2017 IL App (2d) 150629-U
No. 2-15-0629
Order filed October 4, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. SHAWN LOVE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 12 CF 1867 Honorable James Hallock, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient for the trial court to find beyond a reasonable doubt that defendant committed the offense of mob action.

¶ 2 Following a bench trial, defendant, Shawn Love, was found guilty of mob action (see 720 ILCS 5/25-1(a)(1) (West 2012)). Defendant contends that the State failed to prove beyond a reasonable doubt the element of the offense of personally engaging in use of force or violence. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with mob action following an incident where he and his co-defendant, Sweed Strickland, fought with Elbert Berry in the parking lot of an apartment complex on Second Avenue in Aurora on September 14, 2012. It is undisputed that defendant and Berry knew each other, but there is conflicting testimony as to what precipitated the incident.

¶ 5 Berry testified that he and defendant had several altercations from May to September 2012. At the time of the offense, Berry's girlfriend, Brandi Lake, and their children, resided in the apartment complex where the incident occurred. Lake knew defendant from the neighborhood and school.

¶ 6 Berry testified that, around 7:40 a.m. on the day of the incident, he was driving home from dropping off his niece at school when he encountered defendant driving alone in his car. Defendant told Berry "to pull over so [they] could fight." Defendant pulled over behind Berry and appeared to be talking on a cell phone. Defendant walked to the rear of Berry's car and began spitting on it.

¶ 7 Berry opened his door but stayed in his vehicle. He recognized Strickland running across a field toward the two vehicles. Because he feared a two-on-one fight, Berry drove toward the apartment complex. As Berry drove away, he believed the fight was over and did not expect defendant and Strickland to follow him. Berry thought that they would "catch up another day."

¶ 8 Strickland jumped into defendant's car, and the two pursued Berry. At the apartment complex, Berry pulled into a space between two cars, exited his vehicle, and set two cups of coffee on the sidewalk. Lake was already outside waiting for him. Berry told her that defendant "was following [him], and that [he] wasn't going to run or none of that no more." Soon thereafter, defendant pulled his car "right in front of" Berry, blocking his vehicle.

¶ 9 Berry testified that defendant and Strickland "walked out, both of them." Strickland "started swinging" immediately. Once Berry and Strickland "started getting into it, [Strickland] ran off and [defendant] took over right there, he instantly started up" and "took over the fight." Berry admitted swinging a pocket knife from his keychain at Strickland and defendant in an attempt "to get them off of [him]," but he was not sure at the time if he cut them. Strickland struck Berry's head three or four times and ran away. Berry continued to fight defendant, who punched Berry and pulled his head down by his hair. Eventually, defendant knocked the knife from Berry's hand, and they moved from the rear of Berry's car to an area near a dumpster.

¶ 10 Lake testified that, once defendant and Strickland exited the car, they both went to Berry and "everyone just started fighting." However, Lake was unable to identify who hit whom first because "it just happened so fast." As defendant and Berry moved across the parking lot, Lake tried unsuccessfully to break up the fight. Strickland returned to defendant's car and sat in the driver's seat. Lake saw the car back up to the area of the dumpster, and Berry heard someone yell "watch out." Defendant and Berry were tangled up as the car approached. Strickland, accelerating in reverse, backed into defendant and the car stopped. Berry pulled himself away from defendant, but he stumbled in front of the car. Expecting Strickland to drive over him, Berry rolled to avoid the wheels. As the car passed over Berry, he was dragged into the middle of the parking lot. Strickland put the car in reverse to run over Berry again, but he jumped up and ran out of the way.

¶ 11 Defendant testified that Berry initiated the encounter. According to defendant, Berry pulled up in his car and said "we need to get something off our chest, I'm gonna pull over up here." Berry allegedly taunted defendant and drove away. Defendant testified that he intended to fight Berry alone and for Strickland to monitor the situation and prevent others from

participating. Defendant followed Berry to the apartment complex, where "[Strickland] hopped out first, then [defendant] hopped out." Strickland told defendant to "watch out," because "[Berry] got a knife." Defendant stated that he ran away, and "Berry started chasing [him] with the knife." When asked whether he swung at Berry, defendant testified: "at first I didn't. But once he stabbed me two times in the shoulder with the knife, that's when I started swinging." Defendant claimed that he swung only because he "was trying to get away," and Berry "kept coming" at him. Defendant testified that Berry chased him and Strickland with the knife.

¶ 12 Surveillance video from the apartment complex was admitted and displayed at trial. One segment shows Berry parking his vehicle at a curb between two cars. About a minute later, defendant's car can be seen pulling quickly into the parking lot and stopping behind Berry's car perpendicularly, blocking it. The video shows Strickland and defendant exiting the car as soon as it stopped, and rushing toward Berry, who still was in the driver's seat of his vehicle. The trial court found that defendant's exit from his car was "purposeful and immediate."

