2017 IL App (4th) 150200-U

NO. 4-15-0200

FILED
June 2, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
ROLLIE CIRASUOLO,	)	No. 14CF394
Defendant-Appellant.	)	
	)	Honorable
	)	Nancy S. Fahey,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Holder White and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court erred by failing to instruct the jury on all elements of the offense of felony criminal trespass to a residence. Because there was a material variance between the charged offense and the evidence presented at trial, the error was reversible, not harmless.

(2) The record on appeal does not support defendant's contention that the circuit clerk improperly imposed fines against him.

¶ 2 Following a jury trial in the trial court of Vermilion County, defendant, Rollie Cirasuolo, was convicted of two counts of battery (720 ILCS 5/12-3(a)(1), (a)(2) (West 2014)), both Class A misdemeanors, and criminal trespass to a residence (720 ILCS 5/19-4(a)(2) (West 2014)), charged as a Class 4 felony. The trial court sentenced defendant on the felony conviction to five years in prison. Defendant appeals, claiming his conviction for criminal trespass to a residence should be vacated and the cause remanded for the court to resentence him on the misdemeanor offense of criminal trespass to a residence (720 ILCS 5/19-4(a)(1) (West 2014))

because the jury was instructed on the misdemeanor offense, not the felony offense. The State acknowledges the error but insists the error was harmless. We conclude the error was not harmless, and we therefore remand to the trial court with directions to resentence defendant upon his conviction of the misdemeanor offense of criminal trespass to a residence.

¶ 3 I. BACKGROUND

¶ 4 In August 2014, the State charged defendant with two counts of aggravated battery, both Class 3 felonies (720 ILCS 5/12-3.05(c) (West 2014)) (counts I and II), and one count of criminal trespass to a residence, a Class 4 felony (720 ILCS 5/19-4(a)(2) (West 2014)) (count III). Prior to trial, the State added two counts of simple battery, both Class A misdemeanors (720 ILCS 5/12-3(a)(1), (a)(2) (West 2014)), (counts IV and V, respectively). Later, the State dismissed the aggravated battery counts (counts I and II) and proceeded to trial on the felony criminal trespass to a residence charge and the simple battery charges (counts III, IV, and V).

¶ 5 Defendant's jury trial began on November 18, 2014. Rodney Murdock, the battery victim, testified first for the State. He said on August 16, 2014, he lived with his two adult sons, Anthony, age 28, and Bradley, age 26, in Tilton. At approximately 8 p.m., Murdock went "to the bar to play some pool," leaving his two sons at home. Throughout the evening, he would leave the bar, Pammy's Place Tavern, which was less than a block from his house, to go home to check on his sons. Bradley suffered from a seizure disorder and had an episode the night before. At approximately 10:30 p.m., Murdock went home and found each son in his own bedroom, and he went back to the tavern. He left the tavern for the night at approximately 12:55 a.m. When he arrived home, he found defendant sitting on his couch and another man sitting in his recliner in the living room. Murdock had met defendant before at Pammy's Place Tavern, but he had never

invited him to his home. Murdock said he had no idea why defendant and the other man were there. Murdock told them to leave. Defendant told Murdock the only way he was leaving was if Murdock threw him out. By this time, Murdock's sons were in the living room as well. Murdock said they "scuffled around for a little—good little while but there was no fighting inside the house at all." Murdock said the other man pulled him outside and onto the ground. He held Murdock's arms while defendant "punched [him] right directly in the glasses and cut [his] face up and ruined a good pair of glasses." Murdock said he called the police. Defendant and the other man "started to take off," but defendant hit Murdock one more time before leaving. According to Murdock, police officers Ryan Schull and Justin Varvel arrived. Murdock said he told them "[e]xactly what all went down." He said he went by ambulance to the hospital for treatment to the cuts on his face.

¶ 6 Murdock's older son Anthony also testified for the State. He said on the night of the incident, he had been cleaning the house. He took the trash outside and he forgot to lock the front door when he came back in. He went to bed but was awakened by defendant's voice "screaming at [his] dad." He went into the living room and saw his father, defendant, and another man. Defendant was "standing up in dad's face," while his father was telling defendant to leave. Defendant struck Anthony, knocking his glasses off. The other man grabbed his father, dragged him outside, and held him down while defendant "beat him up." Anthony said he called the police and both men "took off running."

