2013 IL App (1st) 111816-U

No. 1-11-1816

SIXTH DIVISION
September 27, 2013

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 MC 6009990
	)	
MARC MILLER,	)	The Honorable
	)	Allen F. Murphy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justice Reyes concurred in the judgment.
Presiding Justice Gordon specially concurred.

O R D E R

¶ 1 HELD: The trial court erred in refusing defendant's requested self-defense jury instructions.

¶ 2 Following a jury trial, defendant, Marc Miller, was found guilty of three counts of resisting a peace officer and sentenced to one day imprisonment. On appeal, defendant contends the trial court erred in failing to provide requested jury instructions. Based on the following, we reverse and remand.

¶ 3 FACTS

¶ 4 At trial, Sergeant Gordon, of the Harvey police department, testified that, on August 14, 2010, at approximately 7:23 p.m., he was on uniformed duty when he executed a traffic stop near 157th Street and Hoyne Avenue in Harvey, Illinois. When the driver did not produce her driver's license or registration, Sergeant Gordon placed her under arrest. Shortly thereafter, Officers Simpkins and Thomas arrived to assist in the arrest. Officer Simpkins stood with the driver and Officer Thomas assisted in the search of the two female occupants of the vehicle. Sergeant Gordon then searched the driver's vehicle, during which time he overheard a loud conversation between the driver and defendant. Defendant was in a wheelchair situated on the sidewalk about 100 feet from the vehicle. According to Sergeant Gordon, defendant was "holding a dark object in his hand, pointing it towards" the officer.

¶ 5 Sergeant Gordon then approached defendant and, while doing so, observed a cellular phone in defendant's right hand. Defendant placed his left hand between the seat of his wheelchair and his body. Sergeant Gordon testified that he asked defendant if he had a weapon or anything on his person or in his chair. Defendant responded in the negative. When Sergeant Gordon requested that defendant reveal his left hand, defendant refused. According to Sergeant Gordon, he grabbed defendant's upper left arm in an attempt to remove defendant's hand from between the wheelchair seat and defendant's body. Defendant then struck Sergeant Gordon in the left leg with defendant's right hand. In response, Sergeant Gordon pulled defendant from his wheelchair onto the ground and attempted to arrest him. According to Sergeant Gordon, defendant flailed his arms and refused to place them behind his back as directed. Officer

Simpkins also attempted to place defendant's arms behind his back without success. Then, Officer Thomas joined the other officers in the attempt to control defendant. Sergeant Gordon testified that a "lengthy struggle" of approximately two to three minutes ensued, during which defendant flailed his hands, moved his head, and made contact with the officers. Eventually, Officer Simpkins sprayed defendant in the face with pepper spray and the officers were able to place defendant in handcuffs.

¶ 6 On cross-examination, Sergeant Gordon testified that his incident and/or supplemental report did not indicate that defendant spoke to the driver or that defendant refused Gordon's request to show his hands. Sergeant Gordon acknowledged that he grabbed defendant by the hair and forced his head onto the ground. According to Sergeant Gordon, his actions effectively were documented in his report when he wrote that there was a "lengthy struggle." Sergeant Gordon testified that defendant originally was charged with battery alleging bodily harm, but the complaint was amended later to allege contact of an insulting or provoking nature. Sergeant Gordon testified that defendant did not appear intoxicated at the time in question, that there were no outstanding warrants for his arrest, and that no drugs or weapons were found on defendant's person.

¶ 7 Officer Simpkins testified that she was with the driver while Sergeant Gordon searched the vehicle. However, after hearing defendant speak loudly, Sergeant Gordon approached defendant and requested to see his hands. Officer Simpkins then left the driver to assist Sergeant Gordon. Officer Simpkins confirmed that defendant refused to show his hands and Sergeant Gordon attempted to forcibly reveal defendant's hand. According to Officer Simpkins, defendant

attempted to strike Sergeant Gordon, but Simpkins was unsure whether contact was made because Sergeant Gordon obstructed her view. Officer Simpkins testified that Sergeant Gordon removed defendant from his wheelchair. Officer Simpkins, Sergeant Gordon, and Officer Thomas attempted to place defendant in handcuffs, but defendant continuously flailed his arms. Defendant repeatedly refused the officers' requests to place his hands behind his back. According to Officer Simpkins, defendant attempted to strike her and Sergeant Gordon with a closed fist. Officer Simpkins used pepper spray to subdue defendant. One minute after doing so, the officers were able to place defendant in handcuffs.

