

NOTICE
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2014 IL App (4th) 120678-U

NO. 4-12-0678

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
January 13, 2014
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
QUALITIAN TYRONE JEFFRIES,)	No. 11CF1123
Defendant-Appellant.)	
)	Honorable
)	David W. Butler,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Knecht and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court found (1) the jury instruction on proximate cause did not constitute error; (2) the jury instruction on the use of force to resist arrest did not constitute error; and (3) the State proved defendant guilty of resisting a peace officer with injury beyond a reasonable doubt.

¶ 2 In April 2012, a jury found defendant, Qualitian Tyrone Jeffries, guilty of resisting a peace officer with injury. In June 2012, the trial court sentenced him to 30 months' probation.

¶ 3 On appeal, defendant argues (1) he was convicted on the basis of inaccurate and misleading instructions, (2) the trial court erred in instructing the jury, and (3) the State failed to prove him guilty beyond a reasonable doubt. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In January 2012, a grand jury indicted defendant on two counts of aggravated

battery (720 ILCS 5/12-3.05(d)(4) (West 2010)) (counts I and II) and single counts of resisting a peace officer with injury (720 ILCS 5/31-1(a-7) (West 2010)) (count III), unlawful restraint (720 ILCS 5/10-3(a) (West 2010)) (count IV), and domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2010)) (count V). Count III alleged defendant committed the offense of resisting a peace officer with injury when he knowingly resisted the performance of Officer Timothy Carlton of an authorized act within his official duties, knowing Carlton to be a peace officer engaged in his official duties, in that he pulled away and struggled with Carlton, and his actions were the proximate cause of Carlton's injury.

¶ 6 In April 2012, defendant's jury trial commenced. The State moved to dismiss count V. Carolyn Steele testified she was at her home in Bloomington on the night of December 19, 2011, when she heard "aggressive yelling from the street." After opening the front door, she saw a "big guy" "trying to get this little woman away from the rail." When Steele asked if she could help, the man told her to get her "[expletive] self back in the house and mind [her] own [f]-ing business." Steele called the police and two officers arrived. One officer put his hand up to the man to move him back when "the guy started swinging at him and fighting him." The man kept fighting until the officers were able to subdue him.

¶ 7 Bloomington police officer Jeremy Cunningham testified he responded to a call after midnight on December 20, 2011. At the time, he was wearing his police uniform with badge, duty belt, handcuffs, radio, pistol, and Taser. After exiting his squad car, Cunningham heard "a female screaming loudly," along with a male's voice "screaming at her." Upon his approach, he saw Officer Carlton trying to separate defendant and Tamika Ellis. Carlton attempted to pull Ellis off to the side and told defendant to stay put. When defendant approached

Carlton and Ellis, Carlton put out his left hand against defendant's chest and told him to stay back. Cunningham then saw defendant "throw Officer Carlton's hands off to the side, at which point, he had struck Officer Carlton in the face with one of his hands." Cunningham attempted to place the taller defendant into custody but was unable to do so. Cunningham drew his Taser and fired, but the probes did not properly connect. To initiate a "drive stun," in which the Taser is physically held against the person, Cunningham had to remove the cartridge. After doing so, he saw Carlton and defendant falling to the ground. Defendant continued struggling and refused to stop. Cunningham "delivered several knee strikes to [defendant's] left abdomen area." Cunningham initiated a drive stun and told defendant to put his hands behind his back. Defendant refused, and Cunningham performed another drive stun. Defendant complied, and the officers were able to secure him in handcuffs. Cunningham testified Carlton received an injury to his chin after defendant swung his arms toward him. Cunningham saw blood just below Carlton's lower lip.

¶ 8 Bloomington police officer Timothy Carlton testified he was in uniform at the time he received a call after midnight on December 20, 2011. After he exited his squad car, Carlton heard a male yelling. As he walked closer, he saw defendant holding a female against a van. Carlton testified he was 6 foot 1 inch, and defendant was approximately 4 to 5 inches taller. Carlton stated he weighed 200 pounds at the time and estimated defendant weighed 300 pounds. Upon approach, Carlton identified himself as a police officer and ordered defendant to stop. Carlton grabbed Ellis and pulled her toward him. Carlton started to lead her away when he heard Officer Cunningham trying to speak with defendant. Carlton turned around and saw defendant coming at him. Carlton put his left hand on defendant's chest. Defendant started swinging and

hit Carlton in the chin. Carlton grabbed ahold of defendant's clothing but defendant continued to punch around his ribs and chest area. Carlton stated defendant struck him 10 to 20 times and described them as "quick rabbit punches." Carlton heard Cunningham's attempted use of the Taser, which had no effect. Carlton tried to take defendant to the ground but was unable to do so because of his size. He then saw defendant remove a folding knife from his pocket. Upon seeing the knife, Carlton hit defendant in the head with his flashlight. A second strike with the flashlight knocked defendant to the ground. Defendant continued punching and refused to cooperate with the officers' commands. Eventually, Officer Cunningham was able to stun defendant with the Taser. Carlton testified he sustained a cut to the knee during the struggle with defendant. He also sustained a cut to his lower lip area from being struck in the face by defendant.

¶ 9 Bloomington police sergeant Brad Ficek testified he arrived at the scene and saw three officers present as well as defendant lying facedown on the sidewalk in handcuffs. He noticed Officer Carlton had a small cut on his chin that was bleeding and a tear on his right pant leg. Ficek observed defendant bleeding "from around the head or face area," and as he was concerned about defendant's "heavy breathing," Ficek called for an ambulance.

