2012 IL App (1st) 103661-U

FIRST DIVISION
DECEMBER 28, 2012

1-10-3661

NOTICE: This order was filed under Supreme Court Rule 23 and may not be listed as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 10 CR 06847
	)	
KERRY ELLIS,	)	Honorable
	)	Luciano Panici,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence at trial was sufficient to support the defendant's conviction of aggravated battery of a peace officer, but insufficient to support a conviction of resisting a peace officer. The trial court did not abuse its discretion in refusing to instruct the jury on a pattern jury instruction regarding prior inconsistent statements.

¶ 2 Following a jury trial in the circuit court of Cook County, defendant Kerry Ellis was convicted of the offenses of aggravated battery of a peace officer and resisting arrest by a peace officer. Subsequently, he was sentenced to two years of probation. On direct appeal, the defendant argues that: (1) he was not proven guilty beyond a reasonable doubt of aggravated battery of a peace

officer and resisting arrest by a peace officer; and (2) the trial court erred in refusing to instruct the jury on Illinois Pattern Jury Instructions, Criminal, No. 3.11 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.11). For the following reasons, we affirm in part and reverse in part the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 On March 20, 2010, at approximately 10:30 p.m., police officer Wesley Karlson (Officer Karlson) and police sergeant Terrence Shubert (Sergeant Shubert), responded to a police dispatch call of a domestic disturbance at 20156 Willow Drive in Lynwood, Illinois. Thereafter, the defendant was arrested at the residence.

¶ 5 In April 2010, the defendant was charged with the offenses of aggravated battery of Officer Karlson and Sergeant Shubert, and resisting Officer Karlson's arrest of the defendant.

¶ 6 On November 1, 2010, a three-day jury trial commenced during which several witnesses testified. The State presented the testimony of Officer Karlson, who testified that on March 20, 2010, at approximately 10:20 p.m., he received a police dispatch call to respond to a domestic disturbance at 20156 Willow Drive in Lynwood, Illinois. The police dispatcher had informed Officer Karlson that the mother of the defendant, Kimberly Glen (Kimberly), called the police to report that the defendant hit her. When Officer Karlson arrived at the residence, Sergeant Shubert, who had arrived earlier, was "banging" on the door to a locked bedroom inside the residence and telling the defendant to open it. The defendant was inside the locked bedroom. Kimberly, the defendant's mother, was also standing beside Sergeant Shubert and urging her son to open the door. Officer Karlson, who was in full police uniform, also knocked on the locked door, announced his

presence as a police officer, and instructed the defendant to open the door. The defendant refused to comply. A few minutes later, Kimberly retrieved a key to the bedroom door and unlocked it, after which Sergeant Shubert and Officer Karlson entered the bedroom. Upon entry into the bedroom, Officer Karlson observed that the defendant was standing with his back turned and packing what appeared to be clothes into a suitcase on his bed. At that point, Sergeant Shubert approached the defendant's back left shoulder, while Officer Karlson stepped towards the defendant's back right side. Sergeant Shubert then ordered the defendant to place his hands behind his back. However, the defendant failed to comply and continued to pack his suitcase. Sergeant Shubert then "went for his arm" and the defendant immediately "pulled away," "squared off" to face Sergeant Shubert, and tried to fight Sergeant Shubert. Meanwhile, Officer Karlson tried to gain control of the defendant by performing the "chicken wing maneuver"–whereby Officer Karlson attempted to grab the defendant from behind under the defendant's armpits, then wrapping the officer's arms at the back of the defendant's neck, and interlocking his fingers. When the "chicken wing maneuver" failed to subdue the defendant, Officer Karlson asked the defendant to "stop and settle down," which the defendant ignored. Officer Karlson then put his left arm around the defendant's neck to perform a "headlock hip-toss" movement, and both the defendant and Officer Karlson fell face-to-face onto the bed as they struggled.

¶ 7 While on the bed, Officer Karlson held the defendant's right arm down and used his upper body as "leverage" to restrain the defendant. Officer Karlson noticed that the defendant was able to breathe, but that the defendant attempted to kick Sergeant Shubert and tried to use his free arm to pull Officer Karlson away. As the struggle continued, the defendant bit Officer Karlson's upper left

chest area for approximately 30 seconds until Officer Karlson was able to push his mouth away. Officer Karlson testified that he then showed the defendant a taser gun, and repeatedly warned him that it would be used if he did not stop fighting the police officers. In response, the defendant stated, "[g]o ahead and do it." Sergeant Shubert then removed the "probe cartridge" of the taser gun and performed a "drive stun" into the defendant's right thigh for about one second, after which the defendant temporarily stopped struggling for about 10 seconds and was then turned over onto his stomach and handcuffed. At trial, Officer Karlson explained that a "drive stun" is one where the metal probes have been removed from the taser gun, and that it is a short charge that ends as soon as the taser gun is no longer in contact with the defendant's skin. Officer Karlson stated that, from the time the defendant began to struggle until he was stunned with the taser gun, the defendant never stopped resisting the police officers. After the defendant was handcuffed, the defendant started resisting again, and Officer Karlson used his body weight to hold him down. The defendant then complained to the police officers that he could not breathe. However, Officer Karlson observed that the defendant had no labored breaths, that he had nothing around his neck, that there was no indication that the defendant was deprived of oxygen, and that Officer Karlson had no difficulty understanding his speech. Officer Karlson then repeatedly informed the defendant that he would "get off of" the defendant if the defendant would stop resisting. The defendant, however, continued to resist, and Kimberly remarked that the defendant could not breathe. At that point, Sergreant Shubert and Officer Karlson pulled the defendant up by his shoulders, escorted him to the police car, and transported him to the police station. Officer Karlson was later treated at a hospital for the bite wound, which was inflicted through several layers of clothing and resulted in bruised and broken

skin. Officer Karlson also suffered a scratch underneath his right eye.

¶ 8 On cross-examination, Officer Karlson acknowledged that the police report he authored regarding this incident did not state that the defendant bit him continuously for approximately 30 seconds. The police report further did not state that the defendant, in response to the threat of use of the taser gun, told the police officers to "[g]o ahead and do it." The police report also failed to state that the defendant continued to resist the police officers after he had been handcuffed.