¶ 13 Behind Berry's car, an encounter occurred that is not visible on the video. The video then shows Strickland running in one direction and defendant and Berry moving across the parking lot in another direction, with Lake trailing. Berry was chasing defendant, and defendant was swinging his fists wildly at Berry. The court concluded that defendant was "punching out at Berry in the video."

¶ 14 The video confirms that Strickland quickly returned to defendant's car and sped in reverse toward defendant and Berry. The video shows a bystander reacting to the car running into defendant and Berry, but the video does not show the collision. Strickland shifted gears and tried to drive forward with Berry stuck under the car. Berry can be seen being dragged and thrown from under the car as Strickland drove past the camera.

¶ 15 Lake drove Berry to a hospital where he was treated for serious abrasions to his skin and fractures to his nose and leg. Defendant jumped into his car and Strickland drove him to the same hospital, where he was treated for stab wounds. At the hospital, defendant told a police officer that "he got stabbed on View Street" and not on Second Avenue. Before the officer mentioned any details about the incident on Second Avenue, defendant asked "if the subject who got run over on Second Avenue was also being placed under arrest." Defendant's statement to the police was inconsistent with his testimony at trial. Berry's accounts of the events, however, were consistent.

¶ 16 The trial court found Berry "quite credible" and defendant less credible. The court found defendant to be the aggressor and expressly rejected defendant's claim that Strickland was present only to prevent interference in a one-on-one fight. The court found that defendant and Strickland acted together, without authority of law, to strike Berry and disturb the peace in front of children and mothers in the parking lot. The court stated that "the video establish[ed] force as well as violence" based on defendant driving to the lot, blocking Berry's car, and the purposefulness of the actions of defendant and Strickland.

¶ 17 The trial court found defendant guilty of mob action on September 10, 2013, and sentenced defendant to four years' imprisonment on November 5, 2013. Defendant filed *pro se* notices of appeal on November 19, 2013, and on November 22, 2013.

¶ 18 Thereafter, defendant had notarized a *pro se* posttrial motion on December 2, 2013, and a mail card from the jail indicates that it was sent for filing on December 3, 2013. The motion was filed in the trial court on December 13, 2013. Over the State's objection, the court determined that, under the "mailbox rule," the motion was timely filed within 30 days of sentencing. The

trial court struck defendant's prior notices of appeal. With the assistance of counsel, defendant amended the motion.

¶ 19 On June 8, 2015, defendant's posttrial motion was denied on the merits. On June 17, 2015, defendant filed another notice of appeal, which was timely,

¶ 20 II. ANALYSIS

¶ 21 A. Jurisdiction

¶ 22 The State challenges our jurisdiction to consider the appeal. For this court to have jurisdiction, defendant must have filed a timely notice of appeal. See *People v. Lugo*, 391 Ill. App. 3d 995, 997 (2009). Illinois Supreme Court Rule 606 (eff. Feb. 6, 2013) establishes the procedure and timeline for perfecting an appeal from a criminal conviction. Rule 606(b) provides that "[e]xcept as provided in Rule 604(d), the notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from or if a motion directed against the judgment is timely filed, within 30 days after the entry of the order disposing of the motion." Ill. S. Ct. R. 606(b) (eff. Feb. 6, 2013). The final judgment in a criminal case is the sentence. *People v. Salem*, 2016 IL 118693, ¶ 11.

¶ 23 The final judgment in this case was entered when defendant was sentenced on November 5, 2013. Within 30 days, defendant filed two *pro se* notices of appeal on November 19, 2013, and November 22, 2013, and a *pro se* posttrial motion with an effective filing date of December 3, 2013. See *People v. Shines*, 2015 IL App (1st) 121070, ¶ 31 (under the mailbox rule, pleadings, including posttrial motions, are considered timely filed on the day they are placed in the prison mail system by an incarcerated defendant). "When a timely posttrial or postsentencing motion directed against the judgment has been filed by counsel or by defendant, if not represented by counsel, any notice of appeal filed before the entry of the order disposing of

all pending postjudgment motions shall have no effect and shall be stricken by the trial court." Ill. S. Ct. R. 606(b) (eff. Feb. 6, 2013). In accordance with Rule 606(b), the trial court struck the notices of appeal that were filed before the posttrial motion.

