

No. 1-10-3696

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).

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 6343
)	
WILLIAM MCKINNEY,)	Honorable
)	Evelyn B. Clay,
Defendant-Appellant.)	Judge Presiding.
)	

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *HELD:* The circuit court did not err in refusing to instruct the jury on self defense where there was no evidence that the officer used any force at all prior to defendant attempting to flee and no evidence of excessive force after defendant used force in resisting arrest. Moreover, defendant was not denied a fair trial where the circuit court waited for defense counsel before responding to a jury request for equipment to view the surveillance video and the jury returned its verdict before defense counsel arrived.

¶ 2 Following a jury trial, defendant William McKinney was convicted of retail theft,

1-10-3696

resisting arrest, and aggravated battery of a police officer. On appeal, defendant contends that the trial court erred in refusing to instruct the jury on self-defense where there was some evidence that the officer used unreasonable force. Defendant further contends that he was denied a fair trial when the trial court did not respond to a jury request for the surveillance video. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3

BACKGROUND

¶ 4 Defendant was charged with retail theft, two counts of aggravated battery to a peace officer, and resisting or obstructing a peace officer. At trial, Veronica Medina testified that she was the store manager at Pay Half retail store located at 12 North Wabash in Chicago. On March 8, 2010, at approximately 10:40 a.m., Medina was working when she heard the chime that indicates a customer has entered the store so she proceeded to the front of the store. Medina observed defendant standing by a rack near the front of the store and greeted defendant. As soon as she spoke to him, defendant turned away and went toward the door. Medina noticed that defendant had store merchandise inside his jacket. She recognized the merchandise and the store tickets attached to the merchandise. Medina said, "Excuse me, sir." Defendant proceeded to exit the store and the store alarm system was activated because the merchandise contained devices that would trigger the alarm if anyone left the store with items that had not been purchased.

¶ 5 Medina followed defendant out of the store and saw a police officer on the street. She told the officer what happened and described what defendant was wearing. The officer walked in the direction defendant had gone and turned the corner on Madison Street. Medina followed and stood outside the Dunkin Donuts store two doors down from her store. The officer returned and

1-10-3696

said something to Medina, who looked inside the Dunkin Donuts store and saw defendant trying to come out through the Wabash Street exit. The officer walked into the store and tried to talk to defendant. Medina saw defendant jump back like he was trying to get away from the officer. He had his hands up and appeared to be trying to run from the officer. Medina then saw defendant push a table and she could see the officer's lips moving but could not hear what she was saying to defendant. Medina decided to return to her store and call for backup. She testified that she had her cashier call 911 because she knew the officer needed help. Medina then returned to the Dunkin Donuts store but did not see the officer or defendant. An employee of Dunkin Donuts directed Medina to her merchandise, which was on the floor by the exit door on Madison. Medina retrieved the merchandise, six turquoises blouses priced at \$12 each. She then saw defendant outside on Madison, still trying to run away from the officer.

¶ 6 Officer Dawn Williams testified that on March 8, 2010, she was assigned to a unit that issues moving violations, directs traffic, and issues parking citations. She was working alone on Wabash Avenue and was wearing a police jacket and a motorcycle helmet. She was approached by a woman who told her someone had just stolen merchandise from her store. Officer Williams asked the woman who it was, and the woman pointed southbound and said he was turning the corner. The woman then described what the individual was wearing and Officer Williams proceeded southbound on Wabash on her all-terrain vehicle. When she reached Madison, Officer Williams saw a person wearing the clothes the woman described enter the Dunkin Donuts store through the Madison entrance.

¶ 7 Officer Williams parked her vehicle, spoke briefly with the woman who had approached

1-10-3696

her, and went inside the Dunkin Donuts through the Wabash entrance. She approached the individual and told him that a lady outside said he had taken something from her store. She identified the individual as defendant. He responded that he had not taken anything. He then reached inside his jacket. Officer Williams covered her holster and told him to take his hand out of his jacket. Defendant took the clothing out and threw it on the floor, saying, "She can have her shit." He then started coming toward her. She told him to stop and attempted to get her radio to call for backup. He kept coming toward her and went past her in an attempt to exit the store. Officer Williams put both hands on him to stop him from getting out the door and told him to calm down. Defendant started to struggle in an attempt to free himself from her grasp and they fell to the ground and wrestled a little. Officer Williams regained her balance and took out her baton. When defendant got up and grabbed a chair, Officer Williams told him, "Don't even think about hitting me with that chair." He swung the chair at her three times, hitting her across her abdomen and over her shoulder and head. Officer Williams struck defendant with her baton and attempted to block the chair. She was able to get the chair away from defendant and then he ran around a table and ran out the door on Madison. She ran after him, calling for backup. Backup arrived and defendant was then apprehended and arrested. Officer Williams was treated at the scene and then taken to Northwestern Hospital. She sustained swelling and a laceration to her left hand and thumb, a knot on her left shin, and swelling, bruising and scarring on her left side and back. She subsequently went to an orthopedic specialist and completed two months of physical therapy.