¶ 9 Sergeant Shubert's testimony at trial substantially paralleled Officer Karlson's trial testimony. Sergeant Shubert testified that on March 20, 2010, at approximately 10:30 p.m., he was the first to arrive at the scene of the incident in response to a police dispatch call of a domestic disturbance. Upon arrival, Kimberly allowed Sergeant Shubert into the residence and informed him that the defendant had locked himself inside a bedroom. Sergeant Shubert, who was wearing a police uniform, proceeded to knock on the locked bedroom door, announced his presence as a police officer, and asked the defendant to open the door. He testified that there were other children in another bedroom of the residence at the time. About a minute later, Officer Karlson arrived on the scene and Sergeant Shubert informed him that "the person that [they] wanted to speak with was behind the locked door." Both Sergeant Shubert and Officer Karlson then repeatedly knocked on the locked door, announced their presence as police officers, and requested the defendant to open the locked door. Kimberly also urged the defendant to open the door. However, the defendant failed to respond or comply with their repeated requests to open the locked door. While Sergeant Shubert and Officer Karlson continued to knock on the locked door, Kimberly retrieved a key to the bedroom door and unlocked it, after which Sergeant Shubert and Officer Karlson entered the bedroom.

Sergeant Shubert, as the first to enter the bedroom, observed the defendant standing, with his back turned to the police officers, in front of a bag located on the bed. Sergeant Shubert then advised the defendant to put his hands behind his back, and attempted to grab the defendant's left hand. The defendant then "pulled his left hand away and turned his body 180 degrees" to face Sergeant Shubert. Sergeant Shubert testified that the reason he grabbed the defendant's hand was to ensure his own safety and the safety of Officer Karlson and Kimberly, because he was not sure whether there were any weapons in the bedroom or in the defendant's hands. At that time, Officer Karlson approached the defendant to try to gain control of the defendant, but that they then fell onto the bed. As they struggled on the bed, Sergeant Shubert told the defendant to "stop resisting, to hold still," but that the defendant proceeded to kick Sergeant Shubert in the chest, knocking him against the bedroom door. Once Sergeant Shubert regained his footing, he continued to attempt "to take [the defendant] into custody," but that the defendant continued to struggle "the entire time" and eventually bit Officer Karlson's chest. Sergeant Shubert then removed the "probe cartridge" of the taser gun, and warned the defendant that it would be used against him if he did not stop resisting. In response, the defendant stated, "[g]o ahead and do it." Thereafter, Sergeant Shubert stunned the defendant's right thigh with a drive stun for about "a second or two." At trial, Sergeant Shubert described a "drive stun" as one where he would only touch the front of the taser gun against the offender. After being stunned by the taser gun, the defendant "yelled out and slowed his resisting," and Sergeant Shubert and Officer Karlson handcuffed the defendant. Sergeant Shubert testified that after the defendant was handcuffed, the defendant "was still tensing against us." Subsequently, the defendant was taken into custody and escorted to the police station. Sergeant Shubert further stated that, based on a

conversation he had with Kimberly when he first arrived at the residence, he intended to place the defendant under arrest for domestic battery. He further noted that approximately four to five minutes passed from the time he first entered the defendant's bedroom to the time that the defendant was placed into police custody.

¶ 10 Detective Daniel Kirby (Detective Kirby) testified that on March 20, 2010, at approximately 11 p.m., he and Sergeant Shubert interviewed the defendant at the police station. Detective Kirby advised the defendant of his *Miranda* warnings, and the defendant agreed to speak with them. After the defendant spoke about the incident, Detective Kirby memorialized the defendant's statements in writing, read the written statement to the defendant, and made corrections to the written statement before the defendant signed it. At trial, the State presented the defendant's signed written statement. In the written statement, the defendant stated that he was a junior in high school[1] and that prior to the incident on March 20, 2010, someone had stolen $300 that he had received for his birthday. The defendant stated that he first thought his "little brother" or "little cousin" had stolen the money, that he "beat both of them," but that he did not think they took it. When the defendant's mother came home, she "beat on" the defendant when she found out what the defendant had done to his brother and cousin. After the defendant locked himself in his bedroom, the police arrived. However, the defendant did not open the bedroom door because he was packing to leave the house. Thereafter, the defendant's mother unlocked the door with a key and the police officers "grabbed [his] arm." In

[1]The record shows that the defendant was 17 years old at the time of the incident. In the written statement, he stated that his mother "said she won't come up here because she is the one that called the police on me."

the written statement, the defendant stated that the police "could have said that [he] was under arrest, but [he] was so mad that [he] didn't know." The defendant then started kicking and fighting the police officers, and eventually bit one of the police officers because he was "just so mad that [he] just couldn't stop." The defendant further stated that he "would like to apologize to the officer."

¶ 11 Following Detective Kirby's trial testimony, the defendant's written statement was entered into evidence and the State rested. The trial court then denied the defendant's oral motion for a directed finding.

¶ 12 The defense presented the testimony of three witnesses at trial. Diane Shears (Diane), the defendant's 17-year-old cousin, testified that she attended the same high school as the defendant and that she was at the defendant's house at the time of the incident. Diane testified that Kimberly had called the police because the defendant had been arguing with his cousin, Isaiah, whom the defendant blamed for his stolen $300. Upon the police's arrival, Kimberly asked the police officers to escort the defendant out of the house to "get some air" so that she could call the defendant's father to spend the weekend with the defendant at the father's home, which would have allowed Kimberly time to locate the missing money. Diane testified that, at that time, the defendant had locked himself inside his bedroom, but that Kimberly unlocked the door with a key. When the police officers entered the bedroom, the defendant's back was turned towards them and the police officers, without asking him any questions, "rushed him onto the bed and grabbed his arm," and bent it behind the defendant's back. The defendant then yelled, "[m]y arm, my arm," to which one of the police officer responded by "thrusting it up harder" and by choking the defendant with his forearm. The defendant then screamed that he could not breathe, but that the police officer did not loosen his grip. Diane testified

that at some point the defendant began kicking, but explained that he was "just kicking whatever to get out of the pain, to get out of the position he was in." Eventually, Diane heard one of the police officers remark that "[t]his son-of-a-[expletive] just bit me." On cross-examination, Diane testified that the defendant "was mad that day" and had an altercation with his brother and cousin Isaiah, but denied that it was a physical altercation. She further denied that the defendant had an altercation with his mother, Kimberly. However, Diane acknowledged that Kimberly called the police because the defendant was "so out of control."

