2017 IL App (1st) 160361-U
No. 1-16-0361
Order filed June 27, 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. 15300304401
	)	
WAHEEK SARKEES,	)	Honorable
	)	Richard Schwind,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE HYMAN delivered the judgment of the court.
Justices Neville and Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction for resisting a peace officer where any variance between the charging document and the proof at trial was not fatal and the evidence was sufficient to convict him of the charge.

¶ 2 Following a jury trial, defendant Waheek Sarkees was convicted of resisting a peace officer (720 ILCS 5/31-1(a) (West 2012)) and sentenced to one year conditional discharge with 100 hours in the Sheriff's Work Alternative Program. On appeal, he argues a fatal variance between the complaint and the proof at trial requires us to vacate his conviction. He also argues that the evidence was insufficient to prove him guilty. We affirm. All the essential elements of

resisting a peace officer were charged in the complaint. Even removing from the complaint the language regarding Sarkees's arrest, the complaint still retains and charges the essential elements of resisting a peace officer, and language regarding Sarkees's arrest is surplusage. As to the sufficiency of the evidence, the jury determined whether Sarkees physically resisted, and there is no reason for us to substitute our judgment for that of the jury's.

¶ 3 BACKGROUND

¶ 4 Sarkees was charged by complaint with one count of resisting a peace officer, one count of aggravated assault, and failure to drive on the right side of the roadway stemming from acts occurring in Rosemont, Illinois. Specifically regarding the resisting a peace officer charge, the complaint stated that Sarkees:

> "knowingly resisted the performance of PSO Vahey of an authorized act within his official capacity, being the arrest of Waheek G Sarkees knowing PSO Vahey to be a uniformed peace officer engaged in the execution of his official duties, in that after he was under arrest for assault he refused to exit his vehicle after being advised multiple times."

¶ 5 At trial, Rosemont police officer Brendan Vahey testified that, on July 29, 2015, around 11:20 p.m., he was working as a uniformed patrol officer in a marked squad car. Vahey was the eighth car in the left-hand-turn lane of westbound Higgins Road approaching the intersection with Mannheim Road. He noticed the car two spots in front of him, a Toyota Corolla, drive into the eastbound traffic lanes before backtracking when a bus approached in the eastbound lanes. After the bus passed, the same driver went back into the eastbound traffic lanes, went past all the cars waiting to turn in front of him, and entered the intersection. The Toyota then made a left

turn onto Mannheim. About 10 to 15 seconds later, Vahey made his left turn onto Mannheim and noticed the Toyota about a quarter mile away.

¶ 6 Vahey activated his emergency lights, and the Toyota abruptly stopped on the left-hand lane of traffic rather than the right-hand side. Vahey instructed the driver, identified in court as Sarkees, to pull over to the right side of the road. In response, Sarkees rolled down the window and stuck his middle finger out in the direction of Vahey. Eventually, Sarkees pulled over on the right side of the road, and Vahey approached the vehicle and asked why Sarkees had given him the finger. Sarkees denied doing so and questioned why he had to provide his license and vehicle information when he did not do anything wrong. Vahey explained to Sarkees that he pulled him over because he was driving in a dangerous manner and had committed a violation.

¶ 7 Sarkees again responded that he did not do anything wrong. He then pointed at Vahey and told the officer to stop yelling at him or he would get out of the car and "fuck [Vahey] up." Vahey, two feet from Sarkees, perceived this statement to be a direct threat and thought Sarkees was going to hurt him. Vahey told Sarkees that he had made a direct threat to a police officer and ordered him to get out of the car. Sarkees refused three times. After the third refusal, Vahey opened the door, grabbed Sarkees by the left shoulder and removed him. As Vahey did this, Sarkees was not compliant and was "dead weight." Once out of the car, Sarkees was handcuffed.

¶ 8 The jury found Sarkees guilty of improper lane usage and resisting a peace officer and not guilty of aggravated assault. The trial court sentenced Sarkees to one year conditional discharge with 100 hours in the Sheriff's Work Alternative Program.

