2017 IL App (1st) 143783-U

No. 1-14-3783

May 11, 2017

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 10087
	)	
GUILLERMO HERNANDEZ,	)	Honorable
	)	Thomas V. Gainer, Jr.,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to prove defendant guilty beyond a reasonable doubt of aggravated battery.

¶ 2 Following a bench trial, defendant Guillermo Hernandez was found guilty of one count of aggravated battery and was sentenced to 18 months of probation. On appeal, defendant argues that the evidence was insufficient to convict him of aggravated battery beyond a reasonable doubt. He asserts that his testimony was believable and unimpeached, but that the testimony of

the victim, Ronald Krupa, was inconsistent, uncorroborated, and "defied logic and common sense." For the reasons below, we affirm.

¶ 3 Defendant's conviction arose from an incident that took place on March 27, 2013, outside Wheatland Tube and Pipe Company (Wheatland). Defendant was charged with two counts of aggravated battery (Counts I and II), one count of criminal damage to property (Count III), and one count of criminal defacement to property (Count IV). Prior to trial, the State *nolle prossed* Counts III and IV[1] as charged against defendant, and informed the trial court that it would proceed on Counts I and II, the aggravated battery charges. Count I alleged that defendant committed aggravated battery in that he "caused great bodily harm" to the victim, Ronald Krupa, when he "struck Ronald Krupa about the body." Count II alleged that he "caused bodily harm" to Krupa when he struck him "about the body, while they were on or about a public way."

¶ 4 At trial, Krupa testified that he had been a Chicago police officer for 25 years and that he also had a part-time job as a security officer at Wheatland. On the night in question, he arrived to work at Wheatland at about 11:55 p.m. When he was at his locker getting his security jacket, flashlight, and handcuffs, he looked at the security monitors and saw a group of "subjects" with a duffel bag and backpacks, spraying the wall of one of Wheatland's buildings, which he referred to as "building three." Krupa called 911 and reported that four individuals were "tagging" one of Wheatland's buildings.

¶ 5 Krupa put on his security shirt and jacket and drove in a golf cart with Wheatland's electrician, Martin, to building three, which was about a half a block away from the security

[1] Codefendants Cristobal Nava and Andres Delgado were also charged with criminal damage to property (Count III) and criminal defacement of property (Count IV). Nava and Delgado are not parties to this appeal, and this order will refer to them as "co-offenders."

office, and went inside. Because Krupa did not want Martin to get hurt and wanted him to wait for the police, Martin stayed inside the building.

¶ 6 When Krupa exited the building through the fire door, he saw three individuals spray painting the building. Defendant, who was about seven feet from the door, had spray paint in his hands and a small black backpack on the ground next to him. The two co-offenders were about 15 or 20 to 25 feet away. Krupa explained that he initially reported to 911 that he saw four individuals because he thought the large duffel bag that defendant was carrying over his right shoulder was a person. Krupa yelled, "Hey!" All three individuals looked at him. Krupa said, "You guys know what time it is. Get on the ground." Defendant looked him straight in the eyes, hesitated, and charged towards him. As Krupa put his hands up, defendant swung his backpack, hit Krupa in the arm, and started to run. Krupa said, "You ain't going anywhere. You are under arrest," grabbed defendant's shirt, and knocked him to the ground. Krupa told defendant to stay on the ground. Defendant kicked Krupa, spraining his finger and knocking the handcuffs out of his hands. Defendant also kicked him in the groin, which knocked him back.

¶ 7 Krupa testified that he told defendant to stay on the ground, but defendant started crawling away on his hands and knees. When defendant was about 20 feet away he stood up by a "large" duffel bag, which was about four feet by two feet. As Krupa was yelling at defendant to get down, defendant grabbed the duffel bag. When defendant picked it up, Krupa heard "[a] lot of noise" and "[a] lot of cans banging around." Then, when Krupa was "in mid air" trying to grab defendant, defendant hit him with the duffel bag in the left leg. Krupa fell to the ground and blacked out for about 50 seconds. He testified that there was no one else present during the incident. At some point during the incident, the two co-offenders had fled the scene.

¶ 8 When Krupa "came to," he saw Martin standing next to him, calling 911. Shortly thereafter, when Krupa was in the back of the ambulance, he saw police officers with defendant and the two co-offenders. Krupa went to the hospital, where x-rays were taken of his finger and left leg. He was diagnosed with a sprained little finger and received a splint for it. For his leg, he was told to go to his doctor the following morning. His doctor gave him medication, an elastic bandage, and crutches. He subsequently had surgery on his leg for a "ripped *** quad tendon." Krupa testified that, as a result of his leg injury, he is not able to run or kneel, has a hard time going up and down stairs, and bending is very painful. Prior to the day in question, he did not have any difficulty running or kneeling and had full use of his left knee.