¶ 13 Kimberly testified on behalf of the defense that on March 20, 2010, she called the police because she had arrived home from work to observe the defendant and Isaiah[2] arguing over the defendant's missing birthday money. Kimberly then instructed them to calm down, and decided that she wanted the defendant to spend the weekend at his father's home. She testified that she did not ask Isaiah to leave the home because, in case he had stolen the money, she did not want Isaiah to leave the premises with it. When the police arrived, Kimberly informed them that the defendant was in his bedroom, and that she only wanted the police officers to escort him out of the house so he could spend the weekend with his father while Kimberly would "figure out what happened" to the missing $300. Kimberly unlocked the bedroom door, at which point the police officers shoved her aside and entered the bedroom, grabbed the defendant's arm, and threw him down onto the bed without saying anything. The defendant's left arm was then restrained behind his back, and the defendant repeatedly yelled that his arm was hurting. While the defendant was lying on the bed, one

[2]Isaiah is referred throughout the record as the defendant's "cousin," even though Kimberly's testimony reveals that Isaiah is Kimberly's 17-year-old adopted brother.

of the police officers "stretched across the top of [the defendant's] body " and lodged his arm across the defendant's throat. The defendant then complained that he could not breathe, and Kimberly observed that he was "foaming at the mouth" and that his eyes were "teary and closing." The police officer then released pressure from the defendant's throat only after Kimberly had made three or four requests to the police officer to do so. She testified that the police officers also used a taser gun in restraining the defendant. On cross-examination, Kimberly testified that she informed the defendant that she was calling the police. However, she stated that she would not have called the police had she known that "the situation was going to calm down."

¶ 14 The defendant testified on his own behalf that on March 20, 2010, he confronted Isaiah and his "little brother" about his missing birthday money. When the defendant's mother, Kimberly, arrived home, she told them to "chill out" and informed him that she was calling the police. The defendant denied hitting or touching his mother that night. The defendant then went into his bedroom, locked the door, and packed his clothes in order to leave to visit his father. The defendant testified that he did not open the door when the police officers and his mother knocked. Eventually, the police officers gained entry into his bedroom, grabbed his left arm, and twisted it behind his back while he stood with his back turned towards them. While the police officers restrained his arm, the defendant screamed in pain because his shoulder had "popped out of place." At trial, the defendant explained that he had an old shoulder injury that was exacerbated during this incident. He further testified that one of the police officers placed his forearm across the defendant's neck, which prevented the defendant from being able to breathe, and that the defendant was wheezing and tried to ask the police officer to stop choking him. The defendant explained that he bit and kicked one

of the police officers in an effort "to get free," and that he had "no intentions of trying to fight the police." The defendant stated that the police officers also stunned him with a taser gun. He further testified that, at the police station, he was not allowed to make any additions to his written statement to the police, but that he signed the written statement without reading its contents. At trial, the defendant testified that the contents of his written statement to the police were inaccurate, and denied telling Detective Kirby that he "beat up" his cousin and his brother. On cross-examination, the defendant acknowledged that he knew that the men who were knocking on his bedroom door on the night of the incident were police officers, but that he purposely ignored them. The defendant also stated that he never sought medical attention for his injured shoulder because the shoulder had "[popped] back into place." He further acknowledged that his signature appeared on the bottom of the written statement.

¶ 15 Following the defendant's testimony, the defense rested and a jury instruction conference was held. During the conference, defense counsel request that the jury be instructed with IPI Criminal 4th No. 3.11, which the trial court denied.

¶ 16 Subsequently, the jury found the defendant not guilty of aggravated battery of Sergeant Shubert, but found him guilty for aggravated battery of Officer Karlson and for resisting arrest by Officer Karlson.

¶ 17 On December 1, 2010, the trial court denied the defendant's motion for a new trial, and sentenced him to concurrent two-year terms of probation for both offenses. As part of probation, the defendant was required to obtain his high school diploma, attend anger management classes, and perform 120 hours of community service. The trial court then denied the defendant's motion to

reconsider sentence.

¶ 18 On December 8, 2010, the defendant filed a notice of appeal before this court.

¶ 19 ANALYSIS

¶ 20 We determine the following issues on appeal: (1) whether the defendant was proven guilty beyond a reasonable doubt of aggravated battery of a peace officer and resisting arrest by a peace officer; and (2) whether the trial court erred in refusing to instruct the jury on IPI Criminal 4th No. 3.11.

¶ 21 We first determine whether the defendant was proven guilty beyond a reasonable doubt of aggravated battery of a peace officer and resisting arrest by a peace officer.

¶ 22 The defendant argues that his convictions of aggravated battery of a peace officer and resisting arrest by a peace officer should be reversed where the State failed to establish beyond a reasonable doubt that the force he used against the peace officers was not justified as self-defense in response to the police's excessive use of force against him. Specifically, the defendant contends that he bit Officer Karlson–the conduct that formed the basis of his felony convictions of aggravated battery and resisting arrest–only after the defendant was "headlocked," "hip-tossed," and "pinned down" by the police officers, who gave "no explanation whatsoever" as to why they were even in his bedroom. Further, the defendant maintains that Officer Karlson, without warning and without physical provocation from the defendant, grabbed him from behind in a "chicken wing maneuver." He argues that the act of pulling his hand away from Sergeant Shubert could not be construed as an act of "resisting" the police officers, nor could it support a conviction of resisting a peace officer under the facts of this case. In the alternative, the defendant argues that, at the very least, this court

should reverse his conviction of resisting arrest by Officer Karlson, where the State failed to establish beyond a reasonable doubt that he knew that the police were attempting to arrest him at the time of the incident.

