

No. 1-11-1576

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 17605
	)	
WALLACE MUHAMMAD,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE ROCHFORD delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

**ORDER**

¶ 1 **Held:** We affirmed defendant's misdemeanor and felony convictions of resisting or obstructing a peace officer, and his conviction of possession of a controlled substance, where the State proved him guilty of all offenses beyond a reasonable doubt and where the alleged instructional errors were waived at trial and did not constitute plain error.

¶ 2 A jury convicted defendant, Wallace Muhammad, of the felony offense of resisting or obstructing a peace officer, the misdemeanor offense of resisting or obstructing a peace officer, and possession of a controlled substance (less than 15 grams of a substance containing cocaine). The trial court sentenced defendant to 60 days' imprisonment, time considered served, on the

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misdemeanor conviction of resisting or obstructing a peace officer, and 2 concurrent terms of 2 years' probation, and 30 hours of community service, on the felony conviction of resisting or obstructing a peace officer, and the possession of a controlled substance conviction. On appeal, defendant contends: (1) the State failed to prove him guilty of any of the offenses beyond a reasonable doubt; and (2) the trial court failed to properly instruct the jury regarding the felony offense of resisting or obstructing a peace officer. We affirm.

¶ 3 At trial, Officer Alejandro Cabral testified he had been with the Chicago Police Department for 4½ years at the time of trial. On June 30, 2010, Officer Cabral was assigned to the Midnight Violence Reduction Team, which focused on areas with high numbers of narcotics offenses, aggravated batteries, robberies, or burglaries. Officer Cabral was working the first shift, from 10:30 p.m. until 7:30 a.m., and Officer Hernandez was his partner. The officers were in street clothes, meaning they were not in uniform, but they still were wearing their Chicago Police Department-issued vest, duty belt, and police star. Officer Cabral was driving an unmarked vehicle with Officer Hernandez in the passenger seat.

¶ 4 Officer Cabral testified that in response to a call from dispatch about a six foot tall, black male with dreadlocks, carrying a gun, they went to 75th Street and Kingston Avenue at approximately 1 a.m., where they were waved down by a male citizen. The citizen pointed northwest, toward a man walking about one block away, and told them that the man had displayed a gun. The officers drove up to the man, whom Officer Cabral identified in court as defendant. Defendant met the description from dispatch (six foot tall black male with dreadlocks). The officers exited their vehicle, began walking toward defendant, and told defendant to come toward them.

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Officer Cabral was on defendant's left side, and Officer Hernandez was on defendant's right side. As defendant walked toward them, he put his right hand in his coat pocket. The officers "immediately kind of grabbed his arms." With his right hand still inside his coat pocket, defendant "twisted and elbowed" Officer Hernandez in the chest, "kind of pushed him and knocked him back a little bit, then turned and started motioning away from [them]."

¶ 5 Officer Cabral testified that at that point, he grabbed defendant's right shoulder to keep him from running away. Officer Hernandez grabbed defendant from the left side. They struggled. Defendant "kept kind of giving elbows, trying to push away. " Officer Cabral was struck in the "chest/body area" by defendant's elbow. Officer Hernandez then "did an emergency takedown, taking him to the ground" face-first. Once defendant was on the ground, he kicked Officer Cabral "high in the right shin towards the knee area." After being kicked, Officer Cabral lost his balance and fell to the ground. Officer Cabral landed on his knees. Defendant kicked Officer Cabral a couple of more times in the chest and once to the left side of the ribs. Officer Hernandez was still trying to get control of defendant, who continued kicking.

¶ 6 Officer Cabral testified he "kind of lunged" at defendant and "took hold of his right side." Officer Cabral explained that he did this because defendant had his hand in his right pocket, leading the officer to believe he had a weapon. The officers "continued to struggle and gain control of [defendant], gave him a couple of knees and head stuns" or open hand strikes that enabled the officers to "eventually take his hands out and place him into custody." Defendant was handcuffed and taken to a squad car that he had driven to the scene to assist. Officer Cabral searched defendant and retrieved from his right coat pocket "two knotted plastic baggies containing a white rock-like

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substance suspect crack cocaine." A piece of the suspect crack cocaine "was kind of loose." Officer Cabral placed the baggies inside an inventory bag and zipped it into his vest pocket. The officers then placed defendant inside the squad car; as they were doing this, defendant told them, "[s]orry guys, that crack is all I had."

¶ 7 Officer Cabral was shown People's exhibit number 1, which was the drug evidence he allegedly recovered from defendant. He identified People's exhibit number 1 as being substantially the same as what he recovered from defendant, except that the rock-like substance was now broken up.

