2016 IL App (2d) 140483-U
No. 2-14-0483
Order filed April 21, 2016

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 12-CF-1524
ROBERT RAMOS,	)	Honorable M. Karen Simpson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: At his trial for armed violence predicated on resisting a peace officer, defendant was entitled to a jury instruction on the lesser included offense of felony resisting a peace officer, as there was evidence from which the jury could have rationally concluded that defendant had disarmed by the time that he resisted; thus, we reversed his conviction and remanded for a new trial.

¶ 2 Following a jury trial, defendant, Robert Ramos, was found guilty of armed violence (720 ILCS 5/33A-2(a) (West 2012)). He appeals, contending that the trial court erred by refusing to give his tendered jury instructions on the lesser included offenses of felony and misdemeanor resisting a peace officer. We reverse and remand.

¶ 3 Defendant was indicted for armed violence, aggravated resisting a peace officer, and four additional counts related to his possession of a handgun. The indictment alleged in relevant part that defendant committed armed violence in that, while armed with a handgun, he knowingly resisted the performance by officer Abel Villanueva of an authorized act, namely defendant's arrest, in that defendant "struggled with and pushed" Villanueva, injuring Villanueva, and that "such resisting" was the proximate cause of Villanueva's injury. The trial court severed the weapons counts, and the State dismissed the resisting charge before trial.

¶ 4 At trial, Villanueva testified that he was on patrol in an unmarked car with officer Clark Johnson when he saw defendant and Alejandro Montenez standing in front of a house at 761 East Galena Street in Aurora. Villanueva confirmed that there was a warrant for defendant's arrest.

¶ 5 The officers parked their car a block away and approached the house on foot. They hid behind a fence near where defendant had been standing. Defendant went inside and the officers waited for him to come back out. Two other investigators watched the porch and notified Villanueva when defendant came back outside.

¶ 6 Defendant was standing alone on the porch. While he was looking away, Villanueva "strategically" moved around the fence line to the front of the porch. Villanueva said, "Police. Don't move." Defendant turned and looked at Villanueva, who was about three feet away. Defendant reached for the front of his waistband. To prevent defendant from running, Villanueva pushed him down onto the porch.

¶ 7 A struggle ensued, during which Villanueva repeatedly told defendant to stop resisting. During the struggle, defendant pushed Villanueva "with both of his open arms away from him" into a wooden pillar on the porch, causing Villanueva momentarily to lose control of him.

Villanueva's left arm hit the pillar, causing slight pain. However, his primary concern was preventing defendant's escape.

¶ 8 Defendant eventually pulled himself off of the porch. Villanueva grabbed him, at which point defendant said, "Okay. You got me." Villanueva escorted defendant back to the porch, where they both fell down. Defendant sat up while Villanueva attempted to stand up. According to Villanueva, defendant then took a gun from his waistband, threw it to the parkway where Montenez was standing, and told Montenez to pick up the gun and run. Villanueva warned Montenez that if he reached for the gun Villanueva would shoot him. Montenez put his hands above his head as defendant continued to struggle with Villanueva for another 20 or 30 seconds. Johnson arrived, and he and Villanueva handcuffed defendant.

¶ 9 At the police station, defendant said that the pistol was his and that he had been carrying it for protection against rival gang members. Villanueva noticed some scratches and swelling on his forearm, but the skin was not broken. He did not require medical treatment and did not miss any time from work.

¶ 10 Villanueva identified photographs of his forearm, which show redness and abrasions. He testified that these were on the area of his arm that struck the pillar.

¶ 11 Johnson testified that, while he and Villanueva were hiding behind the fence, he focused his attention on a second-floor window that had a view of where they were hiding. When he looked back, Villanueva was gone. He heard yelling in the front yard, so he ran around the fence to the front porch. When he arrived, he saw defendant attempting to pull away from Villanueva's grasp. Villanueva had defendant from behind, but as Johnson approached, defendant turned his body to face Villanueva, then pulled back to a seated position on the ground away from him.

¶ 12 Johnson and Villanueva got on top of defendant, with Johnson straddling defendant as he was face-down on the ground. As Johnson grabbed defendant and started to handcuff him, defendant yelled to Montenez to take the gun and run.

¶ 13 After defendant was arrested, Johnson turned him over to another officer and went to see what Villanueva and other officers were looking at. It proved to be a .380 semiautomatic pistol in the grass. Johnson had not seen defendant with the gun, nor had he seen him throw it.