¶ 23 The State counters that the defendant was proven guilty beyond a reasonable doubt of the offenses of aggravated battery of a peace officer and resisting arrest by a peace officer, where the testimony at trial established that the police used force to effectuate the defendant's arrest *after* the defendant had demonstrated aggression towards them. Specifically, the State contends that the trial testimony, which showed that the defendant bit Officer Karlson's chest while Officer Karlson was attempting to arrest him, was sufficient to sustain the defendant's convictions. Further, the State maintains that it offered evidence at trial that properly rebutted several elements of the defendant's claim of self-defense–namely, that the defendant was the original aggressor during the incident; that there was no imminent danger of harm to the defendant; that the police did not use unlawful force against him; and that the defendant lacked reasonable belief that he was in danger.

¶ 24 When the sufficiency of the evidence is challenged on appeal, we must determine " ' whether, after viewing the evidence in the light most favorable to the [State], *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ' " (Emphasis in original.) *People v. Graham*, 392 Ill. App. 3d 1001, 1008-09, 910 N.E.2d 1263, 1271 (2009), quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781, 2789 (1979). A reviewing court affords great deference to the trier of fact and does not retry the defendant on appeal. *People v. Smith*, 318 Ill. App. 3d 64, 73, 740 N.E.2d 1210, 1217 (2000). It is within the province of the trier of fact "to assess the credibility of the witnesses, determine the appropriate weight of the testimony,

and resolve conflicts or inconsistencies in the evidence." *Graham*, 392 Ill. App. 3d at 1009, 910 N.E.2d at 1272. A reviewing court will not substitute its judgment for that of the trier of fact. *People v. Sutherland*, 223 Ill. 2d 187, 242, 860 N.E.2d 178, 217 (2006). A criminal conviction will not be reversed "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt." *Graham*, 392 Ill. App. 3d at 1009, 910 N.E.2d at 1271.

¶ 25 In the instant case, the defendant was convicted of the offenses of aggravated battery of Officer Karlson and resisting arrest by Officer Karlson.

¶ 26 "A person commits battery if he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual." 720 ILCS 5/12-3 (West 2010). The offense of battery rises to the level of "aggravated battery," a Class 3 felony, when, in committing battery, a person "[k]nows the individual harmed to be an officer or employee of the State of Illinois, *** engaged in the performance of his or her authorized duties as such officer or employee." 720 ILCS 5/12-4(b)(18), (e)(1) (West 2010).

¶ 27 A person commits the offense of resisting or obstructing a peace officer when he "knowingly resists or obstructs the performance by one known to the person to be a peace officer, firefighter, or correctional institution employee of any authorized act within his official capacity." 720 ILCS 5/31-1(a) (West 2010).[3] An arrest made by a peace officer is an "authorized act" within the meaning of

[3]The offense of resisting a peace officer rises from a Class A misdemeanor to a Class 4 felony when, in committing this offense, the person was the proximate cause of an injury to the peace officer, firefighter, or correctional institution employee. 720 ILCS 5/31-1(a-7) (West 2010).

the statute. *City of Champaign v. Torres*, 214 Ill. 2d 234, 242, 824 N.E.2d 624, 629 (2005). Resisting arrest includes "a physical act of resistance or obstruction, that is, a physical act that impedes, hinders, interrupts, prevents or delays the performance of the officer's duties, such as going limp, forcefully resisting arrest, or physically helping another party to avoid arrest." *People v. Haynes*, 408 Ill. App. 3d 684. 689-90, 946 N.E.2d 491, 497 (2011). An arresting officer "generally may use any force reasonably necessary to effectuate an arrest and need not retreat in the face of resistance." *Id.* at 690, 946 N.E.2d at 497. An arrestee is not authorized to use force to resist an arrest which he knows is being made by a peace officer, even if the arrest is unlawful. *Id.*; 720 ILCS 5/ 7-7 (West 2010).

¶ 28 At trial, the defendant raised a theory of self-defense. On appeal, he claims that his action in biting Officer Karlson was justified as self-defense in response to the police officers' use of excessive force against him.[4] "The use of excessive force by a police officer invokes the right of self-defense." *Haynes*, 408 Ill. App. 3d at 690, 946 N.E.2d at 497. "A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force." 720 ILCS 5/7-1(a) (West 2010). Once a defendant raises the affirmative defense of self-defense, the State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense, in addition to proving the elements of the charged offense. *People v. Lee*, 213 Ill. 2d 218,

[4]As discussed, the defendant was also charged with the offense of aggravated battery of Sergeant Shubert because he allegedly kicked Sergeant Shubert during the incident. However, the jury found the defendant not guilty of aggravated battery of Sergeant Shubert.

224-25, 821 N.E.2d 307, 311 (2004). "The elements of self-defense are: (1) that unlawful force was threatened against a person; (2) that the person threatened was not the aggressor; (3) that the danger of harm was imminent; (4) that the use of force was necessary; (5) that the person threatened actually and subjectively believed a danger existed that required the use of the force applied; and (6) the beliefs of the person threatened were objectively reasonable." *Id.* at 225, 821 N.E.2d at 311. If the State negates any one of the elements of self-defense, the defendant's claim of self-defense must fail. *Id.*

¶ 29 With respect to the conviction of aggravated battery of Officer Karlson, we find that, viewing the evidence in the light most favorable to the State, the State had proven beyond a reasonable doubt that the defendant "intentionally or knowingly without legal justification [made] physical contact of an insulting or provoking nature" with Officer Karlson, whom the defendant knew to be a police officer acting within his authorized duties. See 720 ILCS 5/12-3; 12-4(b)(18) (West 2010). The trial evidence is undisputed that the defendant knew that the men in full police uniform, who repeatedly knocked on his bedroom door on the night of the incident, and thereafter entered his bedroom, were police officers responding to a police call made by his mother, Kimberly. It is also undisputed that, during the police encounter, the defendant bit Officer Karlson's chest. The act of knowingly biting a police officer, or an employee of the State of Illinois or a unit of local government, has been held by this court to support a conviction of aggravated battery. See *People v. Hale*, 2012 IL App (4th) 100949, ¶ 31 (affirming defendant's conviction of aggravated battery where he bit a correctional officer during an attempt to restrain defendant); *People v. Youngblood*, 389 Ill. App. 3d 209, 212, 906 N.E.2d 720, 723 (2009) (defendant's act of biting a police officer, which resulted in a conviction

of aggravated battery, was upheld by reviewing court); *People v. Burdine*, 362 Ill. App. 3d 19, 23, 839 N.E.2d 573, 578 (2005) ("evidence presented clearly proved" defendant guilty of aggravated battery, who bit an on-duty fireman's arm).

