2016 IL App (2d) 140882-U
No. 2-14-0882
Order filed August 18, 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 Boone County.
Plaintiff-Appellee,	)	
v.	)	No. 14-CF-97
MICHAEL C. YONTS,	)	Honorable C. Robert Tobin III,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court committed no plain error when it provided the jury with the definitional instruction but not the issues instruction for a lesser included offense, as the definitional instruction provided the jury with the elements of the offense.

¶ 2 Following a jury trial, defendant, Michael C. Yonts, was found guilty of aggravated battery (720 ILCS 5/12-3.05(a)(c) (West 2012)) and sentenced to 30 months' probation. He appeals, contending that the trial court committed plain error when it instructed the jury on the definition of the lesser included offense of resisting a peace officer but inadvertently failed to include the issues instruction for that offense. We affirm.

¶ 3 At trial, Sergeant Pat Molloy of the Boone County sheriff's department testified that, on April 28, 2014, he was dispatched to the Camelot School in Garden Prairie. The school was on lockdown because at least two people were yelling and pounding on the doors. He did not know whether they had weapons.

¶ 4 Molloy parked south of the school and approached on foot. Officers Kevin Smyth and Steve Tallacksen parked north of the school and approached from that direction. Smyth was accompanied by his canine partner, Bosco.

¶ 5 As Molloy approached the school from behind the cover of some pine trees, he could see two people standing by the front door. As one of the other deputies approached from the north, Molloy emerged from the cover and began issuing commands to the people at the front door. He recognized one of them as someone they had dealt with earlier in the day.

¶ 6 As Molloy continued walking toward the school, defendant approached from his left. Molloy yelled at him to leave the area. Defendant looked at Molloy and continued walking. He again told defendant to leave, but he did not. Molloy ordered the two people at the door to lie on the ground. At this point, Tallacksen and Smyth arrived. Smyth trained his weapon on defendant. Molloy and Tallacksen arrested the people at the door and Molloy then turned his attention back to defendant.

¶ 7 Molloy and Smyth approached defendant. When he failed to follow commands, Smyth decided to arrest him. Molloy grabbed defendant's right wrist as Smyth reached for his left arm. Defendant tensed up and jerked his arm away from Molloy. Defendant swung and hit Molloy in the back of the head hard enough to cause pain. Molloy and Smyth were able to regain control over defendant by grabbing his arms. Defendant continued resisting, moving forward and backward, as the officers were ordering him to get on the ground.

¶ 8 The officers decided to take defendant down backward, so Molloy put his leg behind defendant's and the officers dropped him to the ground. As the officers were trying to arrest defendant, Bosco bit his pants. After defendant was arrested, they took him inside the school to check for injuries, but found none. Molloy noticed some swelling in the back of his earlobe where defendant had punched him.

¶ 9 Smyth testified about the training he and his canine partner received. If Smyth were struggling with a suspect, Bosco would engage the suspect without being told. He would bite-and-hold the suspect, *i.e.*, bite the person in one area and hold on until told to release the person.

¶ 10 On the day in question, Smyth and Tallacksen parked on Garden Prairie Road north of the school. Smyth got Bosco out of the car and approached the school. They were in radio contact with Molloy, who was approaching from the south. When they reached the school, Tallacksen and Molloy began handcuffing the two people near the door. Smyth then focused his attention on defendant. Smyth yelled at him to get on the ground. Defendant "kind of smiled" and said, " 'Am I under arrest?' "

¶ 11 Smyth again told defendant to get on the ground or he would be placed under arrest. Defendant did not comply. Smyth waited for Molloy to approach, then grabbed for defendant's left arm. Defendant started to pull away as Molloy grabbed for his right side. Bosco grabbed his pants leg. This was consistent with his training, because defendant was actively resisting. Smyth could not tell if the dog bit defendant through his pants.

¶ 12 With Molloy present, Smyth ordered Bosco to release his grip, and the dog did so and lay down. Defendant turned away from Smyth and threw at least one punch at Molloy, hitting him in the back of the head. Defendant continued to resist, even after the officers got him on the ground. Bosco attempted to "re-engage," getting within a foot of defendant, but Smyth ordered

him to stay away. Smyth did not see Bosco bite defendant again. Defendant continued to struggle for another 15 to 20 seconds, but the officers eventually handcuffed him. They helped him up and took him into the vestibule of the school to check for injuries.

¶ 13 Defendant testified that he was a student at Camelot School. He had skipped gym class to get some air. As he was returning to the school through the parking lot, he heard someone yell at him to get out of there. He did not see anyone, so he kept walking. He heard someone else yell to get out of there, but he did not see anyone so he kept walking. A police officer with a dog emerged from the area of the buses and told defendant to get on the ground. Defendant asked if he was under arrest and the officer said he was not. Defendant just stood there, and the officer told him he was going to be under arrest if he did not get on the ground. He again asked if he was under arrest and the officer said that he was not. Defendant backed up as the officer approached him.

