

NOTICE

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2016 IL App (4th) 150161-U

NO. 4-15-0161

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

May 25, 2016
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
WILLIAM MARK CARMICHAEL,)	No. 14CF156
Defendant-Appellant.)	
)	Honorable
)	Paul G. Lawrence,
)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Holder White and Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding the jury was apprised of the relevant legal principles applicable to the evidence presented at trial.

¶ 2 In October 2014, a jury found defendant, William Mark Carmichael, guilty of aggravated battery (720 ILCS 5/12-3.05(c) (West 2012)). In December 2014, the trial court sentenced defendant to 24 months' probation. Defendant appeals, arguing the cumulative effect of jury-instruction errors denied him a fair trial. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In February 2014, the State charged defendant by indictment with one count of aggravated battery (harm on a public way) (count I) (720 ILCS 5/12-3.05(c) (West 2012)). (We note the charging instrument on count I referenced the prior statutory citation (720 ILCS 5/12-4(b)(8) (West Supp. 2011)).) The State alleged, on or about February 7, 2014, defendant

knowingly and without legal justification caused bodily harm to Richard Townsend by hitting and kicking him while on or about a public way or place of accommodation, Hooligan's Pub.

¶ 5 In July 2014, the State charged defendant by indictment with one count of aggravated battery (great bodily harm) (count II) (720 ILCS 5/12-3.05(a)(1) (West 2012)). The State alleged, on or about February 7, 2014, defendant knowingly and without legal justification committed a battery that caused great bodily harm, broken bones, to Townsend.

¶ 6 In October 2014, the trial court held a jury trial. Our review of the evidence presented reveals the following.

¶ 7 A. State's Case in Chief

¶ 8 On February 7, 2014, Townsend, his wife, and his son were working at Hooligan's Pub, a bar Townsend owned in Colfax, Illinois. Around 5 p.m., Angel Aston began her shift as a bartender.

¶ 9 Around 6:30 p.m., defendant and Donald Snyder arrived at the bar. Aston testified both defendant and Snyder appeared "inebriated." Snyder denied that either he or defendant had consumed alcoholic beverages prior to arriving at the bar.

¶ 10 Following a series of events where defendant (1) accused Aston of failing to return money from a previous purchase, (2) accused Aston of touching his pizza with her bare hands, and (3) made sexual references directed at Aston, Aston approached Townsend and requested he ask defendant to leave the bar. Townsend, who had been assisting Aston in delivering food to tables, spoke with defendant, who complained Aston had touched his pizza with her bare hands. Townsend informed defendant he did not have to pay for the pizza. Townsend asked defendant to leave the bar as he was being disruptive to other customers and

Aston. Townsend and defendant shook hands, and defendant left the bar. Snyder remained in the bar to finish his drink.

¶ 11 At some point, defendant stepped back inside the bar and motioned for Townsend to step outside. As there was no confrontation inside the bar, Townsend did not expect trouble outside. Townsend suspected defendant either sought to retrieve something he left in the bar or was wondering when he could return to the bar in the future.

¶ 12 At approximately 9 p.m., Townsend exited the bar and approached defendant on the sidewalk. Defendant appeared aggravated and questioned Townsend's decision to follow Aston's suggestion and require him to leave the bar. Townsend explained he supported Aston's suggestion. Townsend did not call defendant names or refer to him in a derogatory manner. Townsend observed defendant clench his fist and then strike him on the left side of his jaw. After being struck, Townsend stated he did not want to fight as defendant had done what he asked by leaving the bar. Following his statement, Townsend testified, "everything just sort of becomes a blank, and I remember experiencing lots of excruciating pain that continued to go on and on." Townsend recalled begging for the assault to stop. Snyder eventually exited the bar and, once outside, noticed "something was going on." He observed defendant and Townsend "scuffling on the ground." Snyder stated to Townsend to "shut up"; otherwise, defendant would kill him. Snyder testified he "shoved" Townsend. When Townsend regained consciousness, he was on the ground between two cars, and defendant and Snyder had left. Townsend believed he was struck multiple times but everything after the "first blow" became a "blur." Townsend did not strike defendant.

¶ 13 Townsend was transported by ambulance to the hospital and treated for a dislocated shoulder, a fractured left ankle, and a jaw broken in two places.

¶ 14 Townsend testified he had consumed approximately three to six beers between 5:15 and 9 p.m. Townsend's medical records indicated Townsend had admitted to consuming 13 alcoholic beverages and had a blood-alcohol content of 0.164. Prior to owning the bar, Townsend was a correctional officer, which required training in self-defense.

