2020 IL App (1st) 172835-U

THIRD DIVISION
Order filed June 17, 2020
Modified upon denial of rehearing August 5, 2020

No. 1-17-2835

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 17 CR 4409
	)	
LARRY FORD,	)	
	)	Honorable
Defendant-Appellant.	)	Vincent M. Gaughan,
	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for aggravated battery of a peace officer based on defendant's spitting on a Chicago police officer affirmed where there was sufficient evidence to support the jury's verdict. Defendant's sentence vacated where the trial court erred in sentencing defendant as a Class X offender based on convictions for offenses committed as a juvenile.

¶ 2 After a jury trial, defendant, Larry Ford, was found guilty of aggravated battery of a peace officer. The trial court found defendant eligible to be sentenced as a Class X offender based on

prior Class 1 and Class 2 felony convictions, and sentenced defendant to seven years' imprisonment in the Illinois Department of Corrections. Defendant now appeals his conviction and sentence.

¶ 3 The record shows that defendant was charged by information with three counts of aggravated battery of Chicago police officer Radoslaw Wieczorek. At trial, Officer Wieczorek testified that on March 10, 2017, he was on duty in a fully marked patrol vehicle and was working with Officers Ulloa and Kaminska. Officer Wieczorek was in full Chicago police uniform, including a bulletproof vest. Around 12:30 a.m., Officer Wieczorek was in the area of 2018 North Pulaski, where he observed an unmarked police vehicle, several police officers, and a man, who he identified in court as defendant. Officer Wieczorek stepped out of his patrol vehicle, and proceeded to where the officers and defendant were standing. Defendant was "screaming, saying all kinds of stuff." Officer Wieczorek stated that when he first arrived, defendant was "kind of stepping side to side saying random stuff," and after that, defendant was "basically acting violent."

¶ 4 At some point, there was a decision made to place defendant into custody. At that point, two other officers placed defendant against the car parked on Pulaski. Defendant started "flailing his arms and jerking his body *** trying to get away from them." Officer Wieczorek testified that it was at this point when defendant "turned his head toward" Officer Wieczorek, "hocked up his saliva," and "ejected it out of his mouth." Defendant's saliva landed on Officer Wieczorek's chest. Defendant spit at Officer Wieczorek "at least twice." Officer Wieczorek was "approximately two to three feet" from, and "directly behind," defendant when defendant spit on Officer Wieczorek. Officer Wieczorek testified that it was dark outside, but the street was illuminated.

¶ 5 Sergeant Stephen Keenan of the Chicago Police Department testified that around 12:30 a.m. on March 10, 2017, he was dressed in full uniform and in a marked squad car driving

southbound on Pulaski between Dickens and Armitage. At that time, he saw a man, who he identified in court as defendant, walking northbound between the street and the sidewalk along the parked cars. Sergeant Keenan heard defendant "yelling and screaming" at three people who were walking northbound on the sidewalk. Defendant was yelling so loudly that Officer Keenan could hear him from at least half a block away. Sergeant Keenan approached defendant and the group and asked if everybody was okay. Sergeant Keenan stated that his intention in approaching the scene was to "find out what was going on," and to "find out where [defendant] lived and get him home or get him some kind of help." After no one responded and Sergeant Keenan was preparing to drive away, defendant slapped his hand down on the hood of Sergeant Keenan's vehicle. Sergeant Keenan called for backup, then exited his car to speak with defendant and find out what was going on. Sergeant Keenan described defendant as "semi-agitated" and "semi-confrontational," and stated that he "was not giving straight answers." Sergeant Keenan tried to identify defendant and find out where he lived, but defendant did not give him that information.

¶ 6 Sergeant Keenan testified that, at that point, other officers arrived, and they continued to try to determine what was going on and if defendant was in trouble. After receiving no information from defendant, Sergeant Keenan tried to find the people at whom defendant had been yelling, to "see if they were friends of his." Sergeant Keenan located Ismael Villasenor, and his daughter Jasmine, in an apartment of a nearby building. Ismael and Jasmine told Sergeant Keenan that they did not know defendant, and that he had been threatening Jasmine. They agreed to sign complaints against defendant, and a decision was made to take defendant into custody.

¶ 7 Sergeant Keenan testified that he then returned to defendant's location, and other officers began attempting to handcuff defendant. Defendant became agitated and started "resisting his body around a little bit" to avoid having his hands cuffed. A few seconds later, after he was handcuffed,

defendant "turned toward the direction of some of the assisting officers and spat directly at *** Officer Wieczorek." Sergeant Keenan saw defendant spit, and the spit landed on Officer Wieczorek's chest. Defendant spit at Officer Wieczorek "multiple times, *** at least two to three." Defendant then became more agitated and "stated loudly that he had HIV." Defendant was then transported to the station in a squadrol.