¶ 10 Tamika Ellis, defendant's girlfriend, testified for the defense. On the night in question, Ellis and defendant were arguing about their relationship. Once the police arrived, defendant told them he and Ellis were leaving. An officer then pushed his hand in front of defendant and pushed him up against a van. Defendant became angry and eventually an officer used the Taser on him. Another officer hit defendant in the head with a flashlight or a baton. Ellis stated defendant was lying on his stomach and in handcuffs when one of the officers kicked

him in the head. Once defendant was secured, an officer pulled her aside and indicated he needed to take a picture of her injuries. She declined, but the officer indicated he would hold her down to do so and then take her to jail. Ellis stated the officer received the injury to his chin when he hit defendant with the flashlight or baton and it bounced back and hit him in the face.

¶ 11 Defendant testified he and Ellis were arguing when he noticed police officers approaching. Officer Carlton pulled Ellis over to the lawn and defendant stood on the grass. Because he was on an incline, defendant wanted to get on level ground. Defendant took two steps and heard Officer Carlton say "hey." Defendant turned to look and Carlton hit him in the chest. Defendant "stumbled back" and then stepped forward to regain his balance. Carlton grabbed him and Cunningham used the Taser. After the Taser did not work, defendant "got hit in the back of the head." He stumbled forward, was tackled, and his face hit the ground. Defendant rolled to the side and Cunningham placed him in handcuffs. Defendant turned his head and Carlton kicked him in the face. Defendant testified he never threw a punch at Carlton and never pulled out a knife.

¶ 12 On cross-examination, defendant testified he noticed Carlton was a police officer. He stated Carlton's initial shove was enough to cause him to stumble backward. Once he "came back into position," defendant stated he saw "black gloves" coming toward his face. While he was being hit, defendant was Tasered. He stated that "throughout the whole event," the officers never said anything to him.

¶ 13 On rebuttal, Officer Carlton testified he never tackled defendant. Once he struck defendant with the flashlight, he went to the ground and Carlton went down on top of him. Carton also stated he never kicked defendant in the face with his shoe.

¶ 14 Following closing arguments, the jury found defendant guilty of resisting a peace officer with injury (count III). The jury found defendant not guilty on counts I, II, and IV. In May 2012, defendant filed a motion for judgment notwithstanding the verdict or for a new trial. In June 2012, the trial court denied the posttrial motion. Thereafter, the court sentenced defendant to 30 months' probation, ordered him to serve 180 days in jail, and imposed various conditions. This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 A. Resisting a Peace Officer—Jury Instruction

¶ 17 Defendant argues his conviction for resisting a peace officer with injury must be reversed because an inaccurate, nonpattern issues instruction, combined with an instruction defining "proximate cause," improperly directed the jury to convict him even if his act of resistance was not the most immediate and direct cause of the officer's injury. As no error occurred here, we find defendant has forfeited this issue.

¶ 18 In the case *sub judice*, the grand jury indicted defendant on one count of resisting a peace officer with injury. Section 31-1(a) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/31-1(a) (West 2010)) provides as follows:

"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."

However, because of the alleged injury to the officer, defendant was charged with a felony under section 31-1(a-7) of the Criminal Code (720 ILCS 5/31-1(a-7) (West 2010)), which provides as

follows:

"A person convicted for a violation of this Section whose violation was the proximate cause of an injury to a peace officer, firefighter, or correctional institution employee is guilty of a Class 4 felony."

¶ 19 During the trial, the trial court provided a modified instruction to the jury based on Illinois Pattern Jury Instructions, Criminal, No. 22.14 (hereinafter IPI Criminal No. 22.14) (4th ed. 2002), which stated as follows:

"To sustain the charge of resisting or obstructing a peace officer, the State must prove the following propositions:

First Proposition: That Timothy Carlton was a peace officer; and

Second Proposition: That the defendant knew Timothy Carlton was a peace officer; and

Third Proposition: That the defendant knowingly resisted or obstructed the performance by Timothy Carlton of an authorized act within his official capacity; and

Fourth Proposition: That that [*sic*] defendant's act, of resisting was *the* proximate cause of an injury, an abrasion to the knee, of Officer Timothy Carlton.

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

If you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty." (Emphasis added.)

The pattern instruction for this offense does not contain the fourth proposition above. The court also instructed the jury as follows:

"When I use the expression 'proximate cause,' I mean *a cause* that, in the natural or ordinary course of events, produced the person's injury. It need not be the only cause, nor the last or nearest cause. It is sufficient if it combines with another cause resulting in the injury." (Emphasis added.) Illinois Pattern Jury Instructions, Civil, No. 15.01 (hereinafter IPI Civil No. 15.01) (4th ed. Supp. 2009).

¶ 20 Defendant argues the statute defining the Class 4 felony offense requires the jury to find defendant's act of resistance was "*the proximate cause*" of the officer's injury and not merely "*a proximate cause*." Thus, defendant argues the jury was instructed that it need not find his act of resisting was the only cause, nor even the primary cause, of the officer's injury to establish criminal liability.

¶ 21 Initially, we note defendant recognizes his failure to properly preserve this issue for review. Defense counsel neither objected to the tendered instructions at trial nor raised the issue in a posttrial motion. See *People v. Sargent*, 239 Ill. 2d 166, 188-89, 940 N.E.2d 1045, 1058 (2010) (stating "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"); Ill. S. Ct. R. 366(b)(2)(i) (eff. Feb. 1, 1994) ("No party may raise on appeal the failure to give an instruction unless the party shall have tendered it."). Defendant, however, asks this court to review this issue as a matter of plain error or one of ineffective assistance of counsel.

