SIXTH DIVISION
May 13, 2016

No. 1-14-3516

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. 14 CR 1511
	)	
DAVID BARRETT,	)	Honorable
	)	Colleen Ann Hyland,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE DELORTdelivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 ***Held:*** We affirm the judgment of the circuit court because the evidence was sufficient to convict defendant of aggravated battery. The court did not abuse its discretion in refusing to answer a question of fact raised by the jury during deliberations. No individual error, let alone cumulative error, denied defendant a fair trial.

¶ 2 Following a jury trial, defendant David Barrett was convicted of aggravated battery and sentenced to three years' imprisonment. On appeal, defendant contends the evidence was insufficient to find him guilty beyond a reasonable doubt because the State's witnesses did not have ample opportunity to observe the incident and the State did not sustain its burden to

disprove his affirmative defense of self-defense. Defendant also contends that the trial court abused its discretion when it refused to answer one of the jury's questions during deliberations. He finally maintains that due to the cumulative effect of the alleged errors, the judgment of conviction should be vacated and the cause remanded for a new trial. We affirm.

¶ 3 Defendant was charged with multiple counts of aggravated battery, including Count 1 which alleged that, in committing a battery, defendant knowingly caused great bodily harm to the victim, Vincent Detolve, where he thrust his hands into the victim's chest knocking him to the ground causing a fractured hip and torn rotator cuff, and the victim was 60 years of age or older. 720 ILCS 5/12-3.05(a)(4) (West 2012). Defendant asserted the affirmative defense of self-defense.

¶ 4 Vincent Detolve, who was six feet tall and 89 years old, testified that on December 12, 2013, he was at a gas station in Oak Lawn checking his lottery ticket at a kiosk. A woman approached Detolve while he was checking his ticket and they had a conversation. Detolve could not recall the content of the conversation, but said it was a "normal conversation," and denied touching her. After their brief conversation, she went to the counter of the station.

¶ 5 A short time later, Detolve heard defendant, who was approximately 5 feet 7 inches tall, come into the gas station screaming "turn on my f*cking gas pump." An employee responded that defendant needed to be patient. Defendant became more enraged and repeated his demand. Detolve moved towards defendant and asked him to please calm down. Defendant told Detolve that this was none of his "f-ing business" and to "stay the f out of it." Detolve told defendant that it was his business, made a gesture indicating he had a headache, and said that he did not appreciate the screaming. Defendant came within a few inches of Detolve and then shoved Detolve's chest with both hands, causing him to fall to the ground. Customers helped Detolve up

and placed him onto a chair. Detolve testified that he never told defendant that he was going to "kick his ass," or tried to initiate any type of argument. Detolve never touched or threatened defendant.

¶ 6 Paramedics were called and Detolve was taken to the hospital. Detolve suffered several injuries, including a fractured hip, separated right rotator cuff, with three additional tears of the tendons and muscles, and swelling to his right wrist and hand. Detolve had surgery to repair his hip. He had lingering pain, and developed blood clots in his left leg. Detolve testified that he was healthy prior to the incident.

¶ 7 Dr. Craig Adams testified that he was Detolve's doctor and that Detolve suffered a fracture to his right hip and injuries to his right shoulder as a result of the incident. Detolve underwent an operation to realign his hip, and required physical therapy on his shoulder. During his rehabilitation, Detolve developed blood clots in his left leg. Prior to the incident, Adams stated that Detolve had problems with dizziness, walking, and balance.