¶ 8 The State then showed the jury video surveillance footage from Dunkin Donuts. While

1-10-3696

the jury watched the video, Officer Williams described the events that were occurring. She pointed out when they began scuffling and when they were on the floor, indicating where her leg was when they were on the floor. The State also admitted still photographs from the video into evidence. Officer Williams was asked about a still in which it appeared that she was reaching for her left waist and explained that her radio was on her left waist. Another still showed Officer Williams reaching for her right side, and she explained that her gun was located on her right side. She explained that another still showed her when she was turning to grab defendant to stop him from leaving the store. There were no stills of the interaction while they were on the floor. Officer Williams testified that the next still was of them getting up and stated that, at that point in time, she was attempting to place defendant under arrest and defendant was resisting. The next still, a second later, showed Officer Williams trying to call for backup on her radio and the still from two seconds after that showed defendant swinging the chair at Officer Williams. Officer Williams testified that defendant struck her with the chair before she struck him with her baton.

¶ 9 Following Officer Williams' testimony, the State rested and defendant's motion for a directed verdict was denied. Defense counsel informed the trial court that defendant did not intend to call any witnesses. The trial court questioned defendant about his right to testify and he stated that it was his decision not to testify. During the jury instruction conference, defendant requested that the phrase "without legal justification" be added to the battery instruction. Defendant argued that the surveillance video showed that he had legal justification to prevent the use of excessive and unlawful force. The State responded that a person may not use force to resist arrest by a known police officer even if the arrest was unlawful unless the officer uses

1-10-3696

excessive force. The State argued that the video did not support a claim of excessive force. The trial court agreed with the State, ruling that it could not be considered excessive force for the officer to pull out the baton and raise it. Therefore, the trial court declined to insert the requested language over defendant's objection. The trial court also denied defendant's request for an instruction that a person is justified in using force to defend himself against the imminent use of unlawful force. The trial court and the attorneys also discussed whether the surveillance video would be sent back to the jury. Both sides stated that they had no objection to the video being sent to the jury. The trial court noted that viewing the video would require equipment to also be sent back and concluded that it would monitor the situation to see if the jury asked to view the video.

¶ 10 During deliberations, the jury sent out the following note: "Please send in the video equipment so we may watch the videos." The trial court sent for the parties. Before defense counsel arrived, the jury reported that it had reached a verdict. The jury found defendant guilty of retail theft, resisting or obstructing a peace officer, proximately causing an injury to the officer while resisting or obstructing that officer, and aggravated battery under both counts (bodily harm and contact of an insulting or provoking nature). Defendant was subsequently sentenced to 8 years in prison for aggravated battery, to run concurrently with a 6-year sentence for resisting and obstruction and a 6-year sentence for retail theft. Defendant timely filed this appeal.

¶ 11

ANALYSIS

¶ 12 Defendant first contends that the trial court erred in refusing to instruct the jury on self-defense where the surveillance video and testimony provided some evidence that he was

1-10-3696

defending himself against an unreasonable use of force by the officer. The State responds that the evidence at trial showed that defendant resisted arrest and the officer was required to use force to effectuate his arrest.

¶ 13 Instructions convey to the jury the correct principles of law applicable to the evidence presented at trial so that the jury may arrive at the correct conclusion according to the law and the evidence. *People v. Mohr*, 228 Ill. 2d 53, 65 (2008); *People v. Hudson*, 222 Ill. 2d 392, 399 (2006). Instructions not supported by either the evidence or the law should not be given. *Mohr*, 228 Ill. 2d at 66. Our supreme court has issued divergent statements on the proper standard of review on the issue of whether the evidence supports the giving of a jury instruction. On the one hand, the court has stated that “[t]here must be some evidence in the record to justify an instruction, and it is within the trial court’s discretion to determine which issues are raised by the evidence and whether an instruction should be given.” *Id.* On the other hand, the court has noted that “[t]he question of whether sufficient evidence exists in the record to support the giving of a jury instruction is a question of law subject to *de novo* review.” *People v. Washington*, 2012 IL 110283, ¶ 19.

