IN THE COURT OF APPEALS OF IOWA

No. 3-060 / 12-0735
Filed March 13, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHN JACOB TWOMBLY,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

A defendant appeals his conviction for assault on a peace officer. **AFFIRMED.**

Brandon Brown of Parrish, Kruidenier, Dunn, Boles, Gribble, Parrish, Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, John Sarcone, County Attorney, and Olu Salami, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

MULLINS, J.

John Twombly appeals his conviction for one count of assault on a peace officer, in violation of Iowa Code section 708.3A(4) (2011). He claims the district court erred in (1) submitting a jury instruction that was worded too broadly in light of the facts of the case, (2) denying his motion for a new trial and motion in arrest of judgment in light of the inconsistent verdicts, and (3) denying his motion for a new trial as the verdict was contrary to the weight of the evidence. Having reviewed the arguments and the record, we affirm Twombly's conviction.

I. BACKGROUND FACTS AND PROCEEDINGS.

The incident that is the subject of this proceeding occurred on July 23, 2011, Twombly's wedding day. By the time of the reception, Twombly was intoxicated and angry at one of his groomsmen, Travis Cullen, who was acting inappropriately. An off-duty police officer, Andrew Phipps, was hired to work security that night and was in uniform. At approximately 10:40 p.m., Officer Phipps observed Twombly flip over a table and yell something. Twombly appeared agitated. Officer Phipps spoke with Twombly's father, who was attempting to calm Twombly. He told Twombly's father that Twombly would receive no more alcohol and the couple had twenty minutes to say their goodbyes and leave.

A few minutes later, Twombly shoved Cullen, who was dancing with Twombly's new wife. Cullen lost his balance, knocked over a decorative column, breaking it, and landed in Officer Phipps's lap. Officer Phipps decided he needed to place Twombly under arrest, but was afraid of the crowd's reaction. So he

radioed for assistance and stayed within arm's reach of Twombly until backup arrived.

According to Officer Phipps, Twombly began pulling on the patches on his uniform. Officer Phipps told Twombly to go outside, and Twombly responded, "I'll go outside. I'm going to fucking kick your ass." Officer Phipps decided to wait for backup before attempting to place Twombly under arrest. Once he saw the other officers entering the room, Officer Phipps testified Twombly took a stance and threw a punch at him. Officer Phipps was able to avoid being hit, and the other officers rushed Twombly and Officer Phipps, pushing them into the wall. Twombly was wrestled to the ground and placed under arrest.

Twombly was charged with two counts of assault on a peace officer[1] and interference with official acts, a simple misdemeanor. Twombly did not request a jury trial on the simple misdemeanor count, so it was tried to the bench simultaneously with the assault charges. *See* Iowa R. Crim. P. 2.64. After a four-day trial, the jury returned a guilty verdict on one count of assault on a peace officer with respect to Officer Phipps, and not guilty on the other assault. The court also found Twombly not guilty of interference with official acts. Twombly filed two posttrial motions, both of which were denied following a hearing. Twombly was given a ninety-day suspended sentence and placed on probation for one year. He was ordered to pay a fine, complete 100 hours of community

[1] The second count of assault on a peace officer was based on Twombly striking another officer while he was being placed under arrest. The jury found Twombly not guilty of that assault, and it is not the subject of this appeal.

service, and complete substance abuse and assaultive behavior classes. He now appeals.

II. JURY INSTRUCTION.

During trial Twombly objected to the marshaling jury instruction to be given on the assault-on-a-peace-officer count and requested instead the court submit the instruction he requested. Twombly asked that the instruction limit the assaultive behavior by stating, in part,

> 1. On or about the 23rd day of July, 2011, Mr. Twombly attempted to punch Officer Phipps with a closed fist.
> 2. This act was intended to cause pain or injury, result in physical contact which was insulting or offensive, or place Officer Phipps in fear of an immediate physical contact which would have been painful, injurious, insulting, or offensive to Officer Phipps.

The court denied the request, instead giving its proposed instruction, which stated, in part,

> 1. On or about the 23rd day of July, 2011, the defendant did an act which was:
> a. intended to cause pain or injury or intended to result in physical contact which was insulting or offensive to Officer Phipps; or
> b. intended to place Officer Phipps in fear of an immediate physical contact which would have been painful, injurious, insulting, or offensive to Officer Phipps.

On appeal, Twombly contends the court erred in giving the instruction as substantial evidence does not support the broadly worded instruction. Twombly asserts that the focus of the evidence and argument at trial was on the punch thrown. The jury instruction given, according to Twombly, permitted the jury to find the assaultive behavior in actions that were not supported by substantial evidence, such as pulling on Officer Phipps's uniform and the verbal threat.

"Parties to a lawsuit are entitled to have their legal theories submitted to the jury if such theories are supported by substantial evidence." *State v. Hogrefe*, 557 N.W.2d 871, 876 (Iowa 1996). If reasonable minds would accept the evidence as adequate to reach a conclusion, it is substantial to support a jury instruction. *Id*. We view the evidence in the light most favorable to the party requesting the instruction. *Id*. The failure to given an instruction does not warrant a reversal unless it results in prejudice. *Beyer v. Todd*, 601 N.W.2d 35, 38 (Iowa 1999).