¶ 9 ANALYSIS

¶ 10 On appeal, Sarkees argues (i) a fatal variance between the complaint and the proof at trial requires us to vacate his conviction, and (ii) the evidence was insufficient to prove him guilty beyond a reasonable doubt. He asserts that the complaint, which states Sarkees resisted Vahey, who was performing "the arrest of Waheek G Sarkees," varies from the proof adduced at trial because there was no testimony that Sarkees was under arrest.

¶ 11 To receive a new trial, a defendant must show that both (1) a variance exists between allegations contained in the complaint and the proof adduced at trial, and (2) that variance is fatal to his or her conviction. *People v. Smith*, 2013 IL App (3d) 110477, ¶ 14; *People v. Collins*, 214 Ill. 2d 206, 219 (2005). "A variance between allegations in a complaint and proof at trial is fatal to a conviction if the variance is material and could mislead the accused in making his [or her] defense." *Smith*, 2013 IL App (3d) 110477, ¶ 14. If the complaint charges all of the essential elements of the criminal offense, other information unnecessarily added may be considered as surplusage. See *Collins*, 214 Ill. 2d at 219.

¶ 12 For us to sustain the conviction for resisting a peace officer, the State had to prove: (1) defendant knowingly resisted a peace officer, (2) the peace officer was performing an authorized act within his or her official capacity, and (3) defendant knew he or she was a peace officer. 720 ILCS 5/31-1(a) (West 201); see also *People v. Baskerville*, 2012 IL 111056, ¶ 32.

¶ 13 This court's decision in *People v. Smith*, 2013 IL App (3d) 110477, is instructive. In *Smith*, the defendant was charged with obstructing a police officer where the complaint alleged:

> "[d]efendant knowingly obstructed the performance of Jacob Reul of an authorized act within his official capacity, being the arrest of [Smith], knowing Jacob Reul to be a peace officer engaged in the execution of his official duties, in that he exited his vehicle during

> a traffic stop *** and refused to return to the vehicle." *Smith*, 2013 IL App (3d) 110477, ¶ 3.

A jury convicted Smith of obstructing a peace officer. *Id.* ¶¶ 4, 11.

¶ 14 On appeal, Smith argued the evidence presented at trial did not prove he was under arrest at the time he go out of the car and thus, a fatal variance exists between the complaint and the proof adduced at trial. *Id.* ¶ 13. In affirming Smith's conviction, this court held that the State did not need to prove he was under arrest to support the conviction for obstructing a peace officer, even though the complaint indicated Smith obstructed his own arrest. *Id.* ¶ 20. This court further held that the variance from the complaint did not mislead Smith in making his defense because he was aware he was being issued a traffic citation and the peace officer was still in the process of issuing the citation when Smith obstructed him. *Id.* ¶ 21.

¶ 15 Here, Vahey was also performing an authorized act, *i.e.*, ordering and removing Sarkees from the car following Sarkees's direct threat to Vahey. The complaint stated that (i) Sarkees knowingly resisted the performance of Vahey of an authorized act within his official capacity and (ii) Sarkees knew Vahey to be an officer engaged in the execution of his official duties. Even if the language regarding Sarkees's arrest was removed, the complaint still retains and charges the essential elements of resisting a peace officer. Thus, any language regarding Sarkees's arrest would be surplusage. See *Collins*, 214 Ill. 2d at 219. As the complaint charges all the essential elements of resisting a peace officer, any variance was not material and Sarkees was not misled in making his defense. See *Smith*, 2013 IL App (3d) 110477, ¶ 14.

¶ 16 Sarkees next argues that the evidence was insufficient to prove him guilty beyond a reasonable doubt of resisting a peace officer. 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. *Baskerville*, 2012 IL 111056, ¶ 31. 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). The jury, as trier of fact, has the duty to determine the credibility of witnesses and weigh the evidence as well as make inferences from the evidence presented and resolve any conflicts in the evidence. *People v. Kidd*, 2014 IL App (1st) 112854, ¶ 27. We will not overturn a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that a reasonable doubt of Sarkees's guilt exists. *People v. Belknap*, 2014 IL 117094, ¶ 67.