¶ 30 The defendant, however, does *not* contend that he did not bite Officer Karlson, but that he only did so in self-defense in response to the police's use of excessive force against him. In other words, the defendant claims that his conduct in biting Officer Karlson during the police encounter was performed *with legal justification*–self-defense–so that his conviction of aggravated battery should not stand. We disagree.

¶ 31 Based on the evidence presented at trial, we find that the State properly rebutted the defendant's claim of self-defense by negating at least one of the elements of self-defense beyond a reasonable doubt. *Lee*, 213 Ill. 2d at 225, 821 N.E.2d at 311 (a defendant's claim of self-defense fails if the State negates any one of the elements of self-defense). First, both Sergeant Shubert and Officer Karlson's testimony established beyond a reasonable doubt that the defendant was the aggressor. At trial, Officer Karlson and Sergeant Shubert testified that they responded to a police dispatch call of domestic disturbance at Kimberly's residence, that they repeatedly knocked and announced their presence as police officers at the defendant's bedroom door, but that the defendant failed to comply with their requests to unlock the bedroom door. The jury also heard testimony at trial that once Sergeant Shubert and Officer Karlson gained entry into the bedroom, they noticed that the defendant was standing in front of a bag located on his bed, with his back turned towards the police officers. Evidence was presented at trial that Sergeant Shubert then ordered the defendant to place his hands behind his back, which the defendant failed to do. Thereafter, Sergeant Shubert grabbed the

defendant's left hand and the defendant "pulled away," "squared off" to face Sergeant Shubert, and tried to fight Sergeant Shubert. Sergeant Shubert's testimony also revealed that the reason he grabbed the defendant's hand was to ensure his own safety and the safety of Officer Karlson and Kimberly, because he was unsure whether there were any weapons in the bedroom or in the defendant's hands.

¶ 32 Viewed in the light most favorable to the State, the evidence supports a finding beyond a reasonable doubt that the defendant could not claim self-defense because he was the aggressor in the situation. It is the jury's function "to assess the credibility of the witnesses and the weight to be given their testimony by resolving any conflicts or inconsistencies in the evidence." *People v. Hayes*, 2011 IL App (1st) 100127, ¶ 31. "Whether a defendant acted in self-defense is also a question for the jury to determine." *Id.* Based on the trial evidence, the jury could reasonably infer that the defendant's repeated noncompliance to police directives; the location of the bag within the defendant's reach on the bed; the unknown existence of weapons in the bedroom or in the defendant's hands; the defendant's angry demeanor; and the report of domestic disturbance at the residence, created an atmosphere which necessitated Sergeant Shubert to grab the defendant's left hand in order to ensure Sergeant Shubert's safety and the safety of those around him. The jury could reasonably find that the defendant was the initial aggressor during the incident when he "pulled away" his hand, "squared off" to face Sergeant Shubert, and tried to fight Sergeant Shubert.

¶ 33 Second, the State has established beyond a reasonable doubt that no unlawful force was threatened against the defendant. The trial evidence revealed that at no point during the incident did the police officers point a firearm at the defendant, nor did they open the bedroom door by force

when the defendant refused to unlock it. Once the defendant tried to fight Sergeant Shubert, Officer Karlson responded with force by attempting to subdue the defendant with the "chicken wing maneuver," and both Sergeant Shubert and Officer Karlson told the defendant to "stop and settle down" and to "stop resisting," which the defendant ignored. It was only *after* the defendant refused to stop struggling with the police that Officer Karlson performed a "headlock hip-toss" movement on the defendant, causing both Officer Karlson and the defendant to fall onto the bed. The defendant then continued to struggle with Officer Karlson, who used his upper body to restrain the defendant and held the defendant's right arm down on the bed. Subsequently, the defendant bit Officer Karlson's chest. Evidence presented to the jury also showed that the police produced a taser gun only *after* the defendant bit Officer Karlson's chest, and that the defendant was repeatedly warned that it would be used if he did not stop fighting the police officers. In response, the defendant stated, "[g]o ahead and do it," which the jury could reasonably infer to be another act of defiance by the defendant. Testimony also revealed that Sergeant Shubert purposefully removed the metal "probe cartridge" of the taser gun before applying the taser to the defendant's right thigh for a "drive stun" of about "a second or two"–just long enough to slow the defendant's resistence and to handcuff him, but without using the metal probes to expose the defendant's body to full electric shock. Based on this evidence, the jury could reasonably find that the police officers' resort to progressively greater, but tempered, use of force was lawful and reasonable in response to the defendant's continuous defiance and physical struggles against the police. See generally *People v. Wicks*, 355 Ill. App. 3d 760, 823 N.E.2d 1153 (2005) (where police officers engaged in progressively greater use of force as defendant continued to refuse to cooperate with the police, this use of force did not constitute as

excessive and was justified for officers to protect themselves).

¶ 34 Third, the State established beyond a reasonable doubt that any beliefs held by the defendant that he was in danger at the time of the incident was objectively unreasonable. As discussed, neither Sergeant Shubert nor Officer Karlson used force to open the locked bedroom, nor did they draw their guns at any time during the incident. Rather, the police officers entered the bedroom and simply asked the defendant to place his hands behind his back, and Sergeant Shubert grabbed the defendant's hand when the defendant refused to cooperate. Evidence presented at trial showed that the defendant's mother, Kimberly, was present at the time of the police encounter. At trial, the defendant testified that he only kicked and bit one of the police officers because he was unable to breathe. However, Officer Karlson observed that the defendant was able to breathe as they engaged in physical struggle on the bed, that the defendant had no labored breaths, that there was nothing around the defendant's neck, that there was no indication that the defendant was deprived of oxygen, and that Officer Karlson had no difficulty understanding the defendant's speech. We find that it is within the jury's province, as finders of fact, to assess the credibility of the witnesses and resolve any conflicts or inconsistencies in the evidence. Thus, viewing the evidence in a light most favorable to the State, the jury could find that no reasonable person would have believed that the defendant was in danger during the police encounter. Therefore, we hold that the State properly rebutted the defendant's claim of self-defense by negating several elements of self-defense, and proved beyond a reasonable doubt that the defendant committed aggravated battery against Officer Karlson.