¶ 9 Krupa was shown People's Exhibit No. 1, which was admitted into evidence. He testified that it was a photograph of building three and that it showed the graffiti, or "tagging," that was on the building after he observed defendant there on the night in question. Krupa marked an "X" next to the door he exited and next to where he saw defendant as well as the two co-offenders standing when he first exited the door.

¶ 10 Defendant, who was 19 years old and a full-time student at Harold Washington College, testified that he had attended Air Force Academy High School, where he earned a 3.5 grade point average, that he wanted to be a chemical engineer, and that he had never been arrested before. He testified that on the night in question, he intended to spray paint the building at Wheatland with his two friends, Nava and Delgado.

¶ 11 Defendant and his friends carried about four cans of spray paint to the subject building in a backpack. When defendant arrived, he started to paint an "A" and a "Z" on the building. He testified that he intended to paint the word "azul," which means blue in Spanish, but, after about

five minutes, he saw "two guards" in yellow helmets come out of the fire door. When they came out, defendant was about 30 to 40 yards away from the door. Defendant heard someone say, "Stop mother fucker's, [*sic*] don't run." After the "subject" yelled, defendant fled, leaving everything on the ground. He saw Delgado running with him but was not sure what Nava did. As he ran, he looked back for an "instant" and saw somebody chasing him. At some point, the police apprehended him and Delgado. Defendant testified that he never touched Krupa, that the closest distance between him and Krupa on the subject night was 30 to 40 yards, and that the first time he saw Krupa "face to face" was at court on the day of the trial.

¶ 12 Defense counsel showed defendant People's Exhibit No. 1. Defendant placed a circle on the photograph in the area where he spray painted. In response to the trial court's question regarding the significance of "azul," defendant testified that it was his favorite color.

¶ 13 Following closing argument, the trial court found defendant not guilty of the aggravated battery charge in Count II, which alleged that he caused bodily harm to Krupa while they were on or about a public way. However, the trial court found defendant guilty of the aggravated battery charge in Count I, which alleged that he "caused great bodily harm to Ronald Krupa, to wit: struck Ronald Krupa about the body." In doing so, the trial court stated as follows:

> "I would note and I certainly am considering in determining his credibility [that in the photograph] while there appears to be a 'Z' in what he has put a square around and possibly one could argue that the letter next to it, to the left of it is an 'A.' There's also an 'R' and an 'E.'And the last time I looked azul [was] spelled, a-z-u-l. So it kind of reflects poorly on his credibility. And frankly I don't believe that he was out there tagging his favorite color. That doesn't make any sense.

> I believe the officer's testimony. It was clear. It was convincing. In my opinion it is proof beyond a reasonable doubt that he caused great bodily harm to Officer Krupa when he struck him with the bag filled with spray paint cans[.]"

The trial court denied defendant's motion for new trial and sentenced him to 18 months of probation.

¶ 14 Defendant contends on appeal that the State failed to prove him guilty of aggravated battery beyond a reasonable doubt. He asserts that his testimony of the incident was believable, unimpeached, and logical, but that Krupa's testimony was improbable, impeached, inconsistent, uncorroborated, and contradicted by the State's evidence. Defendant requests that we reverse his conviction.

¶ 15 On appeal, when reviewing the sufficiency of the evidence, the question is 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 crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). It is the fact finder's responsibility to determine the "credibility of the witnesses and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from that evidence." *People v. Hale*, 2012 IL App (4th) 100949, ¶ 29. "It is the peculiar prerogative of the trier of fact to ascertain the truth where the evidence is irreconcilably conflicting." *People v. Mays*, 81 Ill. App. 3d 1090, 1099 (1980). As a reviewing court, we will not substitute our judgment with the fact finder on questions regarding the weight of the evidence and the credibility of the witnesses. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009). The reviewing court will only reverse a conviction if the credibility of the witnesses is so improbable as to raise a reasonable doubt (*Mays*, 81 Ill. App. 3d at 1099), or

if the evidence is "so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of defendant's guilt" (*People v. Peck*, 260 Ill. App. 3d 812, 815 (1994)).

¶ 16 To prove the offense of battery, the State must establish that defendant "knowingly without legal justification by any means (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual." 720 ILCS 5/12-3 (West 2012). To prove the offense of aggravated battery, as charged in this case, the State must prove that "when, in committing a battery," defendant knowingly caused "great bodily harm or permanent disability or disfigurement." 720 ILCS 5/12-3.05(a)(1) (West 2012).

