2018 IL App (1st) 150227-U

FIRST DISTRICT
December 31, 2018

No. 1-15-0227

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RENE BUSTAMANTE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County, Criminal Division. No. 14 CR 5158 Honorable Catherine M. Haberkorn, Judge Presiding.

JUSTICE GRIFFIN delivered the judgment of the court.
Presiding Justice Mikva and Justice Pierce concurred in the judgment.

ORDER

Held: Serious errors in the jury instructions deprived defendant of his fundamental right to a fair trial such that a new trial is warranted.

¶ 1 Defendant Rene Bustamante was arrested on the night of February 22, 2014 for allegedly pointing a gun at an off-duty Chicago police officer. He proceeded to a jury trial on two counts (counts I and X) of aggravated assault. 720 ILCS 5/12-2(b)(4.1(i), 12-2 (West 2014). Count I, a misdemeanor offense, alleged that defendant committed an assault against a person he knew to be a peace officer performing his official duties. *Id*. § 12-2(b)(4.1)(i). The State sought to enhance defendant's sentence based on his alleged use of a category I weapon (handgun) during

the assault. See *Id*. § 12-2(d). Count X, a felony offense, alleged that defendant used a firearm to assault a peace officer who was performing his official duties. *Id*. § 12-2(c)(6)(i).

¶ 2 Following closing argument in the case, the trial court instructed the jury. The jury instructions did not contain the applicable sentencing enhancement factor, omitted the word firearm and informed the jury that it could not acquit defendant unless it found that "*each*" of the elements of the offenses had not been proven beyond a reasonable doubt. The jury deliberated and entered a general verdict of guilty. The trial court sentenced defendant to three years' imprisonment; the maximum enhanced sentence on count I. §§ 12-2(b)(4.1)(i), 12-2(d).

¶ 3 Defendant appeals his conviction and argues that: (1) the jury instructions contained serious errors that rendered the trial unfair; and (2) the evidence failed to show beyond a reasonable doubt that the off-duty officer was performing his official duties at the time of the assault. We reverse and remand for a new trial.

¶ 4 BACKGROUND

¶ 5 On February 22, 2014, defendant was arrested for allegedly pointing a handgun at off-duty Chicago police officer Alex Valentin. The State charged him with several counts of aggravated assault (720 ILCS 5/12-2 (West 2014)) and he proceeded to a jury trial on counts I and X. Count I was a misdemeanor offense that required the State to prove defendant assaulted Officer Valentin and knew he was a peace officer performing his official duties. *Id*. § 12-2(b)(4.1)(i). The State sought a felony sentencing enhancement on the alleged basis that defendant used a category I weapon (handgun) during the assault. *Id*. § 12-2(d) ("aggravated assault as defined in ***(b)(4)*** is a Class 4 felony if a Category I, Category II or Category III weapon is used in the commission the assault"). Count X was a felony offense that required the State to prove Officer Valentin was a peace officer who was performing his official duties and

defendant used a firearm during the assault. *Id*. § 12-2(c)(6)(i).

¶ 6 At trial, Officer Valentin testified that he was at a restaurant with his girlfriend and her family on the night of February 22, 2014. Officer Valentin was asked to play a Bruno Mars song on the juke box. As he walked to the juke box, Officer Valentin noticed two men sitting at a table in the corner of the restaurant gesturing for him to come over. He ignored the men, was unable to play the song and returned to his table.

¶ 7 When he attempted to play the song a second time, Officer Valentin noticed the same two men gesturing for him to come over. He approached the men and asked what they wanted. They replied, "what's up, nigga? What do you mean, what's up. What the fuck's up." Officer Valentin told the men he was with his family and did not want any problems.

¶ 8 Officer Valentin turned and walked away, but one of the men, whom he later identified as defendant, followed him. Officer Valentin backed up as the man approached. He told defendant to leave the restaurant, but defendant refused. The situation quickly escalated.

¶ 9 Officer Valentin announced his office and told defendant to leave a second time: "I'm a Chicago police officer. You need to go." Defendant responded, "Fuck the Police. Fuck You." Officer Valentin then heard his girlfriend yell, "he's got a knife," and he turned to see defendant's friend, co-defendant Daniel Delgado, with a pocketknife in his hand. Officer Valentin testified that he pulled a gun from his ankle holster, announced his office again and ordered co-defendant to "drop the knife." Both men responded "we don't give a fuck. Fuck the police."

