2017 IL App (4th) 150533-U

NO. 4-15-0533

FILED
September 26, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
MARCUS D. ANDERSON,	)	No. 14CF1622
Defendant-Appellant.	)	
	)	Honorable
	)	Harry E. Clem,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Turner and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court held (1) defendant waived his challenge to the jury instructions because defense counsel affirmatively acquiesced to the instructions, and (2) the evidence was sufficient to convict defendant of threatening a public official.

¶ 2 In December 2014, the State charged defendant, Marcus D. Anderson, with one count of threatening a public official (720 ILCS 5/12-9(a) (West 2014)). Following a jury trial, defendant was convicted of threatening a public official and was sentenced to five years' imprisonment.

¶ 3 Defendant appeals, arguing the trial court erred by (1) giving a jury instruction that allowed the jury to convict defendant of threatening a public official based on a subjective test of what the public official believed, rather than the proper objective test of what a reasonable

person would have believed and (2) denying defendant's motion for a directed verdict. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 In November 2014, Champaign police officers responded to a call regarding a theft with a gun or physical threat involved. Although defendant did not have a gun, the caller apparently said he did to decrease the response time from the police. Defendant was charged with one count of theft, which the State later moved to dismiss. Defendant was also charged with one count of threatening a public official. In March 2015, the matter proceeded to trial and the jurors heard the following evidence.

¶ 6 A. Evidence and Directed Verdict Ruling

¶ 7 1. *Matthew Henson*

¶ 8 Matthew Henson, a Champaign police officer, testified he was on duty at approximately 8 a.m. on November 29, 2014. That day, Henson responded to a call for an unrelated matter and saw a subject, later identified as defendant, fleeing the area. Henson and several other officers apprehended defendant, who appeared to be intoxicated. Henson noticed a distinct odor of alcohol coming from defendant during their brief conversation, but defendant seemed to understand what was happening. Henson assisted in securing defendant in another officer's squad car, who then transported defendant to the county jail on the theft charge.

¶ 9 2. *Gary Leibach*

¶ 10 Gary Leibach testified, on November 29, 2014, at approximately 8 a.m., he was on duty as a Champaign police officer when he received a dispatch call for a matter unrelated to defendant's criminal charges. When Leibach arrived at the scene, he saw defendant, who was later apprehended by Officer Henson, fleeing the area. Leibach transported defendant to the jail

in his squad car. According to Leibach, his squad car was equipped with video and audio recording equipment, which turned on automatically when he activated his emergency lights. The squad car had two cameras, one facing out the front windshield and the second facing the backseat. Leibach testified an audio and video recording of defendant's transport to the jail had been preserved.

¶ 11 Leibach noticed a strong odor of an alcoholic beverage on defendant's breath. According to Leibach, defendant admitted drinking a 12-pack of beer and stated he had been up all night. However, Leibach opined defendant (1) understood what was happening, (2) knew Leibach was a police officer, (3) knew he was in a squad car, and (4) knew he was being recorded. While in the squad car, Leibach and defendant had a conversation. Defendant was belligerent and loud throughout the recording. According to Leibach, "there was plenty of cursing by [defendant]. He did make mention several times of being on video. He said that if he had the opportunity to shoot me in the head, that he would not shoot me in the head."

¶ 12 The recording showed defendant repeatedly proclaimed his innocence and indicated he was aware he was being recorded and the recording could be used in court. Defendant complained about the "bull shit" police officers and compared the officers to an officer involved in the killing of a black man in Ferguson, Missouri. Defendant then stated, "If I ever got a chance to kill you mother fuckers, bro, I wouldn't do it." Leibach responded, "Well, that's so nice of you to say, Marcus, I appreciate that." Defendant then said, "No, is it on camera?" and "You heard that on videotape?"

¶ 13 While defendant continued his profanity-laced verbal tirade, Leibach attempted to share his personal values with defendant. In response, defendant acknowledged Leibach might be "1 out of 100" and continued arguing police were corrupt. Defendant again brought up the

killing in Ferguson, insisted the officer acted wrongly, and tried to get Leibach to agree. Leibach declined, and defendant concluded he was "just like the fucking rest of them, bro." Defendant then repeatedly said, "I wouldn't kill you, but fuck you, bro." Defendant again acknowledged all his statements were on videotape.