¶ 14 One officer grabbed his right arm while the officer with the dog grabbed the other arm. Defendant was bent over, and the dog ran over barking and attempting to bite his face. In response, defendant struggled with the officers. The dog bit his left leg. Defendant felt pain and struggled to get his hands free. While doing so, he hit one officer in the head. He did not intend to hit the officer. The officers then tripped him backward. Defendant flipped onto his stomach, and the dog again tried to bite him. The officers did not check his leg for injuries. He saw the jail nurse about seven days after he arrived.

¶ 15 At the jury instruction conference, defendant asked that the jury be instructed on the lesser included offense of resisting a peace officer. The State voiced no objection, and the court stated that it would give that instruction.

¶ 16 The trial court read the jury two versions of the definitional and issues instructions for aggravated battery to a peace officer, one for bodily harm and one for insulting or provoking contact. The court read the definitional instruction for resisting a peace officer, but did not read the issues instruction for that offense.

¶ 17 During deliberations, the jury sent out two notes. The first asked if the jurors could see the police reports. The court answered that they could not. Later, the jury asked for the legal definitions of " 'knowingly' " and " 'bodily harm.' " The court answered the first question with Illinois Pattern Jury Instructions, Criminal, No. 5.01B (4th ed. 2000) and answered the second question with "There is no definition for 'bodily harm.' "

¶ 18 The jury found defendant guilty on both counts of aggravated battery. Defendant filed a posttrial motion, which did not raise any issue regarding the jury instructions. The trial court denied the motion and sentenced defendant to 30 months' probation. Defendant timely appeals.

¶ 19 On appeal, defendant contends that the trial court erred by failing to give the issues instruction for resisting a peace officer. He argues that the failure to give this required instruction might have left the jury confused about what elements it had to find to convict him of that offense.

¶ 20 Defendant acknowledges that the record does not contain a copy of an issues instruction for resisting (leading to the inference that defendant failed to tender it). He further acknowledges that he did not object contemporaneously or raise the issue in his posttrial motion, thus forfeiting it. However, he asks us to consider the issue as plain error.

¶ 21 The purpose of jury instructions is to provide the jury with correct legal rules that can be applied to the evidence to guide the jury toward a proper verdict. *People v. Pierce*, 226 Ill. 2d 470, 475 (2007). Generally, a defendant forfeits review of any jury instruction error if he does

not object to the instruction or offer an alternative and does not raise the instruction issue in a posttrial motion. *People v. Herron*, 215 Ill. 2d 167, 175 (2005). Illinois Supreme Court Rule 451(c) (eff. April 8, 2013), however, provides that "substantial defects" in criminal jury instructions "are not waived by failure to make timely objections thereto if the interests of justice require." Rule 451(c) thus creates a limited exception to the general rule of forfeiture "to correct 'grave errors' and errors in cases 'so factually close that fundamental fairness requires that the jury be properly instructed.' " *Herron*, 215 Ill. 2d at 175 (quoting *People v. Hopp,* 209 Ill. 2d 1, 7 (2004)). Rule 451(c) closely tracks the language of the more general plain-error provisions of Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967) and, indeed, the supreme court construes them identically. *People v. Durr*, 215 Ill. 2d 283, 296 (2005).

¶ 22 Illinois Pattern Jury Instructions, Criminal, No. 22.13 (4th ed. 2000) defines the offense of resisting a peace officer or correctional institution employee, and provides as follows:

> "A person commits the offense of resisting or obstructing a [peace officer] when he knowingly resists or obstructs the performance of any authorized act within the official capacity of one known to him to be a [peace officer]."

¶ 23 The committee note states, "Give Instruction 22.14." Illinois Pattern Jury Instructions, Criminal, No. 22.13, Committee Note, at 63 (4th ed. 2000). That instruction, in turn, provides as follows:

> "To sustain the charge of resisting or obstructing a [peace officer], the State must prove the following propositions:
>
> *First Proposition:* That ____ was a [peace officer]; and
>
> *Second Proposition:* That the defendant knew ____ was a [peace officer]; and

Third Proposition: That the defendant knowingly resisted or obstructed the performance by ____ of an authorized act within his official capacity.

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 one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty." Illinois Pattern Jury Instructions, Criminal, No. 22.14 (4th ed. 2000).

¶ 24 Here, the jury received the first instruction but not the second. In *People v. Jones*, 60 Ill. 2d 300, 309-10 (1975), the supreme court affirmed the defendant's convictions of rape and aggravated kidnapping, finding no plain error where the trial court gave the definitional instructions, but not the issues instructions, for those offenses.

