2018 IL App (1st) 162963-U

FIRST DIVISION
May 29, 2018

No. 1-16-2963

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 16 CR 04379 |
| | ) | |
| JONATHAN HUMENSKI, | ) | Honorable |
| | ) | Marc W. Martin, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Pierce and Justice Griffin concurred in the judgment.

## ORDER

¶ 1 ***Held:*** We affirm defendant's conviction for aggravated battery. Defendant has forfeited his constitutional arguments by failing to raise them in a post-trial motion and failing to argue for plain-error review in his opening brief.

¶ 2 Defendant-appellant, Jonathan Humenski, was arrested by the Wheeling police department on suspicion of aggravated battery after an incident at a local restaurant. After his arrest, the State charged defendant with three different counts of aggravated battery. Count I

alleged aggravated battery by causing great bodily harm, count II alleged aggravated battery by causing bodily harm while in a public place of accommodation, and count III alleged aggravated battery by knowingly making physical contact of an insulting or provoking nature while located in a public place of accommodation. Defendant proceeded to a bench trial where he was found not guilty of count I but guilty on counts II and III, both felonies. According to the record, count II was merged into count III. Defendant filed a motion for a new trial, which the trial court denied. The trial court sentenced defendant to 45 days in jail, two years probation, ordered him to pay restitution, attend anger management classes and submit to DNA analysis.

¶ 3 Defendant raises several issues on appeal. Defendant argues (1) the State failed to prove he caused bodily harm, (2) the State failed to show he made physical contact of an insulting or provoking nature, (3) the State failed to prove the defendant did not act in self-defense, (4) the State failed to prove the restaurant where the incident occurred constitutes a public place of accommodation, and (5) the statute under which he was convicted is unconstitutional.

¶ 4 After reviewing the record and relevant case law, we affirm defendant's conviction for aggravated battery. We decline to review the constitutional issues raised by defendant because they have been forfeited.

¶ 5 JURISDICTION

¶ 6 On September 22, 2016, a judge, sitting as the finder of fact, found defendant guilty of two counts of aggravated battery. On October 12, 2016, the trial court sentenced defendant. A notice of appeal was filed on November 4, 2016. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case entered below. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 2013).

¶ 7 BACKGROUND

¶ 8 Defendant was charged with three different counts of aggravated battery stemming from an altercation with employees of Twin Peaks Bar, a restaurant and bar located in Wheeling, Illinois. Count I alleged defendant committed aggravated battery by causing great bodily harm or disfigurement to the victim. Count II (aggravated battery) alleged defendant caused bodily harm while located in a public place of accommodation. Count III (aggravated battery) alleged he made physical contact of an insulting or provoking nature while located in a public place of accommodation. Defendant proceeded to a bench trial.

¶ 9 At trial, the State called three witnesses, Anthony Studnicka, Rafael Ramos (the victim), and Savanna Cathey, to testify about the incident that occurred on the evening of February 19, 2016. On that evening, Studnicka had just finished his shift as general manager and was having dinner and a drink at the restaurant's bar when he noticed a patron become "very vulgar" with one of the bartenders, Savanna Cathey. Studnicka observed the individual, who he identified in court as the defendant, pointing at the Cathey and yelling, "I want my f*cking money back, you b*tch. I'm never going to spend another dime in this place. Come on, Savanna, this is bullsh*t." Cathey responded that the money had been given to her as gratuity. Defendant continued to insist on getting his money back and proceed to call Cathey a "b*tch" and "c*nt." Cathey retrieved some cash from the tip jar and handed it to defendant. She then pointed to Studnicka and informed defendant Studnicka was her general manager.

¶ 10 Defendant approached Studnicka and continued to express his displeasure. Defendant stated, "Well, I just want to tell, you know, what kind of piece of sh*t establishment this is, and Savanna's the worst bartender I've ever had . . . she's nothing but a b*tch, and she's a c*nt, and I'm never coming here again." Studnicka informed defendant he could not speak about

employees that way and he needed to leave. Defendant responded, "I'm not leaving . . . who are you, you f*cking sp*c . . . I don't have to listen to what you have to say."