¶ 8 Officer Thomas testified consistently with Sergeant Gordon and Officer Simpkins. Officer Thomas confirmed that defendant continuously swung his arms and refused to comply with directives to place his arms behind his back. Officer Thomas was unsure whether defendant actually struck either of the other officers. After defendant was successfully placed in handcuffs, Officer Thomas brought a bottle of water to defendant and rinsed his eyes "to relieve the effect of the pepper spray."

¶ 9 After the State rested its case-in-chief, defendant filed a motion for a directed verdict which was denied.

¶ 10 Defendant testified that, on the date and time in question, he was waiting outside his aunt's house for his cousin to pick him up. Defendant testified that he is confined to a wheelchair because he is paralyzed from the chest down. While waiting outside, defendant observed a police vehicle pull over an automobile. The vehicles were parked approximately 30 feet from defendant's location. According to defendant, the arresting officers were searching the

automobile and "ripping" it up. Defendant decided to videotape the occurrence on his cellular phone. Defendant testified that, all of a sudden, Sergeant Gordon approached him and demanded that he give the officer his phone. When defendant refused, Sergeant Gordon confiscated the phone, grabbed defendant by the ponytail, and threw him out of his wheelchair onto the ground. According to defendant, Sergeant Gordon did not ask if he had any weapons on his person nor did the officer provide any verbal commands before demanding the phone. Defendant stated that he "braced" himself when he was thrown from his chair and admitted he was "in a frenzy" when he hit the ground. Defendant, however, denied striking any officer. Defendant testified that he was face down and received injuries on the right side of his face and forehead. While face down, Sergeant Gordon placed his knee on defendant's back and Officer Simpkins administered pepper spray to his eyes. According to defendant, the officers placed him in handcuffs approximately 2 minutes after he was thrown from his wheelchair. Defendant reported being shocked, scared, and in pain. Defendant testified that he did not consume any alcohol or drugs on the day in question.

¶ 11 The defense rested its case.

¶ 12 During the jury instructions conference, defense counsel requested four instructions that were denied by the trial court. First, defendant requested that Illinois Pattern Jury Instructions (IPI), Criminal, No. 22.13 (4th ed. 2000) be modified to include the phrase "without lawful justification" within the definition of resisting a peace officer. The trial court issued the standard instruction. Second, defendant requested that IPI, Criminal, No. 22.14 (4th ed. 2000), which was the issue instruction for each count of resisting a peace officer, be modified to specify the conduct alleged in each complaint, e.g., "refused to put his arms behind his back." The trial court

issued the standard instruction. Third, defendant requested a non-pattern instruction providing that "[a]lthough one may not use force to resist arrest by a known peace officer, even if the arrest is unlawful, an exception is made to this rule for situations in which an officer uses excessive force; use of such force invokes the right of self-defense." In denying the requested instruction, the trial court explained that "if there was some evidence that the defendant acted in self defense, you would be getting this instruction. However, I don't see that evidence in the record in any way, shape or form." Fourth, defendant requested IPI, Criminal, No. 24-25.06 (4th ed. 2000), which defines self-defense. In denying the requested instruction, the court stated "[t]here is no evidence of self defense in the record. The defendant testified he never struck the officer in the leg. He testified he never struck the officer when they were trying to handcuff him."

¶ 13 The jury found defendant guilty of three counts of resisting arrest and not guilty of battery. Defendant then filed a posttrial motion for judgment of acquittal/new trial, arguing, inter alia, that the trial court erred in denying the requested pattern and non-pattern jury instructions related to self defense. Specifically, the motion alleges the trial court erred in refusing IPI, Criminal, Nos. 24-25.06 and 24-25.06A (4th ed. 2000) regarding the use of force in defense of person and erred in refusing to give a non-pattern instruction explaining the self-defense exception to resisting arrest when excessive force is used by an officer. During the parties' arguments on the motion, the trial court stated:

> "I'm not disputing that what was testified to under the law certainly was some evidence of excessive force by the Harvey police officers, specifically Sergeant Gordon as well as Officer Simpkins who doused him in the face with the

pepper spray. I'm not saying that's not excessive. What I'm saying is there has to be some evidence that he was acting in self defense. That's all I'm saying, and according to the record I read, there wasn't a whisper of that from your client."