¶ 14 In an attempt to reconcile these conflicting statements, we have examined the supreme court's analysis in *Washington*. The question before the court in *Washington* was whether an instruction on second degree murder must be given as a mandatory counterpart when the evidence supports the giving of a jury instruction on self-defense. *Id.* ¶ 56. The *Washington* court did not discuss whether or not the trial court erred in finding that the evidence was sufficient to support the giving of an instruction on self-defense, but only whether, under the

1-10-3696

circumstances where such an instruction *was* supported by the evidence, an instruction on second degree murder should have also been given. We further note that the *Washington* court relied on *People v. Everette*, 141 Ill. 2d 147, 157 (1990) for the standard of review. In *Everette*, the supreme court stated that "[i]t is a matter of law whether the defendant has met the evidentiary minimum entitling him to instructions on an affirmative defense." *Id.* The *Everette* court explained that this is because with an affirmative defense, unless the State's evidence raises an issue with respect to the potential affirmative defense, the defendant bears the burden of presenting evidence sufficient to raise the issue. *Id.* The *Everette* court, in turn, cites to *People v. Lockett*, 82 Ill. 2d 546, 553 (1980) for the standard of review. However, in *Lockett*, the supreme court merely stated that it was the trial court's duty to determine if any evidence was presented that the defendant had a subjective belief that use of force was necessary, while it was the jury's duty to determine whether that belief was reasonable. *Id.* at 552-53. The *Lockett* court further pointed out that it could conceive of no circumstance in which the trial court could determine, as a matter of law, that the jury could find that a defendant had a reasonable subjective belief, but not an unreasonable one. *Id.* at 553. This language does not support a *de novo* standard of review for the issue generally of whether the evidence is sufficient to support the giving of a jury instruction. It merely indicates that if there is sufficient evidence that a defendant had a subjective belief that use of force was necessary, the trial court cannot determine as a matter of law whether the evidence supports a reasonable versus an unreasonable belief, but must leave that decision to the jury.

¶ 15 On a number of occasions, this court has rejected the interpretation that *Everette* supports

1-10-3696

a *de novo* standard of review for a trial court's decision to refuse a requested jury instruction, even where the instruction involves an affirmative defense, and the supreme court has not overruled these decisions. See *People v. Gibson*, 403 Ill. App. 3d 942, 950-51 (2010) (relying on *People v. Jones*, 219 Ill. 2d 1, 31 (2006) in applying an abuse of discretion standard to the trial court's decision to refuse a necessity defense instruction); *People v. Couch*, 387 Ill. App. 3d 437, 444 (2008); *People v. Sims*, 374 Ill. App. 3d 427, 431 (2007); *People v. Douglas*, 362 Ill. App. 3d 65, 76 (2005); *People v. Pinkney*, 322 Ill. Spp. 3d 707, 720 (2000). Although the *Washington* decision was filed subsequent to these appellate decisions, there is no discussion by the supreme court in *Washington* of any reasons for a departure from the many supreme court decisions that have applied an abuse of discretion standard of review to the giving of a requested instruction. See, e.g., *Mohr*, 228 Ill. 2d at 65-66; *Hudson*, 222 Ill. 2d at 400-01; *Jones*, 219 Ill. 2d at 31; *People v. Castillo*, 188 Ill. 2d 536, 540 (1999); *People v. Hope*, 168 Ill. 2d 1, 46 (1995).

¶ 16 Thus, because the *Washington* decision does not address the differing standards, does not consider the issue of whether the evidence was sufficient to support a particular instruction in its analysis, and does not overrule the long line of supreme and appellate court decisions that have applied a different standard, we will review this issue under the abuse of discretion standard. We further note that the question of whether there was sufficient evidence to support the requested instruction in the case *sub judice* is a question of fact, not of law and thus, is properly within the discretion of the trial court. See *People v. DiVincenzo*, 183 Ill. 2d 239, 251 (1998) (noting that whether an involuntary manslaughter instruction is warranted depends on the facts and circumstances of each case).

