2017 IL App (1st) 143929-U

No. 1-14-3929

Order filed June 30, 2017

SECOND 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 15313
	)	
GERALD LEMON,	)	Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: We vacate one of defendant's two convictions for aggravated fleeing or attempting to elude a peace officer because the State failed to prove beyond a reasonable doubt defendant traveled at least 21 miles per hour over the legal speed limit.

¶ 2 Following a bench trial, defendant Gerald Lemon was convicted of two counts of aggravated fleeing or attempting to elude a peace officer (625 ILCS 5/11-204.1(a)(1) (West 2012)) and sentenced to 30 months' imprisonment. On appeal, he argues the State did not prove

beyond a reasonable doubt the aggravating factor of traveling at least 21 miles per hour over the speed limit. We vacate defendant's conviction under Count 1 for aggravated fleeing or attempting to elude a peace officer based on driving 21 miles per hour or more over the speed limit and reduce it to misdemeanor fleeing or attempting to elude a peace officer. Judgment is entered on Count 3, aggravated fleeing or attempting to elude a peace officer. Count 1 is merged with Count 3.

¶ 3 Defendant was charged by indictment with three counts of aggravated fleeing or attempting to elude a peace officer stemming from acts occurring on July 24, 2013, in Chicago. Count 1 was based on defendant driving 21 miles per hour or more over the speed limit (625 ILCS 5/11-204.1(a)(1) (West 2012)). Count 2 was predicated on causing more than $300 worth of damage to property (625 ILCS 5/11-204.1(a)(3) (West 2012)). Count 3 was based on disobeying two or more traffic-control devices (625 ILCS 5/11-204.1(a)(4) (West 2012)). Defendant was convicted of counts 1 and 3, and the trial court granted defendant's motion for a directed verdict on count 2.

¶ 4 At trial, Chicago police officer Rumsa testified that, on July 14, 2013, he was in uniform and working with Officer Kimosa in a marked squad car. Following a radio dispatch of a domestic disturbance, Rumsa arrived at 8339 South Justine Street and spoke with a woman, Deborah Lemon. He then left, but returned an hour later upon receiving another report of a domestic disturbance at that location. When he returned he saw two men drive away in a green Ford, which matched the type of vehicle Deborah had seen the "offender" drive. Rumsa followed the Ford, which went southbound on Justine then westbound on 84th street.

¶ 5 At 84th Street just east of Ashland, Rumsa activated his vehicle's emergency equipment, which included visual lights and audible sirens. The Ford traveled west on 84th Street and did not stop at the stop sign at Ashland. Rumsa testified, "[the Ford] was traveling at a high rate of speed. My vehicle was traveling approximately 50 miles an hour. And, he was gaining distance from me, leading me to believe that he was traveling at a greater distance than I was going." He observed that the speed of the vehicle "would not be a safe speed for anyone to operate a vehicle in." At this point, the speed limit in the residential area was 30 miles per hour. The Ford then turned south onto Marshfield, a one-way street going north, and did not stop at the stop sign at 85th and Marshfield or the stop sign at 86th and Marshfield. The Ford then approached a cul-de-sac, turned westbound, and crashed into a fence at the north alley at 87th Street.

¶ 6 Rumsa observed the driver of the Ford, identified in court as defendant, exit from the driver's side door of the vehicle and flee north into the west alley of Marshfield. Kimosa pursued defendant while Rumsa remained with the other individual, who stayed inside the Ford. Eventually, Rumsa learned that defendant was apprehended at 8607 Wood Street.

¶ 7 The court granted defendant's motion for a directed verdict as to count 2, as there was no testimony regarding the monetary amount of any damage to property.

¶ 8 Defendant testified that, on July 25, 2013, he stopped at 8330 South Justine to talk with his wife, Deborah Lemon. He then left the home and entered the passenger seat of a green Ford Escape, which he had rented. Robert Hewett was in the driver's seat and drove to the bus station. As they drove away, defendant noticed the police put their lights on the vehicle. Hewett then started driving the vehicle fast "to get away from the police." Eventually, defendant exited from the passenger side "before the vehicle came to a stop" and left. He stated he did not remain at the

scene because he was afraid of Robert and the way he was driving. He further testified that he did not go to the police after because he was "afraid of Robert, the police, and everything."