¶ 7 Officer Varvel testified he was dispatched to Murdock's home on a report of a "civil dispute." He explained that a "civil dispute" meant a subject was "inside of a residence and was refusing to leave at that time." When Varvel arrived, he saw Murdock lying on the ground, bleeding from his face, with his sons standing next to him. Varvel found defendant

approximately 30 to 45 minutes after he had spoken with the Murdocks. According to Varvel, defendant appeared to be "out of breath, very sweaty and he had—his shoes had weeds and cockleburs on the laces of them and his clothing had some light grass stains and dirt on them." Varvel placed defendant in custody and took him back to the Murdock residence for a "show up identification." Anthony and Bradley positively identified defendant as the "same subject that was involved." Varvel proceeded to the hospital to speak with Murdock again and to take photographs of his injuries.

¶ 8 On cross-examination, Varvel testified he did not see any marks on defendant's body, any swelling or bruises on his fists, or any lacerations to his hands or face. He also testified when he arrived at the scene, Murdock "was beginning to regain consciousness." The State rested.

¶ 9 Defendant called Varvel as his only witness. Varvel testified he saw no evidence of a forced entry at Murdock's home. Defendant rested.

¶ 10 At the jury instruction conference, the State presented instruction Nos. 18 and 19. These instructions addressed the elements of misdemeanor criminal trespass to a residence, not the felony elements. Defendant objected on that basis. The prosecutor indicated that in order to submit the correct instructions, he would have "to go look it up." The judge asked defendant's counsel if he had the "correct" instruction; he indicated he did not. The prosecutor explained he could not argue on the basis of defendant's objection because he did not have the instructions in front of him. He said defendant "may be correct." The judge ordered the prosecutor to "[g]o get it."

¶ 11 The prosecutor later informed the trial court that defense counsel "may be right" in terms of the propriety of the two instructions presented. He stated the pattern instructions

included only the misdemeanor language. There appeared to be no instruction for the felony offense. The prosecutor offered to prepare a modified instruction, which, he claimed, would take 15 to 20 minutes. The judge did not want to make the jury wait any longer and admitted Nos. 18 and 19 over defendant's objection.

¶ 12 After deliberations, the jury found defendant guilty of two counts of battery (720 ILCS 5/12-3(a)(1), (a)(2) (West 2014)) and criminal trespass to a residence as instructed. Defendant filed a motion for a new trial, raising the argument again about the inaccurate jury instructions. The trial court denied defendant's motion. At sentencing, despite defendant's argument he should have been sentenced on the misdemeanor criminal trespass offense, the trial court merged the misdemeanor battery convictions into the felony criminal trespass conviction and sentenced defendant to five years in prison.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 A. Failure To Properly Instruct the Jury

¶ 16 Criminal trespass to a residence can be charged either as a misdemeanor or a felony. It is a misdemeanor if the State alleges the defendant entered or remained in a residence without authority. 720 ILCS 5/19-4(a)(1) (West 2014). However, where the State alleges the defendant entered the residence, knowing that one or more persons was present, or remained in the residence after he knew that one or more persons was present, he is alleged to have committed a Class 4 felony. 720 ILCS 5/19-4(a)(2) (West 2014). Here, the State charged defendant with the felony offense, the jury was instructed on the misdemeanor offense, and the trial court sentenced defendant on a felony conviction. Defendant contends, and the State concedes, it was error to instruct the jury on the misdemeanor offense. The parties agree the jury

was not instructed on the elements of the felony offense, and therefore the jury did not determine defendant committed the felony offense. However, the State claims the error was harmless given the overwhelming evidence presented at trial that demonstrated defendant was guilty of the felony offense.

¶ 17 As *Apprendi* instructs, a defendant is afforded the right to have any fact that increases the penalty for a crime submitted to a jury and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (a defendant is entitled to " 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.' ") (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)). Here, because defendant objected during the trial court proceedings, the State urges this court to conduct a harmless-error review, as opposed to a plain-error review. That is, in a harmless-error analysis, the State must prove beyond a reasonable doubt that the jury verdict would have been the same absent the error. *People v. Thurow*, 203 Ill. 2d 352, 363 (2003).