¶ 25 The court noted that the pattern instructions essentially define each offense twice:

"The first definition is general in nature, but does contain all of the elements of the crime. The second instruction, referred to as the 'issue' instruction, differs from the first as a matter of form, not substance. The so-called 'issue' instructions set forth the facts to be found to establish guilt in a check-list type form in order to avoid any possible confusion." *Id.*

¶ 26 The State contends that *Jones* controls here. We agree. In *Jones*, given that the definitional instructions had informed the jurors of the elements of the offenses, the court declined to find plain error, noting that "there was no omission of substance in the given instructions." *Id.* at 310; see also *People v. Caldwell*, 39 Ill. App. 3d 1, 6-7 (1976) (no plain error where trial court gave issues instruction for murder, which did not refer to justifiable use of force—defendant's affirmative defense—but did give definitional instruction that included

justifiable use of force). Given that the jury here was informed of the elements of resisting a peace officer, we find no plain error.

¶ 27 Defendant contends that *Jones* is distinguishable. He notes that the trial court there did not give issues instructions for either of the offenses with which the defendant was charged. Here, however, the court gave issues instructions for both counts of aggravated battery (a total of four instructions) but only one instruction for resisting. He appears to contend that this tended to over-emphasize the charged offenses and likely left the jury confused about whether or how they could find defendant guilty of the lesser included offense. However, defendant does not develop the argument or cite authority in support. In his reply brief, defendant merely points out the factual distinction between *Jones* and this case and urges us to follow *Hopp* and *Herron* instead. Given the broad language of *Jones* that the failure to give an issues instruction is not plain error where the definitional instruction adequately states the elements of the offense and the defendant does not object, we decline to find plain error here.

¶ 28 Moreover, defendant's citation to *Hopp* and *Herron* does not persuade us otherwise, as those cases are readily distinguishable. In *Hopp*, the supreme court held that there was no reversible error where the defendant was convicted of conspiracy to commit first-degree murder but the trial court, while giving the instructions defining that offense, neglected to give an instruction defining first-degree murder. *Hopp*, 209 Ill. 2d at 17-18. The court distinguished *People v. Ogunsola*, 87 Ill. 2d 216 (1981). There, the defendant's conviction was reversed where the trial court provided the jury with a definition of deceptive practices that omitted an element of the offense. *Id.* at 221-23.

¶ 29 In *Herron*, 215 Ill. 2d at 188, the jury was provided with Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. 2000) (IPI Criminal 4th No. 3.15), entitled " 'Circumstances of

Identification.' " The instruction provides, " 'When you weigh the identification testimony of a witness, you should consider all the facts and circumstances in evidence, including, but not limited to, the following.' " *Herron*, 215 Ill. 2d at 188. The introductory paragraph is followed by five numbered paragraphs separated by " '[or].' " *Id.* The committee note instructs judges to give numbered paragraphs supported by the evidence. *Id.* (citing IPI Criminal 4th No. 3.15, Committee Note, at 107). The trial court, however, read the instruction with the word " 'or' " between the factors. *Id.* at 188-89. The supreme court agreed with the appellate court that, despite the defendant's failure to object to the instruction, this was reversible error. The court reasoned that the instruction likely confused the jurors because the opening paragraph instructed them to consider all of the facts and circumstances, yet the individual factors were separated by the disjunctive "or," implying that any one factor might suffice. *Herron*, 215 Ill. 2d at 189-90 (citing *People v. Gonzalez*, 326 Ill. App. 3d 629, 640 (2001)).

¶ 30 Here, the instruction given neither omitted an element of the offense, as in *Ogunsola*, nor was internally inconsistent, as in *Herron*. The definitional instruction correctly informed the jurors of the elements of resisting a peace officer.

¶ 31 Defendant contends that the jury's sending out notes requesting definitions of "bodily harm" and "knowingly" suggests that the jury was in fact confused. The State suggests the alternative inference that the jury was being meticulous. In any event, the jury's seeking definitions of those terms in no way implies that it was confused about the elements of resisting a peace officer. The mental state of knowledge applies to both aggravated battery (720 ILCS 5/12-3.05(a) (West 2012)) and resisting a peace officer (720 ILCS 5/31-1(a) (West 2012)), and the phrase "bodily harm" appears only in the aggravated battery statute (720 ILCS 5/12-3.05(a)(3)

(West 2012)). Thus, nothing in the jury's questions suggests that it was confused about the elements of resisting.

¶ 32 The judgment of the circuit court of Boone County is affirmed. 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).

¶ 33 Affirmed.