

2016 IL App (1st) 140599-U  
No. 1-14-0599  
June 14, 2016

SECOND DIVISION

**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).

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS, )	Appeal from the Circuit Court
)	Of Cook County.
Plaintiff-Appellee, )	
)	No. 13 MC4 006486
v. )	
)	
MARLONN BOYD, )	The Honorable
)	Carol A. Kipperman,
Defendant-Appellant. )	Judge Presiding.

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JUSTICE NEVILLE delivered the judgment of the court.  
Justices Simon and Hyman concurred in the judgment.

**ORDER**

¶ 1 *Held:* When a defendant uses minimal physical force to push away another person's intruding hand, the trivial contact does not qualify as a battery.

¶ 2 After a bench trial, the trial court found that Marlonn Boyd committed a battery in an encounter in a store when he pushed away the hand of Omar Hernandez, a loss prevention officer. Boyd argues on appeal that the evidence does not prove that he made contact of an insulting and provoking nature. We find that, in the context of the encounter, the trivial contact between Boyd's hand and Hernandez's hand would not have offended an ordinary

person not unduly sensitive to personal dignity. Accordingly, we reverse the battery conviction.

¶ 3

### BACKGROUND

¶ 4

Boyd went to Best Buy on November 20, 2013. In an event partially recorded by one of the store's cameras, Hernandez tackled Boyd. Prosecutors charged Boyd with battery.

¶ 5

At the bench trial, Hernandez testified that he followed Boyd in the store and he saw Boyd conceal several items of merchandise in his clothing. When Hernandez approached Boyd, Boyd used profanity and asked why Hernandez was following him. Hernandez ordered Boyd to go to the security office. Hernandez testified that he stood about one foot away from Boyd and pointed his finger at Boyd's waistband to indicate where he believed Boyd had concealed some items. Boyd, using his left hand, pushed Hernandez's hand away and formed a fist with his right hand. Hernandez then tackled Boyd.

¶ 6

Boyd testified that while he shopped in the store, he realized that employees followed him around. He looked for a manager so that he could lodge a complaint about the treatment. He found only the manager of the electronics department, with whom he spoke briefly. Boyd then headed to the front of the store, followed closely by Hernandez. Hernandez told Boyd to go to the security office and Boyd asked why. Hernandez then grabbed Boyd and pushed him to the floor.

¶ 7

The video shows that for seven minutes, a single camera swiveled to track Boyd as he walked through the store. The parties presented no evidence as to who caused the camera to swivel to track Boyd or why the camera tracked him. Boyd carried a store basket in his left hand and put several items from the shelves into the basket. The video showed Boyd talking

to an employee at 5:17:01 p.m. according to the video's time stamp. As Boyd walked away from that employee, Hernandez came up behind Boyd. Boyd paused at 5:17:13, partly hidden from the video camera by a pole, with Hernandez standing next to him. Boyd turned to face Hernandez at 5:17:16. At 5:17:21 Boyd looked down in the direction of his basket, which he raised somewhat with his left hand. The pole blocked the camera from recording the image of Hernandez, but the video showed that as Boyd walked away, Hernandez looked up as though he, too, had looked into Boyd's basket. At 5:17:25 Boyd started to walk to the front of the store, still carrying the basket in his left hand, with Hernandez very close but slightly behind Boyd. They walked about 20 feet in tandem, until at 5:17:32, Boyd again turned toward Hernandez. Hernandez turned to face Boyd as a second security guard came over. The camera captured the image of Boyd's back, which blocked the view of Boyd's left hand, but the basket remained in Boyd's left hand, and that basket did not move noticeably. A small pole briefly blocked the view of Boyd's right hand. The video does not show the fist Hernandez said Boyd formed. At 5:17:36, Hernandez shoved Boyd to the floor.

¶ 8 The trial court found Hernandez's testimony credible and held that Boyd pushed Hernandez's hand away in an insulting and provoking manner. The court found Boyd guilty of battery and sentenced him to 364 days in the custody of the Department of Corrections. Boyd now appeals.