¶ 8 Officer Cabral testified that later in the morning, after defendant's arrest, he went to the police station and handed the inventory bag to Officer Washington. Officer Cabral testified that after defendant had been subdued and arrested, the officer "was tired" and "a little banged up." He had swelling and pain in his right knee, abrasions on both knees, his ribs were sore and his shoulder was "pretty sore, pretty stiff." Officer Cabral testified that a day or two after the encounter with defendant, the swelling in his right knee caused him to have a hard time walking. The bruising on his ribs "became more like black and blue." His left shoulder became more stiff, limiting his range of motion. Officer Cabral received medical treatment for his injuries and was out of work for a couple of months. The swelling in his right knee and the bruising on his ribs had subsided as of the time of trial, but he continued to have pain in his left shoulder.

¶ 9 Officer Cabral identified People's exhibit numbers 2 through 6 as photographs of the injuries he sustained from defendant. Officer Cabral testified that exhibit numbers 2 and 3 showed the abrasion on his right knee. Exhibit number 4 showed the scrapes on his left knee. Exhibit numbers

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5 and 6 showed an abrasion on his left side above his ribs. All of these photographs were taken on the morning of his injuries. Officer Cabral testified he had been in good health and his shoulder had good mobility prior to the encounter with defendant, and that he did not have any of the injuries depicted in the exhibits prior to said encounter.

¶ 10 On cross-examination, Officer Cabral described the citizen who flagged him down as being a thin, black male, in his early or mid-thirties, wearing a black T-shirt and blue jeans. Officer Cabral could not recall whether the officers were inside or outside their unmarked squad car when he spoke with the citizen. Officer Cabral testified he filled out an arrest report, but did not refer therein to his conversation with the civilian. Officer Cabral explained that the conversation with the civilian did not constitute probable cause for the charge of resisting a peace officer and, therefore, the officer did not describe the conversation in the arrest report. The case report filled out by another officer also did not contain a statement regarding the officers' conversation with the civilian.

¶ 11 Officer Cabral testified that at least one-half hour passed between the time they received the dispatch describing a person with a gun, and the time they were flagged down by the citizen and pointed toward defendant. Officer Cabral testified they did not put their hands on defendant until he elbowed Officer Hernandez. Officer Cabral explained that he called for assistance during the struggle with defendant. Officer Cabral was lying on top of defendant with the left side of his torso on defendant's hip or back. With his left hand on defendant's shoulder or elbow, Officer Cabral radioed for backup with his right hand. The officers never found a gun on defendant.

¶ 12 On re-direct examination, Officer Cabral testified that the conversation with the civilian was brief, about 10 to 20 seconds. The officers did not have time to ask the civilian his name because

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they wanted to quickly intercept defendant before "[s]omebody could get hurt."

¶ 13 Officer Robert Hernandez testified he had been with the Chicago Police Department for a little over 3½ years as of the time of trial. At approximately 1 a.m. on June 30, 2010, he was working the midnight shift with his partner, Officer Cabral. They were in "civilian dress," meaning he was wearing blue jeans, a T-shirt, and a black, bullet-proof vest. Officer Hernandez's police star was hanging on a chain around his neck and was visible over his police vest.

¶ 14 Officer Hernandez testified they received a radio dispatch of a man with a gun. The man was described as being black and having dreadlocks. A citizen subsequently waved them down at the northeast corner of 75th Street and Kingston Avenue. The citizen "just simply stated there's a person with a gun, and he pointed north on Kingston, saying there's a male black with dreads. Just pointed in that general vicinity going north." Officer Hernandez looked north and saw an individual about "a half a block to a block down" whom he identified in court as defendant. Officer Hernandez did not see any other persons on the street other than defendant.

¶ 15 Officer Hernandez testified they drove their unmarked car north toward defendant and activated their lights. They exited the vehicle and Officer Hernandez said, "Chicago police, come here." Officer Hernandez described the area as being "somewhat well lit" with "light poles around." Defendant and the officers began walking toward each other. Officer Hernandez was on defendant's right side; Officer Cabral was on defendant's left side. As he was walking, defendant shoved his right hand into his coat pocket "in a really fast, threatening manner." Officer Hernandez told defendant to take his hands out of his pocket. Defendant did not comply.

¶ 16 Officer Hernandez testified he was fearful defendant had a weapon, so he grabbed defendant's

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right arm and wrist. Defendant "immediately twisted with a jerk" and elbowed Officer Hernandez in the chest. The force of the blow "threw [the officer] back a couple of steps," causing him to release defendant. Officer Hernandez regained his balance and grabbed defendant's arm again. Defendant twisted and moved his body in an effort to get away. Officer Hernandez grabbed defendant on the top part of his coat and performed an emergency takedown, meaning he dragged defendant "from the front forward to the ground." Defendant was now face-down. Officer Hernandez tried to grab defendant's hand to cuff him, but defendant kicked the officer in the right forearm, causing his hand to snap back. Defendant continued to struggle with both officers for a couple of minutes, until they were able to handcuff him.