Here, substantial evidence supported the court's submission of the more broadly worded instruction. There was substantial evidence to support an assault on Officer Phipps other than the thrown punch. The jury could have concluded the verbal threat from Twombly after Officer Phipps asked him to step outside placed the officer "in fear of an immediate physical contact which would have been painful, injurious, insulting, or offensive to Officer Phipps." In addition, Twombly's pulling on Officer Phipps's uniform could also be found to be "intended to result in physical contact which was insulting or offensive to Officer Phipps." Because these actions also support the conclusion that Twombly assaulted the officer, the court correctly used the broadly worded instruction, instead of using Twombly's instruction, which limited the assaultive conduct to the punch alone. We agree with the district court's conclusion that, a "reasonable jury could find by evidence beyond a reasonable doubt, either of the alternatives (a) or (b) or both of them."

III. INCONSISTENT VERDICTS.

Next, Twombly asserts the court erred in denying his posttrial motion on the ground that the court's not-guilty verdict on the interference count is inconsistent with the jury's guilty verdict on the assault count. The court found on the interference count that "the State failed to prove by evidence beyond a reasonable doubt that on July 23, 2011, the defendant knowingly resisted or obstructed a peace officer in the official act of arrest or that the defendant knowingly refused to comply with orders from police officers." Twombly contends the evidence from Officer Phipps established two things: "he gave Mr. Twombly an official directive to go outside. Second, . . . the alleged 'assault' occurred during the time Officer Phipps attempted to take Mr. Twombly into custody." He claims the court's not-guilty verdict on the interference charge inherently determined insufficient evidence existed to support the contention that he assaulted Officer Phipps when Officer Phipps attempted to place him under arrest. Thus, he asserts the verdicts are factually and legally inconsistent.

For a verdict to be found to be inconsistent, it must be "so logically and legally inconsistent as to be irreconcilable within the context of the case." *State v. Fintel*, 689 N.W.2d 95, 100 (Iowa 2004). The district court found, in rejecting this claim, that:

> Interference is not a lesser included offense of Assault on a Peace Officer. It is possible to commit Assault on a Peace Officer without committing Interference with Official Acts. . . .
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> . . . [T]he jury could reasonably have found by evidence beyond a reasonable doubt that by tugging at the patches on Officer Phipps's uniform and threatening to kick his ass, the defendant did an act that was intended to result in physical contact which was insulting or offense to Officer Phipps or was intended to

> place him in fear of immediate physical contact which would be painful, injurious, insulting, or offensive to him. According to Officer Phipps's testimony, this occurred before back up arrived and before the police attempted to take the defendant into custody or remove him from the scene of the wedding reception when the alleged interference occurred.
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> . . . We cannot know what the jury took as an assault on the evidence and instructions submitted to it because the jury returned a general verdict. While this is a plausible argument, the point is that it is possible on the evidence presented to the jury to find that the defendant assaulted Officer Phipps before the defendant allegedly interfered with official acts.
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> Regardless of whether the defendant assaulted Officer Phipps before backup arrived and before Phipps attempted to take the defendant into custody, the Court could reasonably find that the State failed to prove by evidence beyond a reasonable doubt that the defendant knowingly resisted or obstructed a peace officer in the official act of arrest or that the defendant knowingly refused to comply with the orders of police officers because Officer Phipps, Officer Grimes, and numerous other officers overcame the defendant with such overwhelming force that the defendant had no opportunity to resist.

We agree with the district court's conclusion and find Twombly's attempt to analogize his case to *State v. Halstead*, 791 N.W.2d 805, 808 (Iowa 2010), unpersuasive as Twombly's case is not a "compound inconsistency."

IV. WEIGHT OF THE EVIDENCE.

Finally, Twombly asserts the district court erred in denying his motion for a new trial as the jury's verdict was contrary to the weight of the evidence. Twombly contends the weight of the credible evidence favors a finding that Officer Phipps was not accosted, that Twombly did not tug on his patches, and that Twombly never threatened harm. He claims no other witness saw the tugging or heard the threats, and many witnesses, though not all, testified Twombly never threw a punch.

Our review of the district court's denial of a new trial is for abuse of discretion, and trial courts have wide discretion in deciding motions for a new trial. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). The discretion is to be exercised carefully and sparingly, as it has the potential to lessen the role of the jury as the principal trier of fact. *Id*. Our review is "limited to a review of the exercise of discretion by the trial court, not of the underlying question of whether the verdict is against the weight of the evidence." *State v. Reeves*, 670 N.W.2d 199, 203 (Iowa 2003).

In denying the motion for a new trial, the district court stated, in part:

> The weight of the credible evidence supports a finding that the defendant drank too much on his wedding night; that he was upset by his groomsman and had to be calmed down by his father; that he then confronted his groomsman who was dancing inappropriately with the bride; that he and the groomsman fought or engaged in horseplay that caused them to fall into a decorative column breaking it right in front of Officer Phipps; and that Officer Phipps became alarmed and urgently called for backup twice; the second call was 911, officer in distress. Before Officer Grimes and the other police officers arrived, the defendant drunkenly accosted Officer Phipps, tugged on the patches on his uniform and threatened to kick his ass. Bedlam erupted when Officer Grimes and the other officers arrived. Officer Phipps, Officer Grimes, and the other police officers overwhelmed the defendant with such force that he could not physically assault them or resist them.
>
> Both the defendant and the police bear responsibility for the events of the evening; the defendant for his drunken, hot-headed behavior toward his groomsman and Officer Phipps and the police for overreacting. The Court does not find this verdict to be contrary to the weight of the evidence under the *Maxwell* and *Ellis* standard. After considering the credibility of the witnesses and weighing the evidence, the Court finds and concludes that this difficult case has been resolved appropriately and that a miscarriage of justice has not occurred.

We find no abuse of discretion by the district court. We therefore affirm the court's ruling on the motion for a new trial and Twombly's conviction and sentence.

AFFIRMED.