2018 IL App (1st) 160304-U

No. 1-16-0304

Order filed September 27, 2018

Fourth 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. 15 CR 9985
	)	
JOVANTE COLE,	)	Honorable
	)	Carol M. Howard,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GORDON delivered the judgment of the court.
Justices Reyes and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for resisting or obstructing a peace officer is affirmed over his contention that the charging instrument was fatally deficient and prejudiced his ability to prepare a defense.

¶ 2 Following a jury trial, defendant Jovante Cole was found guilty of resisting or obstructing a peace officer (720 ILCS 5/31-1(A-7) (West 2014)) and sentenced to 24 months' probation. On appeal, defendant argues that his conviction should be reversed because the charging instrument

failed to plead any specific facts which might have allowed him to prepare a defense. For the reasons stated herein, we affirm.

¶ 3 Defendant was charged by information with three counts of aggravated battery and one count of resisting or obstructing a peace officer. The aggravated battery counts alleged that defendant "knowingly caused harm to Officer P. Urban *** to wit: head[-]butted Officer Urban in the face" knowing that Officer Urban was a Chicago police officer, and that Urban was battered: (1) while performing his official duties (count I); (2) to prevent performance of his official duties (count II); and (3) in retaliation for performing his official duties (count III). The resisting or obstructing a peace officer count alleged that defendant "knowingly resisted or obstructed the performance of Officer P. Urban *** one known to defendant to be a peace officer of any authorized act within his official capacity and was the proximate cause of an injury to said peace officer." The case proceeded to a jury trial.

¶ 4 Officer Paul Urban testified that, on June 11, 2015, he and his partner Officer Thomas Frole were assigned to a violence reduction mission on Chicago's west side. The officers were dressed in plain clothes, but were wearing their duty belts and bulletproof vests, on which the word "Police" and a police star were visible. While patrolling in the area of 4800 West Huron Street, Urban observed defendant, whom he identified in open court, and another man walking southbound through an alley. When Frole turned their unmarked vehicle northbound into the alley, defendant and the other man turned westbound into another alley and looked back at the vehicle several times. The officers turned westbound into the same alley. As the unmarked vehicle approached the men from behind, the unknown man began to run eastbound and then southbound toward Huron. As Urban exited the passenger side of the vehicle, he observed

defendant run in the same direction. Urban ran after the men and lost sight of defendant for 10 to 15 seconds. When he observed defendant running toward him in a gangway, Urban ordered defendant to stop and show his hands. Defendant stopped running, and walked toward Urban with his hands "clenched by his sides." Urban ordered defendant to stop and show his hands four to five times but defendant did not comply until Urban drew his service weapon. Defendant then stopped and lay down in the gangway. Urban holstered his weapon, handcuffed defendant, and stood defendant on his feet with Frole's assistance. While handcuffed, defendant appeared agitated, stiffened his body, and was "still squirming around and twisting his torso." Urban testified that defendant called him a bitch multiple times, asked "why the f*** you messing with me," and told Urban he "just came out."

¶ 5 Urban stood a foot or two away from defendant and began to pat him down "to make sure he had no weapons." After he finished patting down defendant's waistband area, defendant lunged his upper torso towards Urban and struck him in the right side of his face with his head. Urban described the contact as "like a head[-]butt basically right under my eye." He immediately felt pain and "a little bit of shock." Urban stepped back from defendant, called for assistance from other officers, and told defendant that he was under arrest for battery to a police officer. Defendant asked "what the f*** for" and head-butted Urban again, this time striking him in the chest. This contact caused Urban to fall backwards and strike the wall of a building with his elbows. Urban looked in the chest pocket of his vest and noticed that the screen of his cell phone had a crack on it which had not been there before his encounter with defendant. Other officers arrived on the scene and helped put defendant in the back of a squad vehicle. In open court, Urban identified pictures of himself which were taken on the day of defendant's arrest. He

testified that a close-up picture of his face showed "some swelling and redness" where defendant first struck him with his head. Another picture showed "some redness on the elbows" where "the skin is kind of scraped up" as a result of hitting the wall.

¶ 6 On cross-examination, Urban testified that defendant was not doing anything illegal when they approached him for a field interview. Defendant did not have any drugs, firearms, or knives in his possession when he was searched.

¶ 7 Officer Frole's testimony was consistent with Urban's account of events. The State admitted into evidence photographs of Urban's face, elbow, and cracked cell phone screen, which were taken shortly after the incident. At the close of the State's case-in-chief, the trial court denied the defendant's motion for a directed verdict. Defendant rested without presenting any evidence.

