drawing reasonable inferences from the evidence, and resolving any inconsistencies therein.

People v. Bannister, 378 Ill. App. 3d 19, 39 (2007). A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of defendant's guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009).

¶ 12 In challenging the sufficiency of the evidence against him, defendant essentially argues that a fatal variance existed between the charging instrument and the evidence at trial such that he was found guilty based upon uncharged conduct. However, even assuming that the evidence failed to establish that defendant "pulled away" or "shoved" Sergeant Lacey during the course of the arrest, such a variance between the charging instrument and the evidence is not fatal.

¶ 13 When a variance in the charging instrument is being attacked by a defendant for the first time on appeal, the charging instrument will be held sufficient if it apprised the accused of the offense charged with sufficient specificity to prepare a defense and allow pleading a resulting conviction as a bar to future prosecutions arising out of the same conduct. *People v. Santiago*, 279 Ill. App. 3d 749, 752 (1996). "Where an indictment charges all essential elements of an offense, other matters unnecessarily added may be regarded as surplusage." *People v. Collins*, 214 Ill. 2d 206, 219 (2005).

¶ 14 Applying these principals to the instant case, it is clear that the alleged variance between the allegations and proof is not fatal to defendant's conviction. A person commits the offense of RPO when he "knowingly resists *** 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 (West 2008).

Where, as here, the crime involved can be committed by several acts, a variance between the act

named in the charging instrument and the act proved at trial will not be fatal. *People v. Burdine*, 362 Ill. App. 3d 19, 24 (2005); *People v. Taylor*, 84 Ill. App. 3d 467, 470 (1980).

¶ 15 The evidence presented by the State at trial established a number of acts from which the fact-finder could have found defendant guilty of RPO, including that, after Sergeant Lacey attempted to place defendant under arrest, defendant grabbed Sergeant Lacey's vest and pulled him to the ground, and it took multiple officers to handcuff defendant because he was "struggl[ing]" "jerking and moving around[.]" Contrary to defendant's argument, this evidence clearly shows that defendant pulled and tugged at the officers as he resisted arrest and that proof of the crime conformed to the essential allegations of the charging instrument, *Taylor*, 84 Ill. App. 3d at 469-70.

¶ 16 In reaching that conclusion, we note that defendant alleges that the testimony of the officers "varied wildly[.]" This argument, however, challenges the court's determination regarding the credibility of the witnesses. As previously stated, the issue of witness credibility is the responsibility of the trier of fact (*Bannister*, 378 Ill. App. 3d at 39), which, in this case, ultimately determined that any inconsistencies could be explained by the relative positions of the officers during the incident, and the fact that the incident occurred about a year before trial, and that the variations were insufficient to undermine the evidence proving defendant's commission of the charged offense. It is not our prerogative to substitute our judgment for that of the trial court on such issues. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006); *Bannister* 378 Ill. App. 3d at 39. We therefore conclude that the evidence, viewed in a light most favorable to the State, was not so unsatisfactory, improbable or implausible to raise a reasonable doubt as to defendant's guilt. *Siguenza-Brito*, 235 Ill. 2d at 225.

¶ 17 Defendant next contends that the trial court erred in convicting him of attempted RPO, because he was never charged with that offense. He acknowledges that a defendant may be convicted of an offense not expressly included in the charging instrument if that offense is a lesser included offense of the crime charged (*People v. Jones*, 149 Ill. 2d 288, 292 (1992)), but contends, without explanation, other than referencing the "'charging instruments' approach," that attempted RPO is not a lesser included offense of RPO.

¶ 18 The State disputes defendant's assertion that attempted RPO is not a lesser included offense of the greater offense of RPO, but, maintains that he could not be sentenced on the lesser offense as a sentencing accommodation when he was found guilty of the greater offense. The State thus contends that the sentence should be vacated, and the case remanded for sentencing on the greater offense.

¶ 19 We initially observe that one may be convicted of an attempt to commit an offense, even if, as here, the evidence establishes that defendant committed the substantive offense. *People v. Keller*, 267 Ill. App. 3d 602, 609-10 (1994). Moreover, as the parties recognize, an accused may be convicted of an offense that is not expressly included in the charging instrument if that offense is a lesser included offense of the one expressly charged. *Jones*, 149 Ill. 2d at 292. As relevant to this case, an "included offense" consists of an attempt to commit the offense charged. 720 ILCS 5/2-9(b) (West 2012).

¶ 20 The record here shows that the trial court found defendant guilty of RPO, but, after learning of defendant's lack of criminal record during the sentencing proceeding, the court reconsidered and entered a finding of attempt RPO for the sole purpose of establishing defendant's eligibility for supervision. Although defendant was not specifically charged with attempt RPO, the evidence, as set forth in detail above, was more than sufficient to establish

attempt RPO as a lesser included offense of RPO in this case and defendant's commission thereof. Accordingly, we reject defendant's argument to the contrary.

¶ 21 As to the sentence imposed by the court on the lesser offense, we reject the State's contention that it was void because the court had found defendant guilty of the greater offense, and that the cause should be remanded for resentencing on the greater offense.

¶ 22 The supreme court has recognized the inherent power of the trial court to correct its rulings prior to the entry of final judgment or to reconsider any order within 30 days thereafter. *People ex rel. Daley v. Crilly*, 108 Ill. 2d 301, 307 (1985), citing *People v. Van Cleve*, 89 Ill. 2d 298, 304 (1982) and *People v. Heil*, 71 Ill. 2d 458, 461 (1978). The supreme court has also acknowledged, without condoning, the trial court's exercise of lenity in what it perceives as the interests of justice. *People v. McCoy*, 207 Ill. 2d 352, 358 (2003). As applied here, it is clear that final judgment had not yet been entered when the court reconsidered and reduced defendant's conviction from RPO to attempt RPO, and that it did so to "allow a person who has no prior criminal background **** [to be eligible for] supervision [as a] fair and just sentence." These remarks bespeak the trial court's exercise of lenity in the case over which it had jurisdiction, and provide no cause for reversal or remand for resentencing.

¶ 23 We therefore affirm the judgment of the circuit court of Cook County.

¶ 24 Affirmed.