¶ 9 ANALYSIS

¶ 10 Because Boyd challenges the sufficiency of the evidence, we must determine "whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v.*

*Kotlinski*, 2011 IL App (2d) 101251, ¶ 38, citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The trial court found Hernandez credible, and the video recording does not contradict Hernandez's testimony concerning the contact. We accept as true the finding that Boyd's left hand pushed away Hernandez's right hand immediately before Hernandez tackled Boyd. The fact that the basket remained in Boyd's left hand throughout the encounter and the lack of any significant movement of the basket or the men before the tackle indicates that Boyd used little force to push Hernandez's hand away.

¶ 11 Trivial physical contact may constitute a battery if the person who initiated the contact did so in an offensive and insulting manner. *Cohen v. Smith*, 269 Ill. App. 3d 1087 (1995). The *Cohen* court explained:

"Historically, battery was first and foremost a systematic substitution for private retribution. (W. Prosser & Keeton, *Torts* § 9, at 41 (5th ed. 1984) (Prosser).) Protecting personal integrity has always been viewed as an important basis for battery \*\*\* '[I]nsult is more to be considered than the actual damage; for, though no great bodily pain is suffered by a blow on the palm of the hand, or the skirt of the coat, yet these are clearly within the definition of assault and battery, and among gentlemen too often induce duelling and terminate in murder.' " *Cohen*, 269 Ill. App. 3d at 1091, quoting *Respublica v. De Longchamps*, 1 U.S. 111 (1784).

" '[A] particular physical contact may be deemed insulting or provoking based upon the factual context in which it occurs.' " *People v. Peck*, 260 Ill. App. 3d 812, 814, (1994), quoting *People v. d'Avis*, 250 Ill. App. 3d 649, 651

(1993). In determining whether trivial physical contact counts as a battery, "[t]he element of 'personal indignity' is also given great weight." *Kelly v. County of Monmouth*, 883 A.2d 411, 415 (N.J. Super. 2005).

We adopt the statement of relevant principles found in *Paul v. Holbrook*, 696 So.2d 1311 (1997):

" The element of personal indignity involved always has been given considerable weight. Consequently, the defendant is liable not only for contact which do actual harm, but also for those relatively trivial ones which are merely offensive and insulting....

The time and place, and the circumstances under which the act is done, will necessarily affect its unpermitted character, and so will the relations between the parties. A stranger is not to be expected to tolerate liberties which would be allowed by an intimate friend. But unless the defendant has special reason to believe that more or less will be permitted by the individual plaintiff, the test is what would be offensive to an ordinary person not unduly sensitive to personal dignity.' " *Paul*, 696 So.2d at 1312, *quoting* Prosser § 9.

¶ 12 Here, Hernandez admitted (and the video confirmed) that he stood about one foot from Boyd and gestured toward Boyd's waistband, and then Boyd's left hand pushed Hernandez's hand away. In the context of the encounter, Boyd's use of his left hand should not have offended or insulted any ordinary and not unduly sensitive person. Hernandez's gesture brought his hand very close to Boyd, and Boyd's response only showed the use of minimal force to protect his personal space. The video recorded a gross overreaction to inoffensive

self-defensive contact in response to Hernandez's intrusive gesture. See *People v. Dunker*, 217 Ill. App. 3d 410, 412 (1991).

¶ 13 We agree with the trial court that the video shows physical contact of an insulting and provoking nature. But the insulting contact occurred when Hernandez, without sufficient provocation, tackled Boyd. The court, like the prosecutor, misidentified the victim of the insulting contact as the perpetrator. Because the evidence cannot support a finding that Boyd made contact of an insulting or provoking nature, the findings are against the manifest weight of the evidence (*People v. Absher*, 242 Ill. 2d 77, 82 (2011)), and therefore, we reverse the conviction.

¶ 14 CONCLUSION

¶ 15 Viewing the evidence in the light most favorable to the prosecution, we find that in response to an intrusive gesture, Boyd, without any excessive force, pushed Hernandez's hand away. Because the trivial contact, in this context, would not offend an ordinary and not unduly sensitive person, we find that no rational trier of fact could have found that the State proved all the essential elements of a battery. Accordingly, we reverse the conviction.

¶ 16 Reversed.