¶ 14 Deputy Patrick Keaty testified that, while defendant was in the Kane County jail, he had a visitor. The conversation between defendant and the visitor was recorded. In a transcript of the conversation, defendant talked about the incident on Galena Street. He said that, when the officer approached, he "jumped up and *** threw that banger across, like towards the street." He said that he "resisted a little bit" to give Montenez time to run with the gun.

¶ 15 Defendant requested that the jury be instructed on the lesser included offenses of misdemeanor resisting a peace officer (720 ILCS 5/31-1(a) (West 2014)) and felony resisting a peace officer (720 ILCS 5/31-1(a-7) (West 2014)). The trial court denied the request for an instruction on misdemeanor resisting because it would make the jury instructions confusing. It denied the request for an instruction on felony resisting because, although there was sufficient evidence for counsel to argue that defendant threw the gun before being arrested, the evidence "strongly supports that he had the weapon on him" while he resisted arrest.

¶ 16 In closing, defense counsel argued that the evidence did not support an armed-violence conviction, because defendant had discarded the gun before Villanueva grabbed him. The jury found defendant guilty of armed violence, and the trial court sentenced defendant to 15 years' imprisonment. Defendant timely appeals.

¶ 17 Defendant argues that the trial court erred by refusing his tendered instructions on felony and misdemeanor resisting a peace officer. A defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find the defendant guilty of the lesser included offense while acquitting him or her of the greater offense. *People v. Novak*, 163 Ill. 2d 93, 108 (1994). "The amount of evidence necessary to meet this factual requirement, *i.e.,* that tends to prove the lesser offense rather than the greater, has been described as 'any,' 'some,' 'slight,' or 'very slight.' " *Id.* at 108-09 (quoting *People v. Upton*, 230 Ill. App. 3d 365, 374 (1992), and *People v. Willis*, 50 Ill. App. 3d 487, 490-91 (1977)); see also *People v. Blan*, 392 Ill. App. 3d 453, 458 (2009).

¶ 18 Defendant was charged with armed violence predicated on resisting a peace officer. A defendant commits armed violence when "while armed with a dangerous weapon, he commits any felony defined by Illinois law." 720 ILCS 5/33A-2(a) (West 2012). "A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer *** of any authorized act within his official capacity commits a Class A misdemeanor." 720 ILCS 5/31-1(a) (West 2012). However, 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." 720 ILCS 5/31-1(a-7) (West 2012).

¶ 19 The indictment alleged that defendant, while armed with a dangerous weapon, knowingly resisted his arrest, and that the resistance resulted in an injury to Villanueva when defendant pushed him into a post. Thus, to convict defendant of armed violence, the State had to prove that, in the course of resisting his arrest, defendant was both armed with a dangerous weapon and caused injury to Villanueva. If the jury believed that defendant was not armed when he resisted, it could have found him not guilty of armed violence but convicted him of felony resisting if

Villanueva had been injured. If the jury believed that Villanueva was not injured, then it could have found defendant guilty of misdemeanor resisting.

¶ 20 Defendant contends that at least some evidence supported the proposition that he had discarded the gun before the struggle with Villanueva began. He notes Johnson's testimony that he ran toward the porch immediately upon hearing defendant and Villanueva struggling but did not see defendant with a gun and did not see him throw one. Defendant argues that this evidence supported an inference that he threw the gun before he started to resist. He further contends that his recorded statement, that he "jumped up and *** threw" the gun as the officer approached and that he "resisted a little bit" in order to give Montenez time to get the gun and run with it, also supported his theory that he had already discarded the gun before he began to resist.

¶ 21 The State responds that another portion of his recorded statement proved that he had the gun as he struggled with Villanueva. The State refers to defendant's statement that "he [presumably Villanueva] jumped on my *** ass and I had the little thumper right there." The State argues that this proved conclusively that defendant still had the gun when Villanueva tried to subdue him. Defendant responds that the statement, "I had the little thumper right there," is as consistent with the gun being on the ground nearby as with it being in his waistband.

¶ 22 We agree that there was at least slight evidence that defendant had discarded the gun prior to his encounter with Villanueva. Johnson testified that he ran around to the porch as soon as the struggle began, yet he neither saw defendant with a gun nor saw him discard the gun. Moreover, the jury could reasonably have concluded that it was not possible for defendant to have thrown the gun once Villanueva initiated physical contact, as Villanueva had defendant in his grasp for the majority of that time. Thus, if Johnson responded as soon as the struggle began and did not see defendant with a gun, the jury could reasonably have concluded that defendant

must have discarded the gun before the incident began and that Villanueva's testimony that defendant threw the gun away during the struggle was not credible.