1-10-3696

¶ 17 A defendant is entitled to an instruction on his theory of the case where there is some evidence to support the giving of the instruction. *Jones*, 219 Ill. 2d at 31; *DiVincenzo*, 183 Ill. 2d at 249. Where some evidence exists to support the instruction, it is an abuse of discretion for the trial court to refuse the instruction. *Jones*, 219 Ill. 2d at 31; *DiVincenzo*, 183 Ill. 2d at 249. Slight evidence is sufficient to meet the evidentiary requirement. *Gibson*, 403 Ill. App. 3d at 951; *Couch*, 387 Ill. App. 3d at 443-44. However, instructions which are not supported by the evidence should not be given. *Mohr*, 228 Ill. 2d at 65.

¶ 18 Defendant argues that the evidence at least provides some indication that he was justifiably afraid of Officer Williams. Defendant contends that evidence that he jumped back when the officer approached him could plausibly suggest that he did so because he was afraid of Officer Williams because she reached for her weapon. Defendant further contends that his body language suggested fear when he was cowering on the floor just before he reached for the chair. Finally, defendant contends that evidence that Officer Williams punched him with her fist just seconds into the confrontation gives further credence to his argument that he was acting out of fear for his safety.

¶ 19 Section 31 of the Criminal Code of 1961 (Code) provides, in pertinent part:

"(a) A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer *** of any authorized act within his official capacity commits a Class A misdemeanor." 720 ILCS 5/31-1(a) (West 2010).

Section 7 of the Code provides that a peace officer "need not retreat or desist from efforts to

1-10-3696

make a lawful arrest because of resistance or threatened resistance to the arrest," but is justified in the use of any force the officer believes is reasonably necessary to effect the arrest or defend himself or others. 720 ILCS 5/7-5 (a) (West 2010). Section 7 further provides that a person cannot use force to resist an arrest by a known peace officer, even if he believes that the arrest is unlawful and the arrest actually is unlawful. 720 ILCS 5/7-7 (West 2010). Thus, the statute prohibits any physical act that "impedes, hinders, interrupts, prevents, or delays the performance of the officer's duties, such as by going limp or forcefully resisting arrest." *People v. Agnew-Downs*, 404 Ill. App. 3d 218, 226 (2010). This court has recognized that an exception to this rule exists in situations where an officer uses excessive force to effect the arrest. *People v. Wicks*, 355 Ill. App. 3d 760, 763 (2005); *People v. Williams*, 267 Ill. App. 3d 82, 88 (1994); *People v. Bailey*, 108 Ill. App. 3d 392, 398 (1982).

¶ 20 We begin our inquiry with an examination of whether the evidence indicates that Officer Williams used any force at all prior to defendant attempting to flee. The evidence adduced at trial demonstrates that Officer Williams approached defendant, verbally confronted him about the stolen merchandise, and moved her right hand to cover her holster when defendant reached his hand into his jacket. The surveillance video, although it does not contain audio, supports this testimony where it is clear that Officer Williams moved her right hand toward her waist seconds into the confrontation, but there is no evidence that she ever drew her weapon. The evidence further demonstrated that defendant came toward the officer, refused to stop when ordered by the officer to do so, and attempted to get past the officer and exit the store. Officer Williams then placed her hands on defendant to prevent him from leaving and he struggled with her. This

1-10-3696

portion of the confrontation was not captured on the surveillance video, and the only evidence presented of what happened during this time was the testimony of Officer Williams and Medina, the Pay Half store manager.

¶ 21 In support of his position that he was reacting in fear of his safety from the outset of the confrontation, defendant selectively quotes from Medina's testimony, arguing that she saw him jumping back, pushing a table, and putting his hands in the air, actions consistent with his theory that he was defending himself from the use of excessive force. Medina's actual testimony presents a completely different picture of what happened. Medina stated:

"The officer walked in and tried to talk to him, and he was – tried to like get away from her, jumping back. He had his hands up trying to basically run from her."

When asked what else she saw defendant do, Medina stated that she saw him push a table and that the officer was "trying to stop him." Medina testified that she then went back to her store to call for backup because she knew the officer needed help. This testimony offers no support whatsoever for a possible interpretation that defendant was justifiably afraid of Officer Williams, and instead corroborates the officer's testimony that when she verbally confronted defendant about the stolen merchandise he attempted to get away from her.

