NOTICE
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2011 IL App (4th) 100185-U

Filed 9/27/11

NO. 4-10-0185

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
ERIC L. McCLELLAN,	)	No. 08CF1008
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Knecht and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying defendant's request to instruct the jury on resisting or obstructing a peace officer.

¶ 2 Following a November 2008 trial, a jury found defendant, Eric L. McClellan, guilty of aggravated battery for making physical contact of an insulting nature with a police officer knowing the police officer was engaged in the execution of his official duties (720 ILCS 5/12-4(b)(18), 12-4(e)(2) (West 2006)). Defendant appeals, arguing the trial court erred in refusing defendant's tendered jury instruction for resisting or obstructing a peace officer. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On June 2, 2008, the State charged defendant by information with one count of aggravated battery, alleging defendant made physical contact of an insulting or provoking nature

with Officer David McLearin, by placing his hands on McLearin's chest and pushing, knowing McLearin was a police officer engaged in the execution of his official duties. Later that month, a grand jury indicted defendant on the same charge.

¶ 5 At defendant's November 2008 jury trial, Officer McLearin testified he was on duty in the early morning hours of May 31, 2008. He testified he was in the full Champaign police officer uniform and was riding by himself in a fully marked squad car. According to his testimony, he was called to a fight in progress on North Randolph at 3 a.m. He was the first of three officers on the scene. When he arrived, 10 people were in the yard, but they ran into an apartment. It sounded to McLearin like the fight continued inside. After investigating the fight, the officers on the scene arrested Leman Smith. McLearin testified he had to struggle with Smith to get him handcuffed. Defendant was upset and yelling, asking why Smith was being arrested. Officer McLearin testified he told defendant he needed to leave the area, which defendant eventually did.

¶ 6 At 4:20 a.m. the same morning, McLearin was dispatched on a welfare check to the 50th block of East Bradley. McLearin stated he was the first officer on the scene by 30 to 45 seconds. According to McLearin's testimony, defendant was standing on the corner by himself approximately 20 to 30 feet away. McLearin testified he exited his vehicle and asked defendant what he wanted. According to McLearin, defendant said, " 'What's my brother's mother fucking bond.' " McLearin told defendant he did not know and his brother would go before a judge in the morning. McLearin stated defendant moved toward him as he was walking up to the sidewalk. McLearin testified defendant called him a " 'bogus bitch' " and said whenever he got a chance he would " 'take care of [McLearin's] ass.' " McLearin stated defendant was within arm's

length at that point. McLearin testified defendant was upset, put his hands on McLearin's chest, and pushed him. According to McLearin, at that point, the situation changed from an investigation to something different. McLearin testified he grabbed defendant's hands and pushed him back.

¶ 7 According to McLearin, defendant then clenched his fists and came toward McLearin again. McLearin sprayed defendant with pepper spray. Although not noted in his report, McLearin testified defendant continued to come toward him. McLearin testified he then tackled defendant who continued to struggle and tried to punch McLearin. At that point, McLearin told defendant he was under arrest. McLearin testified he grabbed defendant's arm when defendant tried to punch him and flipped defendant onto his stomach. McLearin stated defendant tucked his hands under his chest. McLearin and Officer Morris, who arrived during the confrontation, had to get defendant's hands from underneath him so he could be cuffed.

¶ 8 McLearin testified he had no intent on arresting defendant when he first exited his vehicle and walked toward defendant. Defendant was not a person of interest at that time. McLearin also testified he did not suffer any injuries during the altercation with defendant.

¶ 9 Defendant testified he and Leman Smith were at the home of a woman with whom defendant was involved. Two other women were also at the home. The woman with whom defendant was involved had a child. The child's father came to the home and started arguing with the mother. When the police arrived, the child's father ran off, and everyone else went back in the house. The police started knocking on the door of the home. Smith eventually opened the door. The police grabbed him, dragged him outside the house, and arrested him. According to defendant, he and Officer McLearin had a verbal altercation at that time.

¶ 10 Defendant testified he later mistakenly called 9-1-1, instead of the police satellite station, to determine Smith's bond. He hung up after calling 9-1-1, but the dispatcher returned his call. Defendant testified he identified himself and told the dispatch operator why he called. Defendant testified Officer Morris stopped him shortly thereafter, and he and Morris were talking about why defendant called 9-1-1. Defendant testified he then saw Officer McLearin make a U-turn in the middle of the street and park behind Officer Morris. According to defendant, Officer McLearin pulled out his Mace and sprayed defendant. Defendant testified he and McLearin had not exchanged any words when this happened. Defendant stated to McLearin, "[W]hat did I do. I ain't do nothing." At that point, McLearin told defendant he was under arrest and cuffed him. Defendant denied pushing either McLearin or Morris.

¶ 11 During the jury instruction conference, defense counsel tendered a jury instruction for resisting or obstructing a peace officer, which defense counsel argued was a lesser-included offense of aggravated battery. The State objected, arguing resisting or obstructing a peace officer was not a lesser-included offense under the facts of this case. The trial court refused the instruction. The jury convicted defendant of aggravated battery.

¶ 12 In November 2008, defendant filed a motion for acquittal or, in the alternative, a motion for a new trial. In January 2009, the trial court denied defendant's motion. In April 2009, the court sentenced defendant *in abstentia* to 8 1/2 years' imprisonment. That same month, defense counsel filed a motion to reduce his sentence. On October 9, 2009, defendant appeared in custody, and the court advised him of the sentence imposed in April 2009. In October 2009, the Champaign County circuit court clerk filed a notice of appeal on defendant's behalf.