¶ 17 Officer Hernandez testified that after they handcuffed defendant, they took him over to a squad car that had arrived on the scene. Officer Cabral performed a protective pat down, during which time Officer Hernandez was holding defendant. Officer Hernandez did not see Officer Cabral remove anything from defendant's person. No gun was ever recovered, and Officer Hernandez did not look in the area for a gun.

¶ 18 Officer Hernandez went to the police station, but he was in a lot of pain, so he went to the hospital. Officer Hernandez testified that as a result of his encounter with defendant, he suffered ligament damage to the wrist and underneath the forearm. There was "a lot of swelling and a lot of excruciating pain." Officer Hernandez identified People's exhibit number 9 as a photograph of his hands and wrist about two hours after his encounter with defendant, depicting the swelling from his injuries. As a result of his injuries, Officer Hernandez missed approximately two months of work.

¶ 19 On cross-examination, Officer Hernandez testified he and Officer Cabral stayed in the car

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while speaking with the citizen whom had flagged them down. Officer Hernandez testified, contrary to his testimony on direct examination, that he did not touch defendant until *after* defendant elbowed him. Officer Hernandez testified that after defendant elbowed him, knocking him off balance, Officer Cabral grabbed defendant and they began to struggle. Officer Hernandez then rejoined the struggle and used the emergency takedown maneuver on defendant. Defendant landed face-down, and later kicked Officer Hernandez, causing the ligament damage. Officer Hernandez later rehabbed the ligaments, but did not undergo surgery.

¶ 20 Officer Hernandez testified he held defendant while Officer Cabral performed the pat down. Officer Hernandez stated he did not watch the pat down, and so did not see Officer Cabral remove anything from defendant's pockets.

¶ 21 The parties stipulated that if called to testify, Officer Washington would state she received an evidence inventory bag from Officer Cabral on June 30, 2010. The inventory bag contained two knotted, plastic bags containing a white, rock-like substance and one small, white, rock-like substance. Officer Washington heat-sealed the inventory bag and signed her name on the seal. She placed the inventory bag into a safe to be sent to the Illinois State Police Crime Lab for analysis.

¶ 22 Tina Joyce, a forensic scientist at the Illinois State Police Forensic Science Center in Chicago, testified she received the sealed inventory bag on July 8, 2010. She opened the bag and removed the contents. There was "a loose piece of chunky substance and then there were two other bags, they were knotted, both contained a similar substance of chunky substance inside each." Ms. Joyce weighed the substance contained in the two knotted, plastic baggies recovered from defendant and determined that the total weight was 2.3 grams. She also weighed the loose substance and

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determined that its weight was .038 grams. Ms. Joyce performed a drug analysis test on the two items in the plastic baggies and she testified they tested positive for cocaine.

¶ 23 Defendant testified on his own behalf. Defendant testified that at about 1 a.m. on June 30, 2010, he was walking from a convenience store around the area of 75th Street and Colfax Avenue, where he had just bought a bottle of Black Label whiskey and some cigarettes. Defendant walked north on Colfax Avenue from 75th Street, in the direction of 74th Street. Defendant turned left on 74th Street, and then made a right turn onto Kingston Avenue, heading north toward the bus stop on 73rd Street to go to a friend's house to watch some DVDs. Defense counsel showed defendant defense exhibit number 5, which defendant described as a photograph of the corner of 75th Street and Kingston Avenue, and which depicted Kingston Avenue going north from 75th Street. Defendant testified that since Kingston Avenue angles to the northwest, a person standing at the corner of 75th Street and Kingston Avenue would be unable to see defendant walking north on Kingston Avenue at 74th Street.

¶ 24 As he was walking north on Kingston Avenue between 74th and 73rd Streets, a blue and white squad car pulled up behind him. Two persons exited the squad car. Although they were dressed in plain clothes, defendant knew they were police officers.

¶ 25 Defendant testified the officers walked in his direction and told him to "come here." Defendant walked toward the officers. Defendant was holding a DVD multi-colored cord in his right hand and a cigarette in his left hand. The other cigarettes and Black Label whiskey bottle were in the right pocket of the hooded sweatshirt he was wearing. As he walked toward the officers, defendant dropped the DVD cord so as not to appear aggressive and then he asked them "what's wrong."

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Defendant denied putting his hands in his pocket or elbowing Officer Hernandez in the chest.

¶ 26 Defendant testified that when the officers got close to him, Officer Cabral, who was on his left side, grabbed him by the underarm and pulled him toward the officers. Officer Cabral pushed him in front of the squad car between the headlights. Defendant put both of his hands on the hood of the car. Officer Cabral kicked defendant's legs open and told him to spread his legs. Defendant did as he was told. Officer Hernandez was standing by the driver's door.

