2017 IL App (1st) 143831-U

SECOND DIVISION
January 31, 2017

No. 1-14-3831

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. 13 CR 10938
	)	
EDWARD SWANIGAN,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HYMAN delivered the judgment of the court.
Justice Neville concurred in the judgment.
Justice Mason specially concurred.

O R D E R

¶ 1 *Held:* We affirm defendant's conviction where the evidence was sufficient to prove him guilty beyond a reasonable doubt of aggravated battery to a peace officer and vacate the improperly-assessed DNA fee.

¶ 2 After a bench trial, defendant Edward Swanigan was convicted of two counts of aggravated battery to a peace officer, and one count of unlawful use or possession of a weapon by a felon, and sentenced to three concurrent six-year terms of imprisonment. On appeal,

Swanigan argues the evidence was insufficient to find him guilty of aggravated battery as to one of the peace officers and disputes the DNA testing fee imposed against him.

¶ 3 We affirm Swanigan's conviction and vacate the DNA fee. The trial court did not err in finding Swanigan acted knowingly or intentionally beyond a reasonable doubt because Swanigan, by struggling with the deputies, made it practically certain one or more of the deputies would be injured. As to the DNA fee, Swanigan had been convicted of a felony in 2010, and, thus, the Illinois State Police database already had his DNA profile.

¶ 4 Background

¶ 5 At trial, deputy Michael Morys of the Cook County Sheriff's Department testified that, on May 16, 2013, he was on duty as an eviction officer with three additional deputies, including Timothy Wilson and Harry Vance. The eviction team met with a representative from the company that manages a multiunit apartment building at 1437 North Long Avenue. The eviction team went to the unit listed on the eviction order, knocked on the door, and announced their office. When no one answered, a deputy used a key to enter the apartment.

¶ 6 Once inside, a man, identified in court as Swanigan, opened a bedroom door and began yelling that the deputies should not be there. Deputy Wilson brought him to a room down the hall to explain the procedure and have him complete paperwork. Deputy Vance went into the bedroom and, after finding a handgun in Swanigan's jacket, told Swanigan that he was under arrest. Swanigan began to struggle, head-butting the wall, and trying to head-butt the deputies. Eventually, the deputies handcuffed Swanigan and escorted him out of the apartment.

¶ 7 Swanigan continued to head-butt, stop, and sway from side to side near the apartment's doorway. Swanigan slapped Morys hand and pinned it between his body and the doorway, causing Morys to sprain his wrist. The deputies eventually got Swanigan down the stairs and

both Morys and Vance "slipped a little bit down the stairs." Morys also saw Wilson fall backwards, but did not see how or why, due to his position on the stairs. Morys then came outside about 30 seconds later and saw Swanigan handcuffed sitting on the grass, repeatedly trying to get up.

¶ 8 Deputy Harry Vance testified that once inside the apartment, he saw a man, identified in court as Swanigan, coming out of the bedroom and yelling. Vance tried to get Swanigan out of the bedroom, but Swanigan attempted to close the door. Vance eventually got Swanigan to leave the bedroom and directed him into the dining room. Vance stood near the bedroom door because he wanted to give a woman inside time to get dressed.

¶ 9 The woman came out of the bedroom and Vance entered to make sure no one else was there. While inside the bedroom, he noticed a clear plastic bag containing suspect cannabis on a table. Vance then approached Swanigan and asked for his identification. Swanigan, who was wearing "boxer type underwear" and a T-shirt, responded that it would probably be inside his shorts or jacket in the bedroom. Vance retrieved a pair of shorts, patted them down to ensure there were no weapons, and gave them to Swanigan. Swanigan stated that his identification was not in the shorts and it might be in his jacket. Swanigan gave Vance permission to retrieve the jacket and, when Vance patted it down, he felt what he believed to be a revolver.

¶ 10 Vance then returned to the dining room and told Swanigan to stand up and place his hands behind his back. As Vance was trying to arrest him, Swanigan blurted out "you wouldn't have found that gun if you hadn't of [*sic*] looked in my jacket." The deputies got one handcuff on Swanigan but, when they tried to get on the other, Swanigan began to resist and pull away, banging his head against the wall, both in the dining room and in the living room. He was "pulling," "tugging," and "pushing" against the deputies as they removed him from the

apartment. Swanigan continued to push and shove the deputies, including Wilson. Vance slipped down a couple of stairs. Vance testified, "[w]hen we got outside, we continued to struggle with him. He pushed back really hard. And Deputy Wilson fell back and hit his head on the brick wall of the building."

¶ 11 Deputy Wilson testified that on entering the apartment, he saw an "agitated" man, identified in court as Swanigan, coming out of the bedroom. Also present was a woman. Wilson tried to explain the process with Swanigan and have him complete the paperwork, but Swanigan refused. Vance asked Swanigan for his identification and then left the room. When he returned, he tried to take Swanigan into custody with the help of the other deputies. Swanigan "was fighting [the deputies] the whole time" but was eventually handcuffed.