¶ 18 Indeed, courts have determined that a jury instruction that omits an element of an offense is an error subject to harmless-error review. *Neder v. United States*, 527 U.S. 1, 15 (1999) (the jury was not instructed that it was to determine whether false statements were material in fraud case, but the judge made that determination; nevertheless, the error was harmless because it did not contribute to the verdict); *Thurow*, 203 Ill. 2d at 368 (finding that the failure to instruct the jury as to the element of the crime that the victim was a member of defendant's household was harmless error). In *Neder*, the Court acknowledged there existed a sixth-amendment violation when the jury was not instructed on an element of the offense, but the Court found such an error did not "*necessarily* render a criminal trial fundamentally unfair or an

unreliable vehicle for determining guilt or innocence." (Emphasis in original.) *Neder*, 527 U.S. at 9.

¶ 19 Omitting an element of the offense from a jury instruction is harmless if the reviewing court determines, beyond a reasonable doubt, that the error did not contribute to the verdict. *Neder*, 527 U.S. at 18 ("Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?"). This can be shown where the omitted element was uncontested and supported by overwhelming evidence. *Thurow*, 203 Ill. 2d at 369. See *People v. Lindmark*, 381 Ill. App. 3d 638, 656 (2008) (State concedes that the jury should have been instructed to find that the defendant's driver's license was suspended due to a statutory summary suspension; the error was harmless because there was overwhelming evidence presented supporting the fact).

¶ 20 The issue presented in this appeal is whether it was harmless error for the judge and not the jury to determine that defendant (1) entered the residence without authority; *and* (2) either (a) knew one or more persons was in the residence at the time, or (b) remained in the residence after he knew one or more persons was present. Any finding of the second enumerated element is sufficient to elevate the offense from a misdemeanor to a felony.

¶ 21 Section 19-4 of the Criminal Code of 2012 (720 ILCS 5/19-4 (West 2014)) states as follows:

> "(a)(1) A person commits criminal trespass to a residence when, without authority, he or she knowingly enters or remains within any residence, including a house trailer that is the dwelling place of another.
>
> (2) A person commits criminal trespass to a residence when, without authority, he or she knowingly enters the residence of another and

knows or has reason to know that one or more persons is present or he or she knowingly enters the residence of another and remains in the residence after he or she knows or has reason to know that one or more persons is present.

***

(b) Sentence.

(1) Criminal trespass to a residence under paragraph (1) of subsection (a) is a Class A misdemeanor.

(2) Criminal trespass to a residence under paragraph (2) of subsection (a) is a Class 4 felony."

¶ 22 The information charged defendant with the felony offense, alleging defendant "knowingly and without authority entered the residence of Rodney E. Murdock knowing or having reason to know that one or more persons were present, in violation of 720 ILCS 5/19-4(a)(2) [(West 2014)]."

¶ 23 The jury instructions given over defendant's objection provided the jury with the definition and elements of the *misdemeanor* offense of criminal trespass to a residence only. In particular, People's instruction No. 18 provided:

"A person commits the offense of criminal trespass to a residence when, without authority, he knowingly enters any residence." Illinois Pattern Jury Instructions, Criminal, No. 14.17 (4th ed. 2000).

People's instruction No. 19 provided:

"To sustain the charge of criminal trespass to a residence, the State must prove the following propositions:

First Proposition: That the defendant knowingly entered a residence; and

Second Proposition: That the defendant remained within the residence without authority to do so.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty. If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty." Illinois Pattern Jury Instructions, Criminal, No. 14.18 (4th ed. 2000).

¶ 24 The problem in this case regarding the improper jury instructions is aggravated by the variation between the charging instrument and the evidence presented at trial. It is apparent from the language contained in the information that the State intended to charge defendant with a *felony* charge of criminal trespass to a residence. The State alleged that defendant not only "knowingly and without authority entered the residence," he did so "knowing or having reason to know that one or more persons were present." The jury was not instructed to find whether defendant entered the residence "knowing or having reason to know that one or more persons were present." This added element was not part of its deliberations. Instead, the jury found only that defendant knowingly entered or remained within the residence without regard to his knowledge of anyone being present.

¶ 25 In *Neder* and *Thurow*, the evidence supporting the omitted element was uncontested and overwhelming. However, in neither case was there an issue regarding a variance between the charged offense and the evidence presented at trial, as there is in the case *sub judice*. Rodney Murdock, Anthony Murdock, and Officer Varvel all testified that Rodney Murdock's

two sons were in the home at the time defendant entered and no one had given defendant authority to enter. The two sons witnessed the altercation in their home. Given this evidence, a reasonable jury, had it been properly instructed, would have most likely found defendant guilty of felony criminal trespass to a residence under the second felony option set forth in the statute. That is, the State presented sufficient evidence to prove beyond a reasonable doubt that defendant (1) entered the residence without authority, and (2) remained in the residence after knowing one or more persons was present. See 720 ILCS 5/19-4(a)(2) (West 2014).