¶ 13 The office of the State Appellate Defender (OSAD) filed a motion for summary

remand with directions to strike the notice of appeal and hear the timely motion for reduction of sentence filed by defense counsel. In January 2010, this court issued a summary order, granting OSAD's motion and remanding the cause with directions to strike the notice of appeal and hold a hearing on defense counsel's timely filed motion to reduce sentence.

¶ 14 In February 2010, defendant wrote the trial court a letter arguing he was not guilty of aggravated battery and asking the court for probation and community service instead of a term of imprisonment. In March 2010, the court denied defendant's motion to reduce sentence.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 According to defendant, resisting a peace officer is a lesser-included offense of aggravated battery. As a result, defendant argues the trial court erred in refusing to give the jury instruction. Defendant relies primarily on *People v. Pedersen*, 195 Ill. App. 3d 121, 551 N.E.2d 1087 (1990), as support for his argument the court erred in not giving an instruction on resisting a police officer. In *Pedersen*, the defendant was charged with aggravated battery, and the trial court refused his request to instruct the jury on the offense of resisting a police officer. *Pedersen*, 195 Ill. App. 3d at 125-26, 551 N.E.2d at 1090. The Second District found the trial court erred. Defendant argues the case *sub judice* is almost identical to *Pedersen*, and the court erred in not instructing the jury on resisting or obstructing a peace officer.

¶ 18 Whether a charged offense encompasses an included offense is a matter of law which is reviewed *de novo*. *People v. Landwer*, 166 Ill. 2d 475, 486, 655 N.E.2d 848, 854 (1995). However, a trial court's decision whether to give a jury instruction is reviewed under an

abuse-of-discretion standard. *People v. Mohr*, 228 Ill. 2d 53, 65-66, 885 N.E.2d 1019, 1026 (2008). An instruction should not be given unless some evidence in the record justifies that instruction. *Mohr*, 228 Ill. 2d at 65, 885 N.E.2d at 1025-26. Because the question before this court is whether the court erred in refusing the tendered instruction, we will not disturb the court's decision unless we determine the court abused its discretion.

¶ 19 Based on the evidence presented in the trial court, the court did not abuse its discretion in refusing the resisting-or-obstructing-a-peace-officer jury instruction. The record does not contain any evidence justifying an instruction for resisting or obstructing a police officer. The State's charge alleged defendant pushed Officer McLearin. The State did not charge defendant with anything that occurred after this initial push. The jury had to make a choice whether to believe Officer McLearin's testimony defendant pushed him or defendant's testimony he never pushed McLearin and McLearin maced him for no reason. If the jury believed Officer McLearin, it could not rationally have found defendant not guilty of aggravated battery. On the other hand, if the jury believed defendant, it could not rationally find defendant guilty of resisting or obstructing a peace officer.

¶ 20 Defendant resisted arrest after Officer McLearin sprayed him with Mace by placing his hands under his chest while lying on the ground. However, this behavior was not the basis of the actual charge. The alleged unprovoked push of Officer McLearin, if proved, constituted a battery, not resistance or obstruction, under the facts here.

¶ 21 This court has stated:

> "In Illinois, courts determine whether an offense is a lesser-included offense using the two-tiered charging-instrument ap-

> proach. [Citation.] The first tier requires the reviewing court to determine whether the charging instrument describes the lesser offense. [Citation.] 'At a minimum, the instrument charging the greater offense must contain a broad foundation or main outline of the lesser offense.' [Citation.]
>
> *If the charging instrument describes the lesser offense, the court moves to the second tier and determines whether the evidence adduced at trial rationally supports the conviction on the lesser-included offense. [Citation.] 'A court must examine the evidence presented and determine whether the evidence would permit a jury to rationally find the defendant guilty of the lesser-included offense, but acquit the defendant of the greater offense.' "* (Emphasis added.) *People v. Sandefur*, 378 Ill. App. 3d 133, 139, 882 N.E.2d 1039, 1045 (2007) (quoting *People v. Ceja*, 204 Ill. 2d 332, 360, 789 N.E.2d 1228, 1246 (2003)).

In *Pedersen*, relied on by defendant, the State and the defendant presented conflicting evidence. Police officers testified the defendant pushed, kicked, and bit a police officer. *Pedersen*, 195 Ill. App. 3d at 123-24, 551 N.E.2d at 1089. However, the defendant's wife testified defendant did not push, bite, or kick the officer but did things which could be seen as resisting or obstructing the police officers. *Pedersen*, 195 Ill. App. 3d at 124-25, 551 N.E.2d at 1089. In *Pedersen*, a rational jury could have found the defendant not guilty of aggravated battery but guilty of resisting or obstructing a police officer. As a result, the instruction for the lesser-included

offense was justified by the evidence in that case.

¶ 22 In the case *sub judice*, the instruction for resisting or obstructing a police officer was not justified because the evidence would not have allowed a rational jury to find defendant guilty of resisting or obstructing a police officer but acquit defendant of aggravated battery. We find the trial court did not abuse its discretion in refusing defendant's tendered instruction for resisting or obstructing a police officer.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 25 Affirmed.