¶ 35 With respect to the defendant's conviction of resisting arrest by Officer Karlson, the defendant again raises a claim of self-defense in arguing that the act of biting Officer Karlson did

not support a conviction for the offense. Further, he contends that the act of pulling his hand away from Sergeant Shubert could not be construed as an act of "resisting" the police officers, nor could it support a conviction of resisting a peace officer under the facts of this case. The defendant argues, in the alternative, that his conviction of resisting arrest by Officer Karlson should be reversed where the State failed to establish beyond a reasonable doubt that he *knew* that the police officers were attempting to place him under arrest at the time of the incident.

¶ 36 The State counters that the defendant was proven guilty beyond a reasonable doubt of resisting a peace officer, where the evidence at trial established that the police officers exercised proper force to effectuate the arrest of the defendant and the defendant's claim of self-defense must fail. In response to the defendant's alternative argument that he lacked knowledge of the police officers' attempt to arrest him, the State maintains that the defendant's conviction should stand because he *should have known* that he was being placed under arrest by the police officers.

¶ 37 We agree with the defendant's alternative argument that the evidence failed to establish that he possessed the requisite knowledge that the police officers were effectuating an arrest, and thus, the defendant's conviction of resisting arrest by Officer Karlson must be reversed.

¶ 38 In the case at bar, the record shows that the indictment charged the defendant with the offense of resisting a peace officer–specifically, resisting arrest by Officer Karlson which proximately caused injury to Officer Karlson.

¶ 39 Section 31-1(a) of the Criminal Code (the Code) provides that a person commits the offense of resisting or obstructing a peace officer when he "*knowingly* resists or obstructs the performance of one known to the person to be a peace officer, firefighter, or correctional institution employee of

any authorized act within his official capacity." (Emphasis added.) 720 ILCS 5/31-1(a) (West 2010). Our supreme court has held that an arrest made by a peace officer is an "authorized act" within the meaning of the statute. *Torres*, 214 Ill. 2d at 242, 824 N.E.2d at 629.

¶ 40 The trial evidence is undisputed that neither Sergeant Shubert nor Officer Karlson informed the defendant that he was being placed under arrest at any time during the incident. While Sergeant Shubert testified at trial that he intended to place the defendant under arrest for domestic battery, based on a conversation he had with Kimberly when he first arrived at the residence, such intention was never conveyed to the defendant during the police encounter. Sergeant Shubert also testified that once Officer Karlson arrived at the scene, he informed Officer Karlson that "the person that [they] wanted to speak with was behind the locked door." The trial testimony undisputedly showed that at the time they knocked on the door and upon entry into the defendant's bedroom, neither Sergeant Shubert nor Officer Karlson informed the defendant that they were placing him under arrest. In the written statement to the police, the defendant speculated that the police "could have said that [he] was under arrest, but [he] was so mad that [he] didn't know." Based on this evidence, we cannot say, after viewing the evidence in the light most favorable to the State, that *any* rational trier of fact could have found the essential elements of the offense of resisting arrest by a peace office beyond a reasonable doubt. Here, the evidence did not show that the defendant possessed the requisite knowledge–an essential element of the charged offense–that the police officers were effectuating an arrest at the time of the incident. Where the defendant lacked the mental state or knowledge element of the crime, he could not be found guilty of *knowingly* resisting arrest by Officer Karlson. Therefore, we reverse the defendant's conviction of resisting arrest by Officer Karlson.

¶ 41 In urging this court to uphold the defendant's conviction of resisting arrest by Officer Karlson, the State argues, citing Illinois Pattern Jury Instructions, Criminal, No. 22.14 (4th ed. 2000) (hereinafter IPI Criminal 4th No. 22.14), that the knowledge element of the crime was met because the defendant *knew or should have known* that the police officers were attempting to arrest him. The State concedes that neither Sergeant Shubert nor Officer Karlson specifically informed the defendant that he was under arrest, but argues that the defendant *should have known* that he was being placed under arrest and that his resistance to their efforts to arrest him supported his conviction.

¶ 42 We find that the State's citation to IPI Criminal 4th No. 22.14 jury instruction to be inapposite, where the "should have known" language neither appears in the IPI Criminal 4th No. 22.14 jury instruction, nor in the statute governing the offense of resisting a peace officer. See 720 ILCS 5/31-1(a) (West 2010).

¶ 43 The State further argues that the "should have known" standard should apply in determining the knowledge element of the offense, and relies on *People v. McKinney*, 62 Ill. App. 3d 61, 378 N.E.2d 1125 (1978), for support of this contention. Specifically, the State argues that, under the totality of the circumstances of the instant case, the defendant should have known he was being placed under arrest because he had hit his "little brother" and "little cousin"; he was in a "violent rampage" and was aware that Kimberly had called the police; and the police officers were in full uniform and requested that he put his hands behind his back when they entered his bedroom.