¶ 8 Michelle Abrams, a cashier at the gas station, testified that she was working at 1:46 p.m. on December 12, 2013, when Detolve walked into the store. Shortly thereafter, defendant entered the store yelling that his gas pump was not working. Detolve told defendant to "calm down," approached him in a non-aggressive manner, and said everything would be fine. Defendant became irate, told Detolve to "shut the f*** up" and mind his own business. Abrams did not see what happened next, but then saw Detolve on the ground. Abrams called 9-1-1, and customers helped Detolve up. Defendant started arguing with the other customers, walked over to the first cash register where Sharray Ferrell was working, and then bumped a customer on his way to the second cash register where Abrams was working. Defendant told Abrams to give him his "f*cking money." Abrams refused and defendant left. Abrams acknowledged that when she

was shown a photo array after the incident, she was unable to identify anyone from those photos. It was only after she watched surveillance footage that she identified defendant.

¶ 9 Sharray Ferrell, who was also a cashier at the gas station, testified similarly to Abrams. She also testified that she saw defendant shove Detolve with significant force using both hands. Detolve never placed his hands on defendant. After the incident, the police asked Ferrell if she could identify the offender, and she responded negatively. After viewing the surveillance footage, she identified defendant as the offender.

¶ 10 Kathy Brew testified that she was a customer at the gas station, and that she heard defendant screaming and swearing about it being cold outside and the gas pumps not working. Detolve approached defendant and told him to calm down, but defendant responded by swearing at him and telling him to mind his own business. Detolve continued speaking calmly to defendant and told him that "tomorrow this would all be history." Defendant then shoved Detolve and Detolve landed on the ground. While Brew attended to Detolve, defendant stated that he was pushed first. Brew told defendant that Detolve never touched him. Defendant demanded his money back, and walked between the two counters before leaving. On December 14, 2013, Brew was shown a photo array by police. She circled one picture of a person she believed to be the offender, but she indicated the wrong person. Brew also viewed a line-up at the Oak Lawn Police Department on December 19, 2013, and identified defendant as the offender.

¶ 11 Defendant, who was 59 years old and a Chicago police officer, testified that he was at the gas station with his 24-year-old son. Defendant's son prepaid for the gasoline while defendant attempted to use the pump, which did not work. Defendant entered the station and yelled that his pump was not working and requested that it be turned on. He denied using any profanity, except

when he stated it was "f*cking cold outside." Defendant got into line and Detolve told him to keep his voice down and stay in line like everyone else. Defendant told Detolve to mind his own business. Detolve "came at [defendant]," defendant extended his arm, and told Detolve to stop, but Detolve kept approaching and then made chest-to-chest contact with defendant. Detolve told defendant in a low voice so nobody could hear that he was going to "kick his ass," pushed defendant, and grabbed defendant's right wrist. At that point, defendant pushed Detolve in order to get him at arm's length to see if he had a weapon, or if he was going into his pocket to retrieve a weapon. Defendant felt that was the only action he could take as he was up against the food aisle and was concerned for his safety. The surveillance video from the incident at the gas station was entered into evidence.

¶ 12 Following closing arguments, the trial court instructed the jury on self-defense. During jury deliberations, the jurors asked for a definition of the term "knowingly," and whether the defendant had to "know" he was going to hurt Detolve. The trial court, along with counsel, sent the jury Illinois Pattern Jury Instructions, Criminal, 5.01B (4th ed. 2000) (IPI Criminal 5.01B), which defined the term "knowledge." A subsequent note from the jury inquired, "[i]n order to be guilty of the charge, 'knowingly caused bodily harm,' does the defendant have to realize that the victim will be harmed by his actions." The court stated that it believed that question addressed the ultimate issue of fact, which was for the jury to determine. Therefore, the court told the jury that it had received all of the evidence and instructions on the law, and to continue deliberating. Neither party objected to the court's response. The jury found defendant guilty of three counts of aggravated battery. The mittimus indicates that defendant was sentenced to three years' imprisonment solely on the aggravated battery charged in Count 1.

¶ 13 On appeal, defendant contends that the State failed to prove him guilty of aggravated battery beyond a reasonable doubt. In particular, defendant contends that the State's witnesses provided an incomplete account of the incident, and the State failed disprove his affirmative defense of self-defense.