¶ 22 We note Illinois Supreme Court Rule 451(c) (eff. Jul. 1, 2006) provides that substantial defects in criminal jury instructions "are not waived by failure to make timely objections thereto if the interests of justice require." "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." *Sargent*, 239 Ill. 2d at 189, 940 N.E.2d at 1058. Our supreme court has stated Rule 451(c) is coextensive with the plain-error clause of Illinois Supreme Court Rule 615(a) (134 Ill. 2d R. 615(a)). *Sargent*, 239 Ill. 2d at 189, 940 N.E.2d at 1058. The plain-error doctrine permits a reviewing court to consider unpreserved error under the following two scenarios:

"(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 Ill. 2d at 189, 940 N.E.2d at 1058.

Under both prongs of the plain-error analysis, the burden of persuasion remains with the defendant. *People v. Lewis*, 234 Ill. 2d 32, 43, 912 N.E.2d 1220, 1227 (2009). As the first step in the analysis, we must determine whether any error occurred at all. *People v. Thompson*, 238 Ill. 2d 598, 613, 939 N.E.2d 403, 413 (2010).

¶ 23 "The purpose of jury instructions is to provide the jury with the correct legal principles applicable to the evidence, so that the jury may reach a correct conclusion according to the law and the evidence." *People v. Bannister*, 232 Ill. 2d 52, 81, 902 N.E.2d 571, 589 (2008). "The failure to inform the jury of the elements of a crime charged has been held to be a grave and fundamental error." *People v. Hari*, 218 Ill. 2d 275, 296, 843 N.E.2d 349, 362 (2006).

¶ 24 Generally, the decision to give certain jury instructions rests with the trial court, and that decision will not be reversed on appeal absent an abuse of that discretion. *People v. Lovejoy*, 235 Ill. 2d 97, 150, 919 N.E.2d 843, 872 (2009). However, "the issue of whether the jury instructions accurately conveyed to the jury the applicable law is reviewed *de novo*." *People v. Parker*, 223 Ill. 2d 494, 501, 861 N.E.2d 936, 939 (2006). Also, our supreme court has noted the primary goal of statutory construction "is to ascertain and give effect to the drafters' intention, and the most reliable indicator of intent is the language used, which must be given its plain and ordinary meaning." *People v. Smith*, 236 Ill. 2d 162, 167, 923 N.E.2d 259, 262 (2010). Statutory construction involves a question of law which is reviewed *de novo*. *Smith*, 236 Ill. 2d at 167, 923 N.E.2d at 262.

¶ 25 We note the Third District confronted a similar scenario involving the offense of felony resisting a peace officer in *People v. Wilson*, 404 Ill. App. 3d 244, 935 N.E.2d 587 (2010), *appeal denied*, 238 Ill. 2d 673, 942 N.E.2d 461 (2010). In that case, the defendant was charged

with, *inter alia*, felony resisting a peace officer (720 ILCS 5/31-1(a-7) (West 2008)), resulting from the officer's attempt to make his way through a crowded alley in front of a nightclub. *Wilson*, 404 Ill. App. 3d at 244-45, 935 N.E.2d at 588. Evidence established that to make his way through the alley, the officer launched pepper balls at the legs and feet of several individuals in the crowd. *Wilson*, 404 Ill. App. 3d at 245, 935 N.E.2d at 588. After the defendant was identified as the person responsible for throwing the bottle, the officer approached and grabbed her arm. *Wilson*, 404 Ill. App. 3d at 245, 935 N.E.2d at 588. The defendant failed to comply with orders to put her hands behind her back. *Wilson*, 404 Ill. App. 3d at 245, 935 N.E.2d at 588. The officer forced her to the ground, whereupon she attempted to pull her arms underneath her body to keep from being handcuffed. *Wilson*, 404 Ill. App. 3d at 245, 935 N.E.2d at 589. While the officer tried to gain control of her left arm, the defendant " 'rolled along with the pile' " and pinned the officer's arm against the ground, thereby spraining the officer's wrist. *Wilson*, 404 Ill. App. 3d at 245, 935 N.E.2d at 589.

¶ 26 During the defendant's trial, the following modified instruction for resisting a peace officer was tendered to the jury without objection:

" To sustain a charge of Resisting or Obstructing a Peace Officer, the State must prove the following propositions:

First Proposition: That Brad Scott was a peace officer; and

Second Proposition: That the defendant knew Brad Scott was a peace officer; and

Third Proposition: That the defendant knowingly resisted or obstructed the performance of Brad Scott of an authorized act

within his official capacity; and

Fourth Proposition: That the defendant's act of resisting was *a proximate cause* of an injury to Brad Scott.' " (Emphasis in original.) *Wilson*, 404 Ill. App. 3d at 246, 935 N.E.2d at 589-90.

The jury found the defendant guilty. *Wilson*, 404 Ill. App. 3d at 246, 935 N.E.2d at 590.

¶ 27 On appeal, the defendant argued the modified jury instruction incorrectly stated the law since it utilized the indefinite article "a" instead of the definite article "the." *Wilson*, 404 Ill. App. 3d at 247, 935 N.E.2d at 590-91. The defendant contended "the use of 'a proximate cause' in the modified instruction permitted a finding of guilt based on a standard lower than the standard required by statute." *Wilson*, 404 Ill. App. 3d at 247, 935 N.E.2d at 591. As in this case, the defendant acknowledged she failed to properly preserve the issue for review but urged the appellate court to consider her claim as a matter of plain error or one of ineffective assistance of counsel. *Wilson*, 404 Ill. App. 3d at 247, 935 N.E.2d at 590.

¶ 28 In a plurality opinion, all three justices agreed the modified instruction contained an accurate statement of the law, and therefore there could be no error, let alone plain error. *Wilson*, 404 Ill. App. 3d at 250, 935 N.E.2d at 592. However, the justices disagreed as to why the tendered instruction was proper.

