2016 IL App (2d) 141038-U
No. 2-14-1038
Order filed January 12, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MARK ANTHONY HERRERA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 13-CF-2004 Honorable Robert G. Kleeman, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The aggravated battery statute was not unconstitutional because it provided a more severe penalty for a battery taking place on a public way; the trial court erred in denying defendant's request to amend the pattern instruction for threatening a public official, but the error did not warrant reversal because the evidence was not closely balanced nor was the error a serious structural error; the trial court did not err in its response to the jury's question; and there was sufficient evidence to prove defendant guilty beyond a reasonable doubt of threatening a public official and obstructing a peace officer. Therefore, we affirmed.

¶ 2 Following a jury trial, defendant, Mark Anthony Herrera, was found guilty of threatening a public official (720 ILCS 5/12-9(a) (West 2012)), aggravated battery on a public way (720

ILCS 5/12-3.05(c) (West 2012)), and obstructing a peace officer (720 ILCS 5/31-1(a) (West 2012)). On appeal, he argues that: (1) the aggravated battery statute is unconstitutional because it upgrades aggravated battery to a felony based on the happenstance of being on a "public way"; (2) his conviction for threatening a public official should be reversed due to improper jury instructions; and (3) he was not proven guilty beyond a reasonable doubt of threatening a public official and obstructing a peace officer. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On September 30, 2013, defendant was charged in a multi-count complaint. Count I alleged that defendant threatened a public official (720 ILCS 5/12-9(a) (West 2012)), in that he told Officer Eric Haimann that if he came onto his property his dogs would kill him, and he twice told Officer Louis Easton that if he came onto his property he would " 'Shoot that Nigger in the face.' " The charge alleged that the officers were performing their official public duties and that defendant's comments put them in reasonable apprehension of immediate or future bodily harm. Defendant was charged in count II with battery (720 ILCS 5/12-3(a)(1) (West 2012)) of Anthony J. Bourdeau for causing him bodily harm by punching him twice in the mouth, resulting in injuries to Bourdeau's upper lip. Count III charged defendant with the same crime for that incident, with the allegation that the contact was of an insulting nature (720 ILCS 5/12-3(a)(2) (West 2012)).

¶ 5 Counts IV through VII also alleged misdemeanor offenses. Count IV charged defendant with false personation of a peace officer (720 ILCS 5/32-5.1 (West 2010)) to Bourdeau.[1] Count

[1] This statute was actually repealed in 2011, before the incident here took place. See Pub. Act. 96-1551, art. 5, § 5-6 (eff. July 1, 2011). However, as we subsequently discuss, the State nol-prossed this charge, so it is not at issue on appeal.

V charged defendant with obstructing a peace officer (720 ILCS 5/31-1(a) (West 2012)). As amended,[2] it alleged that defendant refused the orders of Officers Haimann and Easton to secure his dogs. Count VI charged defendant with resisting a peace office (720 ILCS 5/31-1(a) (West 2012)) for stiffening his arms to avoid being handcuffed. Last, count VII charged defendant with reckless driving (625 ILCS 5/11-503(a)(1) (West 2012)) for swerving around a vehicle at a high rate of speed and disregarding four stop signs.

¶ 6 On October 22, 2013, defendant was charged by indictment with threatening a public official (720 ILCS 5/12-9(a)(1)(i)(2) (West 2012)) for threatening Officer Haimann in saying that he would have his dogs kill him if he came onto defendant's property.[3] Defendant was also charged by superseding indictment with two counts of aggravated battery (720 ILCS 5/12-3.05(c) (West 2012)) against Bourdeau. The charges alleged that Bourdeau was on a public roadway when defendant struck him.

¶ 7 On June 24, 2014, the State nol-prossed counts IV, VI, and VII.

¶ 8 We summarize the evidence presented by the State at defendant's jury trial. On September 29, 2013, at about 9:45 p.m., Anna Zabel was driving to a public gazebo in Villa Park to meet some friends. A yellow Mustang driven by defendant began tailgating her, and when she slowed down to pull into a parking spot, defendant swerved around her vehicle and sped away. Zabel's friends, Bourdeau and Zachery Adams, saw this occur. The two men got into Adams's SUV and followed defendant for a couple of blocks. Defendant pulled into his driveway at 40 South Monterey, and when Adams turned into a driveway a few houses down to turn around, defendant blocked him in with his car. Bourdeau exited the car and exchanged words with

[2] This count was amended on June 24, 2014.

[3] The alleged threat to Officer Easton was removed from the charge.

defendant, during which time defendant claimed to be a police officer. Defendant got back in his car and went to his driveway. Adams stopped his car on the street in front of defendant's neighbor's house. Bourdeau and defendant walked up to each other on the sidewalk. Adams remained in the car. Defendant had his hand behind his back and said that he would shoot Bourdeau if he stepped on his property. He asked Bourdeau if he was bulletproof, and Bourdeau responded in the affirmative. They yelled and swore at each other. Defendant next went into the house and emerged onto the porch with a Rottweiler and a friend who was holding a baseball bat. At defendant's command, the dog charged at Bourdeau, and Bourdeau ran to the SUV's passenger seat. Defendant approached, and he and Bourdeau continued to argue. Defendant then punched Bourdeau in the mouth through the open passenger window. Bourdeau tried to exit the car, but defendant held the car door closed and punched him again, resulting in a swollen, bloody lip. Adams drove down the block to a strip mall, and Bourdeau called 911. A recording of the call was played for the jury.