¶ 17 Vahey, dressed in his full uniform, had parked his marked police car with emergency lights flashing behind Sarkees's car after pulling him over. So Sarkees had to have been aware that Vahey was a peace officer performing an authorized act, that is, ordering and removing Sarkees from his car following Sarkees's direct threat to Vahey. Indeed, Sarkees concedes Vahey was authorized to order him out of his car. Instead, Sarkees argues the State failed to prove him guilty beyond a reasonable doubt of conduct that would constitute resisting the officer.

¶ 18 A defendant resists a peace officer when he or she commits a physical act that "impedes, hinders, interrupts, prevents or delays the performance of the officer's duties, such as going limp, forcefully resisting arrest, or physically helping another party to avoid arrest." *People v. Haynes*, 408 Ill. App. 3d 684, 689-90 (2011); accord *People v. Raby*, 40 Ill. 2d 392, 399 (1968). Simply arguing with a peace officer, including using abusive language, does not rise to the level of resisting a peace officer. *People v. Long*, 316 Ill. App. 3d 919, 927 (2000). It is ultimately for the

trier of fact, here the jury, to determine whether a defendant physically resisted a peace officer. *People v. McCoy*, 378 Ill. App. 3d 954, 962 (2008).

¶ 19 Sarkees argues that he never knowingly performed a physical act of resistance when Vahey removed him. In support, he relies on *People v. Flannigan*, 131 Ill. App. 2d 1059 (1971), where the defendant's conviction for resisting a peace officer was reversed. In *Flannigan*, the defendant was told by an officer that he was under arrest for driving in a reckless manner. *Id.* at 1060. The defendant directed profane language toward Pendell and told him the police were always "picking on" the defendant. *Id.* Pendell took the keys to the defendant's car and ordered him out of it two or three times but the defendant refused. *Id.* Pendell removed the defendant from the car, and defendant stated "[t]ake your hands off me. I'll go." *Id.* The defendant did not go and, when Pendell put his hands on him, the defendant jerked his arm away but did not attempt to flee. *Id.* The defendant was convicted of resisting a peace officer. *Id.* at 1059.

¶ 20 In reversing the defendant's conviction, the court noted that the defendant intended to argue with Pendell and even jerked away his arm. *Id.* at 1063. It further found that, although the defendant's language was abusive, he did not refuse to go with Pendell to the patrol car or attempt to escape. *Id.* The appellate court concluded the defendant's conduct was "at most an insubstantial display of antagonism or belligerence," but did not satisfy the level of resistance necessary for a conviction. *Id.*

¶ 21 But, viewing the evidence in the light most favorable to the State, we find Sarkees performed a physical act of resistance such that his conviction for resisting a peace officer stands. Vahey testified that, after he pulled Sarkees over, Sarkees stated that he would "fuck [Vahey] up." Vahey, two feet from Sarkees, viewed this statement as a direct threat that Sarkees

would hurt him and ordered Sarkees out of the car. Sarkees's refused several requests that he get out of the car. Vahey opened the door, grabbed Sarkees by the left shoulder, and removed him. When Vahey was doing this, Sarkees was not compliant and was "dead weight."

¶ 22 We find that Sarkees being "dead weight" is functionally identical to "going limp," which our supreme court has found to be a physical act sufficient to satisfy the offense of resisting a peace officer. See *Raby*, 40 Ill. 2d at 402-03. Contrary to *Flannigan*, it was reasonable for the jury to find that Sarkees was not merely displaying antagonism to Vahey, but physically impeding him in the execution of his official duties. See *People v. Crawford*, 152 Ill. App. 3d 992, 995 (1987) (refusing to follow *Flannigan* and finding evidence was sufficient to support jury's determination of guilt). As it was the jury's duty to determine whether Sarkees physically resisted, we will not substitute our judgment for that of the jury's. See *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001).

¶ 23 Affirmed.