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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 11-CF-2761
)	
LAMAR O. COATES,)	Honorable
)	Gary V. Pumilia,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Burke and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in instructing the jury on a police officer's right to use deadly force, as defendant's defense to the felony-murder charge was that an off-duty police officer's shooting of his accomplice was not a reasonably foreseeable response to an attempted armed robbery.

¶ 2 Following a jury trial, defendant, Lamar O. Coates, was found guilty of first-degree murder (720 ILCS 5/9-1(a)(3) (West 2010)) in the death of Michael Sago. Evidence at trial showed that Sago was shot by Frank Pobjecky, an off-duty Winnebago County sheriff's deputy, in the course of an attempted armed robbery perpetrated by Sago, defendant, and others. On appeal, defendant argues that the trial court erred by instructing the jury about Pobjecky's status

as a police officer where that status was not an element of the offense with which defendant was charged, Pobjecky was not acting as a police officer at the time, and defendant was not aware that Pobjecky was a police officer. We affirm.

¶ 3 Defendant was charged with felony murder and other offenses arising out of an attempted armed robbery at Marie's Pizza on October 1, 2011. The evidence at trial established that on that date three robbers entered Marie's Pizza. Pobjecky was at the restaurant at the time of the robbery. He was watching television while waiting for a pizza.

¶ 4 One of the robbers, later identified as defendant, pointed a gun at the owner, Vincenzo Tarara, and demanded money. Tarara responded, "you're not getting any of my f'ing money." However, when defendant pointed his gun at Pobjecky's head, Tarara said that he would get the money. Pobjecky knew that Tarara wore a holstered firearm concealed under his shirt. As Tarara was about to open the cash drawer, defendant "looked back and lowered the gun." Tarara's "instinct kicked in," and he grabbed the barrel of the gun. As Tarara and defendant struggled for the gun, they were joined by the two men who had followed defendant into the restaurant.

¶ 5 During the struggle for the gun, Pobjecky lunged toward Tarara and attempted to grab his gun. He struggled with one of the other suspects but eventually gained control of Tarara's gun. At that point, he was kneeling with his back to the suspect with whom he had been struggling. As he stood up, he turned around to face the suspect, who came charging toward him. Pobjecky fired at the suspect. He saw the other suspects begin to move and shot at them. Sago, one of the robbers, was shot three times and died at the scene. All of the shell casings recovered from the scene were consistent with Tarara's gun.

¶ 6 Defendant's theory at trial was that he was not guilty of felony murder because Pobjecky's conduct, obtaining a gun from Tarara and firing at the fleeing suspects, was not a reasonably foreseeable consequence of the attempted robbery. Over a defense objection, the trial court instructed the jury based on Illinois Pattern Jury Instructions, Criminal, No. 24-25.12 (4th ed. 2000), as follows:

“[A] peace officer need not retreat or desist in efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest or to defend himself or another from bodily harm while making the arrest. However, he is justified in using force likely to cause death or great bodily harm only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or another or the arrest from being defeated by resistance or escape and the person to be arrested has committed or attempted armed robbery which involves the infliction or threatened infliction of great bodily harm or the arrest from being defeated by resistance or escape and the person to be arrested has attempted to escape by use of a deadly weapon or otherwise indicated to endanger human life or inflict great bodily harm unless arrested without delay.”

¶ 7 The jury found defendant not guilty of the attempted murder of Tarara, but found him guilty of felony murder in connection with Sago's death, as well as the predicate felonies of attempted armed robbery, mob action, and conspiracy. The trial court merged the convictions and sentenced defendant to 40 years' imprisonment. Defendant timely appeals.

¶ 8 Defendant contends that the trial court erred in instructing the jury on an officer's right to use deadly force when Pobjecky's status was not an element of the offense, he was not acting as

a police officer at the time, and defendant was unaware that Pobjecky was a police officer. Instructions convey the legal rules applicable to the evidence and thus guide the jury's deliberations toward a proper verdict. *People v. Hudson*, 222 Ill. 2d 392, 399 (2006). "There must be some evidence in the record to justify an instruction, and it is within the trial court's discretion to determine which issues are raised by the evidence and whether an instruction should be given." *People v. Mohr*, 228 Ill. 2d 53, 65 (2008). Instructions that are not supported by either the evidence or the law should not be given. *Id.* Our task is to decide whether the instructions, considered together, fully and fairly announced the law applicable to the theories of the State and the defense. *Id.* The standard of review is whether the trial court abused its discretion. *Id.* at 66.

