2018 IL App (2d) 160107-U
No. 2-16-0107
Order filed May 29, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JASON A. BROWN, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 15-CM-1171 Honorable Bruce R. Kelsey, Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State proved defendant guilty beyond a reasonable doubt of obstructing a peace officer, as the trial court was entitled to find that defendant knew that the police had authority to enter the house he was in and that he actually impeded their entry; (2) defendant's jury waiver was invalid, as the record, which appeared to be complete on the issue, contained no discussion of it; we remanded the cause for a new trial.

¶ 2 Following a bench trial, defendant, Jason A. Brown, was convicted of obstructing a police officer (720 ILCS 5/31-1(a) (West 2016)). He appeals, contending that (1) the State failed to prove beyond a reasonable doubt that he knew that the officers were engaged in an authorized act or that he actually obstructed their performance of that act and (2) the record does not

affirmatively show that he validly waived a jury trial. We agree with the latter contention and, accordingly, reverse the conviction and remand the cause.

¶ 3 On April 11, 2015, Naperville police were dispatched to a report of a fight in progress at 379 Pearson Circle. Sergeant David Pastrick was one of those officers, although other officers were already on the scene when he arrived. He went to the door and tried to contact the people inside.

¶ 4 Pastrick's commander had spoken on the phone with the home's owner, who had given the officers permission to enter the house. Pastrick told a man standing inside the house to open the door. The man, later identified as defendant, replied, "[F]uck you, get a search warrant." As there was no evidence of an ongoing fight, Pastrick did not think that a forced entry was required.

¶ 5 Officer Ryan Suthard also responded to 379 Pearson Circle. He saw drops of blood, broken glass, and alcoholic beverages. He knocked on the door, then moved to a "perimeter position" when his supervisor arrived. Suthard ordered the occupants numerous times to open the door.

¶ 6 The homeowner's ex-wife arrived, stating that she had been sent by the homeowner. She said that no one was supposed to be in the house and that the officers could open the door "any way you can." The officers communicated this fact to the house's occupants and gave them one final chance to open the door voluntarily. Defendant responded, "F.U., get a warrant." The officers then used a ram to open the door. They were met at the front door by defendant, who was arrested.

¶ 7 Kayla Budd testified that she was inside the house with defendant when officers arrived and demanded that the door be opened. She called her father, Steven Budd, who owned the

house. She told defendant, "[M]y dad said don't open the door until he gets there." She observed defendant for a few minutes, and he did nothing to actively prevent the officers from entering.

¶ 8 The court found defendant guilty of obstructing. The court found that the officers' entry was justified both by the owner's permission and by exigent circumstances, given the blood and debris found outside the house. The court sentenced defendant to one year of probation with 180 days in jail. Defendant timely appeals.

¶ 9 Defendant first contends that he was not proven guilty beyond a reasonable doubt. He argues that the evidence did not show that he knew that the officers were authorized to enter the house, or that he materially obstructed them from doing so.

¶ 10 Defendant was charged with obstructing a police officer, which required the State to prove that defendant knowingly resisted or obstructed "the performance by one known to the person to be a peace officer *** of any authorized act within his or her official capacity." 720 ILCS 5/31-1(a) (West 2016). In reviewing the sufficiency of the evidence in a criminal case, we ask whether, after viewing the evidence in the light most favorable to the State, any rational factfinder could have found the essential elements of the offense beyond a reasonable doubt. *People v. Davison*, 233 Ill. 2d 30, 43 (2009).

¶ 11 Defendant first contends that the State failed to prove that he knew that the officers' actions were authorized. Defendant assumes, and the State does not dispute, that, because the statute requires that a defendant act knowingly, the State must prove that defendant knew that the officers' actions were in fact authorized. The State contends that it did so here. We agree.

¶ 12 Pastrick and Suthard both testified that the owner authorized them to enter the house and that they conveyed this to defendant. (The trial court also found that exigent circumstances

authorized the entry, although there is no evidence that defendant knew this.) Thus, defendant knew that the police had the authority to enter the home.

¶ 13 Defendant relies on Kayla Budd's testimony that she told defendant that her father had instructed them not to let anyone in until he arrived. However, in denying defendant's motion for a new trial, the court stated that it credited the officers' testimony over Budd's. The court was entitled to do so. See *People v. Pence*, 2018 IL App (2d) 151102, ¶ 16 (resolving evidentiary conflicts is province of trier of fact).