¶ 27 Defendant testified he turned toward Officer Cabral and asked him why he was being so aggressive. Officer Cabral then struck defendant in the corner of his right eye. Defendant testified that the area near his eye began bleeding and he felt like his eye had sustained "real bad damage." Defendant also thought that Officer Cabral was still trying to hit him, so he stepped backward and put up his hands to avoid any more blows. Defendant denied using his elbows to strike the officers.

¶ 28 Defendant testified that as he stepped backward, he stumbled and fell down on his back. Officer Cabral got on top of defendant and sat on his waist, with his knees on either side of defendant's body. Officer Cabral began choking defendant with both hands. Defendant denied kicking at Officer Cabral. Defendant heard Officer Hernandez call for backup. Officer Hernandez then came over, grabbed defendant by the right arm and rolled him over on his face, causing Officer Cabral to get off him. Defendant denied kicking at either Officer Cabral or Officer Hernandez while he was lying facedown on the ground.

¶ 29 Defendant testified that Officer Hernandez pulled defendant's right arm "in some type of weird maneuver" in an attempt to handcuff him. Defendant "jerked forward" so as to allow Officer Hernandez to bend the arm and to prevent the arm from breaking. After they handcuffed him, the

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officers pulled him up to a standing position and took him back to the squad car, where they searched him. Defendant testified that the officers did not recover any narcotics or cocaine from him, and that he did not have any narcotics on him that night. Defendant does not know what happened to the DVDs, Black Label whiskey bottle, and cigarettes he had in his pocket.

¶ 30 Defendant testified that after being placed in the squad car, they drove around and he saw police questioning some individuals on the corner of 74th Street and Phillips Avenue. Then he was taken to the hospital and given dry ice to put on his face. Defendant denied kicking, hitting, or striking either officer during his encounter with them, explaining he knew that they could kill him if he became "aggressive like that."

¶ 31 Following all the evidence, the trial court instructed the jury in pertinent part that to convict defendant of the misdemeanor offense of resisting or obstructing Officer Hernandez, the State must prove: (1) Robert Hernandez was a peace officer; (2) defendant knew Robert Hernandez was a peace officer; and (3) defendant knowingly resisted or obstructed the performance by Officer Hernandez of an authorized act within his official capacity. The trial court gave a similar instruction with respect to the misdemeanor offense of resisting or obstructing Office Cabral.

¶ 32 The trial court further instructed the jury that if it found defendant guilty of the misdemeanor offense of resisting or obstructing a peace officer, it then should consider whether the State proved that during the commission of the offense defendant "proximately caused an injury to that peace officer" so as to enhance the conviction to a felony.

¶ 33 The trial court also instructed the jury that to convict defendant of aggravated battery of Officer Hernandez, the State must prove beyond a reasonable doubt that defendant made physical

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contact of an insulting or provoking nature with Officer Hernandez, that defendant knew he was a peace officer, and that defendant knew Officer Hernandez was engaged in the execution of official duties. The trial court gave a similar instruction with respect to the charge of aggravated battery committed against Officer Cabral.

¶ 34 Finally, the trial court instructed the jury that to convict defendant of possession of a controlled substance, the State must prove beyond a reasonable doubt that defendant knowingly possessed a substance containing cocaine.

¶ 35 The jury convicted defendant of the felony offense of resisting or obstructing Officer Cabral. The jury convicted defendant only of the misdemeanor offense of resisting or obstructing Officer Hernandez, finding that the State failed to prove that defendant proximately caused an injury to Officer Hernandez. The jury convicted defendant of one count of possession of a controlled substance (less than 15 grams of a substance containing cocaine). The jury found defendant not guilty of aggravated battery of either officer. The trial court sentenced defendant to 60 days' imprisonment, time considered served, on the misdemeanor conviction of resisting or obstructing a peace officer, and 2 concurrent terms of 2 years' probation, and 30 hours of community service, on the felony conviction of resisting or obstructing a peace officer and the possession of a controlled substance conviction. Defendant appeals.

¶ 36 I. Whether the State Proved Defendant Guilty Beyond a Reasonable Doubt

¶ 37 First, defendant contends the State failed to prove him guilty beyond a reasonable doubt of the misdemeanor offense of resisting or obstructing Officer Hernandez, the felony offense of resisting or obstructing Officer Cabral, and possession of a controlled substance. It is not the

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function of the reviewing court to retry defendant when presented with a challenge to the sufficiency of the evidence. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). The relevant inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Under this standard, the trier of fact remains responsible for determining the credibility of the witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence. *People v. Ross*, 229 Ill. 2d 255, 272 (2008).