¶ 8 Chicago police officer Patrick Kaminska testified that on March 10, 2017, he was working with Officers Ulloa and Wieczorek. Officer Kaminska testified that they were in the third or fourth car that arrived at the scene in response to Sergeant Keenan's call for assistance. When they arrived, officers were attempting to speak with defendant and get identifying information from him. Defendant told the officers that he "lived in the universe." After asking defendant several times where he lived, the officers learned that an assault had taken place earlier and that an officer was in the process of getting a complaint signed against defendant. The officers then decided to place defendant in custody and attempted to handcuff him. Defendant became "combative," was "flailing his arms" and was not "responding to verbal direction." As this was occurring, Officer Kaminska saw defendant spit on Officer Wieczorek's chest twice.

¶ 9 After defendant spit on Officer Wieczorek, the officers took defendant into full custody in handcuffs and made sure that he was facing away from the officers and down toward the ground. As Officer Kaminska stood to the right of defendant, he heard defendant state that defendant had HIV.

¶ 10 The video footage from Officer Kaminska's police vehicle was published to the court and admitted into evidence. Officer Kaminska identified some interaction between the officers and defendant, before the video ended prior to defendant spitting on Officer Wieczorek. Officer Kaminska testified that he had manually turned off the video camera in his vehicle, because he

determined that the incident was over, and because the camera was aimed at the rear of another vehicle.

¶ 11 Ismael Villasenor testified that on March 10, 2017, around 12:30 a.m., he was walking north on Pulaski toward a house on that street, with his 21-year-old daughter, Jasmine Villasenor, and his friend, Salvador Gomez. They encountered defendant, who was standing about 20 feet away from them at the corner of Armitage and Pulaski. Defendant was screaming, calling Jasmine a "b***" and "a lot of other different names." Ismael, thinking defendant "was drunk or on drugs," positioned his daughter between himself and his friend as they continued walking, and tried to ignore defendant.

¶ 12 Ismael testified that defendant then began walking toward them, "calling [them] names" and telling Ismael he was "going to kick [his] a***." Ismael told his daughter to go inside. At this point, Ismael saw police officers arrive, and saw defendant slam his hand on the hood of a police car. Ismael then saw other officers arrive on the scene, and he went inside the house. About ten minutes later, an officer knocked on the door and asked Ismael what had happened. Ismael told the officer what happened, and signed complaints against defendant.

¶ 13 The State rested, and defendant's motion for a directed verdict was denied. Defendant rested without offering any evidence or testifying.

¶ 14 Following closing arguments, the jury returned a verdict finding defendant guilty of three counts of aggravated battery of a peace officer.

¶ 15 At sentencing, the trial court found defendant eligible for mandatory Class X sentencing based on a previous 2001 Class 1 conviction for delivery of a controlled substance near a school and a 2002 Class 2 conviction for possession of a controlled substance with intent to deliver.

Defendant was 16 years old at the time of the 2001 offense, and 17 years old at the time of the 2002 offense.

¶ 16 In aggravation, the State asked the court for an "appropriate sentence," "in light of [defendant's] background," which included his 2001 and 2002 convictions, as well as a conviction for a "Class 4 drug offense" in 2003. The State noted that defendant was initially sentenced to probation for the 2001 offense, but that he violated that probation and was resentenced to Cook County boot camp. Defendant was also sentenced to boot camp for the 2002 offense, and to one year of imprisonment for the 2003 offense.

¶ 17 In mitigation, defense counsel asked for the minimum sentence. Counsel noted that defendant posted bond and had come to court timely on each court date. Defense counsel argued that defendant's actions did not cause serious harm, and that it had been a significant length of time since his last felony conviction. Counsel further asserted that defendant worked in the community.

¶ 18 Defendant spoke in allocution, denying that he spit on anyone and stating that the testifying officers lied. Defendant further stated that he had not been "in trouble" for 14 years, that he provided care for his daughter with medical issues, and that his girlfriend and mother of his child was "going to be all alone."

¶ 19 The court noted that the applicable Class X sentencing range was a "minimum of six years to a maximum of 30 years" of imprisonment. The court stated that it considered the aggravating and mitigating factors, explicitly noting that it was "impressed" by defendant taking care of his daughter. The trial court sentenced defendant to seven years' imprisonment. The court admonished defendant of his appellate rights, and defendant's oral motion to reconsider his sentence was denied.

