

NOTICE  
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2013 IL App (4th) 120047-U

NO. 4-12-0047

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED  
July 17, 2013  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
DARIN C. MITCHELL,	)	No. 11CM632
Defendant-Appellant.	)	
	)	Honorable
	)	John R. Kennedy,
	)	Judge Presiding.

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JUSTICE KNECHT delivered the judgment of the court.  
Justices Pope and Harris concurred in the judgment.

**ORDER**

¶ 1     *Held:* The appellate court held (1) the State's comments during closing argument did not require plain-error review and (2) defendant's claim of ineffective assistance of counsel failed.

¶ 2             On June 20, 2011, the State charged defendant, Darin C. Mitchell, with resisting a peace officer (720 ILCS 5/31-1 (West 2010)). In November 2011, a jury found defendant guilty of resisting a peace officer. In December 2011, the trial court sentenced defendant to 18 months' conditional discharge.

¶ 3             Defendant appeals and argues he was prejudiced by the prosecutor's comments during closing argument that the jury could convict defendant based on any of the alleged failures to cooperate with police and trial counsel was ineffective for failing to object to the comment.

We affirm.

¶ 4

## I. BACKGROUND

¶ 5 On June 20, 2011, the State charged defendant with resisting a peace officer (720 ILCS 5/31-1 (West 2010)). The charging instrument stated defendant committed the offense of resisting a peace officer "in that the said defendant knowingly resisted the performance by Officer John Lieb of an authorized act within his official capacity, namely: the arrest of the defendant, knowing Officer Lieb to be a peace officer engaged in the execution of his official duties, in that the defendant pulled his arms away to avoid being handcuffed."

¶ 6 In November 2011, defendant's jury trial commenced. The following evidence was adduced at defendant's trial. Officers John Lieb and Justin Prosser of the Champaign police department responded to the American Legion at approximately 1 a.m. to remove individuals loitering in the parking lot. Cathy, an assistant manager at the Legion, requested the officers remove someone from inside. This was not a normal request as the Legion has its own security staff. The officers entered the Legion and observed defendant standing next to three members and talking to two women. Defendant had been in the bar for approximately 15 minutes. Lieb approached defendant and told him he needed to leave the bar because bar staff requested he leave. Defendant replied he was a member of the Legion. Defendant apparently served 11 years in the United States Army. Prosser removed a drink from defendant's hand. Lieb grabbed defendant's elbow to escort him outside. Defendant took his right hand and tried to push Lieb's hand off. Prosser then grabbed his arm and the officers escorted defendant outside. Defendant walked outside on his own power. Once outside, Lieb requested defendant to place his arms behind his back. Defendant brought both his hands in front of him, toward his waist, and clenched his hands. During this time, defendant was not being aggressive or threatening toward

the officers other than not putting his hands behind his back. Lieb again requested defendant to place his arms behind his back but defendant did not. Defendant's witnesses testified the officer requested defendant to get on the ground and defendant replied he had bad knees. Prosser then pepper sprayed defendant in the face. Defendant's witnesses testified the officers took defendant to the ground before deploying the pepper spray. The officers testified they then forcibly took defendant to the ground and handcuffed him.

¶ 7 During closing arguments, the assistant State's Attorney argued as follows:

"I want you to pull all this together and use your common sense. Put that common sense together, with the law I read to you, that third proposition; the Defendant knowingly resisted the performance of John Lieb of an authorized act within his official capacity. Take your pick. Authorized act one: Not leaving the bar when asked to. Authorized act two: Taking ahold of his arm to walk out of the bar. Authorized act three—four and five if you want to count each time the officers had to ask him to put his arms behind his back.

Only one of those would sustain the State's burden. Only one, based upon the law. Keep that in mind when you look at the evidence in this case."

Defense counsel did not object to the State's closing argument.

¶ 8 In November 2011, defendant filed a motion for acquittal, or, in the alternative, a motion for a new trial. The motion did not raise the State's closing argument as an error. In

December 2011, the trial court sentenced defendant to 18 months' conditional discharge.

¶ 9 This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 Defendant argues he was prejudiced by the prosecutor's comments the jury could convict defendant based on any of the alleged failures to cooperate with police and trial counsel was ineffective for failing to object to the comment. We address defendant's contentions in turn.

¶ 12 A. Defendant's Claim of Improper Prosecutorial Comments

¶ 13 Defendant argues "[t]he basis of the charge of resisting a peace officer was that [defendant] allegedly did not put his hands behind his back when ordered to do so" but "[w]ithout charging separate counts or giving any notice to the defense, the prosecutor told the jury that it could convict [defendant] based on any of his alleged failures to cooperate with police that evening." Defendant asserts the State misstated the law "by telling the jury that these alleged actions qualified to sustain the State's burden as to the third element of the offense, when those actions were never charged." In other words, defendant argues the State misstated the law because it argued defendant displayed resistive behavior other than not putting his hands behind his back, as the information alleged. We disagree.