¶ 26 However, the error here cannot be characterized as harmless when defendant was not charged with *that particular* felony offense. Here, there existed an improper or prejudicial variance between the language of the information and the evidence presented at trial. As stated above, the felony offense of criminal trespass to a residence may be established by proving either (1) defendant knew or had reason to know one or more persons was present, *or* (2) defendant remained in the residence after he knew or had reason to know that one or more persons was present. 720 ILCS 5/19-4(a)(2) (West 2014). The State alleged the former in the information, but the evidence presented at trial demonstrated the latter. This variance demonstrates reversible error.

¶ 27 This court has previously stated: "To be fatal, a variance between the charging document and the proof at trial ' "must be material and be of such character as may mislead the accused in making his defense or expose him to double jeopardy." [Citations.]' " *People v. Smith*, 337 Ill. App. 3d 819, 824-25 (2003). Here, we find the variance was material. Defendant was charged with "knowing or having reason to know that one or more persons [was] present, in violation of 720 ILCS 5/19-4(a)(2) [(West 2014)]." The State presented no evidence supporting this charged offense. Had the State charged defendant with the alternative felony offense, *i.e.*,

that defendant remained in the residence after he knew or had reason to know that one or more persons was present (720 ILCS 5/19-4(a)(2) (West 2014)), we may have characterized the jury-instruction error as harmless. There exist potential due-process concerns based on the following: (1) the State's failure to amend the information to conform with the evidence, (2) the trial court's refusal to allow the State the opportunity to present accurate jury instructions, and (3) the likelihood that defendant prepared a defense in response to the particular offense as charged, which was different than the defense required based on the evidence.

¶ 28 "An error is typically designated as structural only if it necessarily renders a criminal trial fundamentally unfair or an unreliable means of determining guilt or innocence." *People v. Thompson*, 238 Ill. 2d 598, 609 (2010). The circumstances of this case do not involve the omission of a factual element from the charging instrument, such as whether the victim was a family or household member (see *People v. Davis*, 217 Ill. 2d 472, 479 (2005)), or whether the payee's name on a fraudulent check was included (see *People v. Gilmore*, 63 Ill. 2d 23, 30 (1976)). Here, the act alleged and the act proved at trial were completely different. That is, the evidence required to prove defendant *knew* someone was in the residence at the time of entry is altogether different than the evidence required to prove he *remained* in the residence once he knew someone was there. We consider the difference to be material and prejudicial, even without regard to the jury-instruction error. See *People v. Collins*, 214 Ill. 2d 206, 219-221 (2005) (to be fatal, a variance must be material and of such character as to mislead the accused in making his defense).

¶ 29 Therefore, in sum, because the jury found defendant guilty of the misdemeanor offense of criminal trespass to a residence, and because the variance between the charging instrument and the evidence presented at trial was, at a minimum, inexcusable, we remand this

case with directions for the trial court to vacate defendant's sentence and resentence defendant upon his misdemeanor conviction of criminal trespass to a residence.

¶ 30 B. Imposed Fines and Fees

¶ 31 Defendant also claims this court should vacate the fines improperly imposed by the circuit clerk. The State agrees that any fine imposed by the circuit clerk is void, as the clerk has no authority to impose fines. See *People v. Rexroad*, 2013 IL App (4th) 110981, ¶ 52 (It is well understood the circuit clerk has no authority to impose fines.). However, the State contends it was the trial court, not the clerk, who imposed the fines in this case. We agree with the State.

¶ 32 At sentencing, the trial court stated: "You would be assessed court costs, as I've stated, in the amount of $272, and you will be given credit for 205 days' [*sic*] served from August 17, 2014, through March 9, 2015." The court did not further specify the particular amounts of each fine or fee. The fines and fees sheet included in the record and certified by the circuit clerk as true and correct indicates defendant was assessed $272 in fines and fees, the exact amount of "court costs" imposed by the court at sentencing. Because the amounts match exactly, and because the court imposed the amounts from the bench at sentencing, we conclude it was the court, not the clerk, who imposed the amounts, including the specified fines.

¶ 33 III. CONCLUSION

¶ 34 For the reasons stated, we affirm the trial court's judgment and remand for resentencing. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 35 Affirmed; cause remanded with directions.