¶ 15 Mike Allsup, a police officer with the Colfax police department, testified, on February 7, 2014, he spoke with defendant at his home. Defendant stated he had been home all evening. Defendant was wearing a pair of jeans, which had two or three blood spots. Defendant appeared uninjured, slightly intoxicated, and nervous.

¶ 16 B. Defendant's Case in Chief

¶ 17 Defendant testified, on February 7, 2014, at approximately 6 p.m., he and Snyder arrived at Hooligan's Pub. Prior to their arrival, defendant and Snyder had not consumed alcoholic beverages. Throughout the night, defendant drank approximately four beers.

¶ 18 Defendant testified he requested a to-go container for leftover pizza. After Aston began picking up the pizza with her bare hands, defendant "pushed and knocked her hand away" and told her not to touch his food. Defendant acknowledged he stated "some pretty vulgar stuff," but he figured, because Aston "was being rude," he would "be rude back." Aston told defendant to leave the bar. Defendant requested to speak with the bar's owner. Defendant complained to Townsend about Aston touching his food. Townsend responded by stating Aston was his best bartender and directing defendant to leave the bar. Defendant left the bar, while Snyder remained to finish his beer.

¶ 19 Defendant, upset that Townsend did not listen to his side of the story before asking him to leave, returned to the bar and asked Townsend to step outside to talk. Defendant testified the sidewalk outside the bar was icy. Once outside, defendant began "talking a lot of

smack" to Townsend. Townsend responded by telling defendant to "get the hell out of here, chink." After defendant began to leave, Townsend struck him on the side of his head, which caused him to fall. Defendant testified the strike caused a "big knot" on his head. Defendant got off the ground and struck Townsend in the face. Townsend threw defendant to the ground. Defendant grabbed Townsend by the ankles as he was afraid Townsend would start kicking him. The next thing defendant recalled was Townsend on the ground in the street. After Townsend was in the street, defendant realized Snyder was outside. Defendant and Snyder left.

¶ 20 Defendant told Officer Allsup he was at home the entire evening because he did not want to go to jail. Defendant testified he grabbed Townsend around his ankles to protect himself. When asked whether he "punched" Townsend to protect himself, defendant testified: "Well, he was—he was coming at me. He started it."

¶ 21 C. Jury-Instruction Conference

¶ 22 At the jury-instruction conference, the State proposed the following instruction be given to the jury on self-defense:

"A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force.

However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself."

Defendant objected to the instruction as he believed the second paragraph was inappropriate under the circumstances. Defendant offered an alternative instruction, which removed the

second paragraph from the State's instruction. Over defendant's objection, the trial court indicated it would instruct the jury with the State's instruction.

¶ 23

D. Closing Arguments

¶ 24

The State informed the jury defendant was charged with two counts of aggravated battery and a lack of legal justification was an element of both charges. The State asserted, "the only place that the State and the defendant disagree is whether or not that force was justified, whether or not the defendant was actually acting in self-defense." The State indicated the jury would receive an instruction explaining a person is justified in using force to the extent he reasonably believed such conduct was necessary to defend himself against the imminent use of unlawful force. The State further noted the instruction would explain a person is justified in using force intended to cause death or great bodily harm only if he reasonably believed such force was necessary to prevent death or great bodily harm. The State argued, even if the jury believed defendant's claim of self-defense, defendant, who walked away with no visible injuries, could not have reasonably believed it was necessary to use such force as to cause a broken jaw, fractured ankle, and dislocated shoulder.

¶ 25

Defense counsel emphasized to the jury the burden of proof rested with the State, and defendant was not required to prove anything. Defense counsel asserted this was a case of self-defense, and defendant used reasonable force in defending himself. Defense counsel highlighted the "issues instructions," which the court would give the jury, and emphasized all of the elements contained within the issues instructions had to be proved beyond a reasonable doubt to find defendant guilty.

¶ 26

E. Jury's Findings

¶ 27 Following deliberations, the jury found defendant guilty of aggravated battery (harm on a public way) and not guilty of aggravated battery (great bodily harm).

¶ 28 F. Posttrial Motion and Sentencing

¶ 29 In November 2014, defendant filed a posttrial motion, alleging, in relevant part, the trial court erred in instructing the jury with the second paragraph of the self-defense instruction. Specifically, defendant asserted the second paragraph was inappropriate as the evidence demonstrated he only punched Townsend, and it could not be said that act either was intended or likely to cause death or great bodily harm. Defendant further suggested alternative language to the State's instruction should have been included to advise the jury as to the appropriate amount of force when a forcible felony had been committed.