¶ 20 In this court, defendant argues that the State failed to prove him guilty beyond a reasonable doubt, that the trial court improperly imposed mandatory Class X sentencing, and that his sentence is excessive and violates the proportionate penalties clause of the Illinois Constitution as applied to him. We consider defendant's sufficiency of the evidence challenge first.

¶ 21 When a defendant claims that the evidence presented at trial is insufficient to sustain his conviction, we look at all the evidence in a light most favorable to the State and ask if any rational trier of fact could find the elements of the charged offense to be proved beyond a reasonable doubt. *People v. Belknap*, 2014 IL 117094, ¶ 67. The trier of fact has the responsibility to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. *People v. Brown*, 2013 IL 114196, ¶ 48. Accordingly, this court will not retry the evidence or substitute its judgment for that of the trier of fact on issues involving the weight of the evidence or credibility of witnesses. *Id.* Under this standard, all reasonable inferences from the evidence must be allowed in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42. A reviewing court will not reverse a criminal conviction unless the evidence is "unreasonable, improbable, or so unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 22 To prove defendant guilty of the aggravated battery of Officer Wieczorek, the State was required to prove, beyond a reasonable doubt, that defendant knowingly and without legal justification made physical contact of an insulting or provoking nature with Officer Wieczorek, whom he knew to be a peace officer (i) who was performing his official duties; (ii) who was battered to prevent performance of his official duties; or (iii) who was battered in retaliation for performing his official duties. 720 ILCS 5/12-3(a)(2) (West 2016); 720 ILCS 5/12-3.05(d)(4)(i)(ii)(iii) (West 2016).

¶ 23 On appeal, defendant contends that the State did not provide sufficient evidence to sustain his conviction. He does not dispute that he was aware that Officer Wieczorek was a police officer performing his official duties on the day of the offense; rather, he argues that the evidence did not establish beyond a reasonable doubt that he knowingly made physical contact of an insulting or provoking nature with Officer Wieczorek. Defendant specifically argues that the evidence failed to establish that any contact made with Officer Wieczorek was done "knowingly," where the evidence "does not support a finding that [defendant] knew that [Officer] Wieczorek – or any other officer – was directly behind him or that his spit would make contact with [Officer] Wieczorek a yard away." Defendant also contends that the evidence at trial failed to prove that the contact made with Officer Wieczorek was "insulting or provoking," where Officer Wieczorek did not testify to any "reaction" from which the trier of fact could have inferred that the officer was insulted or provoked.

¶ 24 A person acts knowingly when he is "consciously aware" of the nature of his conduct and that his conduct is practically certain to cause a particular result. 720 ILCS 5/4-5(a), (b) (West 2016). A person's knowledge is generally established by circumstantial evidence rather than by direct proof. *People v. Castillo*, 2018 IL App (1st) 153147, ¶ 26; see also *People v. Lattimore*, 2011 IL App (1st) 093238, ¶ 44 ("Intent may be inferred (1) from the defendant's conduct surrounding the act and (2) from the act itself.").

¶ 25 Courts have repeatedly found that knowingly or intentionally spitting on a police officer is physical contact of an insulting or provoking nature amounting to battery. See *People v. Wrencher*, 2011 IL App (4th) 080619, ¶ 55 ("For hundreds of years, the common law has regarded deliberate spitting on someone as a battery."); *People v. Peck*, 260 Ill. App. 3d 812, 814 (1994) ("Since the development of early common law, spitting has been recognized as an act sufficient to support a

battery conviction."). A victim does not have to testify that he or she was provoked; the trier of fact can make that inference from the victim's reaction at the time (*People v. Dunker,* 217 Ill. App. 3d 410, 415 (1991)), and a "trier of fact may take into account the context in which a defendant's contact occurred to determine whether the touching was insulting or provoking" (*People v. Fultz*, 2012 IL App (2d) 101101, ¶ 49).

¶ 26 In the present case, defendant's intent, and the insulting or provoking nature of defendant's contact, may be inferred from the context and the act itself. Viewing the evidence in the light most favorable to the State, as we must, we find that a rational trier of fact could find beyond a reasonable doubt that defendant knowingly made contact of an insulting or provoking nature with Officer Wieczorek by spitting on him. The testimony established that defendant was agitated, was "screaming" at the officers, and was "acting violent." When the officers attempted to handcuff defendant, defendant became "combative," and was "flailing his arms," attempting to resist their efforts. Defendant then "turned his head toward" Officer Wieczorek, "hocked up his saliva," and "ejected it out of his mouth." Defendant spit on Officer Wieczorek at least twice, and after spitting, defendant "stated loudly that he had HIV."