¶ 12 As the deputies were escorting Swanigan out of the apartment, Swanigan began "to push back to go back in backwards." The deputies then "tried to take him to the ground. As we took him to the ground, that's when we went back and into the wall and my glasses came off." During this, Wilson hit his head against the wall causing a "slight concussion." After turning Swanigan over to others, Wilson and Vance went back inside the apartment to retrieve, unload, and inventory the weapon.

¶ 13 Defense witness Victoria Stevenson testified that on the morning of the incident, she heard a noise and saw people stepping halfway into the bedroom, telling Swanigan to come out. Stevenson got dressed and went into the living room. She saw Swanigan in another room talking to deputies who were explaining that he was being evicted. Swanigan told the deputies that he had been to court and had "papers." The deputies told Stevenson to leave the apartment. She stood in the hallway and saw the deputies escorting Swanigan, who was handcuffed. Swanigan was not pushing back against the deputies, but he slipped and fell down the stairs. Eventually,

Swanigan was taken outside. She denied that anything "happened" to the deputies but acknowledged that one deputy fell down two stairs before catching himself. Stevenson denied seeing whether Swanigan pushed back against the deputies or whether he head-butted anyone.

¶ 14 The trial court found Swanigan guilty of three counts of aggravated battery to a peace officer (Morys), three counts of aggravated battery to a peace officer (Wilson), and one count of unlawful use of a weapon by a felon. The remaining counts merged, and the trial court entered judgment on one count each of aggravated battery to a peace officer as to Morys and as to Wilson, and one count of unlawful use of a weapon by a felon.

¶ 15 Swanigan's written motion for reconsideration and for a new trial was denied, and the court sentenced Swanigan to three concurrent six-year terms.

¶ 16 Analysis

¶ 17 Swanigan challenges only the sufficiency of the evidence as to his conviction for aggravated battery of deputy Wilson. Specifically, he argues there was no evidence presented that Swanigan actually "struck" Wilson or that he did so "intentionally or knowingly."

¶ 18 When challenging the sufficiency of the evidence, the standard of review is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *People v. Brown,* 2013 IL 114196, ¶ 48. A reviewing court will not substitute its own judgment for the trier of fact on issues of the credibility of witnesses or the weight of the evidence. *People v. Digirolamo*, 179 Ill. 2d 24, 46 (1997). In a bench trial, the trial judge, as the trier of fact, is tasked with determining the credibility of witnesses, weighing the evidence and any inferences derived, and resolving any conflicts in the evidence. *People v. Siguenza-Brito,* 235 Ill. 2d 213, 228 (2009). A conviction will not be overturned unless the evidence is so improbable, unsatisfactory, or

inconclusive that a reasonable doubt of defendant's guilt exists. *People v. Belknap*, 2014 IL 117094, ¶ 67.

¶ 19 Swanigan was charged with having "knowingly caused bodily harm to Deputy Sheriff Wilson." The essential elements of aggravated battery to a peace officer are contained in the descriptions of the offenses of both battery and aggravated battery. *People v. Phillips,* 392 Ill. App. 3d 243, 257-58 (2009). "A person commits battery if he or she 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(a) (West 2012). That is, the State has to prove defendant's conduct was knowing or intentional. *People v. Lattimore,* 2011 IL App (1st) 093238, ¶ 42. The State also has to prove that Swanigan, in committing a battery, knew that deputy Wilson was a peace officer performing his official duties. 720 ILCS 5/12-3.05(d)(4)(i) (West 2012).

¶ 20 Swanigan does not argue that he did not know deputy Wilson was a peace officer or that Wilson was not performing his official duties. Further, he does not contest that Wilson suffered bodily harm. Swanigan instead argues that there is "no evidence that [he] actually struck [Wilson]." Viewing the evidence in the light most favorable to the State, we find a reasonable trier of fact could infer Swanigan struck Wilson.

¶ 21 Wilson testified that, while escorting Swanigan out of the apartment, the deputies "tried to take him to the ground. As we took him to the ground, that's when we went back and into the wall and my glasses came off." As Swanigan was "push[ing] back to go back in backwards" into the apartment, it is reasonable to infer that Swanigan's push caused the individuals to go "back" and Wilson to fall into the wall, causing a "slight concussion." Vance testified, "[Swanigan] pushed back really hard. And Deputy Wilson fell back and hit his head on the brick wall of the

building." Given Swanigan's "pushing" and "pulling" against the deputies, the trial court could have reasonably inferred that when Swanigan "pushed back really hard" again, he struck Wilson causing him to fall back into the brick wall and hit his head causing a "slight concussion." See *In re Jonathon C.B.,* 2011 IL 107750, ¶ 60 ("[a] trier of fact is not required to disregard inferences which flow normally from the evidence before it, nor must the trier of fact search out all possible explanations consistent with innocence, and raise those explanations to a level of reasonable doubt"); see *In re N.H.,* 2016 IL App (1st) 152504, ¶¶ 38-40 (finding that pushing satisfies the physical contact requirement for battery).