¶ 8 During closing arguments the State argued that defendant knowingly resisted or obstructed Officer Urban in the performance of his official duties when he fought him, pushed him, head-butted him, and stiffened his body after he was handcuffed. Regarding Urban's injury, the State argued that "if it happened when he fell down, if it happened when he backed up and hit that wall, or if it happened directly from the head-butt of the defendant, all of those are pieces of evidence of the proximate cause of the injuries that defendant caused." Defense counsel argued that it would not "make sense" for defendant to be compliant with Officer Urban by lying on the ground and then to swear at and head-butt Urban after he had been handcuffed. He also questioned the credibility of the officers, noting that "there are some officers who don't always tell it like it is."

¶ 9 The jury found defendant not guilty of aggravated battery, but guilty of resisting or obstructing a peace officer. After a sentencing hearing, the trial court sentenced defendant to 24 months' probation.

¶ 10 On appeal, defendant argues that his conviction should be reversed because the charging instrument was fatally defective, where it failed to plead any specific facts that might have allowed him to prepare a defense. "The sufficiency of a charging instrument is a question of law which is subject to *de novo* review." *People v. Carey*, 2018 IL 121371, ¶ 19.

¶ 11 A criminal defendant has a fundamental right to be informed of the nature and cause of criminal accusations made against him. *Carey*, 2018 IL 121371, ¶ 20. Section 111-3 of the Code of Criminal Procedure of 1963 mandates that a criminal charge shall be in writing and allege the commission of an offense by: (1) stating the name of the offense; (2) citing the statutory provision alleged to have been violated; (3) setting forth the nature and elements of the offense charged; (4) stating the date and county of the offense as definitely as can be done; and (5) stating the name of the accused, if known. 725 ILCS 5/111-3(a) (West 2014). "This rule '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.' " *Carey*, 2018 IL 121371, ¶ 20 (quoting *People v. Hall*, 96 Ill. 2d 315, 320 (1982)).

¶ 12 The timing of a challenge to a charging instrument is significant in determining whether a defendant is entitled to reversal of his or her conviction based on charging instrument error. *Carey*, 2018 IL 121371, ¶ 21. If an indictment or information is challenged before trial in a

pretrial motion, the charging instrument must strictly comply with the requirements in section 111-3(a). *Carey*, 2018 IL 121371, ¶ 21.

¶ 13 "In contrast, the sufficiency of a charging instrument attacked for the first time on appeal is not determined by strict compliance with the statute but rather 'by a different standard.' " *Carey*, 2018 IL 121371, ¶ 22 (quoting *People v. Pujoue*, 61 Ill. 2d 335, 339 (1975)). "When attacked for the first time on appeal, a charging instrument is sufficient if it notified the defendant of the precise offense charged with enough specificity to allow the defendant to (1) prepare his or her defense and (2) plead a resulting conviction as a bar to future prosecution arising out of the same conduct." *Carey*, 2018 IL 121371, ¶ 22. " 'Thus, the question is whether, in light of the facts of record, the indictment was so imprecise as to prejudice defendant's ability to prepare a defense.' " *Carey*, 2018 IL 121371, ¶ 22 (quoting *People v. Phillips*, 215 Ill. 2d 554, 562 (2005)). In making this determination, the reviewing court may resort to the record. *Carey*, 2018 IL 121371, ¶ 22. If the reviewing court cannot say that the charging instrument error inhibited the defendant in the preparation of his or her defense, then the court cannot conclude that the defendant suffered any prejudice. *Carey*, 2018 IL 121371, ¶ 22. " 'It is a well-established rule in Illinois that all counts of a multiple-count indictment should be read as a whole and that elements missing from one count of an indictment may be supplied by another count.' " *Carey*, 2018 IL 121371, ¶ 25 (quoting *People v. Morris*, 135 Ill. 2d 540, 544 (1990)); see *People v. Johnson*, 231 Ill. App. 3d 412, 424 (1992) (finding that separate counts of a multi-count indictment apprised the defendant of the type of conduct charged by an allegedly ambiguous count of the indictment).

¶ 14 Defendant contends that the charging instrument did not advise him as to the nature of the resisting or obstructing charge because it was couched in the language of the statute and did not specify the type of conduct for which he was being charged. He also contends that he "could have reasonably begun trial focusing his defense narrowly against the alleged head-butt to Urban's cheek," because it was the only physical act referenced in the four counts of charging instrument, "only to be surprised by the State's shotgun approach of seeking conviction on all manner of uncharged contact" when it argued that he fought Urban, stiffened his body and tried to "twist away," and head-butted Urban in the face and chest.