The trial court ultimately denied the motion, reasoning that:

"With regards to the I.P.I.s, like I said, I do not approve of Officer's Gordon's [sic] actions in this case. I don't approve of Officer Simpkins. Mr. Miller wasn't going anywhere. He wasn't going anywhere. And all Mr. Miller had to testify to was that 'I was not putting my hands behind my back because I was afraid they were going to keep beating on me.' I understand you cited the Simms [sic] case [People v. Sims, 374, Ill. App. 3d 427 (2007)] from Will County and they talk about how a resistance, physical actions that constitute resistance can also result in a self-defense instruction given here.

There wasn't a whisper of testimony in that regards. As a matter of fact, he contradicted what Officer Gordon testified to happening. ***. [T]hat's the reason why he didn't get the self defense instruction. If there was a whisper of testimony in that regards, of course he's not going to admit to hitting the police officer.

I understand it's not going to happen during a trial but if he admits to, 'I was struggling, I was flailing because I had pepper spray in my face and I thought they were going to keep beating on me,' he would have received the instruction and that did not come out during the trial."

¶ 14 Prior to announcing defendant's sentence, the trial court reiterated the judge's belief that the officers could have handled the situation "completely differently" especially in light of defendant's disability. The trial court sentenced defendant to one day imprisonment. The court subsequently denied defendant's posttrial motion to reconsider that sentence. This timely appeal followed.

¶ 15 DECISION

¶ 16 The Illinois Supreme Court has advised that "[t]he function of jury instructions is to provide the jury with accurate legal principles to apply to the evidence so it can reach a correct conclusion." People v. Pierce, 226 Ill. 2d 470, 475 (2007). A defendant is entitled to have the jury instructed on his theory of the case if the evidence provides some foundation for the instruction. People v. Sims, 374 Ill. App. 3d 427, 432 (2007). Evidence, however slight, which supports an affirmative defense will entitle a defendant to a jury instruction, even if the evidence is conflicting and the defendant's testimony is impeached. Id.

¶ 17 In general, the decision whether to give a jury instruction is within the trial court' s discretion and will not be reversed absent an abuse of that discretion. People v. Jones, 219 Ill. 2d 1, 31 (2006). However, "[w]hen the question is whether the jury instructions accurately conveyed to the jury the law applicable to the case, our review is de novo." Pierce, 226 Ill. 2d at 475. Additionally, whether there is sufficient evidence in the record to support the giving of a jury instruction is a question of law that we review de novo. People v. Washington, 2012 IL 110283, ¶ 19. We find the appropriate standard of review in this case is de novo.

¶ 18 I. Self-Defense Instructions

¶ 19 Defendant contends the trial court erred in denying the requested jury instructions regarding self defense where the evidence supported the giving of the instructions based on defendant's attempts to defend himself against excessive police force.

¶ 20 At the outset, the State argues that defendant forfeited review, in part, of the challenged jury instructions. See People v. Enoch, 122 Ill. 2d 176, 186 (1988). Based on our review of the record, we disagree and proceed to the merits of defendant's contention.

¶ 21 According to statute, an arresting officer generally may use any force reasonably necessary to effect an arrest and need not retreat in the face of resistance. 720 ILCS 5/7-5(a) (West 2010). Moreover, an individual being arrested has no right to use force to resist an arrest by a known peace officer even if he believes the arrest is unlawful and the arrest is in fact unlawful. 720 ILCS 5/7-7 (West 2010). However, an exception exists where an officer uses excessive force, such that the use of excessive force invokes the right of self-defense. 720 ILCS 5/7-1(a) (West 2010); Sims, 374 Ill. App. 3d at 432. An instruction on self-defense is required in a resisting arrest case when the defendant has presented some evidence of excessive force on the part of the arresting officer. Sims, 374 Ill. App. 3d at 432 (citing People v. Williams, 267 Ill. App. 3d 82, 88 (1994)). "Where there is some evidence in the record which, if found credible by the jury, would support a claim in the nature of self-defense or defense of another, the trial court may not weigh the evidence in deciding whether an issue has been raised entitling defendant to the instruction." People v. Lyda, 190 Ill. App. 3d 540, 544 (1989).