¶ 38 A. Defendant's Misdemeanor Conviction of Resisting or Obstructing Officer Hernandez

¶ 39 To prove defendant guilty of the misdemeanor offense of resisting or obstructing a peace officer, the prosecution must prove defendant knowingly resisted or obstructed "the performance by one known to the person to be a peace officer \*\*\* of any authorized act within his official capacity." 720 ILCS 5/31-1(a) (West 2010).

¶ 40 The evidence at trial established that although Officer Hernandez and Officer Cabral were in plain clothes during their encounter with defendant at 1 a.m. on June 30, 2010, they were wearing their police stars around their necks and defendant admitted he knew they were police officers. Officer Hernandez testified that the officers approached defendant after receiving a radio dispatch of a black man in dreadlocks with a gun, and after speaking with a citizen at 75th Street and Kingston Avenue who pointed out defendant as the man in possession of a gun. Officer Hernandez identified himself as a Chicago Police officer and told defendant to "come here," after which defendant shoved his right hand into his coat pocket in a really fast, threatening manner, causing the

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officers to believe he might be reaching for a weapon. Officer Hernandez grabbed defendant's right arm and wrist to prevent him from using the weapon, and defendant responded by elbowing Officer Hernandez in the chest and twisting his body in an effort to get away. Officer Hernandez dragged defendant to the ground in an emergency takedown and defendant proceeded to kick Officer Hernandez in the right forearm and struggle with both officers for a couple of minutes until he was handcuffed.

¶ 41 Officer Cabral similarly testified to approaching defendant, who met the radio dispatch description of a six foot tall black male with dreadlocks, holding a gun, and whom had been pointed out by a citizen at 75th Street and Kingston Avenue. After they told defendant to come toward them, he approached while putting his right hand in his coat pocket. Officer Cabral testified that, in response, the officers immediately grabbed his arms. Defendant then elbowed Officer Hernandez in the chest and tried to move away from them. Both officers grabbed defendant to keep him from leaving, and defendant threw more elbows, striking Officer Cabral in the chest. Officer Hernandez forced defendant to the ground face-first, after which defendant kicked Officer Cabral in the right shin and subsequently kicked him in the chest and ribs. Officer Cabral testified that Officer Hernandez also was trying to get control of defendant, who continued to kick and struggle until a couple of knees and open-hand strikes stunned defendant enough that the officers were able to handcuff him.

¶ 42 Defendant testified to a different version of events, claiming he did not put his hand in his pocket and denying that he kicked or elbowed the officers. Defendant claimed Officers Cabral and Hernandez were the aggressors.

¶ 43 Defendant argues his testimony was more credible than the officers. Specifically, defendant contends the officers' testimony was suspect, where: (1) they never got the name of the citizen whom had allegedly pointed out defendant to them, and Officer Cabral testified he did not mention in the arrest report that he had encountered a citizen on the corner of 75th Street and Kingston Avenue whom had pointed him in the direction of a man with a gun; (2) the officers could not remember whether they were inside or outside the police car at the time they spoke with the citizen; (3) Officer Cabral and Officer Hernandez initially testified that they immediately grabbed defendant when he put his hand in his pocket, but each later testified he touched defendant only after defendant elbowed Officer Hernandez; (4) Officer Cabral could not recall how Officer Hernandez effectuated the emergency takedown of defendant; and (5) the gun was never recovered. Defendant also contends that the officers' account of defendant elbowing them while keeping his hand in his pocket, and of kicking both of them while lying face-down on the ground, was incredible. Defendant further argues that the officers' testimony that they initially viewed defendant a block northwest from the intersection of 75th Street and Kingston Avenue was "improbable."

¶ 44 As discussed above, it is for the jury, not the reviewing court, to determine the credibility of the witnesses (*Ross*, 229 Ill. 2d at 272), and the jury here obviously resolved the credibility issues in favor of the officers. Further, the jury's credibility findings are supported by the record. Specifically, with respect to the officers' failure to ask the citizen his name or mention the conversation with the citizen in the arrest report, Office Cabral explained at trial that the conversation was brief and that the officers left without getting the citizen's name because they were in a hurry to intercept defendant before somebody got shot. Officer Cabral also testified he did not

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mention the conversation with the citizen in the arrest report because the conversation did not constitute the probable cause for defendant's arrest.

¶ 45 With respect to whether the officers were inside or outside the police car when they spoke with the citizen, Officer Hernandez testified they were inside the car; Officer Cabral did not provide any contrary testimony, but merely indicated his inability to definitively remember whether they had gotten out of the car to speak with the citizen.

¶ 46 With respect to Officer Cabral's inability to recall how Officer Hernandez effectuated the emergency takedown of defendant, Officer Cabral explained he was on the opposite side of defendant at the time the takedown occurred, and so did not witness the maneuver.