¶ 30 In December 2014, the trial court held a hearing on defendant's posttrial motion and sentencing. The court denied defendant's posttrial motion and sentenced him to 24 months' probation, with a condition of 90 days' periodic incarceration.

¶ 31 G. Motion To Reconsider the Sentence and Motion To Modify

¶ 32 In January 2015, defendant filed a motion to reconsider his sentence and a motion to modify his sentence. Following a February 2015 hearing, the trial court denied defendant's motion to reconsider his sentence but issued an amended order of confinement, modifying defendant's schedule of incarceration for employment purposes.

¶ 33 This appeal followed.

¶ 34 II. ANALYSIS

¶ 35 On appeal, defendant argues the cumulative effect of jury-instruction errors denied him a fair trial. Specifically, defendant raises contentions of error with regard to the aggravated battery (harm on a public way) and self-defense definitional instructions.

¶ 36 A. Aggravated Battery (Harm on a Public Way) Definitional Instruction

¶ 37 The trial court instructed the jury with the following aggravated battery (harm on a public way) definitional instruction: "A person commits the offense of aggravated battery when he knowingly and by any means causes bodily harm to another person, and in doing so, he is on or about a public way or a public place of accommodation."

¶ 38 The general definitional instruction for aggravated battery (harm on a public way) in Illinois Pattern Jury Instructions, Criminal, No. 11.15 (4th ed. 2000) (IPI Criminal 4th) reads as follows:

"A person commits the offense of aggravated battery when he [(intentionally) (knowingly)] [without legal justification] and by any means [(causes bodily harm to) (makes physical contact of an insulting or provoking nature with)] another person, and

[8a] in doing so, he is on or about [(a public way) (public property) (a public place of accommodation) (a public place of amusement)]."

The Committee Note to IPI Criminal 4th No. 11.15 indicates to "[u]se the phrase 'without legal justification' whenever an instruction is to be given on an affirmative defense contained in Article 7 of the Criminal Code of 1961." Here, an instruction was given on the affirmative defense of self-defense. See 720 ILCS 5/7-14 (West 2012); Illinois Pattern Jury Instructions, Criminal, No. 24-25.06 (4th ed. 2000) (IPI Criminal 4th No. 24-25.06).

¶ 39 Defendant contends the trial court's failure to include the phrase "without legal justification" in the aggravated battery (harm on a public way) definitional instruction constitutes

reversible error. In response, the State asserts any criticism of the omission of the justification language is forfeited as defendant failed to raise the issue in the trial court.

¶ 40 "Generally, a defendant forfeits review of any putative jury[-]instruction error if the defendant does not object to the instruction or offer an alternative instruction at trial and does not raise the instruction issue in a posttrial motion." *People v. Herron*, 215 Ill. 2d 167, 175, 830 N.E.2d 467, 472 (2005). This rule encourages a defendant to raise contentions of error before the trial court, allowing the court to correct its own errors before the instructions are given, and prevents a defendant from seeking a reversal through inaction. *Herron*, 215 Ill. 2d at 175, 830 N.E.2d at 472-73. Defendant has forfeited his claim by failing to object to the instruction or offer an alternative and raise the claim in a posttrial motion.

¶ 41 Defendant requests we review his claim for plain error. Defendant asserts the failure to include the justification language in the aggravated battery (harm on a public way) definitional instruction rises to the level of plain error as the omission directly bears on the essential issue of whether he was justified in using force against Townsend. In support, defendant cites various cases finding reversible error where *issues* instructions failed to indicate it was the State's burden to prove a lack of justifiable force. See *People v. Cook*, 262 Ill. App. 3d 1005, 1017, 640 N.E.2d 274, 282 (1994); *People v. Lewis*, 53 Ill. App. 3d 89, 93, 368 N.E.2d 619, 623 (1977); *People v. Brophy*, 96 Ill. App. 3d 936, 944, 422 N.E.2d 158, 165 (1981); *People v. Whitney*, 86 Ill. App. 3d 617, 621, 408 N.E.2d 268, 271 (1980). Defendant further contends the giving of the correct aggravated battery (great bodily harm) definitional instruction for count II presents a situation where it is uncertain whether the jury believed it was defendant's or the State's burden to prove lack of legal justification for count I.