¶ 44 In *McKinney*, police officers testified that they responded to the scene of the incident to apprehend a man with a gun. *Id.* at 63, 378 N.E.2d at 1127. At the scene, one of the arresting officers, Officer Pusateri, found the defendant crouching against a wall. *Id.* When Officer Pusateri

told the defendant to step into plain view, the defendant drew a revolver, cocked it and aimed the weapon at the officer. *Id.* Officer Pusateri and another police officer then lunged at the defendant and disarmed him. *Id.* The defendant then fought back by kicking, biting and striking the police officers, "but was subdued and arrested after a struggle." *Id.* Subsequently, the defendant was convicted, amongst other charges, of resisting a peace officer. *Id.* at 64, 378 N.E.2d at 1128. On appeal, the defendant argued that he was improperly convicted of resisting a peace officer because he was never informed by the police officers that he was being placed under arrest. *Id.* at 66, 378 N.E.2d at 1129. In upholding the defendant's conviction, the *McKinney* court found that it was not necessary for the police officers to employ the specific words, "[y]ou are under arrest," in order for the arrest to be properly effectuated under the circumstances. *Id.* at 67, 378 N.E.2d at 1130. The *McKinney* court found that, under the circumstances of that case, the defendant "should have understood that he was under arrest and ceased his violent resistance," and that "a reasonable man, innocent of any crime and standing in the defendant's shoes, would have perceived the officers' intention to arrest him as they struggled to restrain and handcuff him." *Id.*

¶ 45 We find the facts of *McKinney* to be highly distinguishable from the facts of the case at bar. Unlike the *McKinney* defendant who threatened the police officers with a firearm, the defendant in the instant case was not engaged in any criminal activity at the time of the police encounter, and thus, had no reason to believe that he was under arrest without being so apprised by the police officers. Instead, the defendant was in his own bedroom, packing a suitcase for a weekend visit at his father's house. Under the circumstances of this case, we find that the police was obligated to inform the defendant that he was being placed under arrest, in order for the defendant's subsequent actions to

be characterized as "knowingly" resisting arrest by Officer Karlson. See *People v. Kotlinski*, 2011 IL App (2nd) 101251, ¶ 57 (reversing defendant's conviction for obstructing a peace officer where he lacked the requisite mental state that he was interfering with a breathalyzer test conducted by a police officer on defendant's wife, where "[t]he only reasonable inference that the jury could draw was that defendant stepped out of car because he could not see what was happening with his wife, *which means he did not know what* [the officer] *was doing.*") (Emphasis in original.) Here, there is no indication that the defendant *knew* what Sergeant Shubert and Officer Karlson were doing when they entered his bedroom, in the absence of any advisement by the police that they were there to arrest him. Therefore, the State has failed to prove beyond a reasonable doubt that the defendant knowingly resisted arrest by Officer Karlson.

¶ 46 Even assuming that the "should have known" standard was applicable, we find that the State failed to prove beyond a reasonable doubt that the defendant should have known he was being placed under arrest. While it is true that there was some indication in the trial testimony that the 17-year-old defendant had hit his younger brother and cousin, we do not find that a reasonable person in the defendant's position would have believed that he was under arrest. Not every police response to a call of domestic disturbance automatically results in the arrest of someone. Given the lack of evidence of the severity of the "beatings" by the defendant, the defendant's lack of a vantage point to see whether the police officers had their weapons drawn at the outset of the encounter, and the fact that the police officers had not drawn their weapons upon entry into the bedroom, we cannot conclude beyond a reasonable doubt that the defendant should have known he was being placed under arrest. Likewise, although Sergeant Shubert advised the defendant to place his hands behind

his back upon the police officers' entry into the bedroom, Sergeant Shubert testified that he grabbed the defendant's hand in order to ensure his own safety and the safety of those around him because it was unclear whether the defendant possessed any weapons. It could have been just as plausible, for a reasonable person standing in the defendant's shoes, to believe that the police officers were there to investigate the missing money, or to question, but not arrest, the defendant after ensuring that there were no weapons in the bedroom. There was also no evidence presented to the jury that the defendant had any previous arrests and, therefore, in spite of his young age, could be expected to be familiar with police arrest procedure. Moreover, we reject the State's speculative arguments that the defendant committed "at least two arrestable offenses" prior to the officers' arrival at the residence, and that "[o]ne could only wonder what defendant thought police were doing entering his bedroom if they were not there to arrest him after his violent [rampage]." Based on the evidence, we find that, even assuming *arguendo*, that the "should have known" standard was sufficient to satisfy the knowledge element of the offense of resisting arrest by a peace officer, we hold that the State failed to established beyond a reasonable doubt that the defendant should have known he was being placed under arrest at the time of the incident. Therefore, we reverse the defendant's conviction of resisting arrest by Officer Karlson.

¶ 47 We next determine whether the trial court erred in refusing to instruct the jury on IPI Criminal 4th No. 3.11, which we review under an abuse of discretion standard. See *People v. Eggert*, 324 Ill. App. 3d 79, 82, 754 N.E.2d 474, 477 (2001).

¶ 48 At trial, Officer Karlson testified on direct examination that, during the incident, the defendant bit his chest for approximately 30 seconds, that the defendant stated "[g]o ahead and do

it" in response to the police's threat of tasering him, and that the defendant continued to resist the police officers after he was handcuffed. On cross-examination, however, Officer Karlson acknowledged that the police report he authored regarding this incident did not contain this information. During the jury instructions conference, defense counsel requested that the trial court instruct the jury on IPI Criminal 4th No. 3.11, which pertained to "prior inconsistent statements." The State objected, arguing that the requested instruction was inapplicable. The trial court refused to give the proposed instruction, stating that the police report was only a "summary of what [Officer Karlson] thought was important," and that it was "not a prior inconsistent statement if it [was] not in the police report."

¶ 49 The defendant contends on appeal that the trial court abused its discretion in refusing to instruct the jury on IPI Criminal 4th No. 3.11, arguing that the omitted information from Officer Karlson's police report was a "prior inconsistent statement" which could be considered as both affecting the credibility of Officer Karlson's testimony and as substantive evidence that the defendant did *not* bite Officer Karlson for 30 seconds, that the defendant did *not* remark "[g]o ahead and do it" in response to the threat of being tasered, and that the defendant did *not* continue to resist the officers after he was handcuffed. He maintains that he was prejudiced by the trial court's refusal to give this instruction.

¶ 50 The State counters that the trial court properly refused to instruct the jury on IPI Criminal 4th No. 3.11 regarding prior inconsistent statements because the police report created by Officer Karlson was merely a summary of the events which occurred on the night of the incident, and could not be

categorized as an "inconsistent" statement. Further, the State argues that the requested jury instruction was not warranted because the omitted information complained of by the defendant was *de minimis* and not "material."

