

No. 1-09-0064

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).

FIRST DIVISION
March 31, 2011

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. 07 CR 7571
)	
RONALD GOINGS,)	Honorable
)	Thomas V. Gainer,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hall and Justice Hoffman concurred in the judgment.

O R D E R

HELD: Pursuant to *People v. McDonald*, 401 Ill. App. 3d 54 (2010), the trial court committed reversible error when it instructed the jury on an uncharged offense.

After a jury trial, defendant Ronald Goings was convicted of two counts of aggravated battery and sentenced to concurrent prison terms of 10 and 6 years. On appeal, he contends he was

prejudiced when, over defense objection and after all the evidence had been presented, the trial court granted the State's request that the jury be instructed regarding an uncharged offense. Defendant also contends that the trial court did not comply with Supreme Court Rule 431(b) (eff. May 1, 2007), when it failed to permit each potential juror to indicate whether he or she understood and accepted the principles outlined by *People v. Zehr*, 103 Ill. 2d 472 (1984). For the reasons that follow, we reverse defendant's convictions and remand for a new trial.

Defendant was charged with multiple counts of aggravated battery after an incident during which Officer Richard Rizzo was bitten and Detention Aid Darius Daniels was hit in the face.

During *voir dire*, the court outlined the *Zehr* principles. The court then reviewed the *Zehr* principles and asked potential jurors sitting on each "side" of the gallery and those in the jury box, after each principle, if anyone disagreed with it. Defendant did not object. A jury was then selected, and the matter proceeded to trial.

Chicago police officer Timothy Philbin testified that defendant was pulled over after he was observed running a stop sign. Defendant was ultimately taken into custody and transported to a police station.

Detention Aid Darius Daniels testified defendant was uncooperative during the fingerprinting process, so Daniels asked

whether defendant wanted to get fingerprinted. When defendant answered no, Daniels put him in a holding cell. Once placed in the cell, defendant banged on the bars and said he wanted to be fingerprinted. When Daniels and Officers Richard Rizzo and Justin Mielcarz attempted to move other prisoners out of that cell, defendant also stepped out. Although defendant was told to get back inside, he refused, so Daniels and the officers decided to move him to another cell. Daniels and Rizzo held defendant's arms and Mielcarz was standing behind defendant when defendant "snatched" his arms and began pulling away.

The three men subdued defendant and then dragged him to the other cell. Once defendant was placed inside, Rizzo and Mielcarz exited first because Daniels had the key. Defendant then jumped between the bars and slapped Daniels. Daniels grabbed defendant, and, with assistance, pushed him back into the cell.

Officer Richard Rizzo testified that defendant's behavior was "very disruptive." Defendant was uncooperative when Rizzo, Daniels, and Mielcarz attempted to move him to a different cell, so they "picked him up and *** dragged him" approximately 10 feet. Once there, defendant used his body to prevent the cell door from closing and struck Daniels in the face. As Rizzo and the others tried to get defendant into the back of the cell, defendant began swinging his arms and fists, striking both Rizzo and Daniels. Defendant ultimately bit Rizzo on the finger.

Rizzo testified that "necessary force" was used to try to place defendant on the ground and to permit him, Daniels and Mielcarz to exit the cell. He admitted that defendant was struck on the back, but denied placing his hand over defendant's mouth and did not see anyone kick defendant.

Defendant testified that during the fingerprinting process Daniels seemed "annoyed," stated he would fingerprint defendant later, and placed defendant in a cell. Defendant was upset that he was not fingerprinted immediately because he did not want to be in custody any longer than necessary. He shook the bars of the cell and stated that he had not been fingerprinted. Defendant admitted that his behavior was "obnoxious" and disruptive. Daniels came to the cell and told defendant to "stop kicking them bars or else." When defendant did not stop, Daniels left and then returned with Rizzo and Mielcarz.

The cell door was opened and defendant was instructed to step out. Rizzo grabbed defendant's arm and "jacked" it toward the shoulder blades. Daniels then opened a door to another area. Once the group reached the new cell, defendant was hit on the back of the head. He doubled over and then "began to get beat."

Defendant was afraid for his life and began yelling for help. Rizzo then placed his hand over defendant's nose and mouth. Defendant bit Rizzo's hand, as it was impeding his ability to breathe. The officers then stopped striking him and

Daniels opened the cell door. Defendant was hunched over as he entered the cell. Once he was inside, he released Rizzo's finger. When defendant looked up, he saw Daniels lunging toward him in a threatening manner, so he slapped Daniels.

At the close of evidence, the trial court instructed the jury on, *inter alia*, aggravated battery and self defense. At the State's request and over defendant's objection, the jury was also instructed that a peace officer with an arrested person in his custody was justified in the use of any force which he reasonably believed was necessary to prevent that person's escape or to defend himself or someone else from bodily harm while preventing the escape. See Illinois Pattern Jury Instructions, Criminal, No. 24-25.13 (4th ed. 2000).