¶ 42 Illinois Supreme Court Rule 451(c) (eff. Apr. 8, 2013) provides "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) allows for a "limited exception" to the forfeiture rule "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, 830 N.E.2d at 473. Rule 451(c) is coextensive with the plain-error doctrine, which "bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *Herron*, 215 Ill. 2d at 175, 186-87, 830 N.E.2d at 473, 479. "The plain-error doctrine is a narrow and limited exception." *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187 (2010).

¶ 43 The purpose of jury instructions is to convey the legal rules applicable to the evidence presented at trial and guide the jury's deliberations toward a proper verdict. *People v. Mohr*, 228 Ill. 2d 53, 65, 885 N.E.2d 1019, 1025 (2008). "The task of a reviewing court is to determine whether the instructions, considered together, fully and fairly announce the law applicable to the theories of the State and the defense." *Mohr*, 228 Ill. 2d at 65, 885 N.E.2d at 1026. Jury instructions will be deemed sufficient if, as a whole, the series of instructions fully, fairly, and comprehensively apprised the jury of the relevant legal principles. *People v. Marcos*, 2013 IL App (1st) 111040, ¶ 68, 995 N.E.2d 446. "[T]he erroneous omission of a jury instruction rises to the level of plain error only when the omission creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial." *People v. Hopp*, 209 Ill. 2d 1, 8, 805 N.E.2d 1190, 1194 (2004).

¶ 44 The jury was instructed to follow all instructions and not to single out certain instructions and disregard others. Although the aggravated battery (harm on a public way) definitional instruction did not include the phrase "without legal justification," the aggravated battery (harm on a public way) issues instruction correctly noted to find defendant guilty the State had to prove beyond a reasonable doubt "defendant was not justified in using the force which he used." The definitional and issues instructions were complementary rather than conflicting. See *People v. Rios*, 318 Ill. App. 3d 354, 362, 742 N.E.2d 409, 415 (2000) (finding a definitional instruction omitting justification language was complementary to an issues instruction containing justification language); *People v. Ayers*, 331 Ill. App. 3d 742, 752, 771 N.E.2d 1041, 1049 (2002) (finding reversible error where the jury was forced to choose between two contradictory issues instructions). In its closing argument, the State included a lack of legal justification as an element of both aggravated battery charges, and defense counsel emphasized the State's burden to prove all elements contained in the issues instructions. Given the totality of the circumstances, we find the jury was adequately instructed and no severe risk exists such that the jury might have mistakenly believed the affirmative defense of self-defense was inapplicable to count I or defendant was required to prove legal justification. See *Rios*, 318 Ill. App. 3d at 363-64, 742 N.E.2d at 416 (finding the jury was adequately instructed as to the State's burden to prove lack of justifiable force where the parties addressed the justification issue during closing arguments and the appropriate issues and self-defense instructions were submitted to the jury); *People v. Huckstead*, 91 Ill. 2d 536, 545, 440 N.E.2d 1248, 1252 (1982) (finding the combination of the instructions submitted and closing arguments by counsel apprised the jury of the State's burden to prove the defendant was not justified in the force he used).

¶ 45 Defendant asserts, even if the omission "was corrected by the combined proper statement of the law within the issues instruction and closing arguments of counsel," the evidence was so closely balanced that the omission alone severely threatened to tip the scales of justice against him. The evidence demonstrated (1) defendant was disruptive and confrontational prior to the assault; (2) defendant was upset about being required to leave the bar; (3) defendant was confrontational outside the bar; (4) Snyder observed defendant and Townsend outside the bar, which precipitated a statement directing Townsend to "shut up"; otherwise, defendant would kill him; (5) defendant fled the scene; (6) Townsend was treated for a dislocated shoulder, a fractured left ankle, and a jaw broken in two places; (7) Officer Allsup testified defendant appeared uninjured and had blood spots on his jeans; and (8) defendant told Officer Allsup he had been home all evening because he did not want to go to jail. Viewing the evidence in the context of the totality of the circumstances, we conclude the evidence was not closely balanced. See *People v. Belknap*, 2014 IL 117094, ¶ 62, 23 N.E.3d 325.

¶ 46 B. Self-Defense Definitional Instruction

¶ 47 As previously indicated, the trial court instructed the jury with the following self-defense definitional instruction:

"A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force.

However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself."

The general definitional instruction for self-defense in IPI Criminal 4th No. 24-25.06 reads as follows:

"A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend [(himself) (another)] against the imminent use of unlawful force.