¶ 9 After the defense rested, the State introduced a certified copy of defendant's conviction in case number 03 CR 1209501 for armed robbery with a firearm.

¶ 10 The trial court found defendant guilty of the two remaining counts, concluding that defendant traveled at least 21 miles an hour over the speed limit and that he disobeyed two or more traffic-control devices. It noted, "Officer Rumsa's testimony [was] that their car, the squad car, was 50 miles an hour and the defendant was gaining distance from them. So, in excess of that, the speed limit was 30."

¶ 11 The trial court denied defendant's written motion for a new trial and sentenced him to 30 months' imprisonment. Defendant filed a timely notice of appeal.

¶ 12 On appeal, defendant does not challenge his Count 3 conviction for disobeying two or more traffic-control devices. Rather, he argues the evidence was insufficient to find him guilty of count 1, where the evidence did not prove beyond a reasonable doubt that defendant was driving at least 21 miles per hour over the speed limit. Specifically, he asserts Officer Rumsa only testified to his own approximate speed and there was no specific testimony about the rate of speed defendant was driving; only that defendant was "gaining distance" from Rumsa. The State responds that it was reasonable to infer that defendant was driving at least 21 miles per hour over the legal speed limit based on Rumsa's testimony.

¶ 13 When reviewing the sufficiency of the evidence, we look whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find the elements of the offense beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056, ¶ 31. 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. Brown*, 2017 IL App (1st) 142877, ¶ 39. Although the determinations of the trier of fact are afforded great deference, they are not conclusive. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). A conviction will not be reversed unless "the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt." *People v. Collins*, 214 Ill. 2d 206, 217 (2005).

¶ 14 The offense of aggravated fleeing or attempting to elude a peace officer occurs when "any driver or operator of a motor vehicle who flees or attempts to elude a peace officer, after being given a visual or audible signal by a peace officer *** and such flight or attempt to elude *** is at a rate of speed at least 21 miles per hour over the legal speed limit." 625 ILCS 5/11-204.1(a)(1) (West 2012); *People v. Lipscomb*, 2013 IL App (1st) 120530, ¶ 6. Defendant only challenges the evidence pertaining to the element of driving at least 21 miles per hour over the legal speed limit.

¶ 15 Here, as Officer Rumsa testified, the applicable legal speed limit was 30 miles per hour. Therefore, to sustain the conviction, the State must prove beyond a reasonable doubt that defendant was traveling at least 51 miles per hour. We conclude the State failed to satisfy this element of the offense.

¶ 16 This court has previously found that "proof of a defendant's speed may be established by means of a radar gun [citation], by a stopwatch [citation], by pacing the defendant's vehicle [citation], or by direct testimony of an officer [citation]." *Lipscomb*, 2013 IL App (1st) 120530, ¶ 7. Defendant argues Rumsa never testified as to how he estimated his own speed or defendant's

speed during the pursuit, and his testimony fails to show defendant traveled at least 21 miles per hour over the speed limit.

¶ 17 In *People v. Lipscomb*, 2013 IL App (1st) 120530, this court determined the State failed to prove the defendant was traveling at least 21 miles per hour over the legal speed limit where the police officer testified that, based on his speedometer, his vehicle was traveling at 55 miles per hour while pursuing the defendant in a zone with a 15 to 20 miles per hour speed limit. See *Lipscomb*, 2013 IL App (1st) 120530, ¶¶ 2, 8. While the court acknowledged the officer's speed, it held "there is no evidence as to the period of time he drove at this speed, whether this was a constant speed during the pursuit or whether it was simply the speed to which he accelerated in order to catch up to defendant's car." *Id.* ¶ 8. Further, the court noted the officer failed to testify to the position of the defendant's car in relation to his own, such that the trier of fact could infer that the defendant was traveling at least 21 miles per hour over the speed limit. *Id.* Because competent evidence to indicate the speed of the defendant's vehicle was lacking, the court found the State failed to prove the defendant's guilt beyond a reasonable doubt. *Id.*