¶ 22 Defendant argues that, in refusing to instruct the jury as he requested, the trial court improperly prevented the jury from considering whether he was justified in using self-defense against the excessive force demonstrated by the officers. In support, defendant primarily relies on Sims.

¶ 23 In Sims, the trial court rejected the defendant's request for a self-defense instruction based on the officers' use of excessive force in conjunction with his battery and resisting arrest charges. Sims, 374 Ill. App. 3d at 432. The trial evidence demonstrated that the defendant submitted peacefully to being handcuffed and was placed in the police vehicle without incident. Id. at 433. The defendant did not use force against the officers until after his girlfriend arrived at the vehicle. Id. According to the defendant, he only resorted to the use of force when one officer put his hands on the defendant's girlfriend and then another officer threw the defendant to the ground. Id. On appeal, this court reversed the trial court, finding the defendant was entitled to the self-defense instruction where a jury reasonably could have found that the defendant forcibly resisted arrest only after the officers applied excessive force. Id. at 435. In reversing the trial court, this court rejected the trial court's conclusion that no instruction was justified because the defendant never admitted to "kicking" the officers. Id. Instead, in order to satisfy the requirement that defendant present a "slight" amount of evidence to support a claim of self-defense, this court highlighted the fact that the defendant admitted he was "pretty feisty" and "struggled" with the officers, in addition to the defendant's testimony that he was afraid and was struggling to try to get away from the officers. Id.

¶ 24 We similarly find that the evidence in this case supported the giving of a self-defense instruction. Importantly, here, the trial court repeatedly acknowledged that the force used by the officers to effectuate defendant's arrest was arguably excessive. Although defendant denied hitting the officers, Sergeant Gordon testified that defendant struck him in the leg. It is undisputed that "[a]n affirmative defense may be raised by the State's evidence." Lyda, 190 Ill. App. 3d at 545. Notably, the jury found defendant not guilty of the battery charge. Sergeant Gordon further testified that he forcibly removed defendant from his wheelchair and then attempted to arrest him in response to defendant striking him. Though limited in movement due to his paralysis, defendant opposed the arrest by flailing his arms "in a frenzy."

¶ 25 The State contends that the facts in our case more similarly resemble those in People v. Wicks, 355 Ill. App. 3d 760 (2005), where the defendant refused from the outset to cooperate with the police officers' commands to remove his hands out of his pockets. Id. at 764. We disagree. While the officers testified that defendant repeatedly refused to comply with the officers' commands to remove his hand from his wheelchair, there was no testimony demonstrating that defendant was under arrest at that point. Only after defendant allegedly struck Sergeant Gordon were the attempts made to effectuate his arrest. At that point, Sergeant Gordon admittedly threw defendant from his wheelchair, grabbed his hair, and forced his head to the ground. Therefore, there was evidence from which a reasonable jury could conclude the officers' use of force was excessive. Sims, 374 Ill. App. 3d at 432; Lyda, 190 Ill. App. 3d at 544.

¶ 26 In contrast, in Wicks, at the time the defendant placed his hands in his pockets, the officers had requested the defendant's identification and merely placed a hand on the defendant to

prevent him from walking away. Id. The officers' behavior became increasingly forceful only after the defendant refused to comply and the officer testified that he feared the defendant had a weapon in his pocket. Id. The Wicks trial court refused to give a self-defense instruction, finding the officers' use of force was justified and not excessive. Id. This court agreed. Id.

¶ 27 Moreover, the instant case is distinguishable from People v. Haynes, 408 Ill. App. 3d 684 (2011), where the defendant testified that she knew she was being placed under arrest, yet refused to comply with police commands to place her hands behind her back because the officers would not accommodate her request to be cuffed in the front of her body. Id. at 691. In response, the officers resorted to using force. Id. The trial court refused to give a self-defense instruction and this court agreed, stating "[a] self-defense instruction should only be given in a resisting arrest case when a defendant resists arrest after the officers resort to using excessive force." (Emphasis added.) Id.