¶ 9 Officer Haimann and another officer went to the strip mall and then to 40 South Monterey. They approached the house with their guns drawn because they had been told that there might be weapons involved. Defendant was on the front deck with two other men and two dogs, one a Rottweiler and the other appearing to be a pit bull. There was a chain link fence around the house and deck. The officers told the men to show their hands, and the two other individuals complied. However, defendant swore at the officers to get off his property. At this time, the dogs were barking viciously. The officers told defendant they had a report of an incident involving a gun and a bat that they wanted to discuss with him. Defendant said that there was no gun and screamed at the officers. The officers told defendant to put his hands in the air and come down the stairs to talk to them. Defendant continued to yell at the police.

Defendant then told Officer Haimann that if he came on his property, defendant would have his dogs kill him. At this point, the dogs were at the base of the stairwell, still barking viciously at the officers. Defendant refused orders to put the dogs away. Officer Haimann told defendant that he was under arrest. When Officer Haimann went to grab defendant through the gate, defendant said to "get the f*** off [his] property" and that they needed a search warrant. At one point defendant said that he was going to call his parents and that their lawyers would sue them. Officer Haimann overheard defendant telling his father to come quickly because the police were on his property and trying to take him away.

¶ 10 Officer Easton arrived about five minutes after the other officers. He also told defendant to put the dogs away. Defendant said, "fuck you nigger. If you come onto my property, I will have to shoot you in the face." Officer Easton said to put the dogs inside or he would tase the dogs if he had to. Defendant kept yelling. Officer Easton pointed a taser at one of the dogs, at which point defendant repeated his threat but took the dogs inside the house. Defendant then locked himself inside the house as well. Defendant's companions cooperated and were removed from the scene. The officers went to the front door and could see defendant in the house pacing and making phone calls, and they could hear him yelling through the windows.

¶ 11 A man showed up on a motorcycle screaming that defendant was his son and that the police needed a search warrant. He was subsequently taken into custody for disobeying police orders. Sergeant Johnson, who was a high school liaison officer and knew defendant, arrived and was able to persuade him to come outside. The police advised defendant that he was going to be placed under arrest. He resisted by struggling but was handcuffed. In patting him down, an officer took a cell phone out of defendant's pocket and put it on an outside window sill. The front door was still open, and Officer Easton then moved the phone just inside the house and

closed the door, which caused defendant to become very agitated and yell about the police not being allowed to search his house. Defendant got out of the officers' grip and started towards Officer Easton. The other officers grabbed him and told him to stop resisting, but he did not comply until Officer Easton tased him, after a warning. Defendant said that he was done fighting, said that he was going to have a seizure, and then fell to the ground. The police called the paramedics, and in the meantime, defendant stood up and called Officer Cruz a "faggot and a homo." The paramedics examined defendant, but he said that he did not need any help and refused transportation to the hospital.

¶ 12 After the State's case-in-chief, the defense moved for a directed finding, and the trial court denied the motion. The defense then presented its witnesses.

¶ 13 Torey Griffin, defendant's next-door neighbor, testified that he went outside on the night in question after hearing a lot of commotion. The officers wanted defendant to step outside of his fence, and defendant said that he was waiting for his dad to come over first. At the time, the dogs were barking loudly. The police repeatedly told defendant to put his dogs inside. Defendant never said that if the officers came into his house, the dogs would kill them. Rather, he said that if the officers tried to force their way in, the dogs may attack. An African-American officer arrived and threatened to tase the dogs. Defendant put the dogs inside and went in with them. He came out 30 seconds or one minute later. Defendant's father arrived and was placed under arrest. Griffin then saw defendant being led out of the house with his hands behind his back. Defendant and the officers were yelling, and the police pushed him onto a vehicle and slammed his head on it twice. Defendant said that he was not resisting and not to tase him, but then Griffin heard a taser go off. Griffin never heard defendant using a racial slur.

¶ 14 Gerardo Herrera, defendant's father, testified that when he arrived at the house, an African-American officer told him that he needed to leave. Herrera asked the officer to explain what was going on, and the officer hit him in the chest. Herrera said that he was going to call his wife, and the officer smacked the phone out of his hand. The officer hit him and arrested him for resisting arrest.

¶ 15 Defendant testified as follows, in relevant part. On September 29, 2013, he was coming home from the gym and was driving by the gazebo. A car suddenly backed out of a parking spot, and defendant had to swerve around it. Defendant continued home, parked in his driveway, and got out of the car. Another car slammed on its brakes and pulled into the neighbor's driveway. Bourdeau exited and approached defendant on his lawn like he was ready to fight. He said that defendant had almost hit his girlfriend.

¶ 16 Defendant owned two dogs, a pit bull mix and a Rottweiler, that were on the deck. When Bourdeau began raising his voice, the Rottweiler started growling. Defendant turned to look at it, and Bourdeau punched defendant in the nose. The Rottweiler started coming down the stairs, and Bourdeau ran away. Defendant was concerned that Bourdeau was going to get a weapon from the car, so he followed him. Bourdeau got partially into the car and struck defendant again. Defendant punched Bourdeau in the nose or lip. The car went into reverse, and it almost hit the dog. The car then reversed all the way down the street. Defendant never told Bourdeau that he was a police officer or that he was going to shoot him, and he never told his dog to attack Bourdeau. He also never had a gun, and neither he nor anyone with him had a baseball bat.