¶ 10 The owner of the restaurant told defendant and co-defendant to leave and they responded "[j]ust because you're the fucking police I got to leave." Officer Valentin replied, "Yes. Now the owners of the restaurant are asking you to leave. Now you're criminally trespassing."

Defendant and co-defendant eventually left.

¶ 11 Watching from inside the restaurant, Officer Valentin saw defendant get into a dark colored car. He saw co-defendant break a bottle on the sidewalk and walk towards the restaurant with the bottle raised in his right hand. Officer Valentin exited the restaurant to "create a barrier between [his] family and the patrons" and pointed his gun at co-defendant, who backed off.

¶ 12 As co-defendant retreated, Officer Valentin noticed defendant had parked the dark colored car in front of the restaurant. He saw defendant open the passenger side door, exit the driver's side and walk around the front of the car in a crouched position. Officer Valentin saw a gun in defendant's right hand and testified that defendant pointed the gun at him. Officer Valentin fired one shot, and then two more, hitting defendant in the leg. Defendant managed to get into the car with co-defendant and drive away.

¶ 13 A short time later, defendant and co-defendant were pulled over by another police officer and placed under arrest. A pat-down search of co-defendant revealed that he had a folding knife in his possession. A gun was not recovered from defendant or his car.

¶ 14 Alfredo Marrequin, an independent witness who saw the shooting as he drove by the restaurant on the night of February 22, 2014, testified on behalf of the State. He was unable to drive westbound on Fullerton Avenue because a car was double parked in front of the restaurant. Alfredo testified that he stopped within seven to eight feet of defendant's car. He saw defendant exit the car, pull a gun and point it toward the sidewalk. Alfredo testified that he then drove off because there was "going to be a shoot-out."

¶ 15 Alfredo's girlfriend, who was seated in the front passenger side of his car, also testified for the State. She did not see a gun in defendant's hands, but testified to having seen defendant stick out his hand toward the restaurant after exiting his car.

¶ 16 Officer Valentin's girlfriend and her entire family (brother, sister-in-law, their two children and a friend) testified for the State. Officer Valentin's girlfriend testified she heard him announce his office several times while arguing with defendant. She saw co-defendant with a silver knife in his hand and alerted Officer Valentin that he had a weapon. She saw defendant pull his car in front of the restaurant and exit the driver's side door, but she could only identify a "black object" in defendant's hand. None of her family members saw defendant with a gun.

¶ 17 Co-defendant testified under subpoena for the State (he pleaded guilty and received a sentence of probation). He heard Officer Valentin say he was a "cop" and admitted to having pulled a knife from his pocket during the argument between defendant and Officer Valentin. He admitted to raising a Corona bottle as if he was going to throw it at the restaurant, but testified he never planned on throwing it at the restaurant. When asked about defendant's gun, he testified "there was no gun." He later admitted to having stipulated that defendant pointed a gun at Officer Valentin as part of his guilty plea. On cross-examination, co-defendant testified he never saw defendant with a gun. The State rested its case.

¶ 18 Defendant called two witnesses in his defense: the owner of the restaurant and an independent witness who saw the events unfold outside of the restaurant. The owner of the restaurant testified that she did not see defendant with a gun. The independent witness testified that she sat in a parked car across the street on the night in question. She saw defendant get into a car in front of the restaurant after shots were fired, but did not see anything in his hands. The defense rested.

¶ 19 The trial court instructed the jury on two offenses: (1) the misdemeanor offense charged in count I (720 ILCS 5/12-2(b)(4.1)(i) (West 2014)); and (2) an uncharged misdemeanor aggravated assault offense based upon the use of a deadly weapon. *Id.* § 12-2(c)(1). The jury

received no instruction on defendant's alleged use of a category I weapon or firearm. *Id*. § 12-2(d), 12-2(c)(6)(i). The jury was also instructed that it could not acquit defendant unless it found that "*each*" of the elements of the offenses had not been proven beyond a reasonable doubt. The jury deliberated and returned a general verdict of guilty.

¶ 20 At defendant's sentencing hearing, the State indicated that he was "convicted of a class 4 felony." Defense counsel said nothing. The trial court sentenced defendant to three years' imprisonment; the maximum enhanced sentence on count I. *Id*. § 12-2(b)(4.1)(i), 12-2(d). Defendant did not file a post-sentencing motion.

¶ 21 Defendant appeals his conviction and argues that the jury instructions were fatally defective and the State's evidence was insufficient to convict. He seeks a new trial or, in the alternative, a reversal of his conviction.