¶ 28 In conclusion, we find that the trial court erred in finding that, because defendant denied having struck the officer, he was not entitled to a self-defense instruction. The Sims court flatly rejected the premise that the slight evidence necessary for the self-defense instruction could be negated where the defendant denied contacting the officer. Sims, 374 Ill. App. 3d at 435. Instead, as was the case here, the Sims court found the slight evidence requirement was satisfied where the evidence demonstrated the defendant struggled or resisted the arrest in some manner and the defendant expressed that he was afraid during the encounter. We, therefore, conclude that the trial court erred in denying defendant's requested self-defense instructions.

¶ 29 We further find the error was not harmless. "[I]nstructional errors are deemed harmless if it is demonstrated that the result of trial would not have been different had the jury been properly instructed." People v. Washington, 2012 IL 110283, ¶ 60. Once it has been determined that there was sufficient evidence to support instructing the jury on self-defense, it necessarily follows that the jury must assess the fact question regarding the reasonableness of defendant's subjective belief in the need for self-defense. Id. at ¶ 48. The fact question to be resolved by the jury of whether force was justified effectively forecloses a finding of harmless error. People v. Billups, 2012 IL App (1st) 081383-B, ¶ 9.

¶ 30 II. Resisting A Peace Officer Instruction

¶ 31 Defendant next contends that the trial court erred in refusing to modify the jury instruction for resisting a peace officer to specify the conduct alleged in each complaint. We need not address defendant's contention, which is fact specific and must be left to the decision of the trier of fact on remand.

¶ 32 CONCLUSION

¶ 33 Because we found that defendant was entitled to self-defense jury instructions and that the trial court's error in refusing to provide such instructions was not harmless, we reverse the trial court's judgment and remand for a new trial.

¶ 34 Reversed and remanded.

¶ 35 PRESIDING JUSTICE GORDON, specially concurring:

¶ 36 I concur that the trial court erred as a matter of law when it denied defendant's self-defense instruction. However, I write separately to highlight how much the officers' and the defendant's testimony is in agreement and to stress certain points from the case law.

¶ 37 In the case at bar, defendant was convicted of resisting arrest. There is no dispute that defendant is paralyzed from the chest down and confined to a wheelchair. There is also no dispute that defendant was surrounded by three police officers who threw defendant out of his wheelchair and onto the ground, and that the officers then sprayed defendant in the eyes with pepper spray when defendant was unarmed and had committed no crime prior to the officers' approach.

¶ 38 Even if an arrest is unlawful, a person may not use force to resist arrest by a known police officer. However, an exception exists if the police officer uses excessive force, because the use of excessive force triggers the right to self-defense. *People v. Wicks*, 355 Ill. App. 3d 760, 763-64 (2005); *People v. Williams*, 267 Ill. App. 3d 82, 88 (1994). This legal rule is well-established, and neither party contests it on appeal.

¶ 39 In the case at bar, the trial court acknowledged that the officers' use of force against defendant could be considered excessive; but it denied a self-defense instruction on the ground that, since defendant did not specifically testify that he struck an officer, the record lacked sufficient evidence to support the giving of a self-defense instruction. The State concedes on appeal that the trial court denied the instruction due to an alleged lack of evidence to support it.

¶ 40 However, the trial court's ruling overlooks the law: (1) that the State's evidence alone can be sufficient to raise the issue of self-defense *(People v. Lyda*, 190 Ill. App. 3d 540, 545 (1989)); and (2) defendant need not admit to striking an officer to argue that his acts of resistance were acts of self-defense (*People v. Sims*, 374 Ill. App. 3d 427, 435 (2007)). Thus, the trial court's ruling misapplied the law and was in error.

¶ 41 Background

¶ 42 Defendant's and the officers' testimony is similar on many facts.

¶ 43 Defendant testified that he was sitting outside, in front of his aunt's house, waiting for someone to pick him up. Similarly, the officers testified that defendant was sitting outside in his wheelchair, on the sidewalk.

¶ 44 Defendant testified that he observed the police pull over a vehicle and begin searching it, and that he then took out his cellular telephone and began recording the officers' actions, as they ripped up the vehicle's interior. Similarly, the officers testified that they performed a traffic stop and began an inventory search of the vehicle after the driver was unable to produce her driver's license. One officer testified that he walked toward defendant to observe what he was holding in his right hand and, as he became closer, he could observe -- as defendant testified -- that it was a cellular telephone.