¶ 17 Defendant's roommate and his friend came out of the house when the car was driving away. Less than 10 minutes later, two officers arrived with their guns drawn. They said to put the dogs away and to put their hands up, and that they had received a call about a gun and

baseball bat. Defendant had a cigarette in one hand but put his other hand up. Defendant kept saying that he did not know what they were talking about. Officer Haimann started asking defendant questions, such as whether he lived in the house and how he could afford it. Officer Haimann was approaching defendant very slowly while talking and then tried to grab his shirt and pull him off the deck; he never said that defendant was under arrest. Defendant said that he did not want the police on his property and that he wanted to call his father.

¶ 18 Officer Easton arrived and began screaming at defendant, with his gun drawn. Officer Easton said that if defendant did not put the dogs away, he would tase them or worse, and he started to slowly count to three. Defendant grabbed the dogs and went into the house with them. He remained in the house for around four or five minutes, talking to his dad. Sergeant Johnson arrived, and defendant agreed to come out because he knew and respected him. He talked with the police for a few minutes outside, and Officer Haimann handcuffed him. They were walking down the driveway when defendant saw one of the officers lean on his driver's side car mirror with all of his weight. Defendant asked him to get off the mirror because he was about to crack it, and the officer replied, "What's that, sweetheart?" Defendant called him a fag. That officer then took defendant and pushed him against the car mirror. The officer then began taking defendant back towards the house. Defendant saw Officer Easton with his cell phone inside his house. Defendant asked why he was in the house and asked that he close the door because the dogs were inside. The officer with defendant told him several times to stop resisting, and defendant said that he was not resisting, rather he was asking Officer Easton to close the door. The officers slammed him on the hood of his car several times, and Officer Easton tased him. Defendant fell to the ground and started shaking. When paramedics arrived, they just stood

seven feet away and had an officer lift up defendant's shirt. They did not ask defendant if he wanted to go to the hospital.

¶ 19 Defendant agreed that he did not allow the police on his property and did not follow their orders to put his dogs away. Defendant spoke calmly to the officers until Officer Haimann tried to pull him off his deck. He then raised his voice a little and used profanity. At no point did defendant tell the officers that Bourdeau had struck him.

¶ 20 Paramedic Kelly Krupa testified as a rebuttal witness for the State. When she arrived at the scene, defendant was yelling and swearing. Krupa asked defendant what was the matter, and he said that his whole body was tingling but that he did not want any help. Krupa agreed that the officers told her to maintain a safe distance from defendant.

¶ 21 When discussing jury instructions, the defense asked that the pattern instruction for threatening a public official be altered to include that for the purposes of a threat to a police officer, the threat must contain specific facts indicative of a unique threat to that particular officer, his family, or his property, and not a generalized threat of harm. The trial court overruled defendant's objection, stating that the concern was addressed in the issues instruction and that it was "very reluctant to deviate from" a pattern instruction.

¶ 22 During deliberations, the jury sent a note asking: "Is a conditional threat still a threat? In other words, if someone says 'if you do x, then y will happen' is that the same threat as just saying 'y will happen'? " Defense counsel stated that the jury should be instructed that it had been given the law and should continue its deliberation. Over defendant's objection, the trial court gave the following written response: "A CONDITIONAL THREAT COULD BE A THREAT IF IT PLACES THE PUBLIC OFFICIAL IN REASONABLE APPREHENSION OF IMMEDIATE OR FUTURE BODILY HARM."

¶ 23 On June 27, 2014, the jury found defendant guilty of threatening a public official, aggravated battery on or about a public way by making physical contact of an insulting or provoking nature, and obstructing a peace officer. It found defendant not guilty of aggravated battery on a public way causing bodily harm.

¶ 24 On July 28, 2014, defendant filed a motion for a new trial and/or judgment n.o.v. As relevant here, he argued that he was not proven guilty beyond a reasonable doubt and that the trial court erred in answering the jury's question because it sent a note defining "threatening" without including a definition of "warning," to differentiate between the two terms. On October 16, 2014, defendant filed an apparently superseding motion for a new trial and/or judgment of acquittal. He again argued, among other things, that he was not found guilty of the charges beyond a reasonable doubt. He argued that his conviction of aggravated battery based on being on or about a public way should not stand because the statute was vague. Defendant further argued that the trial court's answer to the jury's question was in error because it was confusing, contradicted the pattern jury instructions, and misstated the law. He maintained that the trial court should have taken up his suggestion to instruct the jury as to what constituted a true threat.

¶ 25 The trial court denied defendant's posttrial motion on October 21, 2014. It sentenced defendant to 30 days in jail and 24 months' probation. Defendant timely appealed.

¶ 26 II. ANALYSIS

¶ 27 A. Constitutionality of Aggravated Battery Statute

¶ 28 Defendant first argues that the aggravated battery on or about a public way statute is unconstitutional in that that it violates the equal protection and due process clauses of the United States constitution. Statutes are presumed to be constitutional, and the party challenging the statute has the burden of demonstrating a clear constitutional violation. *People v. Richardson*,

2015 IL 118255, ¶ 8. We will uphold a statute's constitutionality whenever reasonably possible. *Id.* We review the constitutionality of a statute *de novo*. *Id.*

¶ 29 Defendant notes that the fact that the aggravated battery took place on or about a public way elevated the crime to a felony. He argues that this case's facts demonstrate the arbitrariness of the classification, as had he punched Bourdeau on the grass, where the argument began, this would have been a misdemeanor offense, with much less severe sentencing consequences, because that area was his private property. Defendant contends that even if the State could argue that the grassy area near the sidewalk was also on or about a public way, it would still be arbitrary where the imaginary public line ended. Defendant argues that even if he had chased the victim to the victim's home and hit the victim in the victim's front yard, the crime would have been a misdemeanor. Defendant argues that while it may be understandable that public streets should remain safe, it would be even more important to protect people from being attacked on their own property.