¶ 22 Swanigan next argues that the State failed to present sufficient evidence that Swanigan "intentionally or knowingly made physical contact with Deputy Wilson." A person acts intentionally when his or her "conscious objective or purpose is to accomplish that result or engage in that conduct." 720 ILCS 5/4-4 (West 2012). A person acts knowingly if he or she "is consciously aware that that result is practically certain to be caused by his conduct." 720 ILCS 5/4-5(b) (West 2012). Further, "[w]hen the law provides that acting knowingly suffices to establish an element of an offense, that element also is established if a person acts intentionally." 720 ILCS 5/4-5 (West 2012).

¶ 23 Whether a defendant acted intentionally or knowingly is often established by circumstantial evidence. *Lattimore,* 2011 IL App (1st) 093238, ¶ 44. Intent may be inferred (1) from the defendant's conduct surrounding the act and (2) from the act itself. *Phillips,* 392 Ill. App. 3d at 259; see *People v. Begay,* 377 Ill. App. 3d 417, 421-22 (2007) (finding intent could be inferred from defendant's conduct immediately before battery).

¶ 24 We find the trial court did not err in finding Swanigan acted knowingly or intentionally beyond a reasonable doubt. Before the contact with Wilson, Morys testified that Swanigan was

head-butting the wall and attempted to head-butt the deputies. Swanigan further stopped and swayed side to side as the deputies escorted him out of the apartment. He slapped Morys's hand and pinned it between Swanigan's body and the doorway, causing Morys to sprain his wrist. Vance testified that Swanigan was "pulling," "tugging," and "pushing" against the deputies as they removed him from the apartment. Wilson testified that Swanigan "was fighting [the deputies] the whole time" and began "to push back to go back in backwards." Given Swanigan's conduct surrounding the contact with Wilson, the trial court could have inferred that Swanigan was consciously aware that, by pushing backwards into Wilson, his conduct was practically certain to cause bodily harm to Wilson. See *Phillips,* 392 Ill. App. 3d at 259. By struggling with the deputies, the trial court could have inferred that Swanigan "increased the likelihood that someone would be injured so that it became practically certain someone would be injured." *Lattimore,* 2011 IL App (1st), ¶ 46. Thus, the trial court did not err in finding Swanigan knowingly or intentionally made contact with Wilson causing bodily harm.

¶ 25 Lastly, Swanigan argues the $250 DNA fee was improperly assessed as he was previously convicted of a felony and thus, his DNA profile is already in the Illinois State Police database. See 730 ILCS 5/5-4-3(j) (West 2012). Swanigan did not raise this challenge in the trial court. Nevertheless, we may modify a fines and fees order without remand under Illinois Supreme Court Rule 615(b) (eff. Aug. 27, 1999) and therefore need not consider Swanigan's arguments. We review the propriety of the trial court's imposition of fines and fees *de novo*. *People v. Bowen,* 2015 IL App (1st) 132046, ¶ 60.

¶ 26 The State correctly concedes this fee is improper and should be vacated. This fee is only required when a defendant is not currently in the DNA database. *People v. Marshall,* 242 Ill. 2d 285, 303 (2011). Swanigan was convicted of a felony offense in 2010, and we presume this fee

has already been imposed. See *People v. Leach,* 2011 IL App (1st) 090339, ¶ 38. Accordingly, we vacate the improperly-assessed $250 DNA fee.

¶ 27 Affirmed as modified.

¶ 28 JUSTICE MASON, specially concurring:

¶ 29¶ I agree with the result in this case, including the vacation of the improperly assessed DNA fee. I write specially because I disagree with the majority's invocation of Illinois Supreme Court Rule 615(b) as freestanding authority to "modify the judgment or order from which the appeal is taken." Ill. S. Ct. R. 615(b) (eff. Aug. 27, 1999). Without a vehicle, such as plain error, permitting us to review a forfeited error, I do not agree that Rule 615(b), standing alone, permits the result the majority reaches.

¶ 30¶ Swanigan did not raise the improperly assessed DNA fee in the trial court. In his brief, citing *People v. Lewis,* 234 Ill. 2d 32 (2009), Swanigan invoked plain error as a basis for review of this unpreserved error. Although not directly on point, I agree that *Lewis* could arguably support plain error review. The State has not argued against plain error review and so has forfeited that argument. See *People v. Williams,* 193 Ill. 2d 306, 347-48 (2000); Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) ("points not argued are waived."). Therefore, under the circumstances of this case, I agree with the decision to address this issue on the merits.

¶ 31¶ But given the admonition in Rule 615(a) that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights *shall be disregarded*," I am unwilling to state categorically that under all circumstances, Rule 615(b) provides an avenue of review for all unpreserved issues relating to erroneously assessed fines and fees. Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999) (emphasis added).