¶ 29 The authoring judge, Justice Schmidt, initially acknowledged that section 31-1(a-7) specifically provides that to enhance a conviction for resisting a peace officer from a misdemeanor to a felony, the defendant's conduct must be " '*the proximate cause* of [the] injury to [the] peace officer.' " (Emphasis added in *Wilson*.) *Wilson*, 404 Ill. App. 3d at 247, 935 N.E.2d at 590 (quoting 720 ILCS 5/31-1(a-7) (West 2008)). Justice Schmidt next opined this

statutory language is unambiguous. *Wilson*, 404 Ill. App. 3d at 249 n.1, 935 N.E.2d at 591 n.1.

However, he went on to find no difference between the meaning of the phrases "a proximate cause" and "the proximate cause." *Wilson*, 404 Ill. App. 3d at 248-49, 935 N.E.2d at 591.

¶ 30 Justice Schmidt first analyzed how Illinois statutes have used the term "proximate cause," noting:

"The legislature has used the term 'proximate cause' in 19 statutes. [Citations.] The phrase 'a proximate cause' appears in 10 of these statutes and 'the proximate cause' appears in 9. Nowhere within the Illinois Compiled Statutes does the legislature define 'proximate cause,' 'a proximate cause,' or 'the proximate cause.'

However, the legislature has used the phrase 'more than 50% of *the* proximate cause' in at least two instances. (Emphasis added.) In section 2-1107.1 of the Code of Civil Procedure, the legislature stated that, '[I]f the jury finds that the contributory fault of the plaintiff is more than 50% of *the* proximate cause,' then the plaintiff is barred from recovery. (Emphasis added.) [Citation.] Similarly, in section 2(c)(2) of the Wrongful Death Act, the legislature again stated that if a beneficiary on whose behalf an action is brought 'is more than 50% of *the* proximate cause of the wrongful death of the decedent,' then recovery is barred. (Emphasis added.) [Citation.] QUERY: if the legislature intended 'the proximate cause' to mean the 'one most immediate' cause, then

how can there ever be less than 100% of 'the proximate cause'? If use of the phrase 'the proximate cause' means that there is but one singular cause of an injury, why would the legislature ever use the phrase 'more than 50% of the proximate cause,' when to do so would render the phrase self-contradictory nonsense?" *Wilson*, 404 Ill. App. 3d at 248, 935 N.E.2d at 591.

¶ 31 Justice Schmidt next relied on the definition of "proximate cause" in the civil IPI, which defines "proximate cause" not as the single most immediate cause, but rather as one of multiple causes. *Wilson*, 404 Ill. App. 3d at 248, 935 N.E.2d at 591 (quoting IPI Civil No. 15.01 (Supp. 2009)) (" 'When I use the expression "proximate cause," I mean a cause which, in the natural or ordinary course of events, produced the plaintiff's injury. It need not be the only cause, nor the last or nearest cause. It is sufficient if it combines with another cause resulting in the injury.' "). In light of this definition, Justice Schmidt concluded changing the article immediately preceding "proximate cause" from "a" to "the" does not alter the definition; rather "[i]t matters not whether one speaks of 'the' proximate cause or 'a' proximate cause." *Wilson*, 404 Ill. App. 3d at 248-49, 935 N.E.2d at 591.

¶ 32 In support of his conclusion, Justice Schmidt also quoted our supreme court's decision in *People v. Hudson*, 222 Ill. 2d 392, 856 N.E.2d 1078 (2006), wherein the court applied the civil IPI definition of "proximate cause" to felony murder:

"In general, Illinois law provides that a defendant may be charged with murder pursuant to the 'proximate cause' theory of felony murder. [Citation.] The term 'proximate cause' describes two

distinct requirements: cause in fact and legal cause. [Citation.] We have stated, 'We believe that analogies between civil and criminal cases in which individuals are injured or killed are so close that the principle of proximate cause applies to both classes of cases. Causal relation is the universal factor common to all legal liability.' [Citation.] Legal cause 'is essentially a question of foreseeability'; the relevant inquiry is 'whether the injury is of a type that a reasonable person would see as a likely result of his or her conduct.' [Citation.] Foreseeability is added to the cause-in-fact requirement because 'even when cause in fact is established, it must be determined that any variation between the result intended *** and the result actually achieved is not so extraordinary that it would be unfair to hold the defendant responsible for the actual result.' [Citation.] Although foreseeability is a necessary component of a proximate cause analysis, it need not be specifically mentioned in a jury instruction to communicate the idea of 'proximate' to a jury. Thus, the IPI civil jury instruction communicates the definition of 'proximate cause,' as '[any] cause which, in natural or probable sequence, produced the injury complained of. [It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the

injury.]" [Citation.]" (Internal quotation marks omitted.) *Wilson*, 404 Ill. App. 3d at 249-50, 935 N.E.2d at 592 (quoting *Hudson*, 222 Ill. 2d at 401-02, 856 N.E.2d at 1083-84).

¶ 33 Based on the holding in *Hudson*, the prior use of the phrases "a proximate cause" and "the proximate cause" in the Illinois Compiled Statutes, and the language of the civil IPI, Justice Schmidt concluded the legislature intended the two phrases be interchangeable. *Wilson*, 404 Ill. App. 3d at 248-50, 935 N.E.2d at 591-92.

¶ 34 Writing separately in a special concurrence, Justice Holdridge agreed with the outcome of the plurality. *Wilson*, 404 Ill. App. 3d at 252, 935 N.E.2d at 594 (Holdridge, P.J., specially concurring). He, however, disagreed with Justice Schmidt that the plain language of the statute was clear and unambiguous, stating:

"While it is possible that the legislature intended the definite article ('the') to signal an exclusive sort of proximate cause, it is also possible that the legislature intended no such exclusion—allowing more than the single most immediate or direct cause." *Wilson*, 404 Ill. App. 3d at 250, 935 N.E.2d at 593 (Holdridge, P.J., specially concurring).