¶ 14 We initially note that the record is incomplete in that it does not include the transcripts from the pre-trial proceedings, nor the sentencing hearing. As the appellant, defendant has the burden of providing a sufficiently complete record on appeal. *People v. Bannister*, 378 Ill. App. 3d 19, 36 (2007). Any doubts that arise from the incompleteness of the record will be resolved against the appellant. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 15 When a defendant challenges the sufficiency of the evidence to sustain a conviction, the standard of review is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). It is the responsibility of the trier of fact to resolve any inconsistencies and conflicts in the evidence, and to draw reasonable inferences therefrom. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). A criminal conviction will be reversed only if the evidence is so unsatisfactory as to raise a reasonable doubt of guilt. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992).

¶ 16 We note that although defendant recognizes this standard of review, he also maintains that the facts produced in this case "must not only be consistent with the defendant's guilt, but must also be inconsistent with any reasonable hypothesis of innocence." However, the supreme court abolished the reasonable hypothesis of innocence standard of review of circumstantial evidence cases in *People v. Pintos*, 133 Ill. 2d 286, 291 (1989).

¶ 17 As relevant to this appeal, a person commits the offense of aggravated battery when he knowingly without legal justification by any means causes great bodily harm or permanent disability or disfigurement to an individual 60 years of age or older. 720 ILCS 5/12-3.05(a)(4) (West 2012).

¶ 18 The evidence here, when viewed in the light most favorable to the State, showed that defendant committed the offense of aggravated battery in that he pushed an 89-year-old man to the ground causing great bodily harm. Detolve testified defendant walked into the gas station irate that his gas pump was not functioning properly. Detolve approached defendant and asked him to calm down. Defendant responded by swearing at Detolve and telling him to mind his own business. Defendant came within a few inches of Detolve and then shoved Detolve's chest with both hands, causing him to fall onto the ground. Detolve never touched or threatened defendant during the incident. Three eyewitnesses, Abrams, Ferrell, and Brew, all testified consistently with the events as described by Detolve. Moreover, the surveillance video reflected the testimony of the State's witnesses. Detolve suffered several injuries as a result of the incident, including a fractured hip, separated right rotator cuff, and blood clots.

¶ 19 Nevertheless, defendant contends that the testimony offered by the State's witnesses were incomplete accounts of the incident. In particular, defendant asserts that the evidence showed Detolve, who described himself as healthy, was confused regarding the details of his encounter with the woman prior to the incident with defendant, and Detolve was actually the one who approached defendant. Furthermore, he argues that Abrams did not actually see defendant push Detolve, and both Abrams and Ferrell were working at the registers and too far away from the incident to hear what happened. Defendant also highlighted the fact that Brew was not facing defendant during the entire incident, and initially failed to identify defendant in a photo array.

Similarly, Ferrell initially stated that she could not identify the offender. Defendant contends the State's witnesses therefore did not have "ample opportunity" to observe the incident, and the evidence was insufficient to support a conviction. See *People v. Daniels*, 67 Ill. App. 3d 663, 668 (1978) (stating a positive identification by a single witness with ample opportunity to observe is sufficient to support a conviction).

¶ 20 Defendant's contentions are simply attempts to reweigh the evidence, which is not the role of this court. See *People v. Contreras*, 327 Ill. App. 3d 405, 408 (2002) (stating that it is not the reviewing court's role to reweigh the evidence). Instead, it was the responsibility of the jury to determine the credibility of the witnesses and the weight to be given their testimony to resolve any inconsistencies and conflicts in the evidence, and to draw reasonable inferences therefrom. *Sutherland*, 223 Ill. 2d at 242. Here, surveillance footage and the testimony of three eyewitnesses and the victim established that defendant pushed Detolve to the ground causing his injuries. While defendant presented a different version of the events, the jury had to determine which version to believe (*People v. Villarreal*, 198 Ill. 2d 209, 231 (2001)) and was under no obligation to accept defendant's version of the events over the competing versions (*People v. Ortiz*, 196 Ill. 2d 236, 267 (2001)). The jury's finding of guilt shows it believed the State's witnesses, and we see no reason to disturb that finding.

