2017 IL App (3d) 140814-U

Order filed March 30, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Whiteside County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-14-0814
v.	)	Circuit No. 13-CF-345
	)	
ALPHONSO G. PENDLETON,	)	Honorable Stanley B. Steines,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice Schmidt dissented.

ORDER

¶ 1 *Held*: The trial court erred in denying defendant's midtrial motion to dismiss and posttrial motion for a judgment notwithstanding the verdict.

¶ 2 Defendant, Alphonso G. Pendleton, appeals arguing that the trial court erred when it denied his midtrial motion to dismiss and posttrial motion for a judgment notwithstanding the verdict. Defendant asserts the motions should have been granted on the ground that the information failed to properly set forth the offense of aggravated battery. We reverse.

¶ 3 FACTS

¶ 4 The State charged defendant by information with aggravated battery (720 ILCS 5/12-3.05(c) (West 2012)) and resisting or obstructing a peace officer (720 ILCS 5/31-1(a) (West 2012)). The aggravated battery count alleged that on November 27, 2013, defendant,

> "committed the offense of aggravated battery in violation of Act 5, Section 12-3.05(c), Chapter 720, Illinois Compiled Statutes, in that said defendant in committing a battery, in violation of Act 5, Section 12-3, Chapter 720, Illinois Compiled Statutes, without legal justification and while James W. Lester was on or about a public place of accommodation or amusement, being Niemann Foods, doing business as County Market, 210 West 3rd Street, Sterling, Illinois, knowingly made physical contact with James W. Lester, in that said defendant struck James W. Lester on the head."

The cause proceeded to a jury trial.

¶ 5 At trial, the victim, James Lester, testified that while working as a manager at County Market he noticed a loud boisterous customer, later identified as defendant. Lester repeatedly asked defendant to leave the store. Defendant did not leave but instead turned around and began poking Lester. Lester stated that defendant swung his arm and hit him with a closed fist on the side of his head. The State introduced the surveillance videotape of the incident, which is consistent with Lester's testimony. On cross-examination, Lester testified that defendant's strike did not injure him.

¶ 6 Officer Jacob Reul also testified for the State. On the night in question, Reul responded to a complaint of disorderly conduct at County Market. Reul entered the store and observed defendant walking toward the exit. As defendant passed Reul, defendant said, "[D]on't even

mess with me, man." Reul told defendant to stop, but defendant ignored Reul's request. Reul tried to block defendant's path, and defendant attempted to get around Reul. Reul grabbed defendant's coat. As defendant continued to walk away from Reul, Reul yelled to another police officer waiting outside the store. The other officer pinned defendant against some pallets. Both officers told defendant to put his arms behind his back, which defendant resisted. After using a taser on defendant, the officers were able to handcuff defendant.

¶ 7 After the State rested, defendant made an oral motion to dismiss the aggravated battery charge on the basis that the information failed to state an offense. Defendant asserted the aggravated battery charge failed to allege that defendant made contact of an insulting or provoking nature or had caused bodily harm. The State acknowledged that the charge did not specifically allege that defendant made contact of an insulting or provoking nature or caused bodily harm. However, the State argued that the language of the charge sufficiently put defendant on notice that the charge alleged that defendant committed aggravated battery by making physical contact of an insulting or provoking nature with Lester.

¶ 8 Ultimately, the trial court treated the motion as a motion in arrest of judgment. The trial court stated that the standard in a motion for arrest of judgment was whether the offense was charged with sufficient specificity to allow defendant to prepare a defense. The trial court determined that under that standard the information was sufficient, and denied defendant's motion.

¶ 9 Next, defendant testified on his own behalf. According to defendant, he was intoxicated on the night of the offense. Defendant denied making physical contact with Lester. Defendant stated that he wanted to hit Lester, but stopped himself. Defendant claimed that he swung his hand at Lester, but curved his hand so that he did not actually hit Lester.

¶ 10 Following closing arguments, the trial court provided the jury with instructions. As to the aggravated battery charge, the trial court instructed the jury that to convict defendant, the State needed to prove physical contact of an "insulting or provoking nature." Ultimately, the jury found defendant guilty of both aggravated battery and resisting a peace officer.