[However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent [(imminent death or great bodily harm to [(himself) (another)]) (the commission of _____)].]"

The committee note to IPI Criminal 4th 24-25.06 indicates to "[u]se the bracketed paragraph when there is some evidence that the force used by the defendant was likely to cause death or great bodily harm."

¶ 48 Defendant contends the trial court erred in instructing the jury with the second paragraph of the self-defense instruction as no evidence demonstrated the force he used, "a single punch and grappling with Townsend's legs," was intended or likely to cause great bodily harm. Defendant suggests the second paragraph impermissibly lowered the State's burden of proof with respect to count I, as the jury could not have found his use of force was justified unless it also concluded he reasonably believed his conduct was necessary to prevent his death or the infliction of great bodily harm. In response, the State asserts the court did not abuse its discretion in submitting the instruction to the jury as sufficient evidence was presented to justify the instruction, and defendant's suggestion "is predicated on a faulty implied premise that the

instruction compelled the jury to assume that his force was intended or likely to cause great bodily harm."

¶ 49 Whether a jury instruction should be submitted to the jury rests in the sound discretion of the trial court. *People v. Jones*, 219 Ill. 2d 1, 31, 845 N.E.2d 598, 614 (2006). Absent an abuse of discretion, the decision whether to grant or deny a request for a jury instruction will not be reversed. *Jones*, 219 Ill. 2d at 31, 845 N.E.2d at 614. A trial court abuses its discretion if the instruction given is not justified by the evidence. *People v. Lovejoy*, 235 Ill. 2d 97, 150, 919 N.E.2d 843, 872-73 (2009). We review *de novo* whether the record includes sufficient evidence to support the giving of a jury instruction. *People v. Washington*, 2012 IL 110283, ¶ 19, 962 N.E.2d 902. Both parties are entitled to instructions pertaining to their separate theories of the case. *People v. Brown*, 406 Ill. App. 3d 1068, 1079, 952 N.E.2d 32, 41 (2011). "Very slight evidence upon a given theory of a case will justify the giving of an instruction." *People v. Jones*, 175 Ill. 2d 126, 132, 676 N.E.2d 646, 649 (1997).

¶ 50 The State's evidence demonstrated the following. Townsend observed defendant clench his fist and strike Townsend's jaw. After being struck, Townsend stated he did not want to fight. After his statement, everything became a "blank," but he recalled "experiencing lots of excruciating pain that continued to go on and on." Townsend begged for the assault to stop. Once outside, Snyder observed "something was going on," and defendant and Townsend were "scuffling on the ground." Snyder stated to Townsend to "shut up"; otherwise, defendant would kill him. Townsend believed he was struck multiple times but everything after the "first blow" became a "blur." Townsend was treated for a dislocated shoulder, fractured ankle, and a jaw broken in two places.

¶ 51 Given the evidence presented, the trial court did not abuse its discretion in giving the instruction, as the State introduced some evidence from which the jury could conclude defendant had used force that was either intended or likely to cause death or great bodily harm. Further, we note infliction of great bodily harm was an element of count II. Failure to have included the second paragraph of the instruction would have removed from the jury's consideration the justifiable use of the force which was the basis for the charge. See *People v. Cochran*, 178 Ill. App. 3d 728, 739, 533 N.E.2d 558, 565-66 (1989).

¶ 52 We further reject defendant's suggestion the second paragraph of the self-defense instruction lowered the State's burden of proof with respect to count I. As defendant acknowledges, the self-defense instruction was applicable to both charges. The instruction advised the jury when and to the extent a person is legally justified to use force to defend himself. The instruction did not require the jury to find defendant was in fear of great bodily harm or death to find he was justified in using any force to defend himself.

¶ 53 As a final matter, defendant briefly asserts, even if we find sufficient evidence was introduced to warrant the inclusion of the second paragraph of the self-defense instruction, he "should have been allowed to instruct the jury that he reasonably believed that such force was necessary to prevent the commission of an aggravated battery to himself." Defendant did not propose such an instruction during the jury-instruction conference, forfeiting any such claim. See *Herron*, 215 Ill. 2d at 175, 830 N.E.2d at 472; *Hopp*, 209 Ill. 2d at 7, 805 N.E.2d at 1194 ("a party that fails to tender a jury instruction may not raise the failure to give the instruction on appeal").

¶ 54

III. CONCLUSION

¶ 55 We affirm the trial court's judgment. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2014).

¶ 56 Affirmed.