¶ 22 ANALYSIS

¶ 23 The issues on appeal are: (1) whether the trial court erred when it enhanced defendant's sentence on count I in absence of a positive finding by the jury beyond a reasonable that defendant used a category I weapon to assault Officer Valentin; (2) whether the jury instructions contained serious errors that deprived defendant of his right to a fair trial; and (3) whether the State proved beyond a reasonable doubt that Officer Valentin was performing his official duties during the assault.

¶ 24 The trial court clearly erred when it enhanced defendant's sentence on count I. The applicable sentencing enhancement factor is noticeably absent from the jury instructions. As such, the jury was unable to make the requisite finding beyond a reasonable doubt and there was no basis upon which to enhance defendant's sentence. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("[o]ther than the fact of a prior conviction, any fact that increases the penalty for a

crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt").

¶ 25 The State conceded in its brief and at oral argument that the "[t]he jury was not given any instruction allowing them to make a specific finding on the use of a Category I weapon." As a remedy, the State asks us to exercise our power under Illinois Supreme Court Rule 615(b)(3), which allows a reviewing court to reduce the degree of a conviction, and reduce defendant's sentence to a class A misdemeanor. Ill. S. Ct. R. 615(b)(3)(eff. Jan. 1, 1967). In suggesting such a remedy, the State presumes that the jury was properly instructed as to the applicable law. We hold that it was not so instructed.

¶ 26 The purpose of jury instructions is to provide the jury with the correct legal principles applicable to the evidence, so that the jury may reach a correct conclusion according to the law and the evidence." *People v. Hale*, 2012 IL App (4th) 100949, ¶ 19. The question of whether the jury instructions accurately stated the applicable law is reviewed *de novo*. *People v. Getter*, 2015 IL App (1st) 121307, ¶ 36.

¶ 27 Here, defendant failed to object to the jury instructions at trial. Therefore, in order to secure a new trial, he must show that the jury instructions contained a serious error that severely threatened the fundamental fairness of his trial. Ill. S. Ct. R. 451(c) (eff. Apr. 8, 2013) (substantial defects in jury instructions are not waived by failure to make timely objections thereto if the interests of justice require); *People v. Hopp*, 209 Ill. 2d 1, 7 (2004) ("[r]ule 451(c)'s exception to the waiver rule is limited and is applicable only to serious errors which severely threaten the fundamental fairness of the defendant's trial). We first determine whether the jury instructions contained an error.

¶ 28 The trial court instructed the jury that it could not acquit defendant unless it found the

State failed to prove "*each*" of the elements of the offenses beyond a reasonable doubt:

> "If you find from your consideration of all the evidence that *each* one of these propositions has not been proven beyond a reasonable doubt, you should find the defendant not guilty." (Emphasis added.)

¶ 29 This was an elementary misstatement of law. See *In re Winship*, 397 U.S. 358, 364 (1970) (the due process clause of the fourteenth amendment protects criminal defendants against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he or she is charged). The jury instructions should have read as follows: "[i]f you find from your consideration of all the evidence that *any* of these propositions has not been proven beyond a reasonable doubt, you should find the defendant not guilty." This instruction correctly explains how the reasonable doubt standard applies to the elements of any given criminal offense and is stated verbatim throughout Illinois Pattern Jury Instructions, Criminal (4th ed. Supp. 2009) (hereinafter IPI Criminal 4th (Supp. 2009)). Having identified an error, we turn to address its affect on defendant's trial.

¶ 30 We hold that this error severely threatened the fundamental fairness of defendant's trial. To ensure a fair trial, the trial court must instruct the jury on the elements of the offense, the presumption of innocence and the burden of proof. *People v. Green*, 225 Ill. 2d 612, 622 (2007). In considering the jury instructions as a whole, we note that the jury was instructed as to IPI Criminal 4th (Supp. 2009) No. 2.03, which sets forth the presumption of innocence and the burden of proof. The jury was also properly instructed that it could not find defendant guilty unless the State proved *all* of the elements of the offenses beyond a reasonable doubt. *People v. Parker*, 223 Ill. 2d 494, 501 (2006) (jury instructions should be construed as a whole, rather than read in isolation). Thus, the jury was both correctly and incorrectly instructed as to how the

reasonable doubt standard applied to the elements of the offenses. But therein lies the problem.