¶ 11 Subsequently, defendant made a motion for a judgment notwithstanding the verdict. Defendant reasserted his argument that the aggravated battery charge failed to state an offense because it did not specify whether the physical contact was insulting or provoking in nature or caused bodily harm. Defendant argued that the lack of specificity in the information resulted in prejudice. The trial court denied the motion.

¶ 12 Following a hearing, the trial court sentenced defendant to 4 years' imprisonment on the aggravated battery conviction, and 364 days' imprisonment on the resisting a peace officer conviction. The trial court ordered both sentences to run concurrently.

¶ 13 ANALYSIS

¶ 14 On appeal, defendant argues that the trial court erred in denying his midtrial motion to dismiss and posttrial motion for a judgment notwithstanding the verdict. Specifically, defendant asserts the aggravated battery charge failed to allege the element of physical contact either causing bodily harm or of an insulting or provoking nature. Upon review, we find defendant suffered prejudice as a result of the incomplete information due to the fact that it required him to mount a defense that contemplated both battery theories under section 12-3.05(c) of the Code of Criminal Procedure of 1963 (Code) (720 ILCS 5/12-3.05(c) (West 2012)).

¶ 15 When a simple battery is committed in a public place of accommodation, it becomes an aggravated battery. 720 ILCS 5/12-3.05(c) (West 2012). It follows that in order to charge the offense of aggravated battery, the State must allege that defendant committed a simple battery. A

person commits simple battery if he intentionally or knowingly without legal justification: "(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). As the statute creates two distinct crimes, the State is "required to either elect which type of battery to charge, or to charge in the alternative if it is unsure of its evidence." *People v. McBrien*, 144 Ill. App. 3d 489, 496 (1986).

¶ 16 An information must strictly comply with section 111-3 of the Code (725 ILCS 5/111-3 (West 2012)). This includes the requirement that the instrument "[set] forth the nature and elements of the offense charged." 725 ILCS 5/111-3 (West 2012). The remedy for failure to strictly comply with the pleading requirements is dismissal. *People v. Cuadrado*, 214 Ill. 2d 79, 87 (2005). However, in cases such as the present, where an information is attacked for the first time in a midtrial or posttrial motion, defendant must show that the alleged defect in the charging instrument prejudiced defendant in preparation of his defense. *People v. Rowell*, 229 Ill. 2d 82, 93 (2008).

¶ 17 The information in the instant case failed to specify whether the physical contact caused bodily harm or was of an insulting or provoking nature as defined by statute. As noted above, however, defendant did not attack the information until midtrial. As a result, the strict compliance standard set forth in section 111-3 of the Code does not apply. Instead, defendant must meet the prejudice standard, which requires that the defect prejudiced him in preparing his defense. In this context, an information will be deemed "sufficient if it ' "apprised the accused of the precise offense charged with sufficient specificity to prepare his defense and allow pleading a resulting conviction as a bar to future prosecution arising out of the same conduct." ' " *Cuadrado*, 214 Ill. 2d at 87-88 (quoting *People v. Benitez*, 169 Ill. 2d 245, 257 (1996), quoting *People v. Gilmore*, 63 Ill. 2d 23, 29 (1976)).

¶ 18 After careful review of the language of the aggravated battery charge, we find the information provided insufficient notice of the charged offense. As noted above, the battery statute essentially creates two crimes—battery grounded in bodily harm or a touching of an insulting or provoking nature. Because the indictment lacked any reference to either of the alternative criminal elements, the State was essentially free to proceed at trial under *either* theory. Consequently, defendant was left in the prejudicial position of having effectively been charged with two crimes and having to mount a defense that comprehends both. The constitutional requirement that an indictment appraise a defendant of the precise offense charged "protects the defendant against being forced to speculate as to the nature or elements of the underlying offense, thus spreading his resources thin, attempting to rebut all of the possibilities, while the prosecutor merely focuses on the most promising alternative and builds his case around that." *People v. Hall*, 96 Ill. 2d 315, 320 (1982). The State's failure to properly charge defendant with one of the alternative battery theories effectively reduced defendant to a defense that was clearly refuted by the videotape, but would have been a defense against either one of the potential crimes charged.

