

2012 IL App (2d) 100905-U
No. 2-10-0905
Order filed March 5, 2012

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
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 09-CM-4030
)	
DAVID A. MOORE,)	Honorable
)	Robert J. Morrow
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices Burke and Schostok concurred in the judgment.

ORDER

Held: Defendant showed no plain error in the jury instructions: in light of a bystander's report stating that the jury "was instructed on the law," we presumed that the trial court followed the law and instructed the jury on the elements of the offense; although no issues instruction appeared in a set of instructions in the common-law record, nothing indicated that those instructions, and no others, were given.

¶ 1 Following a jury trial, defendant, David A. Moore, was convicted of domestic battery (making contact of an insulting or provoking nature) (720 ILCS 5/12-3.2(a)(2) (West 2008)), and he was sentenced to one year of conditional discharge. Defendant filed a posttrial motion, arguing that the court erred in not tendering self-defense instructions to the jury. The trial court denied the

motion, and this timely appeal followed. At issue in this appeal is whether the jury received instructions on the elements of the offense. We determine that the record before us does not establish that the jury received improper instructions. Accordingly, we affirm the trial court.

¶ 2 The record before this court consists of a common-law record and a bystander's report. The common-law record contains several pages of jury instructions. One such instruction, which is labeled "State's Instruction No. 17," provides:

"A person commits the offense of domestic battery making physical contact of an insulting or provoking nature when he knowingly, without legal justification, and by any means makes physical contact of an insulting or provoking nature with any family or household member."

Although one copy of "State's Instruction No. 17" is marked "Refused," there is also a clean copy of the instruction in the common-law record. Nothing on this clean copy indicates whether the instruction was given or not or whether a modified instruction, deleting the words "without legal justification," was given.

¶ 3 Another instruction in the common-law record, which is labeled "State's Instruction No. 22," provides:

"To sustain the charge of domestic battery making physical contact of an insulting or provoking nature, the State must prove the following propositions:

First Proposition: That the defendant knowingly made physical contact of an insulting or provoking nature with [the victim]; and

Second Proposition: That [the victim] was then a family or household member to the defendant.

Third Proposition: That the defendant was not justified in using the force which he used.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty of that charge.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty of that charge.”

Like “State’s Instruction No. 17,” there are two copies of “State’s Instruction No. 22” in the common-law record. One of these instructions is marked “Refused.” On the clean copy of “State’s Instruction No. 22,” there is no notation indicating whether the instruction was given or not or whether a modified instruction, deleting the verbiage “[t]hat the defendant was not justified in using the force which he used,” was given.

¶ 4 According to the bystander’s report, the State objected at a jury instruction conference to submitting a self-defense instruction to the jury, as defendant testified that he never touched the victim. After hearing arguments on the issue, “[t]he court refused to tender all self-defense instructions.” However, according to the bystander’s report, “[t]he jury was instructed on the law without the defense’s requested instructions on self-defense.”

¶ 5 At issue in this appeal is whether the jury received instructions on the elements of the offense. In resolving that issue, we note that defendant forfeited review of his claim by failing to raise the issue at trial and in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); *People*

v. Mendoza, 354 Ill. App. 3d 621, 627 (2004). Recognizing this, defendant argues that we can consider the issue under the plain-error rule.

¶ 6 Plain error is a limited and narrow exception to the general forfeiture rule. Ill. S. Ct. 615(a) (eff. Jan. 1, 1967); *People v. Hampton*, 149 Ill. 2d 71, 100 (1992). To obtain relief under the plain-error rule, a defendant must show that a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). If the error complained of is not a clear or obvious error, a reviewing court need not go any further, because, without a clear or obvious error, the defendant cannot invoke the plain-error rule. See *People v. Moreira*, 378 Ill. App. 3d 120, 131 (2007). On the other hand, if a clear or obvious error is identified, a defendant may obtain relief if the error complained of meets either prong of the two-pronged plain-error rule. *Id.* That is, the defendant must establish that “either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). Here, because we find that the record does not support the conclusion that an error occurred, we will not consider whether defendant can meet either prong of the two-pronged plain-error rule. *Moreira*, 378 Ill. App. 3d at 131.

¶ 7 In determining that the record shows no error, we begin by noting that defendant, as the appellant, “has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis.” *Foutch v. O’Bryant*, 99 Ill. 2d 389, 391-92 (1984). Under *Foutch*, “[a]ny doubts which may arise from the incompleteness of the record will be resolved against the appellant.” *Id.* at 392.

¶ 8 In *People v. Majka*, 365 Ill. App. 3d 362 (2006), we explained how this presumption works when a bystander’s report generally mentions proceedings without providing in detail what occurred. There, the State claimed that the presumption set out in *Foutch*, *i.e.*, that a reviewing court must resolve any doubt arising from the incompleteness of a record against the appellant, applied against the defendant despite his having filed a bystander’s report. *Id.* at 368. The State argued that, because the report was plainly not as complete as a record of *everything*, the *Foutch* principle required this court to presume that the trial court had admonished the jury concerning reasonable doubt. *Id.* We rejected the State’s argument. *Id.* at 370. We reasoned that the procedure for generating a bystander’s report requires the participation of both parties and that therefore “both parties bear responsibility for the report’s accuracy.” *Id.* at 368. As a result, we concluded that we should presume that “a bystander’s report is materially complete on the points it addresses.” *Id.*

¶ 9 Here, the bystander’s report indicates that the jury was “instructed on the law,” which we presume means that the jury was instructed *accurately* on *all* of the law. Defendant attempts to rebut that presumption by saying that the instructions that were given consist of a clump of instructions appearing in the middle of the common-law record. Although it is true that, in this clump, there are no instructions governing the elements of the offense, it is likewise true that nothing in the record before us indicates that those instructions, and no others, were given. Just like the clean copies of “State’s Instruction No. 17” and “State’s Instruction No. 22,” the clump of instructions to which defendant refers are not marked given. Moreover, although one copy of “State’s Instruction No. 17” and one copy of “State’s Instruction No. 22” are marked “Refused,” that fact alone does not mandate a conclusion that the trial court did not give these instructions in some modified form. Indeed, it is entirely possible that, because the court refused to give the jury any self-defense instruction, the court

gave these instructions but without advising the jury that it had to find that defendant acted “without legal justification” (“State’s Instruction No. 17”) and “[t]hat the defendant was not justified in using the force which he used” (“State’s Instruction No. 22”). If we were to conclude, as defendant suggests, that the court failed to advise the jury about the elements of the offense, we would have to presume that the trial court did not follow the law. In the absence of a record demonstrating as much, we decline to accept that presumption. See *People v. Gaultney*, 174 Ill. 2d 410, 420 (1996).

¶ 10 Accordingly, because the record on appeal does not rebut the presumptions that we draw from the bystander’s report, we affirm the trial court. In so doing, we also admonish this trial court to maintain proper records of the instructions given in all jury trials in the future.

¶ 11 The judgment of the circuit court of Kane County is affirmed.

¶ 12 Affirmed.