¶ 24 The State argues that we lack jurisdiction because the posttrial motion was untimely. The State characterizes the December 3, 2013, posttrial motion as one for a new trial brought under section 116-1 of the Code of Criminal Procedure of 1963. 725 ILCS 5/116-1(b) (West 2012). Based on this characterization, the State concludes that defendant's motion was untimely filed more than 30 days after the September 10, 2013, finding of guilt. 725 ILCS 5/116-1(b) (West 2012) ("[a] written motion for a new trial shall be filed by the defendant within 30 days following the entry of a finding or the return of a verdict"). Defendant responds that his motion was directed against the sentence and was therefore timely filed within 30 days of the November 5, 2013, judgment.

¶ 25 We agree with defendant that the posttrial motion was not a motion for a new trial but one to reduce the sentence. Section 5-4.5-50(d) of the Unified Code of Corrections provides that a defendant's challenge to the correctness of a sentence or to any aspect of the sentencing hearing shall be made by a written motion filed with the circuit court clerk within 30 days following the imposition of sentence. 730 ILCS 5/5-4.5-50(d) (West 2012).

¶ 26 Generally, the character of a motion is determined by its content or substance, not by the label placed on it by the movant. *People v. Shellstrom*, 216 Ill. 2d 45, 51 (2005). We must examine the relief sought to determine a motion's character. *People v. Patrick*, 2011 IL 111666, ¶ 34. Defendant's *pro se* motion was entitled "Motion for Reduction of Sentence" and asked the court to "review the sentence" and "reduce [his] sentence." The motion alleged a variety of reasons for reducing his sentence, including insufficient proof of his guilt, evidentiary errors, and

a violation of due process resulting in an unfair trial. The motion also cited section 5-8-1 of the Unified Code of Corrections, which previously contained a version of section 5-4.5-50(d). (730 ILCS 5/5-8-1(c) (West 2008) (now 730 ILCS 5/5-4.5-50(d) (West 2012))). Defendant's intent to challenge the sentence is manifested by his citation to the statute prescribing a sentencing challenge and his requested relief of reducing his prison term.

¶ 27 Section 5-4.5-50(d) of the Unified Code of Corrections provides, in part, that a motion to reduce a sentence may be made within 30 days after the sentence and that a motion not filed within that 30-day period is not timely. 730 ILCS 5/5-4.5-50 (West 2012). Because defendant's motion to reduce sentence had an effective filing date within 30 days of the sentence, it was timely.

¶ 28 A year later and after several hearings, defendant through counsel filed an amended posttrial motion on December 12, 2014. On June 8, 2015, the trial court denied the motion on the merits, and defendant filed a timely notice of appeal within 30 days on June 15, 2015. Thus, we have jurisdiction to consider the appeal.

¶ 29 B. Sufficiency of the Evidence

¶ 30 Defendant was charged with mob action by "knowingly, by the use of force or violence, disturbed the public peace in that he, while acting together with Sweed Strickland and without authority of law, struck and kicked Elbert Berry on or about the face and body, thereby inflicting injury to Elbert Berry." See 720 ILCS 5/25-1(a)(1) (West 2012). Defendant asserts that (1) the State failed to prove beyond a reasonable doubt that he personally engaged in force or violence and (2) his conduct was legally justified as he was acting in self-defense. The State responds that the evidence was sufficient to show that defendant engaged in force and violence and that defendant was the aggressor.

¶ 31 In a challenge to the evidence supporting a criminal conviction, a reviewing court does not retry the defendant. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). "When reviewing the sufficiency of the evidence, 'the relevant 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.' (Emphasis in original.)" *People v. Bishop*, 218 Ill. 2d 232, 249 (2006) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). "Testimony may be found insufficient under the *Jackson* standard, but only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). Our duty is to carefully examine the evidence while giving due consideration to the fact that the finder of fact saw and heard the witnesses. The testimony of a single witness, if it is positive and the witness is credible, is sufficient to convict. *Smith*, 185 Ill. 2d at 541. The credibility of a witness is within the province of the trier of fact, and the finding on such matters is entitled to great weight, but the fact finder's determination is not conclusive. We will reverse a conviction where the evidence is so unreasonable, improbable, or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *Smith*, 185 Ill. 2d at 542. This standard of review applies regardless of whether the evidence is direct or circumstantial and regardless of whether the defendant was tried before the bench or a jury. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000).

¶ 32 The State concedes that it was required to prove that defendant personally engaged in force or violence. See *In re Dionte J.*, 2013 IL App (1st) 110700 ¶¶ 72-74 (holding that to establish mob action, it was not enough for the State to show that the defendant acted in concert with others to use force or violence, but the State must show that the defendant personally used force or violence). Defendant argues that his use of force or violence was not established by him

simply exiting his vehicle and approaching Berry, even if he did so in a "purposeful" and "hurried" manner as found by the court. Defendant asserts that he did not threaten Berry and that the video shows that he did not touch or attempt to touch Berry until he was stabbed.