¶ 30 The State points out that the appellate court has already addressed and rejected prior due process and equal protection challenges to the statute based on the offense taking place on a public way. See *People v. Buie*, 217 Ill. App. 3d 786 (1991); *People v. Lowe*, 202 Ill. App. 3d 648 (1990); *People v. Handley*, 117 Ill. App. 3d 949 (1983); *People v. Cole*, 47 Ill. App. 3d 775 (1977).

¶ 31 In *Cole*, the court stated that the equal protection and due process clauses do not guarantee absolute equality, but rather only equality in the eyes of the law, and that governments could recognize and act upon factual differences between individuals, classes, and events. *Cole*, 47 Ill. App. 3d at 779. The court stated that the statute bore a rational relation to the evil sought to be remedied because it "might have been intended to remedy the deteriorating condition of

public safety on the streets, thereby calming the widespread reticence of citizens who fear travel beyond their immediate neighborhoods," or it "might also have been intended to preserve public order in the tumultuous times through which we have been passing since the early 1960's." *Id.* at 780.

¶ 32 In *Handley*, the court stated that the statute was designed to deter the possibility of harm to the public. *Handley*, 117 Ill. App. 3d at 952-53. The court in *Lowe* noted this rationale as well; it stated that the courts and *Cole* and *Handley* agreed, when considering both the committee comments and the statute's language, that the legislature's intent was clearly "to protect the public health and safety by treating batteries which occur on or about a public way more harshly than a simple battery." *Lowe*, 202 Ill. App. 3d at 653. In *Buie*, the court again cited the committee comments in stating that the legislature intended to protect public safety because a battery in a public place " 'constitutes a more serious threat to the community than a simple battery.' " *Buie*, 217 Ill. App. 3d at 789 (quoting Ill. Ann. Stat. ch. 38, ¶ 12-4, Committee Comments, at 465 (Smith-Hurd 1979)).

¶ 33 Defendant urges us to follow the opinion of the dissenting justice in *People v. Lockwood*, 37 Ill. App. 3d 502 (1976), *aff'd in part and vacated in part*, 63 Ill. 2d 560.[4] There, Justice Moran *sua sponte* raised the issue of the statute's constitutionality. *Id.* at 509 (Moran, J., dissenting). He stated that "the fortuitous circumstances of being located upon a public way at the instant a simple battery occurs does not warrant the transformation of the same act" from a misdemeanor to a felony. *Id.* He stated that although the rationale for the statute was that a battery on a public way poses a more serious threat to society than one occurring on private

[4] The supreme court did not issue an opinion in the case.

property, in his opinion there was no inherent social evil in committing a battery upon public property as opposed to private property. *Id.* at 509-10.

¶ 34 Defendant argues that the arbitrariness of the statute is further shown by the fact that the domestic battery statute (720 ILCS 5/12-3.2 (West 2012)) does not create a felony enhancement for a domestic battery occurring on or about a public way. Defendant argues that, therefore, a person who batters a family or household member on a public way would be subjected to a misdemeanor domestic battery offense while a person who batters a non-family or non-household member would be subjected to the felony enhancement. Defendant maintains that this is particularly odd since the legislature generally treats domestic battery offenders more harshly for sentencing purposes.

¶ 35 Defendant's argument is not persuasive. Justice Moran apparently focused on the battery itself in reasoning that there was no greater social evil for a battery upon public property as compared to a battery on private property. *Lockwood*, 37 Ill. App. 3d at 509-10 (Moran, J., dissenting). However, subsequent cases focused on the possible harm to the general public from such batteries. See *Lowe*, 202 Ill. App. 3d at 653; *Handley*, 117 Ill. App. 3d at 952-53. One can imagine a scenario where a battery occurs in a crowded public space, also causing injuries to others, or at a minimum a greater fear of being in a public place. Indeed, *Cole* noted that the enhancement could have been based on wanting the public to be able to travel freely, without fear. *Cole*, 47 Ill. App. 3d at 779. Correspondingly, in this case Bourdeau was running away from defendant and was on a public street, where he had a right to be, when defendant punched him. Defendant's contrast of the penalties for aggravated battery on or about a public way to the penalties for domestic battery does not affect our analysis, as the prosecution could charge a person who battered a family member with aggravated battery instead of domestic battery. In

sum, we find no compelling reason to deviate from the line of cases upholding the constitutionality of the aggravated battery statute.

¶ 36 B. Jury Instructions for Threatening a Public Official

¶ 37 Defendant next argues that we should reverse his conviction for threatening a public official because (1) the trial court gave conflicting jury instructions on the crime, and (2) the trial court instructed the jury on a negligence theory of liability, contrary to *Elonis v. United States,* 135 S. Ct. 2001 (2015).

¶ 38 A trial court is required to instruct a jury in a criminal case using criminal pattern instructions unless there is no applicable pattern instruction or the court determines that a particular instruction does not accurately state the law. Ill. S. Ct. R. 451(a) (eff. Apr. 8, 2013); *People v. Cavazos,* 2015 IL App (2d) 120171, ¶ 72. The decision whether to give the jury a non-pattern instruction is within the trial court's sound discretion. *People v. Simms*, 192 Ill. 2d 348, 412 (2000). However, we review *de novo* whether the jury instruction correctly conveyed the applicable law. *People v. Messenger*, 2015 IL App (3d) 130581, ¶ 38.