¶ 47 Finally, with respect to the discrepancies in the officers' testimony regarding the timing of when they first put their hands on defendant, we note "[m]inor inconsistencies in testimony do not constitute grounds for reversal of a criminal conviction [citations], and the effect of testimonial discrepancies upon the credibility of the witnesses is a matter for the jury to determine." *People v. Brown*, 232 Ill. App. 3d 885, 903 (1992). The jury was aware of the discrepancies in the testimony of the arresting officers but apparently determined that these discrepancies were minor and did not compel the conclusion that the officers' testimony regarding defendant's elbowing and kicking them was incredible. In convicting defendant, the jury obviously believed the officers' testimony that the citizen at 75th Street and Kingston Avenue pointed defendant out to them, and that when they approached defendant, defendant was the aggressor whom had actively resisted questioning and arrest. The jury disbelieved defendant's contrary testimony. We will not substitute our judgment for the jury's credibility determination. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009). Viewing

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the testimony of Officer Hernandez and Officer Cabral in the light most favorable to the prosecution, any rational trier of fact could have found defendant knew Officer Hernandez was a peace officer, and that he knowingly resisted or obstructed Officer Hernandez in the performance of an authorized act within his official capacity. See *People v. Taylor*, 112 Ill. App. 3d 3, 5 (1983) (peace officers are endowed under section 107-2 of the Code of Criminal Procedure (725 ILCS 5/107-2 (West 2010)) with authority to make an arrest such that a person may not use force to restrict or obstruct an arrest). Accordingly, we affirm defendant's misdemeanor conviction of resisting or obstructing Officer Hernandez.

¶ 48 B. Defendant's Felony Conviction of Resisting or Obstructing Officer Cabral

¶ 49 Defendant contends the State failed to prove him guilty beyond a reasonable doubt of the felony offense of resisting or obstructing Officer Cabral. To enhance defendant's misdemeanor conviction of resisting or obstructing a peace officer to a felony, the State must prove that during the commission thereof, defendant "was the proximate cause of an injury" to the peace officer. 720 ILCS 5/31-1(a-7) (West 2010). Viewing Officer Cabral's and Officer Hernandez's testimony in the light most favorable to the prosecution, any rational trier of fact could have found that while resisting or obstructing Officer Cabral, defendant was the proximate cause of the injuries to Officer Cabral's knees, ribs, and shoulder. Specifically, as we have discussed, Officer Cabral and Officer Hernandez testified regarding defendant's resistance to the officers, and Officer Cabral testified to defendant elbowing him in the chest and kicking him in the chest, ribs and right shin.

¶ 50 Defendant contends the photographs of Officer Cabral introduced at trial belied his claim of injuries. Contrary to defendant's argument, our review of the photographs, which were included in

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the record on appeal, indicates that they depict injuries to the officer's knee and chest consistent with his testimony. Defendant also questions Officer Cabral's credibility, repeating the same arguments he made when challenging his misdemeanor conviction for resisting or obstructing Officer Hernandez; as discussed above, the jury resolved any pertinent credibility issues in favor of the officers, and we will not substitute our judgment therefor. We affirm defendant's felony conviction of resisting or obstructing Officer Cabral.

¶ 51 C. Defendant's Conviction of Possession of a Controlled Substance

¶ 52 To prove defendant guilty of possession of a controlled substance (less than 15 grams of a substance containing cocaine), the State must prove: "(1) the identity of the substance at issue, *i.e.*, that it is a controlled substance in the proper amount; and (2) that defendant knowingly possessed that substance." *People v. Besz*, 345 Ill. App. 3d 50, 53 (2003); 720 ILCS 570/402 (West 2010).

¶ 53 Officer Cabral testified that after handcuffing defendant and leading him to a squad car, he searched defendant and recovered "two knotted plastic baggies containing a white rock-like substance crack cocaine" from defendant's right coat pocket. Defendant argues on appeal that Officer Cabral's testimony is suspect because Officer Hernandez testified he did not see Officer Cabral recover the cocaine from defendant. However, Officer Hernandez explained that at the time of this search (also referred to as a "pat down"), he was on the other side of defendant holding onto him and was not watching Officer Cabral pat down defendant. Officer Cabral testified he placed the baggies inside an inventory bag and zipped it into his vest pocket. Officer Cabral testified that as defendant was being placed in the squad car, he stated, "[s]orry guys, that crack is all I had." Officer Cabral testified to later handing the inventory bag to Officer Washington at the police station. The

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parties stipulated to Officer Washington's testimony that she received the evidence inventory bag, which contained two knotted, plastic bags containing a white, rock-like substance and one small, white, rock-like substance. Officer Washington heat-sealed the inventory bag and sent it to the Illinois State Police Crime Lab for analysis. Tina Joyce, a forensic scientist at the Illinois State Police Forensic Science Center, testified she received the sealed inventory bag, which contained two knotted bags that each contained a chunky substance. There also was a separate, loose piece of chunky substance. Ms. Joyce weighed the substance contained in the two knotted, plastic baggies recovered from defendant and determined that the total weight was 2.3 grams. She also weighed the loose substance and determined its weight was .038 grams. Ms. Joyce performed a drug analysis test on the two items in the plastic baggies and she testified they tested positive for cocaine. Viewing all this evidence in the light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that defendant knowingly possessed less than 15 grams of a substance containing cocaine. We affirm defendant's conviction of possession of a controlled substance.