¶ 14 Defendant insisted Leibach would kill someone and then "justify" it to get away with murder. Leibach responded, "What I hear you saying, is that if there's an opportunity to get away with something—that I would do it." Defendant agreed and said, "You're just like me. If [you had] the opportunity, and you could get away with it, you will, bro."

¶ 15 Leibach testified he arrived at the jail and entered a sally port, where he remained with defendant until the jailer opened a secured door. Leibach's video portion of the recording terminated when he turned off his squad car, but audio continued to record. Leibach went to get defendant out of the squad car and thanked him for being cooperative. Leibach then told defendant he was "trying to be cool" and asked defendant to continue to cooperate. Defendant slurred his words but indicated he had been nothing but cooperative. A murmur, but no intelligible words, could be heard on the recording, and then Leibach said, "You would, or wouldn't?" Defendant can be heard saying, "It's all about opportunity." Leibach testified, "I opened the [(car)] door and I had [defendant] step out. He took one step, he turned and looked at me in the eye and he said, [']I would shoot you in the head if I had the chance. I would. It's all about opportunity.['] " According to Leibach, he considered defendant's statement threatening and experienced fear or apprehension as a result of the statement.

¶ 16 After the State rested, defendant moved for a directed verdict. Counsel argued that, even if the trial court believed defendant said, "I would shoot you in the head if I had the chance. I would. It's all about opportunity," the statement was a generalized threat of harm.

Counsel argued the statement did not contain "specific facts indicative of a unique threat" as required by the statute (720 ILCS 5/12-9(a-5) (West 2014)).

¶ 17 The trial court denied the motion, and stated:

> "After a blustery 30-minute ride from the place he was arrested to the place he was going to be incarcerated with the defendant repeatedly disclaiming any intent to harm Officer Leibach that, as soon as the recording device had the appearance of not being functioning any further, the defendant made a threat of specific harm, [']I will shoot you in the head when I have the opportunity,['] and I believe that takes this out of the generalized threat, especially given the circumstances, the lowering of his voice, his—that is the defendant's demeanor and behavior when he thought he was being recorded, that a reasonable *** police officer would take that as a specific threat of harm."

¶ 18 B. Jury Instruction Conference

¶ 19 At the jury instruction conference, defendant objected to the State's instructions defining the offense of threatening a public official and setting forth the propositions the State must prove. Specifically, counsel stated the jury instructions must contain language specifying the threat must be "specific and unique, not a generalized threat of harm." Accordingly, the State tendered an instruction defining the offense, which was a modified version of Illinois Pattern Jury Instructions, Criminal, No. 11.49 (4th ed. 2000). Defense counsel agreed with the modified instruction and the trial court gave the jury the following definition of the offense:

"A person commits the offense of Threatening a Public Official when he knowingly delivers or conveys, directly or indirectly, to a public official by any means a communication containing a threat that was specific and unique and not a generalized threat of harm that would place the public official in reasonable apprehension of immediate or future bodily harm and the threat was conveyed because of the performance or nonperformance of some public duty."

The State tendered a modified issues instruction based on Illinois Pattern Jury Instructions, Criminal, No. 11.50 (4th ed. 2000). Defense counsel agreed with the modified issues instruction and the court instructed the jury as to the propositions the State must prove as follows:

"To sustain the charge of Threatening a Public Official, the State must prove the following propositions:

First Proposition: That the defendant knowingly delivered or conveyed, directly or indirectly, to Gary Leibach a threat to shoot Gary Leibach in the head; and

Second Proposition: That Gary Leibach was a public official at the time of the threat; and

Third Proposition: That the threat was contained in a communication; and

Fourth Proposition: That the threat was conveyed because of the performance or nonperformance of some public duty; and

Fifth Proposition: That when the defendant conveyed the threat, he knew Gary Leibach was then a public official[; and]

Sixth Proposition: That the threat was specific and unique and not a generalized threat of harm that placed Gary Leibach in reasonable apprehension of immediate or future bodily harm."