¶ 22 Contrary to defendant's assertions, there was no evidence that Officer Williams used any force at all, let alone excessive force, prior to defendant attempting to flee. Medina's testimony confirmed that Officer Williams was only trying to talk to defendant before he attempted to get away. Moreover, an officer moving her hand to cover her holster is not an act of force, and

1-10-3696

certainly cannot be reasonably interpreted as the use of excessive force. Officer Williams further testified that she moved her hand to cover her holster in response to defendant reaching his hand into his jacket. Defendant is not visible on this portion of the surveillance video. The only argument defendant makes is that because something blue can still be seen protruding from his jacket in the later part of the confrontation, the officer's testimony was impeached. We disagree. There was evidence to indicate that at least 6 turquoise blouses ended up on the floor of the Dunkin Donuts at some point during the confrontation. Whether some or all of the blouses were thrown to the floor initially or at a later point is not relevant to whether the evidence showed the use of excessive force by Officer Williams prior to defendant resisting arrest. There is no evidence to suggest that defendant did not reach into his jacket, and the surveillance video can neither corroborate nor refute Officer Williams' testimony where defendant is not visible in that portion of the video. Whether or not the jury believed Officer Williams' explanation of why she covered her holster is a credibility issue resting solely on the officer's testimony. However, as previously noted, merely moving her hand to her waist to cover her holster is not evidence of use of force, let alone excessive force.

¶ 23 While an officer is entitled to use reasonable force to effect an arrest, she is not entitled to use excessive force. The only indications of any use of force by Officer Williams on the surveillance video occur after defendant's initial resistance to arrest. In one frame, Officer Williams has her hand in the air and appears to be preparing to strike defendant with her fist. Defendant is not shown in this portion of the video, so there is no evidence to contradict the officer's account that he was struggling with her in an attempt to resist arrest. The evidence does

1-10-3696

not indicate whether the officer ever even landed one punch on defendant. One raised fist can hardly be considered evidence of excessive force. Seconds later, defendant comes into view on the surveillance video. He seems to be briefly attempting to regain his balance, and then starts swinging a chair at Officer Williams before she hits him with her baton and attempts to get the chair away from him. Again, this is not evidence of excessive force, but of the officer using reasonable force to defend herself and effect the arrest. Officer Williams' account is further corroborated by Medina's testimony that she knew the officer needed help so she returned to her store and had her cashier call 911 for backup.

¶ 24 In refusing defendant's requested instructions related to his theory of self-defense, the trial court stated that it did not believe the officer's actions could be considered excessive use of force under the circumstances here. We agree and conclude that there is not even a scintilla of evidence that the officer used any force prior to defendant's initial attempt to flee, or that the officer used excessive force in defending herself and attempting to effect the arrest. Thus, the trial court did not abuse its discretion in refusing defendant's requested instructions on self-defense.

¶ 25 Defendant next contends that he was denied a fair trial where the trial court did not respond to the jury's request to view the surveillance video because the court erroneously believed it lacked the authority to grant the request without first consulting defense counsel. As an initial matter, we note that the record does not support this interpretation of the trial court's response to the jury's note or the trial court's assessment of its authority. Rather, this argument represents defendant's creative framing of what occurred and includes inferences that are not

supported by the record. Therefore, in addressing this issue, we will adhere strictly to what the record shows and the reasonable inferences that may be drawn therefrom. The trial court's response to a question or request from the jury is reviewed for an abuse of discretion. *People v. Hill*, 315 Ill. App. 3d 1005, 1011 (2000); *People v. Reid*, 136 Ill. 2d 27, 38-39 (1990).

¶ 26 Issues raised on appeal are preserved for review by both objecting during trial and filing a written posttrial motion raising the alleged error. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). There is no indication that defendant did either here, thus, a plain error analysis is appropriate. The plain error doctrine allows errors not previously challenged to be considered on appeal if either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007); *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). However, before conducting a plain error analysis we must determine whether an error in fact occurred. *People v. Sims*, 192 Ill. 2d 592, 621 (2000).

¶ 27 Defendant argues that the jury requested that the surveillance video be sent back, and the trial court refused to send back the video. Defendant further contends that because the parties agreed during the jury instruction conference that the video could go back, the trial court should not have waited for defense counsel to arrive before sending it back. We note that it is apparent from the record that the jury already had the surveillance video and was simply requesting the necessary equipment to view the video. Although we recognize that having the video is not helpful without the means to view it, the issue is not, as defendant puts it, whether the video itself

1-10-3696

should have been sent to the jury, but whether the equipment should have been sent without notifying counsel of the request. Moreover, the record does not support defendant's contention that the trial court refused to respond to the jury's note, or refused to send back the equipment.

¶ 28 During the jury instruction conference, the following discussion occurred:

"MS. DILLON [defense attorney]: No. We have no objection to the video going back either, your Honor.

THE COURT: Well, that was entered into evidence. And tell you what, it requires a machine and everything. Do you intend to send that back, State?