¶ 54 II. Whether the Trial Court Failed to Properly Instruct the Jury

¶ 55 Next, defendant contends we should reverse his felony conviction for resisting or obstructing Officer Cabral and remand for a new trial because the jury instructions given by the trial court failed to inform the jury that the State had to prove beyond a reasonable doubt that defendant's action of resisting or obstructing the officer was "the proximate cause" of his injuries.

¶ 56 As discussed above, to enhance defendant's misdemeanor conviction of resisting or obstructing a peace officer to a felony, the State must prove beyond a reasonable doubt that during

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the commission thereof, defendant "was the proximate cause of an injury" to the peace officer. 720 ILCS 5/31-1(a-7) (West 2010). Defendant argues that the use of the definite article "the" in the phrase "the proximate cause" has been interpreted to mean that "the proximate cause" is "the one most immediate, efficient, and direct cause preceding an injury." *Robinson v. City of Detroit*, 462 Mich. 439, 445-46 (Mich. 2000). Instead of instructing the jury that it must find defendant was "the proximate cause" of Officer Cabral's injuries in order to enhance the conviction of resisting or obstructing a peace officer from a misdemeanor to a felony, the trial court here gave several Illinois Pattern Jury Instructions (without objection from defendant) informing the jury that it must find defendant "proximately caused" the officer's injuries in order to so enhance the conviction. See Illinois Pattern Jury Instructions, Criminal, Nos. 28.01, 28.02, 28.03 and 28.04 (4th ed. 2000) (hereinafter IPI Criminal 4th). Defendant contends the phrase "proximately caused" as used in the instructions given to the jury here introduced a level of ambiguity into the jury's deliberations because the phrase is easily susceptible to the interpretation that defendant's actions need be only one of several causes of the officer's injuries. Defendant contends we should reverse and remand for a new trial in which the jury is properly instructed that it must find defendant was "the proximate cause" of Officer Cabral's injuries in order to enhance his misdemeanor conviction of resisting or obstructing a peace officer to a felony.

¶ 57 Defendant did not object to the instructions given here that used the phrase "proximately caused" instead of the phrase "the proximate cause", nor did he tender any alternative instructions or raise the issue in a posttrial motion. Illinois Supreme Court Rule 366(b)(2)(i) states that "[n]o party may raise on appeal the failure to give an instruction unless the party shall have tendered it."

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Ill. S. Ct. R. 366(b)(2)(i) (eff. Feb. 1, 1994). Also, our supreme court has held that "a defendant will be deemed to have procedurally defaulted his right to obtain review of any supposed jury instruction error if he failed to object to the instruction or offer an alternative at trial and did not raise the issue in a posttrial motion." *People v. Sargent*, 239 Ill. 2d 166, 188-89 (2010).

¶ 58 Illinois Supreme Court Rule 451(c) provides limited relief from this principle, stating that "substantial defects" in criminal jury instructions "are not waived by failure to make timely objections thereto if the interests of justice require." Ill. S. Ct. R. 451(c) (eff. July 1, 2006). Our supreme court has noted:

"The purpose of Rule 451(c) is to permit correction of grave errors and errors in cases so factually close that fundamental fairness requires that the jury be properly instructed. The rule is co-extensive with the plain-error clause of Supreme Court Rule 615(a) (134 Ill. 2d R. 615(a)), which provides:

'Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.' [Citation.]

The plain error doctrine is a familiar one. It permits a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Sargent*, 239

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Ill. 2d at 189.

¶ 59 In the present case, the evidence was not closely balanced with regard to any of the charges of which defendant was convicted. Specifically, as we have discussed, Officers Cabral and Hernandez each testified to defendant as being the aggressor whom had actively resisted questioning and arrest, Officer Cabral testified to defendant causing his injuries, and Officer Cabral and Tina Joyce testified regarding defendant's possession of cocaine. Accordingly, defendant has not satisfied the first prong of the plain error doctrine.

¶ 60 Nor has defendant satisfied the second prong of the plain error doctrine, as the alleged error was not so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process. As discussed, defendant contends the alleged instructional error allowed the jury to improperly convict him of the felony offense of resisting or obstructing Officer Cabral if it found defendant "proximately caused" Officer Cabral's injuries while resisting or obstructing the officer, meaning defendant was merely one of several proximate causes of the officer's injuries. Defendant contends the jury should have been instructed that it must find him to be "the proximate cause" of Officer Cabral's injuries, which would have required the jury to find him to be the one most immediate and direct cause of the officer's injuries and would have prevented the jurors from convicting him where he was merely one of several proximate causes.