¶ 35 Noting the language was indeed ambiguous, Justice Holdridge found it proper to look to the legislative history for guidance. *Wilson*, 404 Ill. App. 3d at 250, 935 N.E.2d at 593 (Holdridge, P.J., specially concurring). He focused on the following statements made on the Senate floor by the bill's sponsor, Senator Petka:

"When the disputed language was being considered on the

Senate floor, Senator Petka explained that 'it raises the offense of resisting arrest to a Class 4 felony in circumstances where a peace officer suffers harm as a proximate result of the arrest.' 92d Ill. Gen. Assem., Senate Proceedings, April 3, 2002, at 115 (statements of Senator Petka). Later, the following colloquy occurred:

"SENATOR CULLERTON:

Senator, for the purposes, I guess, of legislative intent, there's an amendment that we put on the bill that says a person convicted for a violation of this Section whose violation was the proximate cause of an injury to a peace officer is guilty of a Class 4 felony. Could you describe how the—what the burden of proof would be, who it would be on and what is the burden of proof in order for the State to—to prove that Section?

* * *

SENATOR PETKA:

First of all, thank you for—asking that question. The burden of proof will be on the State. It'll be a burden of proof beyond all reasonable doubt. The—I envision a jury instruction which

would hold that the individual to be found guilty of the offense must be found guilty beyond all reasonable doubt and must prove that the injury was proximately related to the action.

* * *

SENATOR MOLARO:

For the crime of resisting arrest, where is that classified? Is that a Class A misdemeanor or is that a Class 1 felony, or what is resisting arrest?

SENATOR PETKA:

Resisting arrest will remain a Class A misdemeanor, Senator. In those circumstances where a peace officer in effectuating an arrest is injured as a result of that arrest, such as situations where there's a struggle for placing the handcuffs on or it's just a struggle in apprehending the individual who is running, the peace officer suffers great bodily harm, under those circumstances, the— the charge can be upgraded to a felony." 92d Ill. Gen. Assem., Senate Proceedings, April 4, 2002, at 87-89 (statements of Senators Cullerton, Petka &

Molaro)." *Wilson*, 404 Ill. App. 3d at 251-52, 935 N.E.2d at 593-94 (Holdridge, P.J., specially concurring).

¶ 36 Based on the aforementioned statements by Senator Petka, Justice Holdridge concluded "the legislature did not attach exclusive significance to the definite article in the phrase 'the proximate cause.' " *Wilson*, 404 Ill. App. 3d at 252, 935 N.E.2d at 594 (Holdridge, P.J., specially concurring). In coming to this conclusion, Justice Holdridge stated: "Senator Petka (the sponsor) explained, the State must prove that the officer's injury was 'proximately related' to the defendant's resistance or occurred 'as a result' of making the arrest. Senator Petka explicitly used the phrase 'a proximate result,' and the bill passed with his explanation." *Wilson*, 404 Ill. App. 3d at 252, 935 N.E.2d at 594 (Holdridge, P.J., specially concurring).

¶ 37 Writing separately in a special concurrence, Justice McDade first agreed with Justice Holdridge that the phrase "the proximate cause" in the statute is ambiguous. *Wilson*, 404 Ill. App. 3d at 253, 935 N.E.2d at 595 (McDade, J., specially concurring). She criticized Justice Schmidt's plurality opinion for finding this phrase is unambiguous but then violating the most basic canon of statutory construction in refusing to apply the clear language of the statute as written without resorting to extrinsic aids of statutory interpretation. *Wilson*, 404 Ill. App. 3d at 253, 935 N.E.2d at 595 (McDade, J., specially concurring). Justice McDade stated:

"Justice Schmidt has, however, dropped a footnote asserting that he finds the statute unambiguous. It is legally incorrect to cite and discuss outside sources where the statute in question is itself unambiguous. *People v. Nunez*, 236 Ill. 2d 488,

495, 925 N.E.2d 1083, 1087 (2010) ('When the statutory language is clear and unambiguous, it is unnecessary to resort to other aids of interpretation.');

Solon v. Midwest Medical Records Ass'n[, Inc.], 236 Ill. 2d 433, 440, 925 N.E.2d 1113, 1117 (2010) ('When the statutory language is clear and unambiguous, it must be applied as written, without resort to extrinsic aids of statutory construction');

In re J.L., 236 Ill. 2d 329, 339[], 924 N.E.2d 961, 96[7] (2010) ('Where the statutory language is clear and unambiguous, it will be given effect as written, without resort to other aids of construction.')

Justice Schmidt has elected to 'plead guilty' to violating this canon of statutory construction rather than conform the decision to the rule." *Wilson*, 404 Ill. App. 3d at 253 n.2, 935 N.E.2d at 595 n.2 (McDade, J., specially concurring).

¶ 38 Justice McDade then looked to the legislative history and agreed with Justice Holdridge that Senator Petka's statements signaled the legislature did not intend to distinguish between "a" and "the" proximate cause. *Wilson*, 404 Ill. App. 3d at 253, 935 N.E.2d at 595 (McDade, J., specially concurring). Thus, Justice McDade agreed with the plurality's conclusion the modified jury instruction containing the phrase "a proximate cause" was an accurate statement of the law. *Wilson*, 404 Ill. App. 3d at 253, 935 N.E.2d at 595 (McDade, J., specially concurring).