The jury found defendant guilty of threatening a public official and the court sentenced defendant to five years' imprisonment.

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 On appeal, defendant argues the trial court erred by (1) giving a jury instruction that allowed the jury to convict defendant of threatening a public official based on a subjective test of what the public official believed, rather than the proper objective test of what a reasonable person would have believed; and (2) denying defendant's motion for a directed verdict.

¶ 23 A. Jury Instructions

¶ 24 Section 12-9 of the Criminal Code of 2012 (Code) proscribes, in pertinent part, threatening a public official by communicating "a threat that would place the public official *** in reasonable apprehension of immediate or future bodily harm." 720 ILCS 5/12-9(a)(1)(i) (West 2014). When a threat is made to a sworn law enforcement officer, "the threat must contain specific facts indicative of a unique threat to the person *** and not a generalized threat of harm." 720 ILCS 5/12-9(a-5) (West 2014).

¶ 25 Defendant contends he was denied a fair trial where the jury was erroneously instructed "[t]hat the threat was specific and unique and not a generalized threat of harm that placed Gary Leibach in reasonable apprehension of immediate or future bodily harm."

Specifically, defendant contends this proposition in the issues instruction allowed the jury to convict defendant based on Leibach's subjective apprehension of bodily harm. Further, defendant contends the issues instruction contradicted the definitional instruction which correctly stated the objective requirement that the "threat *** was specific and unique and not a generalized threat of harm that would place the public official in reasonable apprehension of immediate or future bodily harm." The State contends (1) defendant has forfeited this issue, and (2) the jury was properly instructed. Defendant concedes he forfeited this issue, but asks this court for review under the plain-error doctrine.

¶ 26 The supreme court "has recognized that 'a defendant forfeits review of any putative jury instruction error if the defendant does not object to the instruction or offer an alternative instruction at trial and does not raise the instruction issue in a posttrial motion.' " *People v. Patrick*, 233 Ill. 2d 62, 76, 908 N.E.2d 1, 9 (2009) (quoting *People v. Herron*, 215 Ill. 2d 167, 175, 830 N.E.2d 467, 472 (2005)). Here, defendant objected to the State's definition and issues instructions because they did not include the requirement that "the threat must contain specific facts indicative of a unique threat to the person *** and not a generalized threat of harm." 720 ILCS 5/12-9(a-5) (West 2014). Defendant did not raise his subjective/objective-test argument at trial, nor did he preserve the issue in his posttrial motion. Following defendant's objections to the instructions failing to include the language requiring the threat to be specific and unique rather than one of generalized harm, the State offered revised definition and issues instructions including that language. Counsel for defendant specifically agreed to those instructions. Therefore, "defense counsel affirmatively acquiesced to the court's instruction[s], and under the invited error doctrine, defendant cannot object to the instruction[s] on appeal." *People v. Curry*, 2013 IL App (4th) 120724, ¶ 88, 990 N.E.2d 1269.

¶ 27 Despite this, defendant requests this court review his claim under the plain-error doctrine. "Plain-error analysis applies to cases involving procedural default [citation], not affirmative acquiescence [citation]. In a situation like this, where defense counsel affirmatively acquiesces to actions taken by the trial court, a defendant's only challenge may be presented as a claim for ineffective assistance of counsel on collateral attack." *People v. Bowens*, 407 Ill. App. 3d 1094, 1101, 943 N.E.2d 1249, 1258 (2011). (Defendant does not contend in this appeal that his counsel was ineffective.)

¶ 28 B. Sufficiency of the Evidence

¶ 29 Defendant's second argument contends the trial court erred in denying his motion for a directed verdict because defendant's statement was too generalized to qualify as a specific and unique threat, and a reasonable person would not have believed it to be a true threat. Defendant contends this court should review his claim *de novo* because his challenge to the sufficiency of the evidence questions whether the uncontested facts were sufficient to prove the elements of the offense. *People v. Smith*, 191 Ill. 2d 408, 411, 732 N.E.2d 513, 514 (2000). However, defendant further contends we must determine, after viewing the evidence in the light most favorable to the State, whether any rational trier of fact could have found the essential elements of the offense. *People v. Ross*, 229 Ill. 2d 255, 272, 891 N.E.2d 865, 876 (2008).