MS. SULLIVAN [Assistant State's Attorney]: Yes. We can send it back. They do have the stills, and I am anticipating probably to show it in my argument.

THE COURT: So you have the stills of the same thing. That's 20 through –

MS. SULLIVAN: 39, I believe. We can offer the disk back. And if they inquire –

THE COURT: If they want to see it. How about that?

MS. DILLON: Fine.

THE COURT: We will monitor that.

MS. DILLON: Thank you."

¶ 29 While the jury was in the process of returning from deliberations after reaching a verdict, the trial court stated:

"While they are coming, the attorneys, there was a question that came out, and we sent for everyone. The State was already here. 'Please send in the video

1-10-3696

equipment so we may watch the videos.' And it was signed Al Fish, foreperson.

And we never got a chance because we wanted to get you all's input on this

because the machinery has to be set up for them, et cetera, et cetera. And then the

verdict came in. So that's spread of record, the note that came out from the jury."

¶ 30 Considered in context, the result of the discussion during the jury instruction conference was that both parties agreed that the video itself would go back to the jury, but the situation would be monitored to see if the equipment needed to be sent back. After the trial court noted that viewing the video would require machinery, the State pointed out that the jury would also have the exhibits of the stills from the video. The State then said the video could go back and started to say that if the jury inquired, but the trial court interrupted and said, "If they want to see it. How about that?" The question clearly indicates a proposal by the trial court, and it is clear from the context that the machinery to view the video would not be sent back unless the jury asked for it, a proposition to which defense counsel agreed. The trial court later explained on record that it wanted to get input from both parties regarding the logistics involved in setting up the machinery for the jury, which is consistent with what the court appeared to be saying during the jury instruction conference. This does not indicate, as defendant suggests, that because the parties reached an agreement that the video could go back, the trial court could just send back the viewing equipment if the jury asked for it, without notifying either party. Thus, the record does not support the assertion that the trial court was acting under an erroneous belief that it lacked the authority to send back the video. It is entirely appropriate and indeed, expected, for the trial court to notify counsel whenever there is a note from the jury. See *People v. Marsan*, 264 Ill.

1-10-3696

App. 3d 970, 873 (1994) (noting that the proper procedure for the trial court to follow is to discuss the jury's request with counsel before responding). It is also reasonable for the trial court to get input from both sides on the logistics of setting up the equipment.

¶ 31 Defendant cites to *People v. Childs*, 159 Ill. 2d 217, 229 (1994) for his contention that he should be granted a new trial because the trial court failed to respond to the jury's note. In *Childs*, the supreme court stated that "[t]he failure to answer or the giving of a response which provides no answer to the particular question of law posed has been held to be prejudicial error." *Id.* However, we note that the trial court in *Childs* responded to a note from the jury without notifying counsel for either side, and told the jury that it had the instructions and should keep deliberating. *Id.* at 225. Because the trial court engaged in *ex parte* communication with the jury and gave an answer which "was tantamount to no answer" to a question that should have been answered, the supreme court held that the defendant was entitled to a new trial. *Id.* at 234-35. We note that the result in *Childs* does not support defendant's position. Rather, to the extent that part of the reason for reversal was that the trial court responded to the jury's question without notifying counsel, it supports the trial court's actions in the instant case.

¶ 32 Defendant further relies on *People v. Hill*, 315 Ill. App. 3d 1005 (2000), in which this court granted the defendant a new trial where a substitute judge refrained from answering the jury's question based upon the misapprehension that, as a substitute for the trial judge, he lacked the authority to respond. The *Hill* court held that where the jury's question was the type that required an answer, the judge's abstention was reversible error. *Id.* at 1011. In the case *sub judice*, as previously noted, there is no evidence in the record that the trial court believed it did

1-10-3696

not have the authority to respond to the jury's request, or that it abstained from doing so. Instead, the trial court followed the proper procedure and notified counsel for both sides prior to issuing a response; however, the jury returned its verdict before defense counsel could return to the courtroom. The timing of defense counsel's response to the trial court's notification and the jury actually reaching its verdict without waiting for the equipment are things that are outside of the trial court's control. However, it was not an abuse of discretion for the trial court to notify counsel and wait for input from both sides prior to sending back the video equipment, and there is no indication of a lengthy delay in the record. Thus, no error occurred and it is not necessary to conduct a plain error analysis. Accordingly, we affirm the judgment of the circuit court.

¶ 33 Affirmed.