¶ 14 1. *Plain-Error Review*

¶ 15 Defendant concedes he did not raise this issue before the trial court but argues plain error review applies. "A reviewing court may consider unpreserved error when a clear or obvious error occurs and (1) 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) the 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." *People v. Ramsey*, 239 Ill. 2d 342, 440-41, 942 N.E.2d 1168, 1222 (2010). The first step is to determine whether error occurred at all. *Id.* at 441, 942 N.E.2d at 1222.

¶ 16 *2. Section 31-1(a) of the Criminal Code of 1961*

¶ 17 Section 31-1(a) of the Criminal Code of 1961 states "[a] person who knowingly resists or obstructs the performance by one known to the person to be a peace officer, firefighter, or correctional institution employee of any authorized act within his official capacity commits a Class A misdemeanor." 720 ILCS 5/31-1(a) (West 2010).

¶ 18 *3. The State's Comments Were Not Error*

¶ 19 Defendant's argument focuses on the prosecutor's comments as misstatements of law. "It is well settled that an attorney may not misstate the law in closing argument." *Ramsey*, 239 Ill. 2d at 441, 942 N.E.2d at 1223. " 'A prosecutor has wide latitude in making a closing argument and is permitted to comment on the evidence and any fair, reasonable inferences it yields.' " *People v. Jacobs*, 405 Ill. App. 3d 210, 220, 939 N.E.2d 64, 74 (2010) (quoting *People v. Glasper*, 234 Ill. 2d 173, 204, 917 N.E.2d 401, 419 (2009)).

¶ 20 Defendant does not argue Officer Lieb was not authorized to request defendant to leave the bar or take hold of defendant's arm to escort defendant out—the additional conduct referenced in the State's comment. Defendant instead premises his argument on whether the State could argue resistive acts *other than* defendant's failure to put his hands behind his back were unlawful. Despite defendant's protestations otherwise, this concerns whether there was a fatal variance in the information. Section 111-3(a) of the Code of Criminal Procedure of 1963 mandates a charge include, as relevant to this case, the name of the offense, the statutory

provision alleged to have been violated, and "the nature and elements of the offense charged." 725 ILCS 5/111-3(a)(1), (a)(2), (a)(3) (West 2010). "A defendant is only entitled to a new trial if he can show (1) that a variance existed between the allegations in a complaint and proof at trial, and (2) that said variance was fatal to his conviction. [Citation.] A variance between allegations in a complaint and proof at trial is fatal to a conviction if the variance is material and could mislead the accused in making his defense." *People v. Smith*, 2013 IL App (3d) 110477, ¶ 14, \_\_\_ N.E.2d \_\_\_ (citing *People v. Collins*, 214 Ill. 2d 206, 219, 824 N.E.2d 262, 269 (2005)). Defendant was on notice of the basis of the charged offense. The information stated defendant resisted Officer Lieb's arrest of defendant. The information included the statement defendant resisted Officer Lieb's arrest when he "pulled his arms away to avoid being handcuffed." However, the State was not restricted to arguing this was the only conduct defendant exhibited in resisting arrest. See *Collins*, 214 Ill. 2d at 219, 824 N.E.2d at 269 ("Where an indictment charges all essential elements of an offense, other matters unnecessarily added may be regarded as surplusage.").

¶ 21 We conclude the State's comments were permitted and in reference to the evidence, namely, defendant resisted arrest by not immediately complying with the officer's directives to leave the bar and place his arms behind his back. The prosecutor's statements requested the jury to hold defendant responsible for the charged conduct, resisting arrest. See *People v. Howell*, 358 Ill. App. 3d 512, 523, 831 N.E.2d 681, 692 (2005).

¶ 22 B. Defendant's Ineffective-Assistance-of-Counsel Claim

¶ 23 To make out a claim for ineffective assistance of counsel, a defendant must demonstrate "(1) that counsel's performance fell below an objective standard of reasonableness

and (2) a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Ramsey*, 239 Ill. 2d at 433, 942 N.E.2d at 1218. "To establish deficient performance, the defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy." *Id.*

¶ 24 As discussed above, the State's comments were not error. We need not address defendant's argument he was prejudiced by the State's comments. Defendant presented conflicting testimony about the sequence of events and the directives issued by the police officers. The jury's role is to assess witness credibility, determine the weight given to his or her testimony, and resolve discrepancies in the evidence. *People v. Burney*, 2011 IL App (4th) 100343, ¶ 25, 963 N.E.2d 430. Further, defendant has not provided insight into counsel's decision. See *People v. Bew*, 228 Ill. 2d 122, 134, 886 N.E.2d 1002, 1009 (2008) (claims of ineffective assistance of counsel where the record on direct appeal is insufficient to support a claim of ineffective assistance of counsel are preferably brought on collateral review).

¶ 25 III. CONCLUSION

¶ 26 We affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2010).

¶ 27 Affirmed.