¶ 14 In *City of Champaign v. Torres*, 214 Ill. 2d 234 (2005), an officer responded to a complaint of loud noise coming from a campus apartment. The defendant opened the door, agreed to get the registered tenant, and started to close the door. The officer tried to prevent the defendant from closing the door. They struggled in this way for some time and the defendant was eventually arrested for obstruction pursuant to a city ordinance. The supreme court affirmed the conviction, holding that, although the officer was not authorized to forcibly enter the apartment to investigate a misdemeanor complaint, the defendant could not assert the tenant's fourth-amendment rights. *Id.* at 245-46.

¶ 15 Defendant acknowledges that *Torres* appears at first blush to control this case, but argues that it is distinguishable because, here, he did not know that the officers had authority to enter the house. As noted, however, there was evidence, which the trial court credited, that the officers told defendant that the homeowner had authorized them to go in.

¶ 16 Citing *People v. Hilgenberg*, 223 Ill. App. 3d 286 (1991), defendant contends that one cannot be charged with obstruction for failing to open a door in response to a police request. There, however, it was undisputed that the officers lacked a warrant, exigent circumstances, or homeowner consent. *Id*. at 292-93.

¶ 17 At oral argument, defendant contended that he could not be convicted of obstruction based on his failure to open the door, as his mere inaction could not be the basis for such a conviction. However, as the State points out, it is now well-established that obstructing as used in the statute includes the failure to act. *People v. Synnott*, 349 Ill. App. 3d 223, 227 (2004). There, we noted that "the word 'act' is used broadly and is understood to include 'a failure or omission to take action.' " *Id.* (quoting 720 ILCS 5/2-2 (West 2002)). Thus, defendant was properly convicted despite the lack of an affirmative act.

¶ 18 Defendant next contends that he did not actually obstruct the officers, given that the officers did eventually gain entry and there is no evidence of how long defendant's recalcitrance delayed them. Defendant contends that his conduct is no different from that at issue in *People v. Baskerville*, 2012 IL 111056, and *People v. Taylor*, 2012 IL App (2d) 110222.

¶ 19 "Obstruct" means " '1: to block up: stop up or close up: place an obstacle in or fill with obstacles or impediments to passing *** 2: to be or come in the way of: hinder from passing, action, or operation: IMPEDE ***.' " *Baskerville*, 2012 IL 111056, ¶ 19 (quoting Webster's Third New International Dictionary 1559 (1961)). In turn, "hinder" means " 'to make slow or difficult the course or progress of.' " *Id.* (quoting Webster's Third New International Dictionary 1070 (1961)).

¶ 20 In *Baskerville*, two officers saw the defendant's wife, Christine Baskerville, driving. They recognized her and, believing that her license was suspended, followed her to her house. She got out and started walking toward the house. The officers, having confirmed their suspicions about her license, asked her to return to her car, but she continued on. The defendant then emerged and conversed with one of the officers. He said that he had been driving and that Christine was not home, then went back inside. When the defendant returned, he said that he did

not know what was going on, because he had been at home during the incident. The defendant told the officer that he could go inside to look for Christine, but the officer declined.

¶ 21 The defendant was convicted of obstruction, but the appellate court reversed the conviction and the supreme court affirmed the reversal. The supreme court held that the defendant's false statement would have "legal significance" only if it actually impeded an official act that the officer was performing. *Id*, ¶ 35. However, the momentary delay did not actually hinder the officer, as the defendant almost immediately went in the house, returned, and told the officer that he could search. *Id*.

¶ 22 In *Taylor*, when questioned by an officer, the defendant gave a false name. Despite this, the officer was " 'pretty sure' " that he recognized the defendant, who had an outstanding warrant. *Taylor*, 2012 IL App (2d) 110222, ¶ 4. Applying *Baskerville*, we held that the defendant's conduct was not a "material impediment" to the officer arresting the defendant, as the officer arrested the defendant "almost immediately" despite the false statements. *Id.* ¶ 17.

¶ 23 Defendant contends that this case is indistinguishable from *Baskerville* and *Taylor* because there was no evidence of the length of the delay and the officers were eventually able to accomplish their objective of getting inside the house. We disagree.

¶ 24 The delay here was not inconsequential. Suthard testified that he ordered the occupants "numerous" times to open the door. While Suthard and Pastrick were trying to get defendant to open the door, Kayla Budd called her father, who in turn called his ex-wife, who drove to the scene and conversed with the officers. The court could reasonably infer that this took at least several minutes. But more importantly, the officers never did secure defendant's voluntary compliance; they accomplished their objective only by force.