¶ 31 The jury instructions were inherently contradictory and likely placed the jury in an untenable position. For instance, if the jury had found that the State failed to prove an element of the offenses beyond a reasonable doubt, and turned to the jury instructions for guidance, it would have found itself in a state of paralysis, unable to acquit (must acquit if the State failed to prove all of the elements of the offense beyond a reasonable doubt) or convict (must convict if the State proved all of the elements beyond a reasonable doubt). This all or none instruction was incorrect and giving it was serious error. Had the jury been properly instructed, it may have acquitted defendant.

¶ 32 Accordingly, the jury instructions created a serious risk that the jurors incorrectly convicted defendant because they did not understand the applicable law so as to severely threaten the fundamental fairness of his trial. *People v. Herron*, 215 Ill. 2d 167, 193 (2005). A new trial is warranted. But rather than stop here, we turn to address the State's remaining concession.

¶ 33 The State conceded in its brief and at oral argument that the jury was given "no option" to find that defendant "used a firearm without discharging it." It is the essence of a fair trial that the jury not be allowed to deliberate on a defendant's guilt or innocence of the crime charged without being told the essential characteristics of that crime. *People v. Ogunsola*, 87 Ill. 2d 216, 222 (1981). The "use of a firearm, other than by discharging a firearm" is an essential element of aggravated assault based upon the use of a firearm. See 720 ILCS 5/12-2(c)(6) (West 2014). ("[a] person commits aggravated assault when, in committing an assault, he or she ***[u]ses a firearm, other than by discharging a firearm, against a peace officer *** performing his or her official duties"). Accordingly, the omission of this essential element from the jury instructions was a clear and obvious error.

¶ 34 We hold that the error is reversible. *Ogunsola*, 87 Ill. 2d at 223 (omission in jury instructions reversible because it removed from the jury's consideration a disputed issue essential to the determination of defendant's guilt or innocence). Defendant's theory of the case was that he never had a gun on the night of February 22, 2014. The State's case was predicated upon defendant's having pointed a gun at Officer Valentin. Only two witnesses at trial (Officer Valentin and independent witness Alfredo) testified to having seen a gun in defendant's hand. The remaining witnesses did not see a gun in defendant's hand. Officer Valentin's girlfriend saw a "black object" and co-defendant testified on cross-examination that defendant did not have a gun. Accordingly, the omission of the firearm element from the jury instructions removed from the jury's consideration a disputed issue essential to the determination of defendant's guilt or innocence. Defendant is entitled to a new trial on this separate basis.

¶ 35 In order to remove the risk of subjecting defendant to double jeopardy upon retrial, we must address the sufficiency of the evidence *People v. Jones*, 175 Ill. 2d 126, 134 (1997). Defendant challenges the sufficiency of the State's evidence in one respect. He argues that the State failed to prove beyond a reasonable doubt that Officer Valentin was performing his official duties when he was assaulted. This argument is unavailing.

¶ 36 A peace officer has a duty to maintain public order wherever he may be (as long as he is in the State) and his duties are not confined to a specific time or place. *People v. Barrett*, 54 Ill. App. 3d 994, 996 (1977); *People v. Weaver*, 100 Ill. App. 3d 512, 514 (1981). The fact that a police officer is on or off-duty is not controlling as it is the nature of the act performed which determines whether an officer has acted under color of law. *Barrett*, 54 Ill. App. 3d at 996.

¶ 37 Viewed in the light most favorable to the State, a rational trier of fact could have found beyond a reasonable doubt that Officer Valentin was acting under the color of law when he

exited the restaurant to protect his family and the patrons from the threat posed by defendant and co-defendant. *People v. Wright*, 2017 IL 119561, ¶ 70. At trial, Officer Valentin testified that he exited the restaurant to "create a barrier between [his] family and the patrons" after seeing co-defendant break a bottle on the sidewalk and walk towards the restaurant with the bottle raised in his right hand. He then saw defendant pull his car in front of the restaurant, exit the passenger side door, walk around the car in a crouched position and point a gun at him. Accordingly, defendant's challenge to the sufficiency of the evidence fails.

¶ 38 We find the evidence, if free from the taint of the improper jury instructions and believed by a properly instructed jury, would be sufficient to convict defendant the offenses charged in counts I and X. 720 ILCS 5/12-2(b)(4.1(i), 12-2(c)(6)(i) (West 2014). This finding is, however, not binding on retrial.

¶ 39 CONCLUSION

¶ 40 Accordingly, we reverse defendant's conviction and sentence on count I and remand his case for a new trial.

¶ 41 Reversed and remanded.