¶ 9 Here, the trial court did not abuse its discretion when it gave the instruction. Defendant's defense was that Pobjecky's reaction to the situation was not reasonably foreseeable. The trial court conducted a hearing on the proposed jury instructions. It heard from the State; it heard defendant's objections; and it considered the evidence presented during trial before rendering its decision at the conference. The trial court reasoned that it was appropriate to inform the jury that Pobjecky, as a police officer, reacted as he was trained to do in attempting to prevent the robbery. Moreover, with respect to foreseeability, the trial court reasoned that it did not matter that Pobjecky did not identify himself to defendant and the other suspects as a police officer. In allowing the instruction, the court could have considered that it was reasonably foreseeable that an off-duty officer might be present and might react as Pobjecky did. While the reference in the instruction to an arrest was unnecessary given that there was no evidence that Pobjecky was attempting to arrest anyone when Sago was shot, this fact alone does not require reversal.

¶ 10 Defendant speculates that the instruction confused the jury. However, he points to nothing in the record supporting such an inference. The jury did not send out any notes and nothing about the verdicts suggests that the jury was confused. See *People v. Snow*, 2012 IL App (4th) 110415, ¶ 32 (stating that “it is not the job of this court to bear defendant’s burden of argument”).

¶ 11 An error in jury instructions is harmless if it is clear that the result of the trial would not have been different had the jury been properly instructed. *Mohr*, 228 Ill. 2d at 69. Conversely, giving an improper jury instruction requires reversal where the instruction was likely essential to the jury’s finding of guilt. *People v. Stromblad*, 74 Ill. 2d 35, 41 (1978). The record fails to support a conclusion that the instruction was essential to the jury’s verdict. It did not relate to an essential element of the offense, and indeed it did not relate to defendant’s conduct at all. Defendant argues that the injection of an irrelevant issue likely confused and misled the jury. However, as noted, he points to no evidence showing that the jury was confused.

¶ 12 Defendant complains that the instruction confused the jurors “by impermissibly shifting their focus from a determination of proximate causation of the *defendant’s* actions to Michael’s death to a consideration of the reasonableness of Pobjecky’s actions. The court’s injection of the irrelevant instructions suggested to the jury that Pobjecky’s intentional and deliberate act of shooting the unarmed and fleeing [Sago] multiple times in the back could not have broken the chain of foreseeability and causation required to sustain a conviction for felony first degree murder if Pobjecky acted reasonably as a peace officer.” (Emphasis in original.)

¶ 13 Defendant cannot have it both ways. He insists that the instruction improperly shifted the jury’s focus away from his actions and onto the reasonableness of Pobjecky’s conduct, yet in the same paragraph he argues that Pobjecky’s actions were so outrageous that they were not

reasonably foreseeable. In either case, the question for the jury was the same: whether Pobjecky's actions broke the causal chain between defendant's conduct and Sago's death. To the extent that Pobjecky's actions became relevant, it was defendant who injected the issue into the case.

¶ 14 We note that the jury was also instructed on the ability of a private citizen to use force to resist a robbery. Defendant does not complain about this instruction, which, except for the reference to an arrest, was not appreciably different from the one concerning a police officer's right to use force. As defendant conceded at oral argument, Pobjecky would have had a right to resist the robbery even if he were acting solely as a private citizen.

¶ 15 Defendant cites *People v. McCauley*, 2 Ill. App. 3d 734 (1972), where this court held that giving an earlier version of this instruction where the defendant was not charged with escape or resisting arrest was prejudicial error. *Id.* at 736. However, the court's concern there, that the instruction implied that the defendant was guilty of additional crimes with which he was not charged, is simply not present here. In *People v. Paez*, 45 Ill. App. 3d 349 (1977), we distinguished *McCauley*. We held that giving the instruction was not error where the defendant was charged with aggravated battery of a police officer in the course of being arrested. We noted that the defendant introduced evidence for the obvious purpose of showing that the police officers were overreacting and from which his counsel argued to the jury that, in fact, defendant was justified in his response. *Id.* at 351. *McCauley* is similarly distinguishable here.

¶ 16 We affirm the judgment of the circuit court of Winnebago County. As part of our judgment, we grant the State's request that defendant be assessed \$50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 17 Affirmed.