¶ 25 We rejected a similar argument in *People v. Shenault*, 2014 Il App (2d) 130211. There, the defendant refused to comply with an officer's command to get out of her car during a traffic stop, and the officer ultimately had to remove her forcibly. We upheld the defendant's conviction of obstruction. We noted that neither *Baskerville* nor *Taylor* held that obstruction is measured solely by the amount of time necessary to overcome a defendant's conduct. *Id.* ¶ 22. Instead, considerations of officer safety were paramount (*id.*) and the need to forcibly remove the defendant from her car undoubtedly increased the risk to the officer.

¶ 26 Defendant argues that *Shenault* is distinguishable because there the officer did not want to go into the car to remove the defendant, whereas here the officers' intent all along was to get into the house and they were ultimately able to do so. But this is a false comparison. The officer's objective in *Shenault* was to get the defendant out of her car, just as the officers' objective here was to get into the house. The officers in this case undoubtedly did not want to have to go and get a battering ram to break down the door any more than the officer in *Shenault* wanted to drag the defendant out of the car. In *Shenault*, we stated that officer safety was the paramount concern. Despite defendant's unsupported protestations to the contrary, using a heavy object to break down the door undoubtedly increased the risk to the officers, as well as the occupants of the house. Thus, there was sufficient evidence to convict defendant of obstruction.

¶ 27 Defendant contends that his conviction must be reversed in any event because the record does not show that he validly waived a jury. Defendant made his initial court appearance on May 19, 2015, at which time the case was continued to July 6 for a jury trial. On that date, the State requested and received a continuance. The court then asked, "We still have a jury trial[,] correct?" Defense counsel responded, "Judge, I anticipate *** we will be waiving and going bench."

¶ 28 At an August 12, 2015, court appearance, defense counsel informed the court that "this will be a bench trial." The court responded, "I've got that. I take the waiver ahead of time, but—"

¶ 29 A bench trial commenced November 18, 2015. There was no discussion of a jury waiver at that time. No written jury waiver appears in the record.

¶ 30 To be valid, a jury trial waiver must be made knowingly and understandingly. *People v. Bracey*, 213 Ill. 2d 265, 269 (2004); see 725 ILCS 5/103-6 (West 2016). A written waiver is one means by which a defendant's intent to waive a jury may be established. See 725 ILCS 5/115-1 (West 2016). However, the lack of a written waiver is not dispositive, if we can ascertain that the defendant validly waived his right to a jury trial. *Bracey*, 213 Ill. 2d at 269-70. Generally, a jury waiver is valid if made by defense counsel in the defendant's presence in open court and without an objection by the defendant. *Id.* at 270. However, as the supreme court observed in *People v. Scott*, 186 Ill. 2d 283, 285 (1999), "We have never found a valid jury waiver where the defendant was not present in open court when a jury waiver, written or otherwise, was at least discussed."

¶ 31 The State concedes that the record does not contain a written jury waiver and that no judicial admonishment of the right to a jury trial appears in the transcribed portion of the proceedings. Thus, the State concedes that, if we are "satisfied with the completeness of the record," the conviction must be reversed. The State points out, however, that the record is not complete, given that defendant's initial court appearance on May 19 was not transcribed. Defendant responds that, because of the requirement that the waiver affirmatively appear in the record, a gap in the record should not automatically be construed against him.

¶ 32 In *People v. Hernandez*, 409 Ill. App. 3d 294 (2011), the parties presented a bystander's report that did not mention a jury waiver. We presumed that, although the report was sparse, "the descriptions of what occurred on those days is materially complete for our purposes." *Id.* at 301. We stated that we "further must presume that the defendant did not waive a jury during some proceeding of which we have no record." *Id.* We relied for that statement on *People v. Smith*, 106 Ill. 2d 327 (1985). That case held that, although a defendant claiming that he did not validly waive his right to a jury trial had the duty to supply an adequate record for the proceeding during which the common-law record implied the waiver took place, "[i]f the State believes that the jury waiver was made on an occasion other than that suggested in the record, then the record may be supplemented, at the State's request, with the corresponding report." *Id.* at 335.

¶ 33 Here, nothing in the common-law record suggests that a jury waiver took place on May 19. Indeed, it appears that the idea of a bench trial was mentioned for the first time on July 6. On that date, the court stated its belief that the matter would be continued for a jury trial and defense counsel, apparently for the first time, suggested that his client might waive a jury and proceed to a bench trial. Therefore, it is unlikely that a jury waiver occurred six weeks before that, on May 19.

¶ 34 Because the record does not show that defendant waived a jury trial, we reverse his conviction. As we have already found that the evidence was sufficient to convict defendant, double jeopardy does not bar a retrial. See *People v. McKown*, 236 Ill. 2d 278, 311 (2010).

¶ 35 The judgment of the circuit court of Du Page County is reversed and the cause is remanded.

¶ 36 Reversed and remanded.