¶ 33 We agree with defendant that merely pursuing someone without saying anything will not constitute force or violence. In *In re Kirby*, 50 Ill. App. 3d 915, 917 (1977), the appellate court concluded that mere presence is insufficient for a conviction of mob action. The court remarked that the only evidence of mob action or battery was that the respondent left a car, participated in a chase of the victims, and was present as another person committed a battery. There was no evidence that the respondent either threatened or touched either victim. *Kirby*, 50 Ill. App. 3d at 917.

¶ 34 This case is distinguishable in that there is no dispute that defendant was personally engaged in a violent encounter with Berry. Although the video does not clearly depict who threw the first punch, defendant can be seen swinging his fists at Berry once the fight moved across the parking lot from behind the car. Unlike *Kirby*, this is not a case were defendant merely chased the victim.

¶ 35 Also, the trial court's finding of force and violence was not limited to the manner in which defendant parked and approached the victim. The court observed that defendant and Berry had an earlier incident and were hostile to one another. Strickland joined defendant in his vehicle, and they followed Berry to the parking lot. Berry pulled into a parking space at a reasonable speed, and about a minute later defendant sped into the parking lot and blocked Berry's car.

¶ 36 The video and testimony establish that defendant and Strickland jumped out of the car and rushed toward Berry. Defendant and Strickland backed away momentarily, but the court

found that neither retreated until Strickland ran away, leaving defendant and Berry to fight. The trial court found that "all of [defendant's] actions, from the time he drove into the parking lot *** and then on throughout the fight, all of his actions seen on the video establish force as well as violence." The court relied upon Berry's testimony in finding that Strickland began the fight with Berry and defendant took over immediately once Strickland backed away. Berry reported the incident immediately to the police at the hospital, while defendant did not report the incident and was not forthright when questioned about it.

¶ 37 The trial court assessed the credibility of the witnesses, reviewed the video, and found that defendant was an active participant and aggressor in the two-on-one fight against Berry. The video does not clearly contradict Berry's testimony or the court's finding. Therefore, the finding that defendant personally engaged in use of force or violence is not so unreasonable, improbable, or unsatisfactory that it creates a reasonable doubt of defendant's guilt. See *Smith*, 185 Ill. 2d at 542. When considering all of the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found the essential elements of mob action beyond a reasonable doubt. See *Cunningham*, 212 Ill. 2d at 278.

¶ 38 C. Self Defense

¶ 39 Defendant also argues that his conviction must be reversed because there was evidence that he acted in self defense. The elements of self-defense are: (1) unlawful force was threatened against a person; (2) the person threatened was not the aggressor; (3) the degree of harm was imminent; (4) the use of force was necessary; (5) the person threatened actually and subjectively believed a danger existed that required the use of the force applied; and (6) the beliefs of the person threatened were objectively reasonable. *People v. Lee*, 213 Ill. 2d 218, 225 (2004); 720 ILCS 5/7-1(a) (West 2012).

¶ 40 The justification of self-defense is not available to one who is attempting to commit, committing, or escaping after the commission of, a forcible felony. See 720 ILCS 5/7-4(a) (West 2012). Mob action is a forcible felony as it is a "felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8 (West 2012).

¶ 41 Defendant contends that he was legally justified in swinging at Berry because Berry chased him with a knife and stabbed him multiple times. Berry testified consistently that Strickland and defendant arrived in the parking lot together, confronted Berry, and struck him before he swung his knife. The trial court found Berry to be more credible than defendant, concluding from Berry's testimony that defendant personally engaged in use of force and violence and that defendant was the aggressor who went to the parking lot "to have a fight." The court found that defendant did not retreat at any point during the fight. We decline to disturb the court's finding of no self defense because it is not so unreasonable, improper, or unsatisfactory as to create a reasonable doubt of defendant's guilt. See *People v. Evans*, 87 Ill. 2d 77, 86 (1981). Defendant was the aggressor in committing mob action and cannot rely on the justification of self defense. See 720 ILCS 5/7-1(b) (West 2012) (any person acting as the "aggressor" as defined in section 7-4 may not claim of self-defense).

¶ 42 III. CONCLUSION

¶ 43 For the reasons stated, we affirm the judgment of the circuit court of Kane County. As part of our judgment, we grant the State's request that defendant be assessed the State's attorney fee of $50 under section 4-2002(a) of the Counties Code (55 ILCS 5/4-2002(a) (West 2014)) for the cost of this appeal. See *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 44 Affirmed.