¶ 39 As pertains here, a person threatens a public official if that person knowingly delivers or conveys, directly or indirectly, to a public official by any means a communication containing a threat that would place the public official or a member of his or her immediate family in reasonable apprehension of immediate or future bodily harm, and the threat was conveyed because of the performance or nonperformance of some public duty. 720 ILCS 5/12-9(a)(1), (2) (West 2012). Moreover, "[f]or purposes of a threat to a sworn enforcement officer, the threat must contain specific facts indicative of a unique threat to the person, family or property of the officer and not a generalized threat of harm." 720 ILCS 5/12-9(a-5) (West 2012).

¶ 40 The trial court gave the following pattern definitional instruction for threatening a public official:

> "A person commits the offense [of] threatening a public official when he knowingly delivers or conveys, directly or indirectly, to a public official by any means a communication containing a threat that would place the public official in reasonable apprehension of immediate or future bodily harm and the threat was conveyed because of the performance or nonperformance of some public duty." See Illinois Pattern Jury Instructions, Criminal, No. 11.49 (2014) (hereinafter, IPI 11.49).

¶ 41 The trial court also gave the following elements instruction for threatening a public official:

> "To sustain the charge of threatening a public official, the State must prove the following propositions.
>
> *First Proposition*: That the defendant knowingly delivered or conveyed, directly or indirectly, to a public official by any means a communication containing a threat that would place the public official in reasonable apprehension of immediate or future bodily harm; and
>
> *Second Proposition*: That Officer Eric Haimann was a public official at the time of the threat; and
>
> *Third Proposition*: That the threat was conveyed because of the performance or nonperformance of some public duty; and
>
> *Fourth Proposition*: That when the defendant conveyed the threat, he knew Official Eric Haimann was a public official; and

Fifth Proposition: That the threat to a sworn law enforcement officer contained specific facts indicative of a unique threat to the sworn law enforcement officer, and not a generalized threat of harm.

If you find from your consideration of all the evidence that each one of these propositions has been proven 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." (Emphases in original.) See Illinois Pattern Jury Instructions, Criminal, No. 11.50 (2014) (hereinafter, IPI 11.50).

¶ 42 Defendant asked that IPI 11.49 be modified to include the fifth proposition from IPI 11.50 that the threat must contain specific facts indicative of a unique threat, but the trial court denied this request and issued IPI 11.49 over defendant's objection.

¶ 43 During deliberations, the jury sent a note asking: "Is a conditional threat still a threat? In other words, if someone says 'if you do x, then y will happen' is that the same threat as just saying 'y will happen'?" Over defendant's objection, the trial court gave the following written response: "A CONDITIONAL THREAT COULD BE A THREAT IF IT PLACES THE PUBLIC OFFICIAL IN REASONABLE APPREHENSION OF IMMEDIATE OR FUTURE BODILY HARM."

¶ 44 Defendant argues that the jury instructions, combined with the trial court's note to the jury, misstated the law and offered conflicting statements on what the law required to convict him. He argues that the definition and elements instruction were contradictory because the

definition instruction omitted the required element from the statute that defendant made a unique threat to Officer Haimann rather than a generalized threat.

¶ 45 Defendant analogizes this case to *People v. Warrington*, 2014 IL App (3d) 110772. There, the definitional instruction did not contain the phrase "reasonable apprehension" (see 720 ILCS 5/12-9(a)(1)(i) (West 2010) (the communication must contain a threat "that would place the public official or member of his or her immediate family in *reasonable apprehension* of immediate or future bodily harm (emphasis added))," though the issues instruction contained the phrase. *Id.* ¶ 29. The appellate court stated that the instructions were inconsistent and that the trial court erred by giving the jury inconsistent instructions regarding the offense. *Id.* ¶ 30. It then stated: "[M]ore importantly, neither the issues nor definition instruction included an element of the offense requiring the State to prove defendant communicated a unique threat to a police officer." *Id.* ¶ 31. The court reversed defendant's conviction of threatening a public official and remanded for a new trial on that count. *Id.* ¶ 37.

¶ 46 Defendant argues that here the conflict in the instructions was exacerbated when the trial court answered the jury's question about whether a conditional threat could still be considered a threat, because its answer eliminated the "unique threat" element, causing further confusion as to what was required to prove the threat.

¶ 47 The State argues that defendant forfeited his argument that IPI 11.49 and IPI 11.50 conflict because he objected only to IPI 11.49. The State argues that, even otherwise, the trial court properly instructed the jury. It argues that IPI 11.49 was a pattern instruction that accurately conveyed the law as to subsection (a)(1) (720 ILCS 5/12-9(a)(1) (West 2012)), the more general definition of threatening a public official, whereas IPI 11.50, the issues instruction, included language from subsection (a-5) (720 ILCS 5/12-9(a-5) (West 2012)) applicable only

where the public official is a police officer. The State argues that IPI 11.50 clarified the elements it was required to prove, including that defendant must have communicated a unique threat.

¶ 48 The State argues that *Warrington* is distinguishable because it involved the absence of the "reasonable apprehension" language in the definitional instruction (IPI 11.49), and that language is part of subsection (a)(1), whereas the "unique threat" language is not. It argues that the *Warrington* court also did not ultimately rely on the conflicting instructions as the basis for its ruling that the jury instructions constituted plain error, as the jury was never instructed that the State had to prove that the defendant communicated a unique threat, so it is unclear whether the inconsistency in the jury instructions regarding the "reasonable apprehension" language alone would have been sufficient for reversal. The State argues that here, unlike *Warrington*, the jury instructions properly instructed the jury on all of the elements of threatening a public official.