¶ 11 The closing manager, Rafael Ramos, noticed the argument and joined Studnicka. Ramos agreed with Studnicka and informed defendant he needed to leave. Defendant protested, "I'm not going anywhere . . . who the f*ck are you." Defendant continued calling Studnicka ethnic slurs. Defendant then appeared to be heading for the exit, but quickly turned around, leaned over the bar, and continued his verbal tirade against Cathey. Studnicka continued telling defendant that it was time to leave.

¶ 12 Defendant then put his finger in Studnicka's face, and stated "I will come back in here and I'll f*cking kill you, your family, all your friends. You don't know who I am, you don't know who I know." Ramos then stepped in between the pair. Studnicka and Ramos testified defendant proceeded to poke Ramos in the chest several times. Cathey also testified that she observed defendant poke Ramos in the chest several times. Ramos claimed defendant then put his hands on his chest and that is when Ramos grabbed defendant and flung him to the floor. Studnicka did not know if defendant placed his hand on Ramos's chest. While on the ground, defendant flared his arms and legs while continuing to curse and threaten Studnicka and Ramos. Ramos and Studnicka pinned defendant to the floor. After a minute or two, another patron approached and asked that defendant be let up. The pair agreed to let defendant up on the condition he exit the restaurant.

¶ 13 They allowed defendant back on his feet. Almost immediately after returning to his feet, defendant took a swing at Ramos. Ramos testified that defendant struck him near the left eye and forehead. Studnicka believed that defendant missed but admitted he was unsure because it all happened so fast. Cathey testified defendant missed Ramos with the punch. Cathey admitted her

attention was split because during the altercation, she continued to serve other customers at the bar. Ramos then tackled defendant back to the ground. Ramos testified that while the two were on the ground, defendant bit his arm and scratched his face. Defendant also stuck fingers up Ramos's nose; Ramos heard a loud pop and noticed blood coming from his nose. After going to the floor a second time, Cathey called the Wheeling police department. Officers arrived at the scene and placed defendant under arrest. Studnicka took the officers back to the business office where they watched surveillance video of the incident before the police took possession of a copy.

¶ 14 After Cathey, Ramos, and Studnicka testified, the State moved several photos of Ramos's injuries and a video of the incident into evidence. Two photos depict scratches and a bruise to Ramos's left arm. One photo shows a bruise on Ramos's chest he testified came from defendant poking him in the chest. Two photos depict Ramos with a black left eye and a bruise above the same eye. Another photo depicts a bruise to Ramos's right eye and another picture shows a cut on his nose. The video contains eleven minutes of footage depicting the incident. After submitting these exhibits into evidence, the State rested.

¶ 15 Defendant moved for a directed verdict. The defense attorney argued the State failed to demonstrate a battery had occurred or that the Twin Peaks was "a place of public accommodation" as required for a conviction under section 12-3.05(c). The court denied the motion for a directed verdict. The defense then moved to admit two receipts into evidence. After their admission, the defense rested.

¶ 16 After hearing closing arguments and considering the evidence the court issued its verdict. The court found the State demonstrated beyond a reasonable doubt defendant had not acted in self-defense. The trial court found defendant had been the initial aggressor. The court found

defendant not guilty of aggravated battery resulting great bodily harm. The court concluded the State failed to demonstrate Ramos suffered great bodily harm. The court found defendant had poked Ramos in the chest and connected with a punch. Therefore, the court found defendant guilty of counts II and III, both of which were aggravated battery and class 3 felonies.

¶ 17 Defendant filed a post-trial motion. He argued the State's evidence failed to show beyond a reasonable doubt that he had not acted in self-defense. He further argued Ramos was the aggressor and the injuries he sustained occurred after Ramos slammed the defendant on the floor. He argued both Cathey and Studnicka testified the defendant's punched missed Ramos and the video evidence showed Ramos dodging defendant's punch. Finally, the motion argued the State failed to prove the event occurred in a "place of public accommodation." The judge rejected the motion. The record indicates the court then merged count II into count III. The court sentenced defendant to 45 days in jail and two years probation.

¶ 18 Defendant timely filed his notice of appeal.

