

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).

2011 IL App (4<sup>th</sup>) 100196-U

Filed 10/14/11

NO. 4-10-0196

IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
WILLIAM O. SPIVEY,	)	No. 09CF160
Defendant-Appellant.	)	
	)	Honorable
	)	Robert L. Freitag,
	)	Judge Presiding.

---

JUSTICE APPLETON delivered the judgment of the court.  
Justices Pope and McCullough concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not abuse its discretion in refusing a proposed defense instruction on prior inconsistent statements, because there could be a reasonable difference of opinion on the applicability of the instruction.

¶ 2 A jury found defendant, William O. Spivey, guilty of aggravated battery (720 ILCS 5/12-4(a) (West 2008)), and the trial court sentenced him to six years' imprisonment. Defendant appeals, arguing that the court abused its discretion by refusing defense instruction No. 1, an instruction on prior inconsistent statements (Illinois Pattern Jury Instructions, Criminal, No. 3.11 (4th ed. 2000) (hereinafter IPI Criminal 4th No. 3.11)). We find no abuse of discretion in the refusal of the instruction. Therefore, we affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 A. The Information

¶ 5 On February 26, 2009, the State filed an information charging defendant with aggravated battery (720 ILCS 5/12-4(a) (West 2008)) in that on February 24, 2009, he spat on Robert Raycraft, a peace officer who was performing his duties.

¶ 6 B. The Jury Trial

¶ 7 1. *Benjamin Klekamp*

¶ 8 In the jury trial, which occurred on November 9, 2009, Benjamin Klekamp testified as follows. He was a security officer at Bloomington Public Library, and on February 24, 2009, "[t]here was a disturbance" in the library. The disturbance involved defendant. Klekamp telephoned the police and asked defendant to leave. He followed defendant out of the library.

¶ 9 While walking down the street, defendant encountered the police. Klekamp testified he was standing 15 to 20 feet away when he saw defendant spit at the police officers as they searched him and arrested him. (Klekamp explained: "I wanted to stay with the officers because I wanted to get their names for my library reports, and I knew they would like to get a report from me.") According to Klekamp, the police officers warned defendant that if he did not stop spitting at them, they would pepper-spray him. They laid defendant on the ground, but he persisted in trying to spit on them. After another verbal warning, they sprayed him with pepper spray.

¶ 10 On cross-examination, Klekamp identified defendant's exhibit No. 1, a statement he wrote on February 24, 2009, for the Bloomington police. This was all he wrote in his statement: "Mr. Spivey was in the library cursing at patrons. Library security guard approached Mr. Spivey to ask him to stop. Mr. Spivey then proceeded to spit towards the security officer and walk around the library spitting on the floor and towards other patrons."

¶ 11 On cross-examination, defense counsel asked Klekamp:

"Q. And it was important to you to put in important information into your report, correct?

A. Yes.

Q. Okay. So, of the time that you were there, and the information that you have for Mr. Spivey as he is with their—with the police department, could you please highlight in that report where you indicate that you were there with the police?

A. I did not indicate where I was with the police.

Q. Would you highlight in that report where you are ten to 15 feet away from them the whole time?

A. I did not indicate that.

Q. Would you highlight in that report where the defendant was spitting towards or away from officers?

A. Other than myself, I did not write that.

Q. Okay. In fact, you don't have anything in that police report concerning you standing there with the police department, do you?

A. No, sir."

¶ 12

On redirect examination, Klekamp explained:

"I had written in this statement everything that pertained to me. I specifically remember it being very cold, and I was in a short-sleeved shirt and I was rushed. I did, however, fill out a complete report, what happened within the library that is in the library records.

That's what I remember about that statement."

¶ 13 On recross-examination, defense counsel asked Klekamp:

"Q. So, officers dealing with someone to the extent that they are pepper spraying somebody isn't an event important enough to note in a report to the police?

A. I didn't see it as that, no."

¶ 14 *2. Robert A. Raycraft*

¶ 15 Robert A. Raycraft testified he was a Bloomington police officer and that on February 24, 2009, he responded to a report of a disturbance at the public library. Klekamp pointed out defendant to Raycraft as Raycraft was coming up a hill. Because Raycraft was by himself and because the disturbance reportedly had been of an aggressive nature, he asked defendant to put his hands on top of the squad car. Defendant demanded to be left alone. Again Raycraft asked him to put his hands on top of the squad car. Defendant then spat at Raycraft and called him a "bitch."

¶ 16 The prosecutor asked Raycraft:

"Q. Where exactly did he spit on you?

A. Part of it hit me in the chest area and part of it hit me in the leg area, ma'am. It was more of a large spray coming at me. I'm sure it got me elsewhere. That's the two biggest pieces I remember hitting me."