¶ 45 The police and defendant's testimony diverges significantly at this point in the events. Defendant testified that the officer demanded that he turn over his cellular telephone and he refused and that the officer then grabbed defendant by his ponytail and threw him from his wheelchair.

¶ 46 By contrast, an officer testified that, after observing defendant place his left hand under his seat, the officer asked defendant if he had a weapon and defendant replied that he did not. However, defendant refused to show his left hand. The officer then tried to remove defendant's left hand, and defendant punched the officer in the leg. After defendant punched him, the officer testified that he tried to arrest defendant for battery and to restrain his arms. The officer then pulled defendant out of the wheelchair and defendant fell to the ground. The jury later acquitted defendant of the battery charge.

¶ 47 Since the police, by their own testimony, did not attempt to arrest defendant until after he allegedly punched one of the officers, defendant's resistance to arrest could not have started until after this alleged battery.

¶ 48 Defendant denied punching the officer and, as noted, he was acquitted of that charge. Although defendant denied striking the officers, he did admit that he tried to "brace[]" himself in his chair and that he was "in a frenzy" when he struck the ground.

¶ 49 Both defendant and the officers testified that it took approximately two minutes after defendant struck the ground for the officers to handcuff him. The officers testified that, during this time, defendant was flailing his arms. Similarly, defendant testified that, during this time, he was shocked, scared and frenzied. Although defendant denied attempting to strike the officers, one of the officers testified that he did.

¶ 50 Both the officers and defendant testified that the officers sprayed defendant's face with pepper spray and handcuffed him. Based on this testimony and the jury instructions that they were given, the jurors acquitted defendant of the battery charge and convicted him of resisting

arrest.

¶ 51 Analysis

¶ 52 As noted above, the trial court denied defendant's request for a self-defense instruction on the ground that defendant did not specifically testify that he struck an officer and therefore the record lacked sufficient evidence to support the giving of a self-defense instruction. On appeal, defendant argues that the trial court's ruling overlooks the law: (1) that the State's evidence alone can be sufficient to raise the issue of self-defense *(People v. Lyda*, 190 Ill. App. 3d 540, 545 (1989)); and (2) defendant need not admit to striking an officer to argue that his acts of resistance were acts of self-defense (*People v. Sims*, 374 Ill. App. 3d 427,435 (2007)). For the following reasons, I find defendant's arguments persuasive.

¶ 53 I. Standard of Review

¶ 54 Both parties agree that, although the giving or withholding of jury instructions is generally a matter within the trial court's discretion (*People v. Jones*, 219 Ill. 2d 1, 31 (2006)), "the abuse-of-discretion standard does not apply in every jury instruction case." *People v. Walker*, 2012 IL App (2d) 110288, ¶ 18. For example, "when the issue raised concerns whether the law was accurately conveyed in the jury instructions, our review is *de novo*." *Walker*, 2012 IL App (2d) 110288, ¶ 18 (distinguishing *Jones* and citing in support *People v. Parker*, 223 Ill. 2d 494, 501 (2006), and *People v. Herron*, 215 Ill. 2d 167, 174 (2005)).

¶ 55 Also, as our supreme court has recently stated, "[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; *People v. Billups*, 2012

IL App (1st) 081383-B, ¶ 7. Since this is the exact question before us, our standard of review is *de novo*.

¶ 56 However, under either a *de novo* or an abuse of discretion standard of review, our ultimate conclusion would be the same, since a misapplication of the law is also an abuse of discretion. *People v. Woodson*, 2011 IL App (4th) 100223, ¶ 21 ("[a] court abuses its discretion *** when it applies the improper legal standard"); see also *Jones*, 219 Ill. 2d at 31 (when the record contains evidence to support the giving of an instruction, the trial court abuses its discretion when it refuses to give it).

¶ 57 II. Sufficient Evidence to Support the Instruction

¶ 58 The police officers testified that defendant resisted arrest by flailing his arms, thereby preventing them from handcuffing him for the alleged battery, for which he was later acquitted. Their testimony provided sufficient support for a self-defense instruction, even though defendant denied trying to strike the officers.