¶ 39 Justice McDade, however, expressed her reservations with this holding:

"I am left troubled, however, because a principle of

statutory construction is that "the definite article 'the' particularizes the subject which it precedes. *It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.'*" (Emphasis in original.) [Citations.] Applying this principle, a compelling argument can be made that the legislature's use of the language 'the proximate cause' illustrates an intent to focus on the one most immediate, efficient, and direct cause preceding an injury. [Citation.] Alternatively, the language 'a proximate cause' merely requires that the State establish that the accused's actions were a contributing cause of the victim's injuries. [Citation.]" *Wilson*, 404 Ill. App. 3d at 253-54, 935 N.E.2d at 595 (McDade, J., specially concurring).

¶ 40 Justice McDade was also concerned that a holding equating the phrase "a proximate cause" with the phrase "the proximate cause" violated the rule of lenity, according to which ambiguous penal statutes are to be strictly construed in favor of the accused, "with nothing taken by intendment or implication beyond the obvious or literal meaning of the statute. [Citation.]" *Wilson*, 404 Ill. App. 3d at 254, 935 N.E.2d at 596 (McDade, J., specially concurring). She, therefore, urged the legislature to be more clear in writing its statutes expressing its intent, stating:

"While I am wary of ignoring the rule of lenity simply on the basis of other irrelevant statutes and Senator Petka's sparse statement that the State must prove that the officer's injury was

'proximately related' to the defendant's resistance (92 Ill. Gen. Assem., Senate Proceedings, April 4, 2002, at 87-89), I acknowledge that we ultimately do in fact look to the legislative history of a statute when attempting to ascertain its intent. [Citation.] It is my sincere hope, however, that the legislature takes the opportunity in the future to clarify its intent so that other important cases like this one, where an individual's conviction is being enhanced from a misdemeanor to a felony, are not determined on the basis of a senator's two-word utterance." *Wilson*, 404 Ill. App. 3d at 254, 935 N.E.2d at 596 (McDade, J., specially concurring).

¶ 41 In this case, defendant acknowledges the Third District's decision in *Wilson* but argues it "did not conclusively resolve the significant concerns presented by the statutory language defining the criminal offense—which focuses on the one most immediate, efficient, and direct cause preceding an injury—especially given the rule of lenity concerning ambiguous penal statutes." The State points out the criminal pattern jury instructions define "proximate cause," as follows:

"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)]." IPI Criminal No. 4.24 (Supp. 2011).

While this instruction applies in cases involving section 31-1(a-7), it was not given to the jury in this case.

¶ 42 The Committee Note instructs that:

"This definition should be given when causation is an issue in the above listed statutory offenses or sentencing enhancement factors.

The first part of this instruction should be given where the evidence shows that the sole cause of the injury or death was the conduct of the defendant. The instruction in its entirety, however, should be given when there is evidence of a concurring or contributing cause of the injury or death." IPI Criminal No. 4.24, Committee Note (Supp. 2011).

The Committee Note observes that in the 12 enumerated statutes, the language regarding "proximate cause" is variously worded as "proximately caused," "proximately causes," "a proximate cause," and "the proximate cause." IPI Criminal No. 4.24, Committee Note (Supp. 2011). The Committee Note continues as follows:

"The Committee believes that there is no significance to the variation in the phraseology that affects the applicability of this

definition with one possible exception. When using 720 ILCS 5/31-1(a-7) (the proximate cause) the Committee directs the user to *Sibenaller v. Milschewski*?? [*sic*], 379 Ill. App. 3d 717, 721-22[, 884 N.E.2d 1215, 1219-20] (2nd Dist. 2008), where the appellate court discusses a principle of statutory construction when 'the' is used instead of 'a.' The Committee takes no position as to whether the bracketed second sentence should be given when defining 'the proximate cause.' " IPI Criminal No. 4.24, Committee Note (Supp. 2011).

Defendant points out the bracketed second sentence referred to in the Committee Note refers precisely to the second part of the IPI definition of proximate cause that the trial court provided to the jury in his case. Defendant argues the IPI Committee recognized the definition of proximate cause is potentially problematic in cases involving felony resisting a peace officer and the use of the second bracketed portion of IPI Criminal 4.24 is inconsistent with the statutory language defining the offense.

¶ 43 Considering the case law, the Committee Note, and the parties' arguments, we see no reason to depart from the Third District's unanimous conclusion in *Wilson* that an instruction stating "a" proximate cause was not contrary to the statute. The Third District filed the *Wilson* decision over three years ago, in August 2010. Since that time, the General Assembly has not taken the opportunity to clarify its intent, despite that published opinion and the special concurrence of Justice McDade indicating her "sincere hope" that it do so. "[W]hen a court interprets a statute and the legislature does not amend it to supersede that judicial gloss, we

presume that the legislature has acquiesced in the court's understanding of legislative intent." *People v. Coleman*, 227 Ill. 2d 426, 438, 882 N.E.2d 1025, 1031 (2008); see also *People v. Hairston*, 46 Ill. 2d 348, 353, 263 N.E.2d 840, 845 (1970) ("It is axiomatic that where a statute has been judicially construed and the construction has not evoked an amendment, it will be presumed that the legislature has acquiesced in the court's exposition of the legislative intent."); *People v. Craig*, 403 Ill. App. 3d 762, 767, 934 N.E.2d 657, 663 (2010) (stating "when the court construes a statute and its construction is not altered, the presumption is that the construction is in harmony with the legislative intent"). We conclude, as did the *Wilson* court, the legislature did not intend the phrase "the proximate cause" in section 31-1(a-7) to mean the sole and proximate cause. Accordingly, we hold IPI Civil No. 15.01 tendered to the jury using the phrase "a cause" and that proximate cause "need not be the only cause, nor the last or nearest cause" accurately stated the law. As no error occurred, there can be no plain error and we must honor defendant's procedural default. See *People v. Johnson*, 208 Ill. 2d 53, 64, 803 N.E.2d 405, 412 (2003). Moreover, as no error occurred in the giving of jury instructions, defense counsel cannot be said to have been ineffective.