¶ 23 Defendant's statements that he "had the little thumper right there" and that he "threw that banger across" are subject to varying interpretations, but could also support an inference that he discarded the gun before starting to resist and that the only reason he resisted was to give Montenez time to retrieve the gun. Thus, the jury could rationally have found that defendant was guilty of felony resisting but not guilty of armed violence, and defendant was entitled to the instruction on felony resisting. The trial court implicitly acknowledged that there was some evidence that defendant had discarded the gun earlier—sufficient for defense counsel to argue the point—but refused the instruction because the evidence "strongly support[ed] that he had the weapon on him." However, a lesser-included-offense instruction is required where even slight evidence supports it, and a trial court may not assess credibility in deciding whether to give such an instruction. *People v. Willett*, 2015 IL App (4th) 130702, ¶ 88. Thus, the jury should have been instructed on felony resisting.

¶ 24 Defendant further contends that there was evidence from which the jury could have concluded that Johnson was not injured, thus supporting an instruction on misdemeanor resisting. He notes that Villanueva testified that his arm was not cut, there was no bleeding, he did not require medical treatment, and he did not miss any time from work. Villanueva testified that he felt momentary pain, but did not have to interrupt his pursuit of defendant.

¶ 25 The parties do not cite, and our research has not uncovered, a case defining what constitutes an "injury" for purposes of section 31-1(a-7). The supreme court has held that "bodily harm" includes "some sort of physical pain or damage to the body, like lacerations, bruises or abrasions, whether temporary or permanent." *People v. Mays*, 91 Ill. 2d 251, 256

(1982). "[I]njury" and "bodily harm," while " 'not identical,' " are nonetheless similar. *People v. Boyer*, 138 Ill. App. 3d 16, 19-20 (1985) (quoting *People v. Bitner*, 89 Ill. App. 3d 1106, 1112 (1980)). "Injury," as used in the home-invasion statute (720 ILCS 5/19-6 (West 2014)), has been defined as "an act that hurts, *i.e.*, that causes bodily pain." *People v. Garrett*, 281 Ill. App. 3d 535, 542 (1996) (citing Webster's Third New International Dictionary 1104 (1993)).

¶ 26 Villanueva testified without contradiction that he felt pain when his arm struck the pillar. This was sufficient to constitute an injury under the *Garrett* definition. Moreover, the photographs show abrasions and redness on the arm, corroborating Villanueva's testimony.

¶ 27 Defendant points to no contrary evidence. The facts that defendant points out—that Villanueva did not seek medical treatment or miss time from work—establish that the injury was relatively minor, but do not prove that he was not injured. Defendant's primary argument on this point is that, based on the conflicting evidence in the record, the jury could have discredited Villanueva's testimony that defendant discarded the gun during the struggle and, "because Villanueva's testimony was not credible, the jury could have given no weight to his claim that he had felt pain on his arm when defendant pushed him during the struggle."

¶ 28 A defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury *rationally* to find the defendant guilty of the lesser included offense while acquitting him or her of the greater offense. *Novak*, 163 Ill. 2d at 108. Defendant offers a plausible evidentiary basis for the jury to have rejected Villanueva's testimony about when defendant discarded the gun. The jury could infer from Johnson's testimony and defendant's recorded statement that defendant tossed the gun before the struggle began. However, defendant offers no such plausible basis for the jury to reject Villanueva's testimony that he was injured. Defendant merely hopes that the jury would disregard uncontradicted and unimpeached

testimony about a matter peculiarly within the witness's personal knowledge: whether he felt pain when his arm struck the pillar. Moreover, to reject his testimony on this point, the jury would also have to disregard the photographs or conclude that he coincidentally received the marks on his arm some other way. This is simply not rational. Thus, defendant was not entitled to an instruction on misdemeanor resisting. We note that a retrial is permissible because the evidence was sufficient to prove defendant's guilt beyond a reasonable doubt. See *People v. Ward*, 2011 IL 108690, ¶ 50.

¶ 29 The judgment of the circuit court of Kane County is reversed, and the cause is remanded.

¶ 30 Reversed and remanded.