¶ 30 Here, whether defendant's statement was a proscribed threat that placed the public official in reasonable apprehension of bodily harm was a question for the trier of fact. *In re Gino W.*, 354 Ill. App. 3d 775, 777-78, 822 N.E.2d 592, 594 (2005). The jury had to decide how to interpret defendant's statement and then determine whether Leibach was reasonably placed in apprehension of harm by that remark. Therefore, the relevant inquiry before this court is whether the evidence, viewed in the light most favorable to the State, would allow any rational

trier of fact to find all the elements of the offense of threatening a public official. *Ross*, 229 Ill. 2d at 272, 891 N.E.2d at 876. It is not this court's function to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261, 478 N.E.2d 267, 277 (1985). The credibility of the witnesses and the weight given to their testimony are determinations for the trier of fact. *People v. Sutherland*, 223 Ill. 2d 187, 242, 860 N.E.2d 178, 217 (2006).

¶ 31 Defendant disputes whether (1) defendant's statement was sufficiently specific to be a unique threat, and (2) a reasonable person would have believed the statement constituted a threat. The evidence shows defendant repeatedly stating he would *not* kill a police officer if he had the opportunity to do so. Although defendant repeated this, he also repeatedly made sure the statements were captured on the video recording from Leibach's squad car. After Leibach turned the vehicle off, the video recording stopped and the screen went black. Once the recording appeared to stop and Leibach got defendant out of the squad car, defendant took a step toward Leibach, looked Leibach in the eye, lowered his voice, and said, "I would shoot you in the head if I had the chance. I would. It's all about opportunity." Leibach, apparently taken by surprise, could be heard on the recording asking, "You would? Or wouldn't," and defendant stated he would. Leibach testified he felt threatened and experienced fear or apprehension as a result of defendant's words.

¶ 32 This evidence, viewed in the light most favorable to the State, was sufficient for a rational trier of fact to find beyond a reasonable doubt a specific and unique threat. Defendant contends he was merely speaking in generalities about how negatively he viewed the police and his threat continued in the same hypothetical vein. However, defendant made concerted efforts to ensure his statements that he would *not* kill Leibach if given the opportunity were captured on videotape, and he only made the statement that he *would* kill Leibach once it appeared the

recording had ended. This, coupled with defendant's demeanor—stepping toward Leibach, making eye contact, lowering his voice—is sufficient evidence to permit a trier of fact to conclude defendant made a unique threat to Leibach. Defendant also contends his statement did not indicate he knew any personal information about Leibach. However, defendant's knowledge of Leibach's home address or other personal information is not a prerequisite to a rational trier of fact finding defendant's comment to be a specific and unique threat.

¶ 33 The evidence was also sufficient for a trier of fact to find defendant placed Leibach in objectively reasonable apprehension of immediate or future bodily harm. We agree an objective inquiry is required and, here, the evidence met that requirement. Again, defendant's intimidating demeanor and sudden reversal from his statements made in the squad car support an objective finding of reasonable apprehension. Moreover, Leibach's surprised response and defendant's comment, "It's all about opportunity," support a finding that Leibach was, in fact, in reasonable apprehension of immediate or future bodily harm. Although the test is objective, reasonable apprehension may be inferred from the facts and circumstances of the case, including the conduct of both defendant and Leibach. See *In re C.L.*, 180 Ill. App. 3d 173, 181, 534 N.E.2d 1330, 1337 (1989). Thus, we conclude the evidence was sufficient to support the jury's finding of a unique threat that placed Leibach in reasonable apprehension of bodily harm. Accordingly, we affirm the trial court's judgment.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we affirm the trial court's judgment.

¶ 36 Affirmed.