¶ 59 "[A] defendant is entitled to the benefit of any defense shown by the *entire* evidence, even if the facts on which the defense is based are inconsistent with a defendant's own testimony." (Emphasis in original.) *People v. Lyda*, 190 Ill. App. 3d 540, 545 (1989). In response to defendant's citation of *Lyda*, the State does not cite other cases or argue that *Lyda* is not good law. Instead, the State simply tries to distinguish *Lyda* on its facts.

¶ 60 In *Lyda*, as in the case at bar, the defendant was charged with both battery and resisting arrest, and was acquitted of the battery charge and convicted of resisting arrest. *Lyda*, 190 Ill. App. 3d at 541. In *Lyda*, as in the case at bar, the trial court refused the defendant's tendered jury

instruction regarding the affirmative defense of the use of justifiable force. *Lyda*, 190 Ill. App. 3d at 541. A minor difference between *Lyda* and the case at bar is that in *Lyda* the defendant was not acting in self-defense but in defense of another, namely, his brother. *Lyda*, 190 Ill. App. 3d at 541.

¶ 61 In *Lyda*, the State's evidence established that the officers dragged the defendant's handcuffed brother out of a squad vehicle when the brother began kicking the vehicle. They then applied a chokehold on him in the hope that he would pass out. When this failed, they hogtied him, tying his handcuffed wrists to his ankles. One of the officers testified that the defendant became agitated and "elbowed" the officer, and the officer then placed him under arrest, but the defendant continued to struggle. *Lyda*, 190 Ill. App. 3d at 542.

¶ 62 In *Lyda*, as in the case at bar, none of the defense witnesses testified that the defendant struck an officer. In stark contrast to the officer's testimony, the defense witnesses in *Lyda* testified that the defendant was trying to calm his brother down and encourage him to cooperate with police. *Lyda*, 190 Ill. App. 3d at 543. Nonetheless, the appellate court held that the affirmative defense was raised by the State's evidence alone, and that it was reversible error for the trial court to refuse to give it. *Lyda*, 190 Ill. App. 3d at 544-45.

¶ 63 The State attempts to distinguish *Lyda* on the sole ground that defendant's flailing of his arms was "not tantamount to self-defense." What the State's argument overlooks is that this was all defendant could do in the way of self-defense, since he was paralyzed from the chest down. The State does not suggest what more an unarmed, paralyzed man could have done in order to defend himself. As a result, I do not find the State's argument persuasive.

¶ 64 III. Acts of Resistance Can Be Acts of Self-Defense

¶ 65 In addition, a defendant does not have to admit to striking an officer in order to argue that his acts of resistance were acts of self-defense. *People v. Sims*, 374 Ill. App. 3d 427, 435 (2007). As it did with *Lyda*, in response to defendant's citation of *Sims*, the State does not cite other cases or argue that *Sims* is bad law; the State simply tries to distinguish *Sims* on its facts.

¶ 66 In *Sims*, the appellate court held that it was reversible error for the trial court to refuse the defendant's tendered self-defense instruction, where he stood charged with battery and resisting arrest. *Sims*, 374 Ill. App. 3d at 428, 436. The appellate court found "no justification for the trial court's denial of the instruction on the basis that defendant never admitted to kicking the officers, or claimed that he did so because he was afraid for his safety. While defendant may not have specifically admitted to 'kicking' the officers, he did acknowledge that he was 'pretty feisty' and 'struggled.' " *Sims*, 374 Ill. App. 3d at 435. In addition, both officers testified that the defendant was " 'flailing his feet.' " *Sims*, 374 Ill. App. 3d at 435. The defendant testified that "he was afraid during his encounter with the officers." *Sims*, 373 Ill. App. 3d at 435.

¶ 67 These key facts in *Sims* are similar to the facts at bar. As in *Sims*, defendant was charged with battery and resisting arrest. As in *Sims*, defendant did not specifically admit to striking the officers or that he did so because he was afraid for his safety. Similar to the *Sims* defendant's statement that he was " 'pretty feisty' " (*Sims*, 374 Ill. App. 3d at 435), defendant in the case at bar admitted that he was "in a frenzy." Similar to the *Sims* officers' testimony that the defendant was " 'flailing his feet' " (*Sims*, 374 Ill. App. 3d at 435), the officers in the case at bar testified that defendant was flailing his arms, which was all the defendant in the case at bar could do. Similar

to the *Sims* defendant's statement that "he was afraid during his encounter with the officers" (*Sims*, 374 Ill. App. 3d at 435), defendant in the case at bar testified that he also was scared.