¶ 17 Here, Krupa and defendant presented conflicting versions of events. Krupa testified that defendant charged him, hit him in the arm with a backpack, kicked his hands and groin, and hit his leg with a large duffel bag, which caused him to fall down and lose consciousness for about 50 seconds. In contrast, defendant testified that when he saw "two guards" exit the door and heard somebody yell, he fled the scene. He stated that he never touched Krupa, that the closest distance between him and Krupa that night was 30 to 40 yards, and that the first time he saw Krupa face to face was at trial.

¶ 18 The trial court specifically found that defendant's credibility was poor, while Krupa's testimony was believable, clear, and convincing. This was its prerogative in its role as the fact finder. *People v. Moody*, 2016 IL App (1st) 130071, ¶ 52; see also *People v. Ortiz*, 196 Ill. 2d 236, 267 (2001) ("a fact finder need not accept the defendant's version of events as among competing versions"). We will not substitute our judgment for that of the trial court on its credibility finding (*Mays*, 81 Ill. App. 3d at 1101 ("[T]his case turned largely upon the credibility of the witnesses. Since the trial court, unlike this reviewing court, heard the evidence presented

and observed the demeanor of the witnesses, the trial court was in a better position to evaluate the evidence and to appraise the witnesses' credibility. We will not disturb the trial court's determination.")), and we cannot say that Krupa's credibility was so improbable as to raise a reasonable doubt of guilt (*id.* at 1099).

¶ 19 Defendant nevertheless argues that Krupa's testimony was internally inconsistent and impeached. Defendant primarily takes issue with three areas in Krupa's testimony. First, he notes that Krupa initially reported to 911 that he saw four individuals spray painting the building, but then Krupa testified that when he got to the scene, he only saw three individuals. We are not troubled by this inconsistency, since Krupa explained at trial that he originally thought the large duffel bag that defendant was carrying was a fourth person. Second, defendant takes issue with Krupa's testimony that he was seven feet away from defendant when he exited the fire door, when People's Exhibit No. 1 shows that this distance was much greater than seven feet. The trial court rejected this very argument when it heard defendant's motion for a new trial, stating that it did not find the discrepancy regarding distance to be significant impeachment. We agree with the trial court's assessment. Third, defendant asserts the following: "Krupa further testified that when [defendant] initially charged him [defendant's] hands were empty, but he then said that when he held his hands up to deflect [defendant's] charge, [defendant] swung the backpack at him striking him in the arm." We do not find this testimony to be inconsistent, just because Krupa did not specify when defendant picked up the backpack. Krupa's testimony does not contain such gross inconsistencies that the trial court could not have reasonably accepted it. See *People v. Parker*, 2016 IL App (1st) 141597, ¶ 38 ("[complainant's] testimony in this case was not so 'fraught with inconsistencies and contradictions' that it was 'impossible for any fact finder

reasonably to accept any part of it' " (quoting *People v. Herman*, 407 Ill. App. 3d 688, 705, 709 (2011))). Defendant's arguments fail.

¶ 20 Defendant cites *People v. Jakes*, 207 Ill. App. 3d 762 (1990), to support his argument that the evidence was insufficient to convict him because Krupa's testimony provided a "logistically improbable" account of the incident and was inconsistent. We find *Jakes* distinguishable. In *Jakes*, the victim of an alleged aggravated battery and armed robbery made various inconsistent statements to different police officers after the incident, the victim's testimony at trial about the incident was inconsistent with another witness, and there was evidence presented that the victim was under the influence of alcohol at the time of the incident. *Jakes*, 207 Ill. App. 3d 762 at 764. While the trial court found the defendant guilty on two counts of aggravated battery, it stated that there was "a lot of confusing testimony." *Id.* at 769. On appeal, the court reversed the defendant's conviction, finding that the inconsistencies in the victim's various versions of the incident combined with the testimony of the other witness and the fact that the victim was under the influence at the time of the incident created a reasonable doubt as to the victim's credibility. *Id.* at 771.

¶ 21 Here, unlike in *Jakes*, there was no evidence presented that Krupa was intoxicated or made any prior statements about the incident that contained inconsistencies. Moreover, while defendant provided a different version of the incident, no other eyewitness contradicted Krupa's testimony, and, as discussed above, the trial court need not accept defendant's version over a competing one. *Ortiz*, 196 Ill. 2d at 267. Further, unlike the trial court in *Jakes*, which stated that there was "a lot of confusing testimony," the trial court in the instant case specifically stated that it believed Krupa's testimony and that he was clear and convincing. *Jakes* is not persuasive.