¶ 18 Similarly, there was insufficient evidence to conclude defendant was traveling at least 51 miles per hour. Relevant here, Rumsa testified that defendant "was traveling at a high rate of speed. My vehicle was traveling approximately 50 miles an hour. And, he was gaining distance from me, leading me to believe that he was traveling at a greater distance than I was going." Rumsa never testified to his exact speed, or even how he determined his approximate speed. Even assuming he gathered this information from his speedometer, which he did not testify to, it is certainly possible that Rumsa could have been driving at a speed less than 50 miles per hour and, yet, his testimony would still be accurate that he was driving "approximately" 50 miles per

hour with defendant still "gaining distance" from him. As defendant points out, Rumsa could have been driving at 49 miles per hour, and defendant driving at 50 miles per hour, without contradicting Rumsa's testimony. Given the specificity the statute requires, *i.e.*, the defendant must be traveling at least 21 miles per hour over the speed limit, the State's inconclusive evidence failed to prove defendant guilty beyond a reasonable doubt where Rumsa could only testify to his approximate speed.

¶ 19 Further, while Rumsa did testify that defendant "was gaining distance" from him, there is no testimony as to the rate at which defendant was increasing his distance from Rumsa. Given Rumsa's testimony regarding his approximate speed, it is certainly possible for defendant to gain distance on Rumsa, yet still be traveling at a speed less than 51 miles per hour. While *Lipscomb* indicated testimony regarding the position of the defendant's car relative to the officer's could give rise to an inference that the defendant was traveling at least 21 miles per hour over the speed limit, here the uncertainty regarding Rumsa's speed is an insufficient basis to infer beyond a reasonable doubt that defendant was traveling at least 51 miles per hour. See *Lipscomb*, 2013 IL App (1st) 120530, ¶ 8. We therefore find the evidence unsatisfactory and insufficient to show defendant traveled at least 21 miles per hour over the speed limit as required to prove his conviction beyond a reasonable doubt.

¶ 20 In finding the evidence insufficient to sustain defendant's conviction, we find *People v. Brown*, 362 Ill. App. 3d 374 (2005), relied upon by the State, distinguishable. In *Brown*, the court affirmed defendant's conviction for aggravated fleeing or attempting to elude a peace officer where the officer testified that, in an area with a 35 miles per hour speed limit, he chased the defendant at an estimated speed of 60 to 70 miles per hour, while defendant was traveling at

an estimated 70 to 80 miles per hour. *Brown*, 362 Ill. App. 3d at 375-76. But, in *Brown*, the main issue was whether the defendant drove at least 21 miles per hour over the speed limit *after* becoming aware of the visual or audio signal given by the peace officer. See *id.* at 377-79; see also *Lipscomb*, 2013 IL App (1st) 120530, ¶ 9 (distinguishing *Brown* on this point). Based on the testimony in *Brown*, the defendant was clearly driving at least 21 miles per hour over the speed limit of 35 miles per hour where the officer testified he was driving between 60 and 70 miles per hour and defendant was estimated to be driving 70 to 80 miles per hour. Here, as explained above, defendant could have been driving less than 21 miles per hour over the speed limit, as Officer Rumsa only testified to his approximate speed of 50 miles per hour.

¶ 21 While Rumsa's testimony does indicate defendant was speeding, it is insufficient to sustain his conviction for traveling at least 21 miles per hour over the legal speed limit. See *People v. Steele*, 2014 IL App (1st) 121452, ¶ 53 (noting that, while a trier of fact "can presume that a person fleeing the police may travel at a high rate of speed ***, a trier of fact must determine a defendant's guilt on the evidence presented at the trial and not presume evidence when there is none"). Further, Officer Rumsa's vague testimony regarding his own speed and his observation that defendant "was gaining distance" is insufficient to prove beyond a reasonable doubt that defendant was traveling at least 21 miles per hour over the legal speed limit, an element necessary to sustain his conviction.

¶ 22 We therefore vacate his aggravated fleeing or attempting to elude a peace officer conviction under count 1 and, pursuant to Supreme Court Rule 615(b)(3), reduce it to misdemeanor fleeing or attempting to elude a peace officer. Count 1 will merge into Count 3. See *Lipscomb*, 2013 IL App (1st) 120530, ¶ 12. Judgment is entered on Count 3.

¶ 23 Vacated in part; judgment modified.