¶ 17 Another police officer, named Brace, arrived, and they laid defendant down in a grassy area because he was struggling with them. Even when defendant was handcuffed and facedown on the ground, he persisted in trying to spit on the police officers. Brace showed

defendant a can of pepper spray and warned him that if he kept spitting, he would use it on him. Defendant spat on Brace and received a burst of pepper spray in the face.

¶ 18 On cross-examination, Raycraft admitted he did not turn on the video camera in his squad car so as to record his confrontation with defendant. Raycraft also admitted that in his police report (defendant's exhibit No. 2), he stated merely that defendant had spat on him, without specifying that the spittle had landed on his chest and his leg.

¶ 19 *3. The Jury Instruction Conference*

¶ 20 In the jury instruction conference, defense counsel offered defendant's instruction No. 1, a pattern instruction on prior inconsistent statements (IPI Criminal 4th No. 3.11). The proposed instruction read as follows:

"The believability of a witness may be challenged by evidence that on some former occasion he made a statement that was not consistent with his testimony in this case. Evidence of this kind may be considered by you only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom.

It is for you to determine whether the witness made the earlier statement, and, if so what weight should be given to that statement. In determining the weight to be given to an earlier statement, you should consider all of the circumstances under which it was made."

¶ 21 The trial court refused defendant's instruction No. 1 for the following reason:

"I think impeachment by omission is appropriate type of

impeachment, and I think you certainly have the right under this evidence to make such arguments; but I still don't think it's inconsistent, and so I don't think this instruction is particularly helpful to the jury. You're certainly free to argue those omissions and the fact that they impeach the testimony, but this instruction in the court's view goes to inconsistent statements, not incomplete and so I'm going to refuse that instruction."

¶ 22 *4. Defense Counsel's Closing Argument*

¶ 23 In his closing argument, defense counsel questioned whether "Officer Raycraft [was] sp[a]t on at all," given that he was the only witness to testify that defendant spat on him and given that he did not include "where he was specifically sp[a]t on in his police report."

¶ 24 As for Klekamp, defense counsel noted that his written statement for the Bloomington police omitted "[t]he most important part," "[t]he most interesting stuff," that occurred outside between defendant and the police.

¶ 25 **II. ANALYSIS**

¶ 26 The appellate court has held: "Impeachment by omission of facts may be used where \*\*\* it is shown that the witness had the opportunity to make a statement about the omitted facts and, under the circumstances, a reasonable person ordinarily would have included the facts." *People v. McWhite*, 399 Ill. App. 3d 637, 642 (2010). The trial court allowed defense counsel to argue impeachment by omission, and defense counsel did so.

¶ 27 Trial court did not think, however, that IPI Criminal 4th No. 3.11 would be helpful to the jury because it was unclear how the testimony of Klekamp and Raycraft actually contradicted

their earlier statements. No one could reasonably disagree with the court regarding Raycraft. He wrote in his report that defendant spat on him, and he testified that defendant spat on his chest and his leg. Raycraft's testimony was merely a more detailed version of what he stated in his report. There was no inconsistency here.

¶ 28 With regard to Klekamp, it was a closer call whether IPI Criminal 4th No. 3.11 would have been apposite. We understand defendant's argument, and it is a reasonable argument: Klekamp's testimony was incompatible with his previous statement because spitting on the police was an important event that Klekamp witnessed, and, under the circumstances, no reasonable person writing a statement for the police would have omitted that event.

¶ 29 On the other hand, a reasonable counterargument could be made. The police themselves were witnesses to defendant's spitting on them, and hence they were perfectly capable of documenting that criminal activity. Klekamp, therefore, confined himself to writing about what he knew and what the police would not have known, namely, what had happened in the library. From his perspective, his statement was strictly information for the benefit of the police in their investigation, and he did not need to tell them what they themselves had witnessed.

¶ 30 "A court's decision to decline a particular instruction is subject to an abuse-of-discretion standard of review" (*People v. Moore*, 343 Ill. App. 3d 331, 338 (2003)), which is the most deferential standard of review known to the law (*People v. Coleman*, 183 Ill. 2d 366, 387 (1998)). The trial court abused its discretion by refusing defendant's instruction No. 1 only if no reasonable person could take the trial court's view. *People v. Bailey*, 405 Ill. App. 3d 154, 173 (2010). Reasonable persons could disagree on the applicability of defendant's instruction No. 1, and therefore we find no abuse of discretion in the refusal of the instruction.

¶ 31 Besides, "[f]ailure to give an appropriate jury instruction requires reversal only where the defendant was so prejudiced by the failure to give the instruction as to affect the outcome of the verdict." *People v. Bertucci*, 81 Ill. App. 3d 851, 859 (1980). Before being so instructed, juries probably already know that someone who tells inconsistent stories could be considered an unreliable narrator.

¶ 32 III. CONCLUSION

¶ 33 For the foregoing reasons, we affirm the trial court's judgment. We award the State \$50 in costs against defendant.

¶ 34 Affirmed.