¶ 49 Finally, the State argues that even if we find that IPI 11.49 was erroneous and conflicted with IPI 11.50, it does not warrant reversal because the evidence was not closely balanced.

¶ 50 To preserve review of a jury instruction error, a defendant must object to the instruction at trial and include the issue in a posttrial motion. *People v. Sharp*, 2015 IL App (1st) 130438, ¶ 74. We disagree with the State that defendant forfeited his argument by failing to object to IPI 11.50; defendant's position is that IPI 11.50 accurately conveyed the law, so it was logical for him to object to just 11.49, which he argues misstated the law. Still, defendant did not argue that 11.49 was inaccurate in his posttrial motion, as generally required to avoid forfeiture. That being said, Illinois Supreme Court Rule 451(c) (eff. Apr. 8, 2013) provides that a defendant does not waive "substantial defects" in criminal jury instructions by "failure to make timely objections thereto if the interests of justice require." The errors must either be grave or occur in cases that

are factually so close that fundamental fairness requires that the jury receive proper instructions. *People v. Downs*, 2015 IL 117934, ¶ 14. We construe Rule 451 identically to the plain error clause of Illinois Supreme Court Rule 615(a). *Id.*

¶ 51 The plain error doctrine allows a reviewing court to consider an unpreserved error where either (1) a clear error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) a clear error occurs that is so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. *People v. Sargent*, 239 Ill. 2d 166, 189 (2010). The defendant has the burden of persuasion in showing that both a clear and obvious error occurred and that one of the prongs is satisfied. *People v. Marcos*, 2013 IL App (1st) 111040, ¶ 58. In applying the plain error test, the first step is to determine whether error occurred at all. *People v. Kitch*, 239 Ill. 2d 452, 462 (2011).

¶ 52 Here, we agree with the defendant that the trial court should have granted his request to amend IPI 11.49 to include language regarding a unique threat, as that was an element of the crime under the facts of this case, in which the public official was a police officer. See 720 ILCS 5/12-9(a-5) (West 2012).

¶ 53 Returning to the elements of plain error, plain error can be found where the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant. *Sargent*, 239 Ill. 2d at 189. Here, there was strong evidence against defendant, in that he admitted that he did not want the police on his property and that he refused repeated requests to put his dog away, which indicates a negative state of mind toward the police at the time and makes the possibility of a threat more likely. Further, Bourdeau testified that defendant was yelling and swearing at him, Officer Easton testified that defendant threatened to kill him and threatened Officer Haimann, Griffin and Krupa testified that defendant was yelling, and Officer

Haimann testified that defendant made the threat at issue. Thus, the evidence against defendant on this charge certainly cannot be labeled as so closely balanced that the error alone could have caused the jury to find defendant guilty. *Cf. People v. Minter*, 2015 IL App (1st) 120958, ¶ 62 (where there was strong evidence against the defendant, he could not show that the court's error threatened to tip the balance of the evidence in the State's favor).

¶ 54 The alternative, second prong of the plain error analysis requires a structural error (*People v. Jackson*, 2015 IL App (3d) 140300, ¶ 56) that is so serious that it affected the trial's fairness and challenged the integrity of the judicial process (*Sargent*, 239 Ill. 2d at 189). An erroneous omission of a jury instruction constitutes plain error only where it creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law. *Id.* at 191. This is a difficult standard to meet, and even an incorrect instruction on an element of the offense is not necessarily reversible error. *Id.*; see also *People v. Hopp*, 209 Ill. 2d 1, 10 (2004) (omission of an instruction cannot be labeled as plain error without considering the effect the omission had on the defendant's trial).

¶ 55 The error here does not rise to the level of creating a serious risk that the jury misunderstood the law. While the definitional instruction omitted the element of a unique threat, it did not include an alternative, conflicting element. *Cf. People v. Clark*, 2015 IL App (1st) 131678, ¶ 80 (error in jury instruction was less egregious because it was incomplete rather than containing an affirmative misstatement of the law). Moreover, this court has stated that an error in an instruction that either omits or misdescribes an element cannot be structural error. *People v. Watt*, 2013 Ill. App. (2d) 120183, ¶ 38. Additionally, the issues instruction clearly and distinctly listed each proposition that the jury was required to find in convicting defendant, including: "That the threat to a sworn law enforcement officer contained specific facts indicative

of a unique threat to the sworn law enforcement officer, and not a generalized threat of harm." The State also specifically discussed this element in its closing argument. Accordingly, we conclude that the error is not plain error. *Cf. People v. Young*, 2013 IL App (2d) 120167, ¶ 33 (although it was error not to specifically tailor the instruction to the case, and the instruction had the potential to be confusing, the error did not create a serious risk of misinforming the jury of the applicable law considering the other instructions in the case).

¶ 56 We next look at the trial court's response to the jury question. Even if a jury has been properly instructed, a trial court generally has a duty to further instruct a jury that has raised an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion. *People v. Childs*, 159 Ill. 2d 217, 228-29 (1994). Still, the trial court may refrain from answering a jury question under appropriate circumstances, such as "when the instructions are readily understandable and sufficiently explain the relevant law, where further instructions would serve no useful purpose or would potentially mislead the jury, when the jury's inquiry involves a question of fact, or where the giving of an answer would cause the court to express an opinion that would likely direct a verdict one way or another." *People v. Millsap*, 189 Ill. 2d 155, 161 (2000). The decision of how to respond to jury question during deliberations is generally within the trial court's discretion. *People v. Brown*, 2015 IL App (1st) 131552, ¶ 42.