¶ 27 From this evidence, a rational fact finder could find that defendant knowingly and intentionally made physical contact of an insulting or provoking nature with Officer Wieczorek, proving the elements of aggravated battery beyond a reasonable doubt. See *People v. Siguenza-Brito*, 235 Ill. 2d 213, 229 (2009) ("[T]he trier of fact is not required to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt.").

¶ 28 We are not persuaded by defendant's contention that the lack of testimony regarding Officer Wieczorek's reaction to being spit on requires a finding that the evidence was insufficient

to sustain his conviction. In *People v. Nichols*, 2012 IL App (4th) 110519, ¶ 43, the fourth district appellate court rejected the defendant's argument that the "routine" nature of a correctional officer's reaction after the defendant threw a liquid in his face raised a reasonable doubt of defendant's battery conviction. The court explained that, "as professionally as those corrections officers may handle it in certain circumstances, juries are nevertheless generally permitted to infer the insulting or provoking nature of those obviously repulsive contacts." *Id.* Similarly here, even without specific testimony regarding Officer Wieczorek's reaction, we conclude that the jury could have reasonably inferred from the circumstances surrounding defendant's actions that he knew, and was consciously aware, that spitting at Officer Wieczorek would result in physical contact that was of an insulting or provoking nature. We also note that courts have held that behavior was insulting or provoking in far less extreme or "obviously repulsive" (*id.*) circumstances. See *People v. DeRosario,* 397 Ill. App. 3d 332, 332–34 (2009) (contact was found to be insulting or provoking when the defendant's "right knee touched [the victim's] back through [a] chair, and his left knee touched her hip," because it occurred in the context of a failed relationship and the room was not crowded). Under the evidence presented here, we find the jury's conclusion that defendant made physical contact of an insulting or provoking nature with Officer Wieczorek by spitting on him is a reasonable inference from the evidence.

¶ 29 We are also unpersuaded by defendant's challenges to the lack of photographic or video evidence, as well as the fact that Officer Wieczorek did not "inventory the vest or have any samples collected from it." Defendant cites no authority requiring such evidence. To the contrary, the testimony of a single witness, if it is positive and the witness credible, is sufficient to convict. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). Proof of physical evidence connecting a defendant to a crime has never been required to establish guilt. *Williams,* 182 Ill. 2d at 192; see also *People v.*

Clarke, 391 Ill. App. 3d 596, 610 (2009) ("The lack of physical evidence in a case does not raise a reasonable doubt where an eyewitness has positively identified the defendant as the perpetrator of the crime."). Here, three officers testified that they saw defendant spit on Officer Wieczorek, and that the spit landed on Officer Wieczorek's chest. It was the responsibility of the trier of fact to evaluate the credibility of those witnesses and to weigh their testimony, and we will not substitute our judgment for that of the jury on such issues. *Brown*, 2013 IL 114196, ¶ 48.

¶ 30 Defendant next contends that the trial court wrongly concluded that mandatory Class X sentencing applied in his case. He argues that his two prior convictions, for offenses committed while he was a minor, are not convictions triggering Class X sentencing. Defendant recognizes that the issue was not raised in the trial court, however, he asks this court to review the merits of his arguments under the plain error doctrine.

¶ 31 Under the plain error doctrine, a reviewing court may excuse a party's procedural default if a clear or obvious error has occurred and either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Staake*, 2017 IL 121755, ¶ 31. A sentence that is not statutorily authorized affects a defendant's substantial rights and is reviewable under the second prong of the plain error doctrine. *People v. Miles*, 2020 IL App (1st) 180736. In particular, this court has repeatedly concluded that plain error allows review of claims that a prior conviction is not a qualifying prior offense for Class X sentencing. See *id.*; *People v. Foreman*, 2019 IL App (3d) 160334, ¶¶ 41, 42. However, before we consider the application of the plain error doctrine, we must first determine whether any error occurred (*People v. Wooden*, 2014 IL App (1st) 130907, ¶ 10), because " 'without error, there can

be no plain error' " (*Wooden*, 2014 IL App (1st) 130907, ¶ 10 (quoting *People v. Smith*, 372 Ill. App. 3d 179, 181 (2007))).

¶ 32 Pursuant to section 5/5-4.5-95(b) of the Unified Code of Corrections, "When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now (the date the Class 1 or Class 2 felony was committed) classified in Illinois as a Class 2 or greater Class felony and those charges are separately brought and tried and arise out of different series of acts, that defendant shall be sentenced as a Class X offender." 730 ILCS 5/5-4.5-95(b) (West 2016).