¶ 21 In a related argument, defendant maintains that the evidence presented at trial did not disprove his affirmative defense of self-defense. In particular, defendant asserts that when Detolve "came at" him, he did not know if Detolve possessed any weapons that could have endangered his safety. Moreover, defendant asserts that he acted as he had been trained to act on the police force, *i.e.*, if a strange man approached and stood close to him, it was reasonable for him to be on alert for danger and push the man away to create some distance between them.

¶ 22 In order to establish self-defense, the defendant must provide some evidence of the following elements: (1) unlawful force was threatened against a person; (2) the person threatened was not the aggressor; (3) the danger of harm was imminent; (4) the use of force was necessary; (5) the person threatened actually and subjectively believed a danger existed that required the use of the force applied; and (6) the beliefs of the person threatened were objectively reasonable. 720 ILCS 5/7-1 (West 2012); *People v. Lee*, 213 Ill. 2d 218, 225 (2004). Once the defendant has met his burden, the burden shifts to the State to prove beyond a reasonable doubt that the defendant did not act in self-defense. *People v. Hawkins*, 296 Ill. App. 3d 830, 837 (1998). If the State negates any one of the above elements beyond a reasonable doubt, it has carried its burden. *People v. Jeffries*, 164 Ill. 2d 104, 128 (1995).

¶ 23 Furthermore, whether a defendant acted in self-defense is a question for the jury to determine. *People v. Goliday*, 222 Ill. App. 3d 815, 822 (1991). The jury is not required to accept a defendant's claim of self-defense, but instead must consider the probability or improbability of the testimony, the surrounding circumstances, and the testimony of other witnesses. *People v. Rodriguez*, 336 Ill. App. 3d 1, 15 (2002). As stated above, we will not substitute our judgment for that of the jury on these questions of fact (*People v. Tenney*, 205 Ill. 2d 411, 428 (2002)), and will only reverse if the proof is so improbable as to raise a reasonable doubt of the defendant's guilt (*People v. Gill*, 264 Ill. App. 3d 451, 459 (1992)).

¶ 24 The jury, in finding defendant guilty, clearly found ample evidence in the testimony of the victim and the eyewitnesses to rebut defendant's claim of self-defense. The evidence showed that defendant was the aggressor, and the victim was simply trying to calm defendant down. This case is thus distinguishable from *People v. Bailey*, 27 Ill. App. 3d 128, 136 (1975), relied on by defendant, where the victims were the aggressors. Moreover, defendant's citation to *Bailey*,

27 Ill. App. 3d at 135, for the proposition that he acted in self-defense out of necessity, and the concept of necessity must be viewed through the eyes of the defendant, is unpersuasive. Unlike *Bailey*, the issue in this case did not involve the necessity of firing a gun to stop a further assault. Here, there was only one battery, and it was committed by defendant. At no time did defendant have a reasonable belief that he was about to suffer imminent death or serious bodily harm. Therefore, the jury's determination that defendant did not act in self-defense is supported by the record, and, accordingly, we will not overturn that finding.

¶ 25 Defendant also argues that the evidence was insufficient because the victim's injuries were inconsistent with being pushed onto the floor, particularly because Detolve testified that he was in good health. However, defendant's argument is contrary to the evidence because the State's witnesses established that Detolve was pushed with enough force that he fell onto a concrete floor. The medical testimony supported the eyewitness testimony where Dr. Adams stated that Detolve's injuries were caused by the fall. In sum, the State proved defendant guilty beyond a reasonable doubt.