¶ 57 The State cites *People v. Curtis*, 354 Ill. App. 3d 312, 323 (2004), where the appellate court held that the trial court correctly relied on language from case law that was on point. *Cf. People v. Falls*, 387 Ill. App. 3d 533, 538 (2008) (trial court should have answered jury's question on an issue that was made clear by case law). The State argues that the trial court's response here was likewise based on applicable case law, that being *People v. Kirkpatrick*, 365 Ill. App. 3d 927, 930 (2006).

¶ 58 In this case, the jury asked if a conditional threat could be a threat, showing that it was confused on a point of law, so the trial court acted within its discretion by providing an answer. We agree with the State that the trial court's response was correct based on *Kirkpatrick*, in that a conditional threat could still constitute a threat. Defendant does not contest that this is true but rather argues that the trial court should have also stated that the threat had to be a unique threat. We disagree, as the trial court answered the jury's question and did not purport to list all of the elements necessary to convict defendant of threatening a public official, a subject which was covered by the issues instruction. For example, the threat must also be conveyed because of the performance or nonperformance of a public duty (see 720 ILCS 5/12-9(a)(2) (West 2012)), but even defendant does not argue that this should have been included in the response to the question. In sum, we conclude that the trial court did not abuse its discretion in the manner in which it answered the question. As we find no error in the answer, it necessarily did not aggravate the error in not amending IPI 11.49 to include the element of a unique threat.

¶ 59 Defendant alternatively argues that the trial court committed an even greater fundamental error in providing instructions that allowed the jury to convict him based on a negligence theory of liability, contrary to *Elonis v. United States*, __ U.S. __, 135 S. Ct. 2001 (2015). Defendant argues that the standard applied for deciding whether his language constituted a threat was a "reasonable person standard," whereas the crime should require a more culpable mental state.

¶ 60 In *Elonis*, the statute at issue was a federal criminal statute prohibiting the transmission in interstate or federal commerce of any communication with a threat to kidnap or injure a person. *Id.* at 2008 (citing 18 U.S.C. § 875(c)). The Supreme Court stated: "When interpreting *federal criminal statutes* that are silent on the required mental state, we read into the statute 'only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct.' "

(citation and quotation marks omitted) (emphasis added)." *Id.* at 2010. The Court stated that the defendant was convicted based solely on how a reasonable person would view the language he used, but that was a negligence-type of standard used for civil liability in tort law, whereas the conventional requirement for criminal conduct was awareness of some wrongdoing. *Id.* at 2011.

¶ 61 We do not find *Elonis* controlling here. First, the statute as applicable here specifies that the defendant must knowingly convey the threat to a public official and must do so because of that official's public duty (720 ILCS 5/12-9(a)(1), (2) (West 2012)), which are aspects of *mens rea* that were not present in the federal statute. That is, the threat must be conveyed specifically because the victim's performance or nonperformance of a public duty, which would tend to show the defendant's awareness of wrongdoing. Threatening a public official can be analogized to the crime of intimidation, which is a specific intent crime. See *People v. Casciaro*, 2015 IL App (2d) 131291, ¶ 84 (intimidation is a specific intent crime where the defendant must have intended to engage in certain acts with an intended criminal result; the defendant's intent can be inferred from the defendant's statements and the surrounding circumstances); see also *People v. Byrd*, 285 Ill. App. 3d 641, 648 (1996) (the intent the State must prove for the crime of intimidation is the intent to affect the performance of an act, rather than the intent to carry out the threat).

¶ 62 More importantly, the Supreme Court used a rule of statutory construction applicable to federal criminal statutes, not both federal and state statutes, and it did not purport to make a constitutional ruling. *Cf. United States v. Kirsch*, No. 07-CR-304S(6), 2015 WL 9077546, at *5 (D. W.D.N.Y. Dec. 16, 2015) (*Elonis* is a case of statutory construction that applies only to the statute discussed); *People v. Murillo*, 238 Cal. App. 4th 1122, 1129 (2015) (*Elonis* did not control interpretation of state statute); *Council on Am.-Islamic Relations Action Network, Inc. v. Gaubatz*, No. CV 09-2030 (CKK), 2015 WL 5011583, at *3 (D.D.C. Aug. 24, 2015) (same).

Illinois courts use an objective, rather than subjective, approach to determine whether a communication constitutes a threat (*People v. Diomedes,* 2014 IL App (2d) 121080, ¶ 34), and *Elonis* does not require us to depart from this approach.

¶ 63 C. Sufficiency of the Evidence

¶ 64 Last, defendant argues that he was not proven guilty beyond a reasonable doubt of threatening a public official and obstructing a peace officer. When faced with a challenge to the sufficiency of the evidence, we must determine whether, after 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. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The trier of fact has the responsibility to assess witnesses' credibility, weigh their testimony, resolve inconsistencies and conflicts in the evidence, and draw reasonable inferences from the evidence. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). We will not set aside a criminal conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of the defendant's guilt. *People v. Lloyd*, 2013 IL 113510, ¶ 42.