¶ 51 IPI Criminal 4th No. 3.11 states in relevant part the following:

> "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 ordinarily 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.
>
> However, you may consider a witness's earlier inconsistent statement as evidence without this limitation when:
>
> [1] the statement was made under oath at a [(trial) (hearing) (proceeding)] [or]
>
> [2] the statement narrates, describes, or explains an event or condition the witness had personal knowledge of; and [a] the statement was written or signed by the witness [or] the witness acknowledged under oath that he made the statement. ***
>
> 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." IPI Criminal 4th No. 3.11.

¶ 52 In the instant case, the trial court refused to instruct the jury on IPI Criminal 4th No. 3.11, finding that the omitted information from the police report was not a "prior inconsistent statement" and that it was only a "summary of what [Officer Karlson] thought was important." A prior statement is deemed to be inconsistent "when it omits a significant matter that would reasonably be expected to be mentioned if true." *People v. Zurita*, 295 Ill. App. 3d 1072, 1077, 693 N.E.2d 887, 891 (1998). Further, the prior statement of a witness does not have to "directly contradict the testimony given at trial to be considered 'inconsistent.' " *Id.* at 1076, 693 N.E.2d at 891. "Rather, a prior statement is inconsistent with a witness's trial testimony when it has a tendency to contradict the trial testimony." *Id.* at 1077, 693 N.E.2d at 891. "Inconsistencies may be found in evasive answers, silence, or changes in position." *Id.* The determination of whether a witness' prior statement is consistent is left to the sound discretion of the trial court. *Id.*

¶ 53 We find that the omitted information from the police report authored by Officer Karlson was not an "inconsistent" statement. While a prior inconsistent statement may encompass omissions as well as affirmative statements (*People v. Cannon*, 150 Ill. App. 3d 1009, 1019, 502 N.E.2d 345, 351 (1986)), the omissions complained of did not have a "tendency to contradict" Officer Karlson's trial testimony. It is also important to note that the defendant, as the appellant, failed to include Officer

Karlson's police report in the record on appeal before us, thus, depriving this court of the opportunity to read the police report in its entirety. See *People v. Steward*, 406 Ill. App. 3d 82, 87, 940 N.E.2d 140, 145 (2010) ("[a]ny doubts that may arise from the incompleteness of the record will be resolved against the appellant," and in the absence of a sufficiently complete record on appeal, the trial court's decision will be presumed to have been entered in conformity with the law and had a sufficient factual basis). Thus, in the absence of Officer Karlson's police report in the record before us, we must presume that the trial court's ruling in refusing to give the requested jury instruction, based on its reading of the police report at issue, to be supported by a sufficient factual basis. Therefore, we hold that the trial court did not abuse its discretion in refusing to instruct the jury on IPI Criminal 4th No. 3.11 regarding prior inconsistent statements.

¶ 54 Even assuming, for the sake of argument, that the omissions complained of were an "inconsistent" statement that could be considered by the jury as both affecting the credibility of Officer Karlson's testimony and as substantive evidence, and that the trial court erred in refusing to give the requested jury instruction, we find that the trial court's error to be harmless. First, with respect to the giving of the proposed instruction for impeachment purposes, we find that the trial court had instructed the jury on Illinois Pattern Jury Instructions, Criminal, No. 1.02 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 1.02), which adequately informed the jurors that they were the sole "judges of the believability of the witnesses and of the weight to be given to the testimony of each of them." See *Cannon*, 150 Ill. App. 3d at 1018-20, 502 N.E.2d at 350-51 (where the police report was a summary of the incident and did not include the defendant's exact words to the police, the trial

court's refusal to give a jury instruction on prior inconsistent statements was proper since the trial court had given the jury another instruction that correctly and sufficiently covered the applicable legal principles). Further, the trial court's refusal to instruct the jury on the requested jury instruction for impeachment purposes did not leave the jury without adequate guidance, because defense counsel had already impeached Officer Karlson with the police report during cross-examination, and "[i]t is obvious to the layman that any contradiction to a witness' testimony calls into question the accuracy of that testimony." (Internal quotations marks omitted.) *People v. Luckett*, 273 Ill. App. 3d 1023, 1035, 652 N.E.2d 1342, 1350 (1995). Second, with respect to the giving of the proposed instruction for the purpose of informing the jury that the omitted information could be considered as substantive evidence that the defendant did *not* bite Officer Karlson for 30 seconds, that the defendant did *not* remark "[g]o ahead and do it" in response to the threat of being tasered, and that the defendant did *not* continue to resist the officers after he was handcuffed, the jury could reasonably find the defendant guilty based on other testimony at trial–specifically, Sergeant Shubert's testimony–that the defendant bit Officer Karlson's chest, that he *did* remark "[g]o ahead and do it" in response to the threat of the taser gun, and that the defendant was "still tensing against [the officers]" even after he was handcuffed. Further, we find that the omitted information–the duration of the bite, the defendant's remark, and the defendant's continued struggle against the police after he was handcuffed–was a minor and immaterial omission that had no bearing upon the elements of the charged crimes. We further reject the defendant's contention that he was prejudiced by the trial court's refusal to instruct the jury on IPI Criminal 4th No. 3.11, based on speculation that the jury "very well may have found the State failed to disprove self-defense beyond a reasonable doubt" had

it been instructed to consider the omissions as substantive evidence and that such prejudice was magnified by the State's closing arguments which relied on the omitted information in urging the jury to reject the theory of self-defense. We find that, regardless of whether the jury was informed to consider the omitted information as substantive evidence or whether the State relied on the omissions in its closing arguments, other testimony presented at trial was sufficient to establish the defendant's guilt of aggravated battery beyond a reasonable doubt and to rebut the defendant's claim of self-defense. Therefore, we hold that the trial court did not abuse its discretion in declining to instruct the jury on IPI Criminal 4th No. 3.11.

¶ 55 Accordingly, based on our foregoing reasons, we affirm the defendant's conviction and sentence for aggravated battery, reverse the defendant's conviction for resisting a peace officer, and vacate the defendant's sentence for resisting a peace officer.

¶ 56 Affirmed in part and reversed in part.