¶ 61 Defendant's contention is without merit. The evidence at trial revealed only one possible proximate cause of Officer Cabral's injuries: defendant's act of physically resisting the officers, during which he elbowed Officer Cabral in the chest and kicked him in the right shin near the knee, causing him to fall to the ground on his knees, and then kicked him again in the chest and the left

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side of the ribs. Defendant contends another possible proximate cause of Officer Cabral's injuries to his chest and ribs (other than defendant's elbowing and kicking him while resisting arrest) included a rash caused by wearing the bulletproof vest, and that the injuries to his knees could have been proximately caused when the officer kneeled to the ground. However, no evidence at trial was presented that Officer Cabral's injuries were caused by a rash from wearing the bullet proof vest, or from his kneeling on the ground. Contrary to defendant's argument, there was no evidence presented at trial as to any causes of Officer Cabral's injuries other than defendant's act of resisting arrest by elbowing Officer Cabral in the chest and kicking him the chest, ribs, and right shin, causing him to fall to the ground on his knees. In the absence of any evidence of other proximate causes of Office Cabral's injuries, the supposed distinction between the phrases "the proximate cause" and "proximately caused" is meaningless and did not affect the fairness of the trial and the integrity of the judicial process.

¶ 62 Next, defendant argues the trial court erred by failing to give the jury any instruction defining "proximate cause." IPI Criminal 4th No. 4.24 gives the following definition of proximate cause:

"The term 'proximate cause' means any cause which, in the natural or probable sequence, produced the [(great bodily harm) (permanent disability) (permanent disfigurement) (death of another person) (death of the child) (injury to a peace officer)]. [It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause which in combination with it, causes the [(great bodily harm) (permanent disability) (permanent disfigurement) (death of another person) (death of the child) (injury to a peace officer)]."

¶ 63 Defendant argues that the existence of IPI Criminal 4th No. 4.24 demonstrates that the term

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"proximate cause" is not self-defining and, therefore, the trial court erred when it failed to give the jury a definition of "proximate cause." However, IPI Criminal 4th No. 4.24 was not issued until June 2011, *after* defendant's trial. Further, even if IPI Criminal 4th No. 4.24 had been issued as of the time of defendant's trial, defendant states he would have objected to and argued against the trial court giving IPI Criminal 4th No. 4.24 because according to him it incorrectly states the law of proximate cause for purposes of section 31-1(a-7). Instead, defendant would have argued that proximate cause here means the most immediate, efficient and direct cause preceding an injury. Defendant did not tender an instruction defining "proximate cause" as the most immediate, efficient and direct cause preceding an injury and, therefore, has waived review of the issue. Ill. S. Ct. R. 366(b)(2)(i) (eff. Feb. 1, 1994). Further, the failure to instruct the jury as to defendant's definition of proximate cause did not constitute plain error, where the evidence was not closely balanced and where the evidence at trial indicated that defendant's elbowing and kicking Officer Cabral was the only proximate cause of the officer's injuries.

¶ 64 Finally, defendant contends his trial counsel provided ineffective assistance by failing to submit a jury instruction defining "proximate cause" as the most immediate, efficient and direct cause preceding an injury and for failing to object to the trial court's use of the term "proximately caused" in the instructions given to the jury. To determine whether defendant was denied his right to effective assistance of counsel, we apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First, defendant must show "counsel's representation fell below an objective standard of reasonableness" (*id.* at 688), and second, he was prejudiced such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

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would have been different." *Id.* at 694.

¶ 65 To prevail on his claim of ineffective assistance, defendant must satisfy both prongs of the *Strickland* test. If we can dispose of defendant's ineffective assistance claim because he suffered no prejudice, we need not address whether his counsel's performance was objectively reasonable. *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011).

¶ 66 As we have discussed, the evidence here was not closely balanced and the alleged instructional errors did not deprive defendant of a fair trial where, on the facts of this case, there was only one possible proximate cause of Office Cabral's injuries, rendering the supposed distinction between the phrases "the proximate cause" and "proximately caused" meaningless. Thus, the outcome of the trial would have been the same even if counsel had submitted a jury instruction defining "proximate cause" as the most immediate, efficient and direct cause preceding an injury and had objected to the trial court's use of the term "proximately caused" in the instructions given to the jury. Accordingly, defendant's claim of ineffective assistance fails, as he has not shown he was prejudiced by counsel's allegedly unprofessional errors with regard to the jury instructions.

¶ 67 For the foregoing reasons, we affirm the circuit court.

¶ 68 Affirmed.