¶ 15 However, in evaluating challenges to a charging instrument that are raised for the first time on appeal, " '[t]he relevant inquiry is not whether a charging instrument could have described an offense with more particularity, but whether there is sufficient particularity to allow the defendant to prepare a defense.' " *People v. Brogan*, 352 Ill. App. 3d 477, 489 (2004) (quoting *People v. Swartwout*, 311 Ill. App. 3d 250, 256 (2000)). It is defendant's burden to show that he was prejudiced in the preparation of his defense. *People v. Davis*, 217 Ill. 2d 472, 479 (2005). Here, we find defendant's claim of prejudice to be entirely speculative. The record shows that trial counsel mounted a capable and well-prepared defense, in which he argued that defendant did not resist or obstruct Urban by *any means*, because the idea that defendant would be disrespectful to Urban, "twist away" while being handcuffed, or head-butt Urban in the face or chest after being held at gunpoint and detained, defied common sense. Counsel also questioned the credibility of the arresting officers, arguing that "there are some officers who don't always tell it like it is," and contended that Urban did not sustain any injuries which were caused by defendant. Where defendant's defense amounted to a complete denial of criminal

activity, defendant cannot show that he was prejudiced by the charging instrument's lack of specificity. See also *People v. Stephenson*, 2016 IL App (1st) 142031, ¶ 22 (where defense was a denial of alleged criminal activity, defendant was not prejudiced by indictment's failure to identify the victim of crime). Had the indictment alleged the name of the victim of the crime and included with specificity both head-butts with the "stiffening and twisting" of the officer's body, defendant's defense would not have changed. *People v. Montgomery*, 96 Ill. App. 3d 994, 998 (1981). Because defendant disputed resisting or obstructing Urban in any way, and relied on a theory that the officers did not "tell it like it is," the failure to specify the manner in which defendant resisted or obstructed could not have misled his defense. *Montgomery*, 96 Ill. App. 3d at 998. Thus, defendant has failed to show that any deficiency in the charging instrument prejudiced him in preparing his defense.

¶ 16 Likewise, the charging instrument was sufficiently detailed to plead a resulting conviction as a bar from future prosecution for the same conduct. Read as a whole, the charging instrument alleged that defendant was involved with a physical altercation with Officer Urban on or about June 11, 2015. This information, coupled with the detailed account of events contained in the report of proceedings, would allow defendant to assert a double jeopardy defense in bar of subsequent prosecution of the offense. See *People v. DiLorenzo*, 169 Ill. 2d 318, 325 (1996) ("With the indictment and the allegations setting forth the name of the complainant, the date and place of the offense [citation] along with the record of proceedings [citation], defendant would be able to assert a double jeopardy defense in bar of a subsequent indictment for this same offense.").

¶ 17 Defendant argues that *People v. Hughes*, 229 Ill. App. 3d 469, 473 (1992), controls the outcome of the instant case, as it found that, even when applying the appellate standard for reviewing the sufficiency of charging instrument, a "complaint charging a defendant with resisting or obstructing a peace officer solely in the language of the statute is not sufficient" and "must contain language describing the act(s) alleged to have obstructed the officer." However, in *Hughes*, "the State included only the common law record in the record on appeal." *Hughes*, 229 Ill. App. 3d at 474. Thus, there was no way of establishing from the record whether the charging instrument prejudiced defendant in the preparation of his defense. Here, as noted above, the record of proceedings established that defendant was not prejudiced in the preparation of his defense.

¶ 18 We are similarly unpersuaded by defendant's reliance on *People v. Hilgenburg*, 223 Ill. App. 3d. 286 (1991), and *People v. Stoudt*, 198 Ill. App. 3d 124 (1990), for the proposition that that the charging instrument was fatally insufficient because it failed to articulate the specific "authorized act" that Officer Urban was engaging in. These cases dealt with the sufficiency of charging instruments which were challenged and dismissed prior to trial. Here, because defendant challenged the sufficiency of the charging instrument for the first time on appeal, and because we found that the charging instrument was sufficient to allow defendant to prepare a defense and to defend against future prosecution stemming from the same conduct, we find that the charging instrument was not fatally deficient.

¶ 19 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 20 Affirmed.