¶ 26 Defendant next contends that the trial court abused its discretion when it refused to answer one of the jury's questions during deliberations. In particular, defendant maintains that the question "[i]n order to be guilty of the charge, 'knowingly caused bodily harm' does the defendant have to realize the victim will be harmed by his actions," was one of law and required an answer. According to defendant, the trial court's response, "you have received all the evidence and the instructions on the law, please continue to deliberate," was improper.

¶ 27 Defendant forfeited this claim when he failed to object at trial and did not raise this issue with specificity in his motion for a new trial. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (failure to object at trial and raise the issue in a motion for a new trial results in waiver of that

issue on appeal). The plain error doctrine allows a reviewing court to consider unpreserved error when (1) an error occurs and the evidence is so closely balanced that the error alone threatens to tip the scales of just against the defendant, regardless of the seriousness of the error; or (2) an error occurs and it 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. Lewis*, 234 Ill. 2d 32, 42-43 (2009). In his reply brief, defendant contends that the alleged error was so serious it affected the fairness of his trial. The first step in plain error analysis, however, is to determine whether an error occurred at all. *People v. Walker*, 232 Ill. 2d 113, 124-25 (2009).

¶ 28 In general, the trial court has a duty to provide instruction to the jury where it has posed a question or asked for clarification regarding a point of law arising from the facts about which there is doubt or confusion. *People v. Kliner*, 185 Ill. 2d 81, 163 (1998). However, the trial court may exercise its discretion and decline to provide answers to a jury's questions where: (1) the instructions are understandable and explain the law; (2) further instructions would serve no purpose or potentially mislead the jury; (3) the jury's question involved one of fact; or (4) if providing an answer would cause the court to express an opinion which would likely direct a verdict one way or the other. *Id*. We review the trial court's decision as to how to respond to a jury question for abuse of discretion. *People v. Davis*, 393 Ill. App. 3d 114, 126 (2009).

¶ 29 Here, the record shows that the jury first asked the court to define "knowingly." The court decided, and both parties agreed, to send the jurors IPI Criminal 5.01B. The court instructed the jury that:

> "A person acts knowingly with regard to the nature or attendant circumstances of his conduct when he is consciously aware that his conduct is of such nature, or that such circumstances

> exist. Knowledge of a material fact includes awareness of a substantial probability that such fact exists. A person acts knowingly with regard to the result of his conduct when he is consciously aware that such result is practically certain to be caused by his conduct." IPI Criminal 5.01B.

Consequently, the question of law posed by the jury was in fact answered by the trial court.

¶ 30 After the court answered the jury's initial question, the jury asked "[i]n order to be guilty of the charge, 'knowingly caused bodily harm' does the defendant have to realize the victim will be harmed by his actions." The trial court did not abuse its discretion in refusing to answer this question because it went to the ultimate question of fact for the jury to decide, and was not a question of law as suggested by defendant on appeal. As the trial court aptly stated, "I think that is the ultimate issue of fact that is for the fact finder to decide. For us to answer that would be going into the job of the fact finder, which is exactly the question before the *** jury ***." The court further stated that the State would want to answer the question negatively, and the defense would want to answer it positively. In fact, had the court responded to the jury question at issue, it would have abused its discretion. See *Davis*, 393 Ill. App. 3d at 129-31 (holding that the trial court abused its discretion when it responded to a factual inquiry by the jury). Because the trial court did not err at all, there can be no plain error to overcome defendant's forfeiture of this issue.

¶ 31 Defendant finally contends that the cumulative effect of all the alleged errors denied him a fair trial. He thus asserts that in the interests of justice this court should vacate the judgment of conviction and remand for a new trial.

¶ 32 The resolution of the general argument that the cumulative effect of various alleged trial errors warrants reversal depends on this court's evaluation of the individual alleged errors. *People v. Doyle*, 328 Ill. App. 3d 1, 15 (2002). When the alleged errors do not constitute reversible error on an individual basis, there can be no cumulative error. *Id.* Here, as there are no individual errors, than can be no cumulative error.

¶ 33 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 34 Affirmed.