¶ 19 ANALYSIS

¶ 20 Before turning to the merits of defendant's appeal, we are required to clarify the record before us. The trial court convicted defendant on counts II and III, but not on count I. Counts II and III charged defendant with same conduct under different theories of criminal liability. Count II alleged defendant committed the offense of aggravated battery when he "knowingly caused bodily harm to Rafael Ramos, to wit: struck about the head or body, while they were on or about a public place of accommodation or amusement." Count III alleged defendant committed the offense of aggravated battery when he "knowingly made physical contact of an insulting or provoking nature with Rafael Ramos, to wit: struck about the head or body, while they were on or about a public place of accommodation or amusement." The trial court found defendant guilty

of counts II and III, however, the State failed to differentiate between "bodily harm" and the "physical contact." Therefore, pursuant to the one-act, one-crime rule the trial merged the two convictions. While not clear from the briefing of the parties, the record does indicate the trial court merged count II into count III and imposed one sentence under count III. We therefore review defendant's conviction under count III but not count II. See *People v. Neely*, 2013 IL App (1st) 120043, ¶¶ 14-15 (declining to review an unsentenced merged conviction).

¶ 21 We begin our analysis with defendant's challenge to the trial court's finding that he did not act in self-defense. In rejecting this affirmative defense, the trial court concluded defendant was the initial aggressor during the event.

¶ 22 Under Illinois law the affirmative defense of self-defense can be raised only if a defendant presents some evidence as to each of the following elements: "(1) force had been threatened against the defendant; (2) defendant was not the aggressor; (3) the danger of harm is imminent; (4) the force threatened was unlawful; (5) defendant actually believed that a danger existed, that force was necessary to avert the danger, and that the amount of force he used was necessary; and (6) that the beliefs were reasonable." *People v. Willis*, 217 Ill. App. 3d 909, 917 (1991) (citing *People v. Kyles*, 91 Ill. App. 3d 1019 (1980)).

¶ 23 If a defendant presents "some evidence as to each of these elements," the burden shifts to the State to disprove the defense beyond a reasonable doubt. *Id.*; *People v. Estes*, 127 Ill. App. 3d 642, 651 (1984). The State needs only to negate one element listed above in order to defeat a self-defense claim. *People v. Zolidis*, 115 Ill. App. 3d 669, 674 (1983). Whether or not the testimony and evidence support a self-defense claim is to be determined by the trier of fact. *Estes*, 127 Ill. App. 3d at 651. In this case, the trial court, sitting as the trier of fact, had the duty to resolve conflicts in the evidence and determine the credibility of witnesses. *People v. Perry*,

91 Ill. App. 3d 988, 993 (1980). We will not reverse a trier of fact's conclusions unless the evidence is so improbable or unsatisfactory as to raise a reasonable doubt of guilt. *Zolidis*, 115 Ill. App. 3d at 674.

¶ 24 Without addressing any of the other necessary factors, we find the trial court's conclusion defendant acted as the initial aggressor is supported by the record. The court accepted the testimony of all three State's witnesses that defendant "made physical contact with Mr. Ramos by tapping him and placing his hands on [Ramos's] chest." The court also found, "[A]fter the first takedown, the testimony and the video show that the defendant gets up and very clearly without any equivocation he cold-cocks and punches Mr. Ramos." Defendant argues that "no bodily harm occurred to Ramos prior to the [first] takedown." Ignoring the bruise on Ramos's chest, this argument does not address the fact the trial court found defendant to be initial aggressor when he poked and placed his hand on Ramos. Defendant's contention regarding the lack of initial injury to Ramos does not address the trial court's finding regarding these actions. Defendant cites to no case law requiring the State to prove the initial aggressor must cause bodily harm. Based on the evidence presented, the trial court did not err in rejecting defendant's self-defense claim.