¶ 65 Regarding the crime of threatening a public official, defendant recognizes that in viewing the evidence in the light most favorable to the prosecution, we must accept that he told Officer Haimann that he would have his dogs kill him if he came onto defendant's property. However, defendant argues that there was insufficient evidence that he made a "unique threat" rather than a generalized threat of harm. See 720 ILCS 5/12-9(a-5) (West 2012) (a threat to a police officer "must contain specific facts indicative of a unique threat to the person, family or property of the officer and not a generalized threat of harm"). Defendant argues that, viewed under the circumstances of him asserting his fourth amendment rights, the threat must be seen not as one

targeting Officer Haimann specifically but rather directed at anyone who attempted to come onto defendant's property without a warrant.

¶ 66 Officer Haimann testified that he and another officer had moved closer to the gate after defendant refused their initial orders to put his hands in the air. They again asked him to put his hands in the air, and he refused to comply. Instead, he screamed at the officers and told Officer Haimann that if he came on to his property, he would have his dogs kill him. Defendant was using aggressive body language when delivering the threat. At this time, the dogs were barking viciously, and defendant refused the officers' orders to put the dogs away.

¶ 67 Officer Easton testified that when he pulled up, one officer was standing towards the end of the driveway and Officer Haimann was standing in front of the fence enclosing the front porch. Officer Easton testified that the dogs were barking "pretty bad" at Officer Haimann.

¶ 68 Given the evidence that defendant was speaking directly to Officer Haimann when making the threat and that Officer Haimann was physically closer to defendant than the other officers at the time, a rational trier of fact could have determined that the threat was directed specifically at Officer Haimann and not to law enforcement as a whole. Accordingly, there was sufficient evidence for the jury to find defendant guilty of threatening a public official beyond a reasonable doubt.

¶ 69 Turning to the offense of obstructing a peace officer, the State was required to prove that defendant knowingly resisted or obstructed the performance of any authorized act of a person defendant knew to be a peace officer. 720 ILCS 5/31-1(a) (West 2012). Count V alleged that defendant "knowingly obstructed the performance of Officer Haimann and Officer Easton of the Villa Park Police department who were performing authorized acts within their official capacity,

being the investigation of reports of a crime, in that said defendant refused to comply with an order to secure his dogs."

¶ 70 Defendant cites *People v. Jones*, 2015 IL App (2d) 130387, ¶ 11, where we stated as follows. An " 'authorized act' " under section 31-1 is an act of a type that an officer is authorized to perform. *Id.* If the authorized act is an arrest, a defendant is not privileged to resist even an unlawful arrest. *Id.* However, an officer's entry into the defendant's home in violation of the fourth amendment is not an authorized act under section 31-1. *Id.* "The fourth amendment 'has drawn a firm line at the entrance to the house.' " *Id.* ¶ 13 (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)). Therefore, unless there are exigent circumstances, the police may not enter a private residence to make a warrantless search or arrest. *Id.*

¶ 71 Defendant points out that the obstruction count related to his conduct in not securing the dogs when the officers were investigating a complaint, before he was told that he was under arrest. Defendant states that he knows of no law that would require compliance with such order, so he cannot be said to have obstructed any "authorized act."

¶ 72 The purpose of section 31-1 is to promote the orderly and peaceful resolution of disputes and prevent the frustration of the valid enforcement of the law. *People v. Baskerville*, 2012 IL 111056, ¶ 24. When determining whether an officer was engaged in an authorized act, we look to whether the officer was doing what he or she was employed to do or was "engaging in a personal frolic." *City of Champaign v. Torres*, 346 Ill. App. 3d 214, 217 (2004). An officer's investigation of a reported disturbance can constitute an authorized act. See *People v. Jamison*, 2014 IL App (5th) 130150, ¶ 18. Obstructive conduct under section 31-1 is conduct that tends to interpose an obstacle that impedes or hinders the officer in his performance of authorized duties. *Baskerville*, 2012 IL 111056, ¶ 23. Even refusing a police officer's lawful order to move can

amount to interference with the officer's discharge of his or her duty. *People v. Shenault*, 2014 IL App (2d) 130211, ¶ 17. Whether conduct is obstructive is a factual determination. *Baskerville*, 2012 IL 111056, ¶ 23.

¶ 73 Here, Officers Haimann and Easton were engaged in an "authorized act" when they approached defendant's home because they had received a report that he had punched Bourdeau and that he may have had a gun and a bat. That is, they were authorized to investigate the complaint (*Jones*, 2015 IL App (2d) 130387, ¶ 11) and were acting pursuant to their duties rather than a "personal frolic" (*Torres*, 346 Ill. App. 3d at 217). Moreover, the appellate court has specifically held that the investigation of a report of a potential crime can constitute an authorized act. *Jamison*, 2014 IL App (5th) 130150, ¶ 18. Corresponding, the police had the right to enter onto defendant's property to continue their investigation; notably, they did not go into his house during the time that defendant was alleged to have engaged in obstruction. *Cf. Jones*, 2015 IL App (2d) 130387, ¶ 14. Further, a rational trier of fact could reasonably conclude that defendant's refusal to put his dogs away interfered with the officers' discharge of their duty because it impeded or hindered them in investigating the crime, as the dogs could be seen as anything from a significant distraction in trying to talk to defendant to a potential threat to the officers' safety. Accordingly, there was sufficient evidence to prove defendant guilty of obstructing a peace officer beyond a reasonable doubt.

¶ 74 III. CONCLUSION

¶ 75 For the reasons stated, we affirm the judgment of the Du Page County circuit court.

¶ 76 Affirmed.