¶ 44 B. Use of Force To Resist Arrest—Jury Instruction

¶ 45 Defendant argues his conviction for resisting a peace officer with injury must be reversed because the trial court instructed the jury that he was not authorized to use force to resist arrest, where the instruction did not accurately state the law because he presented evidence the police used excessive force and he reasonably believed he must use force to protect himself from the imminent use of unlawful force by the arresting officers. We find no error.

¶ 46 As with the previous issue, defendant recognizes he has forfeited this issue

because defense counsel did not object to the trial court's use of the suspect instruction and did not tender a self-defense instruction. However, defendant argues this court should consider the issue as a matter of plain error or ineffective assistance of counsel. Thus, we must first consider whether any error occurred.

¶ 47 Defendant was charged with the offense of resisting or obstructing a peace officer with injury. Concerning this charge, the trial court instructed the jury as follows:

"A person is not authorized to use force to resist an arrest which he knows is being made by a peace officer, even if he believes that the arrest is unlawful and the arrest in fact is unlawful." IPI Criminal No. 24-25.20 (4th ed. 2002).

Defendant argues the court committed plain error when it instructed the jury that he had no right to use force to resist arrest. Defendant claims he was entitled to the jury's determination of whether his own use of force was reasonable to protect himself from the imminent use of unlawful force.

¶ 48 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). "This rule is qualified, however, in that it does not apply to a situation in which an officer uses excessive force." *People v. Sims*, 374 Ill. App. 3d 427, 432, 871 N.E.2d 153, 157 (2007). The use of excessive force invokes the right of self-defense. 720 ILCS 5/7-1(a) (West 2010).

¶ 49 "A defendant is entitled to an instruction on his theory of the case if there is some foundation for the instruction in the evidence, and if there is such evidence, it is an abuse of discretion for the trial court to refuse to so instruct the jury." *People v. Jones*, 175 Ill. 2d 126, 131-32, 676 N.E.2d 646, 649 (1997). "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." *People v. Haynes*, 408 Ill. App. 3d 684, 690, 946 N.E.2d 491, 497 (2011). Whether sufficient evidence exists in the record to support the giving of an instruction is a question of law that we review *de novo*. *People v. Washington*, 2012 IL 110283, ¶ 19, 962 N.E.2d 902.

¶ 50 Defendant argues he presented evidence that the officers used excessive force. Thus, defendant argues he retained a right of self-defense against the officers' use of excessive force and the instruction that he could not use force to resist the arrest was improper. "The elements of self-defense are (1) that unlawful force is threatened against a person; (2) that the person threatened is not the aggressor; (3) that the danger of harm is imminent; and (4) that the use of force was necessary." *People v. White*, 293 Ill. App. 3d 335, 338, 687 N.E.2d 1179, 1181 (1997).

¶ 51 The State's evidence indicates defendant was "highly intoxicated" when he was arguing with Ellis in the early morning hours of December 20, 2011. Officer Carlton arrived on the scene, announced his presence, and told defendant to stop. Carlton grabbed hold of Ellis and pulled her behind him. When he looked back, Carlton saw defendant coming toward him with both fists clenched. Carlton extended his left arm to stop defendant. Defendant "walked into" Carlton's hand and swung both arms. Defendant hit Carlton's chin, causing injury. Carlton

covered his head and grabbed ahold of defendant's clothing as a "defensive move." Defendant then punched Carlton's rib-cage area 10 to 20 times. As this was occurring, Carlton heard Officer Cunningham warn defendant that he was going to use the Taser if he did not stop. When defendant failed to comply, Cunningham used the Taser, which had no effect as it did not make good contact with defendant. Carlton then tried to take defendant to the ground but was unable to do so given defendant's size. Carlton testified defendant reached into his pocket and pulled out a folding knife, which he tried to open with the thumb of one hand. Upon seeing the knife, Carlton stated it changed into a "deadly force encounter." As he did not have time to draw his gun, Carlton struck defendant with a flashlight on the right side of his face. As defendant appeared unfazed by the blow, Carlton struck him a second time. Defendant fell to the ground. He then started "flailing his arms and legs" and refused orders to place his hands behind his back. Defendant continued to resist. In an effort to roll defendant on his stomach, Carlton placed his left knee on the ground, lifted defendant's right shoulder, and placed his right knee on the back of defendant's head. After Cunningham used the Taser, he and Carlton were able to roll defendant onto his stomach. Defendant attempted to get back on his feet, and Carlton and Cunningham used their bodies to keep him down. Defendant tensed his arms and hands beneath his body to prevent the officers from placing his hands behind his back. Cunningham used the Taser once again, and the officers were able to secure defendant in handcuffs.

¶ 52 Cunningham testified he saw Carlton place his hand against defendant's chest and told him to stay back. Defendant threw Carlton's hand off to the side and struck him. Cunningham told defendant to put his hands behind his back but defendant refused to comply. Cunningham also tried to place defendant's arms behind his back but defendant kept trying to

move toward Carlton. Cunningham then warned defendant he would use the Taser unless he stopped. Cunningham aimed the Taser at defendant's back, but the electrodes got caught in his jacket and did not take effect. Cunningham looked down to remove the cartridge from the Taser to apply a drive-stun. When he looked up, he saw Carlton and defendant falling to the ground. After defendant fell, he swung his arms and then tucked them beneath his chest to prevent being handcuffed. Cunningham delivered several knee strikes to defendant's abdomen. With no result, Cunningham used the Taser and told defendant to put his hands behind his back. When defendant refused, Cunningham used the Taser again. Defendant then complied and allowed the officers to handcuff him.