¶ 25 In his next issue, defendant challenges the sufficiency of the evidence used to obtain his aggravated battery conviction under count III. When a defendant argues the evidence was insufficient to sustain his conviction, the inquiry is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). In reviewing the sufficiency of the evidence, the appellate court will not retry the defendant. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). It is the trier of fact's function to assess witness credibility, weigh and

resolve conflicts in the evidence, and draw reasonable inferences from the evidence. *People v. Williams*, 193 Ill. 2d 306, 338 (2000). While the trier of fact's findings regarding witness credibility are entitled to great weight, the determination is not conclusive. *Smith*, 185 Ill. 2d at 542. The fact that the finder of fact accepted testimony as true does not guarantee that it was reasonable to do so. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). However, an appellate court will only reverse a conviction where no "rational tier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Smith*, 185 Ill. 2d at 541.

¶ 26 Section 12-3.05(c) states "[a] person commits aggravated battery when, in committing a battery, other than by discharge of a firearm, he or she is or the person battered is on or about a public way, public property, a public place of accommodation or amusement * * *." 720 ILCS 5/12-3.05(c) (West 2016). An individual commits a battery "if he or she knowingly without legal justification by any means (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual." *Id.* § 12-3(a). Based on count III of the indictment, the State was required to prove defendant made physical contact of an insulting or provoking nature while the defendant or the victim was on or about a public place of accommodation or amusement. See *People v. Cherry*, 2016 IL 118728, ¶ 16 (sustaining a conviction for aggravated battery requires proof of battery and the presence of an additional aggravating factor).

¶ 27 Based on the evidence presented, the trial court, sitting as the finder of fact, could reasonably concluded defendant's poking of Ramos represented "physical contact of an insulting or provoking nature." Before this court, defendant argues the State did not meet its burden of proving a poke took place. Defendant's argues the video evidence "did not depict defendant poking anyone in the chest." This argument is premised on reweighing the evidence, rejecting

the trial court's factual findings, and substituting his view of the evidence for the trial court's view. *People v. Abdullah*, 220 Ill. App. 3d 687, 693 (1991) (a reviewing court has neither the duty nor the privilege to substitute its judgment for the trier of fact). The trial court found Studnicka and Ramos testified credibly. Both Studnicka and Ramos testified on direct that defendant poked Ramos repeatedly in the chest. Cathey testified on cross-examination that she witnessed defendant poke Ramos in the chest. The video, which defendant primarily relies on, is inconclusive as to whether a poke took place. The video does conform with Studnicka and Ramos's testimony concerning the actions of defendant immediately prior to the first takedown. Viewing this evidence in a light most favorable to the State, the record contains sufficient evidence for a trier of fact to conclude the defendant made physical contact of an insulting or provoking nature.

¶ 28 Defendant also challenges the finding that Twin Peaks constitutes a public place of accommodation or amusement. Defendant argues the trial court erroneously relied on section 5-101(A)(2) of the Illinois Humans Right Act, which defines a "place of public accommodation" to include "a restaurant, bar, or other establishment serving food or drink." 775 ILCS 5/5-101(A)(2) (West 2016). He further argues, absent this statutory support, the facts demonstrated Twin Peaks is not a "public place of accommodation."

¶ 29 We agree with the defendant that the trial court erred in utilizing section 5-101(A)(2) to conclude Twin Peaks represented a "public place of accommodation" pursuant to section 12-3.05(c). This raises an issue of statutory construction which we review *de novo*. *In re Detention of Liebermann*, 201 Ill. 2d 300, 309 (2002). Section 5-101 states "[t]he following definitions are *applicable strictly* in the context of this Article." (Emphasis added.) 775 ILCS 5/5-101 (West 2016). The limiting language demonstrates the intention of the legislature to restrict the

applicability of this section to the Illinois Human Rights Act only. *In re D.F.*, 208 Ill. 2d 223, 229 (2003) (the most reliable indicator of legislative intent is the language of the statute, which is to be given its plain, ordinary, and popularly understood meaning). The State concedes this because it does not respond with any argument to the contrary in its brief. We agree with the defendant that the trial court erred in relying on section 5-101 to conclude Twin Peaks represented a "public place of accommodation."