¶ 68 Despite these similarities, the State tries to distinguish *Sims* by stating that, in the case at bar, "defendant testified that he never made contact with the officers," and that, unlike in *Sims*, "there was no evidence in this case that defendant was injured." I find it difficult to understand exactly what the State is trying to argue here. In the case at bar, both sides testified that there was plenty of contact between the officers and defendant. However, defendant, similar to the *Sims* defendant, did not specifically admit to striking the officers but instead admitted he was "in a frenzy." Although the State argues that "there was no evidence in this case that defendant was injured," defendant testified that the right side of his face and forehead were injured and bleeding. In addition, the State does not cite any case law to support its implicit assertion that a defendant must show injury in order to be entitled to a self-defense instruction. For these reasons, I do not find the State's argument persuasive.

¶ 69 In sum, the trial court erred when it denied a self-defense instruction on the ground that, since defendant did not specifically testify that he struck an officer, the record lacked sufficient evidence to support the giving of a self-defense instruction. This ruling overlooks the law: (1) that the State's evidence alone can be sufficient to raise the issue of self-defense (*People v. Lyda*, 190 Ill. App. 3d 540, 545 (1989)); and (2) defendant need not admit to striking an officer to argue that his acts of resistance were acts of self-defense (*People v. Sims*, 374 Ill. App. 3d 427, 435 (2007)). As a result, the trial court erred as a matter of law.

¶ 70 IV. Harmless Error

¶ 71 Having found error, we must now consider whether the error was harmless. Since the State concedes that defendant preserved this error for our review, there is no dispute that we must apply a harmless error analysis rather than one of plain error. Although a plain error analysis normally requires the same kind of inquiry as does harmless error analysis, there is an important difference between the two types of review. *Herron*, 215 Ill. 2d at 181. In a harmless error analysis where, as here, defendant has made a timely objection at trial and raised the issue in a posttrial motion, it is the State that bears the burden of persuasion with respect to prejudice. *Herron*, 215 Ill. 2d at 181. In other words, the State must prove beyond a reasonable doubt that the jury verdict would have been the same absent the error. *Herron*, 215 Ill. 2d at 181-82. By contrast, in a plain error analysis where the defendant failed to preserve the error, it would have been the defendant rather than the State who bears the burden of persuasion. *Herron*, 215 Ill. 2d at 182.

¶ 72 In the case at bar, the State has failed to carry its burden of showing beyond a reasonable doubt that, even if a self-defense instruction had been given, the verdict would have been the same. Once we determine that the record raises a question of fact of whether force was justified, that question of fact must be resolved by the jury. *Billups*, 2012 IL App (1st) 081383-B, ¶ 9. As this court has previously observed, "[t]hat factual question to be resolved by the jury effectively forecloses the State's contention of harmless error." *Billups*, 2012 IL App (1st) 081383-B, ¶ 9.

¶ 73 In the case at bar, defendant was convicted of resisting arrest. The officers testified that they were arresting him for defendant's alleged battery of striking an officer in the leg and that

defendant resisted arrest by flailing his arms. Without a self-defense instruction, the jury was not allowed to consider whether the police engaged in an excessive use of force and whether defendant's flailing of his arms was a reasonable defensive response by an unarmed man paralyzed from the chest down.

¶ 74 Conclusion

¶ 75 In sum, the trial court denied defendant's request for a self-defense instruction on the ground that defendant did not specifically testify that he struck an officer and therefore the record lacked sufficient evidence to support the giving of a self-defense instruction. On appeal, defendant argues that the trial court's ruling overlooks the law: (1) that the State's evidence alone can be sufficient to raise the issue of self-defense (*People v. Lyda*, 190 Ill. App. 3d 540, 545 (1989)); and (2) defendant need not admit to striking an officer to argue that his acts of resistance were acts of self-defense (*People v. Sims*, 374 Ill. App. 3d 427, 435 (2007)). For the foregoing reasons, I find defendant's arguments persuasive. Therefore, I conclude that the trial court erred as a matter of law when it denied defendant's self-defense instruction. Since I find that this error was not harmless, I concur that we have no choice but to reverse.