¶ 53 Carolyn Steele corroborated the officers' account that defendant was the aggressor. She saw one of the officers "put his hand up to move him [(defendant)] back" and defendant clench his fist and swing at the officer. She stated defendant kept fighting until the officers were able to subdue him.

¶ 54 Defendant and Ellis claimed he peaceably submitted to the officers and he never struggled with them. Defendant claimed Carlton did not say anything to him when he approached but simply stood one foot away and stared at him. When defendant stepped forward to stand on the sidewalk, he stated Carlton turned around and hit him in the chest. Once he regained his footing, all defendant saw "was black gloves." He stated the officers did not say anything before he got Tasered. Defendant tried "to endure it." Shortly thereafter, he was struck in the back of the head. He was then tackled to the ground and his face hit the sidewalk. Defendant stated he was in handcuffs when Carlton kicked him in the face. Defendant testified he never threw a punch at Carlton and never defended himself.

¶ 55 Ellis testified Carlton pushed defendant into a parked van. She said the officers had defendant's arms and they were "doing the tussling type of thing." Ellis stated defendant "wasn't budging." She stated defendant fell to his knees after being Tasered. As he was falling, an officer "hit him upside the head." She also stated defendant was handcuffed when an officer kicked him in the face.

¶ 56 "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." *Haynes*, 408 Ill. App. 3d at 691, 946 N.E.2d at 498. Here, a review of the evidence indicates defendant was the initial aggressor, he used deadly force against Officer Carlton, and the progressively greater use of force by the officers was justified considering defendant's continued and violent refusal to cooperate. As such, defendant was not entitled to a self-defense instruction. As no error occurred, there can be no plain error and we must honor defendant's procedural default. Moreover, since no error occurred in the lack of a self-defense instruction, defense counsel cannot be said to have been ineffective.

¶ 57 C. Sufficiency of the Evidence

¶ 58 Defendant argues the State failed to establish the offense of resisting a peace officer beyond a reasonable doubt because the State failed to establish he knew he was resisting the performance of an authorized act within the officer's official capacity. We disagree.

¶ 59 " 'When reviewing a challenge to the sufficiency of the evidence in a criminal case, the relevant inquiry is whether, when 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.' " *People v. Ngo*, 388 Ill. App. 3d 1048, 1052, 904 N.E.2d 98, 102

(2008) (quoting *People v. Singleton*, 367 Ill. App. 3d 182, 187, 854 N.E.2d 326, 331 (2006)).

The trier of fact has the responsibility to determine the credibility of witnesses and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from that evidence. *People v. Jackson*, 232 Ill. 2d 246, 280-81, 903 N.E.2d 388, 406 (2009).

"[A] reviewing court will not reverse a criminal conviction unless the evidence is so unreasonable, improbable[,] or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *People v. Rowell*, 229 Ill. 2d 82, 98, 890 N.E.2d 487, 496-97 (2008).

¶ 60 In this case, the indictment charged defendant knowingly resisted Officer Carlton's performance of an authorized act within his official duties—the arrest of defendant—in that defendant pulled away and struggled and his actions were the proximate cause of Carlton's injury. Thus, the State was required to prove defendant "knowingly resisted or obstructed the performance of a person known to be a peace officer of any authorized act within his official capacity" and his violation was the proximate cause of the officer's injury. *People v. Hagler*, 402 Ill. App. 3d 149, 152, 937 N.E.2d 204, 207 (2010) (citing 720 ILCS 5/31-1(a), 31-1(a-7) (West 2006)).

¶ 61 "[A]n arrest occurs when a person's freedom of movement is restrained by physical force or a show of authority; the test for determining whether a suspect has been arrested is whether, in light of the surrounding circumstances, a reasonable, innocent person would have considered himself free to leave[.]" *People v. Agnew-Downs*, 404 Ill. App. 3d 218, 227, 936 N.E.2d 166, 174 (2010) (citing *People v. Washington*, 363 Ill. App. 3d 13, 23-24, 842 N.E.2d 1193, 1202 (2006)).

¶ 62 Here, defendant was in effect arrested after he punched Carlton in the face,

Carlton grabbed ahold of him to take him down, and Cunningham grabbed his chest or neck with one arm and tried to force his left arm behind his back to handcuff him. Defendant pulled his arm away from Cunningham and ignored his commands to put his hands behind his back, which forced Cunningham to use the Taser. Given the violent struggle, a formal pronouncement of arrest was impractical. Instead, defendant was arrested in the sense that he was seized when the officers grabbed him and attempted to place his hands behind his back. See *People v. McKinney*, 62 Ill. App. 3d 61, 67, 378 N.E.2d 1125, 1130 (1978) (finding "a reasonable man, innocent of any crime and standing in defendant's shoes, would have perceived the officers' intention to arrest him as they struggled to restrain and handcuff him. Therefore, it was not necessary for the officers to employ the specific words 'You are under arrest,' in order for defendant's arrest to be properly effectuated under the circumstances."). Moreover, defendant testified that after Carlton and Cunningham each took one of his arms, he was "waiting to hear" them tell him to "get down on the ground you[re] under arrest." Defendant knew he was under arrest and he was knowingly resisting arrest when he kicked his legs and swung his clenched fists at the officers after falling to the sidewalk, forced them to roll him on his stomach, and placed his hands beneath his torso to prevent them from handcuffing him. Viewing the evidence in the light most favorable to the State, a rational trier of fact could have found defendant knowingly resisted arrest.

¶ 63

III. CONCLUSION

¶ 64 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal.

¶ 65 Affirmed.