¶ 30 While the trial court erred in relying on the above statutory definition, the error was harmless, as the State presented enough evidence to establish Twin Peaks represents a "public place of accommodation" pursuant to section 12-3.05(c). In *People v. Murphy*, 145 Ill. App. 3d 813, 815 (1986), this court determined the term applied "generically to places where the public is invited to come into and partake of whatever is being offered therein." This comports with a prior holding that determined "what is significant is that the alleged offense occurred in an area accessible to the public." *People v. Ward*, 95 Ill. App. 3d 283, 288 (1981). In this case, Studnicka testified Twin Peaks was "open to the public" and there were probably 100 patrons present. The video confirms this testimony, as members of the public can be seen sitting at the bar, tables, and booths in the area, while also moving freely through the aisles.

¶ 31 Defendant's argument that the facts established Twin Peaks is not a "public place of accommodation" is unpersuasive. Defendant argues the "bar area was in a separate part of the establishment, less accessible to the public" and "the bar was not in fact open to the public." Nothing in the record suggests the bar area was less accessible to the public or was in anyway closed to the public. Defendant's argument finds no support in the record. The record contains sufficient evidence for a trier of fact to conclude Twin Peaks represented a "public place of accommodation" pursuant to section 12-3.05(c).

¶ 32 In reaching this conclusion, we reject defendant's reliance on both *People v. Johnson*, 87 Ill. App. 3d 306 (1980), and *People v. Logstron*, 196 Ill. App. 3d 96 (1990). In *Johnson*, the court determined a tavern bathroom did not represent a "public place of accommodation." 87 Ill. App. 3d at 308. *Johnson* has no applicability to this matter because this incident did not take place in the restroom. In *Logstron*, the appellate court determined the trial court erred when it provided a jury instruction which stated "a tavern is place of public amusement." 196 Ill. App. 3d at 100. Despite this, the *Logstron* court determined the error was harmless because "the public nature of the establishment was so conclusively established." *Id.* Like the error in *Logstron*, the trial court's reliance on an inapplicable statutory definition was harmless where the State presented facts to establish the public nature of Twin Peaks beyond a reasonable doubt. *Id.* citing *Chapman v. California*, 386 U.S. 18 (1967).

¶ 33 Based on the preceding, the State presented sufficient evidence to establish defendant made "physical contact of an insulting of provoking nature" and that such contact occurred while both the defendant and victim were located in a "public place of accommodation." Accordingly, we affirm defendant's conviction for aggravated battery under section 12-3.05(c).

¶ 34 In the next issue, defendant raises several constitutional challenges to his conviction. The State responds defendant has forfeited this issue by failing to raise it in a post-trial motion. A review of the post-trial motion shows that the State is correct. Defendant's post-trial motion attacked to the sufficiency of the evidence and does not raise any constitutional issues. Before this court, defendant does not argue for plain-error in his opening brief.

¶ 35 In order to preserve a claim of error, a defendant must object to the error as well as raise the objection in a post-trial motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2009). Issues in a post-trial motion must be raised with enough specificity to afford the trial court the opportunity

to rule on the issue presented for review. *People v. McMillen*, 281 Ill. App. 3d 247, 251 (1996). Requiring a written post-trial motion allows the trial court the opportunity to review a defendant's contention of error and saves the delay and expense inherent in the appeal if the contention is meritorious. *People v. Reed*, 177 Ill. 2d 389, 393-94 (1997). We agree with the State that defendant's failure to object and raise the issue in a post-trial motion results in forfeiture of the issue on appeal.

¶ 36 As stated above, defendant did not raise plain-error in his opening brief. The plain-error doctrine is well known in Illinois jurisprudence. This doctrine allows reviewing courts to consider an unpreserved error when (1) the evidence was closely balanced, or (2) the error was so egregious as to deny the defendant a trial. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). It is defendant's burden to satisfy either prong. *Id.* When defendant fails to meet this burden, the forfeiture will be honored. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008).

¶ 37 Based on the failure to raise the issue in a post-trial motion or argue for plain-error review in his opening brief, we find defendant has forfeited the constitutional issues he seeks to raise and we decline to address them.

¶ 38 CONCLUSION

¶ 39 For the foregoing reasons, we affirm defendant's conviction for aggravated battery.

¶ 40 Affirmed.