¶ 33 Defendant contends that he is not eligible for Class X sentencing under the above provision because his convictions, for offenses committed while he was a minor, would have been subject to the exclusive jurisdiction of the juvenile court in 2017. See Pub. Act. 98-61 (eff. Jan. 1, 2014) (amending 705 ILCS 405/5-120 of the Juvenile Court Act to assert jurisdiction over minors under 18). Thus, had such offenses been committed in 2017, they would have been subject to delinquency adjudications, and not Class 1 and Class 2 felony convictions.

¶ 34 This court recently addressed a virtually identical argument in *Miles*, 2020 IL App (1st) 180736. The defendant in *Miles* received a Class X sentence based, in part, on a 2006 conviction for aggravated vehicular hijacking with a firearm and armed robbery, an offense committed while the defendant was a minor. *Id.*, ¶ 3. This court found the defendant's 2006 conviction to be an invalid predicate conviction for Class X sentencing because, had it been committed on the date of the present offense, in 2016, it "would have been resolved with delinquency proceedings in juvenile court rather than in criminal proceedings." *Id.*, ¶ 11. The court reasoned that the plain language in section 5-4.5-95(b)—"an offense now *** classified in Illinois as a Class 2 or greater

Class felony"—required this result because the defendant's 2006 offense would not have been so classified had the defendant committed it in 2016. *Id.*

¶ 35 Similarly here, defendant's 2001 Class 1 felony conviction, and his 2002 Class 2 felony conviction, for offenses committed when defendant was, respectively, 16 and 17 years old, are not "offense[s] now *** classified in Illinois as *** Class 2 or greater Class felon[ies]." Rather, had these offenses been committed under the laws in effect at the time of the present offense, they would have been resolved through delinquency proceedings. See *id.*, ¶¶ 11, 22. Because defendant's offenses would have led to juvenile adjudications rather than felony convictions, neither conviction is a qualifying prior offense for Class X sentencing purposes under the plain language of the Class X statute. *Id*.

¶ 36 Having so found, we also conclude that the Class X sentence imposed on defendant, which was not statutorily authorized and which affected defendant's substantial rights, resulted in plain error. See *id*. (holding that plain error applied where defendant was improperly sentenced under Class X sentencing); *Foreman*, 2019 IL App (3d) 160334, ¶¶ 41, 42 (same). In light of our conclusion, we need not reach defendant's alternative arguments—that mandatory Class X sentencing does not apply because he was sentenced for both prior convictions on the same date, that his sentence is excessive, and that his sentence violates the proportionate penalties clause of the Illinois Constitution as applied to him.

¶ 37 In a petition for rehearing filed after this case's initial filing, the Appellate Defender informed this court that, as of February 5, 2020, defendant satisfied his seven-year term of imprisonment, and was released on a three-year period of mandatory supervised release. Defendant requests that, rather than remanding this matter to the circuit court for resentencing as a Class 2 offender, this court enter the maximum Class 2 sentence of seven years, which he has already

served, and modify his mandatory supervised release term to the two-year term applicable to Class 2 sentencing. See 730 ILCS 5/5-4.5-35(a) (West 2016); Ill. Sup. Ct. R. 615(b)(3); (b)(4) (allowing this Court to reduce the degree of the offense of which the appellant was convicted, and to reduce the punishment imposed by the trial court).

¶ 38 This court ordered the parties to confer to determine whether they agreed to the requested relief. This court was subsequently informed that the State had "no objection to [this court] exercising its authority under Rules 367 and 615(b)(4) and altering the relief awarded in the Rule 23 order by amending his sentence from a 7 year Class X sentence to a 7 year Class 2 sentence as a remedy for the Appellate Court's ruling that he was not eligible for a Class X sentence," but the State reserved its right to appeal this court's judgment. Accordingly, this court will impose the maximum Class 2 sentence of seven years' imprisonment, followed by a two-year term of mandatory supervised release.

¶ 39 For the foregoing reasons, we affirm defendant's conviction for aggravated battery of a peace officer, and vacate defendant's Class X sentence. Pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) to order the correction of a mittimus without remanding the cause to the trial court (*People v. McCray*, 273 Ill. App. 3d 396, 403 (1995)), we order the clerk of the circuit court to amend defendant's mittimus to reflect a Class 2 sentence of seven years' imprisonment followed by a two-year term of mandatory supervised release.

¶ 40 Affirmed in part and vacated in part; mittimus corrected.