The jury ultimately found defendant guilty of two counts of aggravated battery. Defendant's motion for a new trial argued, among other claims, that the court erred when it instructed the jury on an officer's use of force to prevent an escape when defendant was not charged with escape. The court denied the motion and sentenced defendant to concurrent prison terms of 10 and 6 years.

On appeal, defendant first contends that this cause must be remanded for a new trial when, after the close of evidence and over defense objection, the trial court instructed the jury regarding an uncharged offense.

While it rests within the trial court's discretion to determine the issues raised by the evidence presented at trial and whether a particular jury instruction should be given, there must be some evidence in the record to justify the instruction. *People v. Mohr*, 228 Ill. 2d 53, 65 (2008). An instruction that is not supported by either the evidence or the law should not be given. *Mohr*, 228 Ill. 2d at 65. This court has previously held that it is reversible error to give a jury instruction which introduces offenses or elements of offenses that a defendant has not been properly charged with. *People v. McDonald*, 401 Ill. App. 3d 54, 61 (2010); see also *People v. McCauley*, 2 Ill. App. 3d 734, 736 (1972) (the "natural result" of jury instructions based on uncharged crimes is prejudice to the defendant).

This court's holding in *People v. McDonald*, 401 Ill. App. 3d 54 (2010), is instructive. In that case, the defendant was indicted for intentional and knowing murder, but not felony murder or armed robbery. During the jury instruction conference, the trial court agreed to instruct the jury on the concepts of self defense, the inability of an initial aggressor to claim self defense and second degree murder. The court also agreed, over the defendant's objection, to instruct the jury as to the elements of armed robbery and that the defense of justifiable use of force was not available when a defendant committed a forcible felony like armed robbery.

This court relied on our supreme court's decision in *People v. Mohr*, 228 Ill. 2d 53 (2008), to find that the trial court erred when it instructed the jury on an uncharged offense, as the jury could have assumed that the elements of the armed robbery were definitively established because the only mention of the offense was during the State's closing argument and the giving of the jury instructions. *McDonald*, 401 Ill. App. 3d at 61-62. Although no evidence of the armed robbery was presented during trial and the defendant was not permitted an opportunity to raise any defense to the claim that he committed the act, the jury was permitted to consider whether he was guilty of this uncharged offense. *McDonald*, 401 Ill. App. 3d at 62. Essentially, the defendant was forced to defend himself against an uncharged offense that was first raised in instructions to the jury. *McDonald*, 401 Ill. App. 3d at 62. We found that the insertion of an uncharged crime into the trial after the close of evidence through the jury instructions created a strong probability of jury confusion and denied the defendant a fair trial. *McDonald*, 401 Ill. App. 3d at 64.

Here, defendant was charged with aggravated battery. At trial, he admitted that he slapped Daniels and bit Rizzo, but asserted that he acted in self defense. Although the record does not contain any testimony indicating that defendant tried to escape, the jury was instructed that a peace officer was

justified in the use of any force which he reasonably believed was necessary to prevent an arrested person from escaping from custody or to defend himself while preventing the escape.

Presenting the complained of instruction to the jury at the close of evidence without any discussion of an alleged escape during trial created a risk that the jury assumed there was evidence, not presented during trial, that defendant had actually tried to escape, and, consequently, could have disregarded defendant's self defense claim on that basis. See *McDonald*, 401 Ill. App. 3d at 63. Defendant was prejudiced when the trial court instructed the jury on an uncharged offense because the instruction created a strong probability of jury confusion. *McDonald*, 401 Ill. App. 3d at 61, 64; see also *McCauley*, 2 Ill. App. 3d at 736 (it is reversible error to inject issues into the case, through a jury instruction, which are not properly before the jury).

Here, the State's evidence at trial, absent the erroneous jury instruction and if believed by the jury, was sufficient to convict defendant of aggravated battery. See *McDonald*, 401 Ill. App. 3d at 64 (addressing double jeopardy). However, two conflicting versions of events were presented at trial. Absent the complained of jury instruction, if the jury believed defendant's version of events, the outcome of the trial could have been different. Thus, we find that the trial court committed reversible error when it permitted the State to inject

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an uncharged offense into the trial after the close of evidence.
McDonald, 401 Ill. App. 3d at 64-65.

Because we are reversing defendant's convictions and remanding this cause for a new trial, we do not reach defendant's contention that the trial court failed to comply with Rule 431(b).

For the reasons set forth above, we reverse defendant's convictions for aggravated battery and remand for a new trial.

Reversed and remanded.