¶ 22 Defendant also contends that the believability of Krupa's testimony was undermined because the State did not call Martin, who, defendant argues, could have provided corroborating testimony about Krupa being unconscious when he arrived at the scene. We disagree. Krupa's testimony, by itself, was sufficient to support defendant's conviction. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009) ("It remains the firm holding of this court that the testimony of a single witness, if positive and credible, is sufficient to convict, even though it is contradicted by the defendant"). Furthermore, generally, if a witness appears to have special information relevant to the case such that his or her testimony would not be cumulative, the State's failure to call that witness may give rise to a negative inference. *People v. Doll*, 371 Ill. App. 3d 1131, 1137 (2007). "Such a negative inference is permissible only under certain circumstances: for example, where the State fails to call a witness who possesses unique knowledge of a crucial, disputed issue of fact [citation], or where the government has caused the absence of a material witness [citation]." *Doll*, 371 Ill. App. 3d at 1137. "However, no negative inference is raised when the witness is also known and available to the defense yet is not called by it." *Id.* at 1137. Here, Martin did not witness the incident between Krupa and defendant, and the record does not indicate that Martin had special information that was not cumulative, or that he was not known or unavailable to defendant. Therefore, we find that no unfavorable inference arose here when the State did not call Martin as a witness.

¶ 23 Defendant's citation to *People v. Johnson*, 191 Ill. App. 3d 940, 945 (1989), does not change our conclusion. In *Johnson*, the State did not call an informant witness who allegedly observed the incident that led to defendant's conviction. *Johnson*, 191 Ill. App. 3d at 945. Before trial, the defendant filed a motion for "pertinent information" about the informant and to produce

him at hearings and at trial. *Id.* at 944. On appeal, the court held that, because the informant's absence as a witness was unexplained, an unfavorable inference arose that his testimony would be unfavorable to the State. *Id.* at 945. In this case, unlike *Johnson*, Martin was not an informant, did not witness the incident, and, as stated above, the record does not indicate that Martin was not known or unavailable to defendant or that he had special information that was not cumulative.

¶ 24 Finally, defendant argues that the trial court convicted, "in part, based on considerations extraneous to the evidence." He asserts that the trial court seemed to be filling in gaps in the State's case when it made the following statement:

> "The reason that he is arrested with the co-defendant's [*sic*] is because he gets away and the policem[a]n was out. Not that this is an agg bat P-O, but the security officer was out for 50 seconds and the other units responding on the scene got all three guys, put them in a squad and came back. That's why there were all together."

Defendant argues that the record does not support the trial court's inference that the co-offenders were arrested separately and then put into the squad car. We disagree. In our view, the trial court made a reasonable inference, based on the evidence, as to why the three offenders were together in the squad car after the incident. *People v. Ford*, 2015 IL App (3d) 130810, ¶ 17 ("the fact finder's determinations regarding the * * * inferences to be drawn from the testimony are given great deference").

¶ 25 We are not persuaded otherwise by defendant's citation to *People v. Herman*, 407 Ill. App. 3d 688 (2011). In *Herman*, the defendant was charged with various offenses committed while he was on duty as a Chicago police officer. *Herman*, 407 Ill. App. 3d at 689. At trial, two

detectives testified that the victim told one of the detectives that if the defendant paid her $5,000, she would make the case "go away." *Id.* at 697-98. In finding the defendant guilty, the trial court found the victim's testimony to be "reasonable and believable despite minor inconsistencies," but that the detectives' testimony was unbelievable and incredible. *Id.* at 702. The trial court explained that if a witness-complainant requested money in exchange for dropping charges, the person would more than likely be arrested immediately, and that if there was any reason not to charge the person immediately, it would be unreasonable that the detective would not pass this information along to people involved in the investigation. *Id.* at 701-02. On appeal, this court reversed, noting that the State's case rested primarily on the victim's credibility, that the trial court's credibility determination regarding the victim was premised in part upon its finding that the detectives' testimony was not believable, and that the trial court's finding regarding the detectives' credibility was "premised, in part, upon an improper and unreasonable inference." *Id.* at 704, 707, 708. Specifically, the court held that the "[t]he trial court's reasoning, that had [the victim] indeed offered to 'make the case go away for $5,000' she would have 'more than likely' been arrested immediately and reported, is not grounded in the evidence but, rather, on the trial court's own perception of what was required under the circumstances. This conclusion is mere speculation." *Id.* at 708.

¶ 26 Here, unlike *Herman*, nothing in the record suggests that the trial court's finding regarding Krupa's credibility was premised on the trial court's statement or inference about the three offenders being in the squad car together after the incident. Moreover, even if we were to assume that the trial court's credibility finding was, in part, premised on this inference, as

discussed above, the trial court's inference was proper, reasonable, and supported by the evidence presented at trial. *Herman* is inapplicable.

¶ 27 Accordingly, after viewing the evidence in the light most favorable to the State, we conclude that the evidence was sufficient to establish that defendant committed the offense of aggravated battery beyond a reasonable doubt.

¶ 28 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 29 Affirmed.