¶ 19 CONCLUSION

¶ 20 The judgment of the trial court of Whiteside County is reversed.

¶ 21 Reversed.

¶ 22 JUSTICE SCHMIDT, dissenting.

¶ 23 The majority reverses defendant's conviction and sentence for aggravated battery on the basis that the information provided insufficient notice of the charged offense. Specifically, the majority finds that the absence of a specific allegation in the information that the physical conduct either caused bodily harm, or was insulting and provoking in nature prejudiced

defendant in preparing his defense. I dissent on the grounds that the factual allegations included in the information provided sufficient notice of the charged offense.

¶ 24 In this case, the information (1) stated the offense alleged to have been committed, (2) cited the criminal statute which defendant violated, (3) alleged defendant violated the statute due to defendant striking the victim on the head, (4) stated the date of the offense, and (5) identified the accused. "The variance between the language of the complaints and that of the statute is inconsequential." *People v. Bowman*, 132 Ill. App. 2d 744, 746 (1971). Striking the complainant "about the head," described with specificity the physical contact of an insulting or provoking nature prohibited by the statute. See *id*. Just what human being is not, at the very least, insulted or provoked when struck on the head by a stranger? I would therefore affirm defendant's conviction.

¶ 25 The victim of the battery testified that defendant swung at him and struck a glancing blow to the side of his head. The video confirms this. Likewise, witness Olivia Gilkey testified that she saw defendant swing at the victim. While she did not actually see the impact, she was convinced that contact was made because of the movement of the victim's head. This is confirmed by the video.

¶ 26 A review of the trial record makes crystal clear that defendant's motion was strategically timed for the close of the State's case. This entire trial took an afternoon. The State's case took approximately an hour. Right before the start of trial, defense counsel confirmed that he had no issues to raise with the court. An hour later when the court suggested a 10 minute break at the close of the State's case, defense counsel asked for a little extra time so that he could "research" an issue. He agreed that 20 minutes would be more than enough. After 20 minutes, he came in and argued that the information was fatally defective for failing to allege either contact of an

insulting or provoking nature or bodily harm. He argued that the absence of one or more of those elements rendered the indictment "void on its face," and left the trial court with "no jurisdiction or authority to convict and the defendant cannot by waiver or consent confer such jurisdiction for authority." That is, defense counsel argued that prejudice or the lack thereof to defendant was irrelevant. Not once did he argue that the missing language in the indictment prejudiced his client or his defense in any way.

¶ 27 The majority acknowledges that where an information is attacked for the first time in a midtrial or posttrial motion, defendant must show that the alleged defect in the charging instrument prejudiced defendant in preparation of his defense. *Supra* ¶ 16. At trial, defendant did not even argue prejudice, let alone show it.

¶ 28 Even if I were to assume, as the majority finds, a question existed as to which of the alternative forms of battery the State alleged defendant committed, I fail to see how the absence of these allegations prejudiced defendant in preparing his defense. Defendant testified that he was not only drunk at the time of the incident, but he also denied making physical contact with the victim. In other words, defendant's entire defense revolved around whether he actually made physical contact with the victim, not whether said contact was insulting or provoking in nature. The video of the incident refutes defendant's assertion. Defendant had no defense. More importantly, defendant and the majority fail to explain how his defense would have changed had the information included the "insulting or provoking in nature" verbiage.

¶ 29 The videotape established defendant's guilt beyond all doubt. It is clear to me that the decision to wait until midtrial to attack the information was a strategic one. The majority says that the missing verbiage led defendant to a trial strategy that failed. It fails to explain just what possible defense strategy would have overcome the videotape evidence had the verbiage been

present. No matter the verbiage, defendant has but one argument: “Are you gonna believe me or your lying eyes?” Furthermore, Olivia Gilkey testified that she was shopping in the store at the time of the incident. She overheard an argument between the victim and defendant. She saw defendant swing at the victim. She did not actually see contact, but she saw the victim’s head snap back and his glasses fall off, which led her to conclude that defendant struck the victim.