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FILED
December 20, 2018
Carla Bender
4th District Appellate Court, IL

2018 IL App (4th) 150557-U

NO. 4-15-0557

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Brown County
BASHIR OMAR,	)	No. 14CF3
Defendant-Appellant.	)	
	)	Honorable
	)	John C. Wooleyhan,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justice Cavanagh concurred in the judgment.
Justice Steigmann specially concurred.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding (1) defendant was properly charged and tried for felony resisting or obstructing a correctional officer, (2) defendant's discovery requests were properly handled, (3) the trial court did not abuse its discretion in instructing the jury, (4) the use of shackles on defendant and inmate witnesses did not deprive defendant of a fair trial, and (5) defendant was not deprived of a fair trial based on alleged prosecutorial misconduct.

¶ 2 In May 2015, the State charged defendant, Bashir Omar, with two counts of resisting or obstructing a correctional institution employee causing injury, Class 4 felonies (720 ILCS 5/31-1(a), (a-7) (West 2014)). That same month, a jury found defendant guilty on both counts. In July 2015, the trial court sentenced defendant to a term of three years' imprisonment on each count.

¶ 3 Defendant appeals, arguing (1) the State improperly filed felony charges against him, (2) the trial court improperly handled his discovery requests, (3) the court erred by improperly instructing the jury and refusing defendant's requested instructions, (4) the court erred by allowing defendant and inmate witnesses to be shackled during trial, and (5) he was denied a fair trial where the prosecutor elicited improper testimony and commented on defendant's silence. For the following reasons, we affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 The charges in this case arose from an incident that occurred at the Western Illinois Correctional Center (Western). On May 9, 2013, a group of inmates were moving from the library to the housing unit. Correctional officers conducted a surprise shakedown of the prisoners. An officer patting down defendant poked his finger on a pencil defendant had in his pocket. After confiscating the pencil, officers ordered defendant to return to his housing unit. Defendant refused to comply, officers used pepper spray, and an altercation ensued. During the altercation, defendant allegedly punched one officer in the face and elbowed another officer in the head.

¶ 6 In January 2014, the State charged defendant with two counts of aggravated battery (720 ILCS 5/12-3.05(d)(4)(i) (West 2014)). In May 2015, the State filed a second amended information charging defendant with two counts of resisting or obstructing a correctional institution employee causing injury, Class 4 felonies (720 ILCS 5/31-1(a), (a-7) (West 2014)). Defendant elected to represent himself during all proceedings before the trial court.

¶ 7 A. Pretrial Proceedings

¶ 8 1. *Discovery Requests*

¶ 9 The State's compliance with defendant's discovery requests was raised and discussed on no less than eight occasions. Defendant's discovery requests included photographs of himself and the correctional officers from the day of the incident, personnel files, medical reports, and logs or records of the inmates who went through the shakedown. Defendant also requested a video from the area where the incident occurred.

¶ 10 The State attempted to obtain record logs of inmate movement on the day of the incident but the Illinois Department of Corrections (DOC) only kept those records for 90 days before destroying them. The State also indicated there were no video cameras situated where they could have to captured the incident. The prosecutor and standby counsel toured the prison facility and viewed the placement of the video cameras. According to both attorneys, no cameras covered the area where the incident occurred and video from other parts of the prison had long since been destroyed. The circuit court judge also toured the facility and viewed the placement of the video cameras. The record shows the State provided other information in response to defendant's discovery requests.

¶ 11 2. *Shackling*

¶ 12 Prior to trial, defendant filed a motion requesting, in part, that he and his witnesses be able to use their hands during testimony and that any handcuffs or shackles not be visible to the jury. At the final pretrial hearing, the trial court addressed this issue and asked the State if it had a position. The State responded as follows:

> "I think what we have done in the past is this counsel table has a covering that goes to the floor, and if the defendant needs to be shackled on this end that that is not visible by the jury. If the defendant intended to testify on his own behalf, that would—I

> think what had been done in that case is he's taken to the stand outside of the jury, although, depending on the nature of the defendant or the offense, he can be shackled at the witness chair as well, but then that's visible to the jury."

The court subsequently noted, "We have talked about the procedures that can be in place for handcuffs not to be visible to the jury when [defendant] is seated at counsel table. If the defendant does decide to testify at trial, he would be in the [witness stand], and he would not be handcuffed while he's testifying." Defendant raised another question about the visibility of handcuffs, saying, "That situation I was saying, like, well, I know this is going to be shackled. That's guaranteed. How are they going to do it if I need to go through my papers, you know, do all this[,] sort through that?" The court clarified defendant's handcuffs would be removed, he would be seated at counsel table where the jury would not see any handcuffs, and arrangements would be made to have defendant on the witness stand so the jury could not see any handcuffs.

¶ 13 B. Jury Trial

¶ 14 In May 2015, the matter proceeded to trial where the jury heard the following evidence.

¶ 15 1. *Robert Fishel*

¶ 16 Robert Fishel, a correctional lieutenant at Western, testified that at approximately 10 a.m. on May 9, 2013, correctional officers were bringing a line of 35 to 45 inmates into housing unit three. The inmates stepped up to a desk, where Officer Shawn Volk checked their identification and signed them into a log. Fishel and Officer Michael Woodward then performed pat down searches on the inmates. According to Fishel, correctional officers occasionally

performed unannounced pat downs because inmates used the library as a place to exchange contraband.

¶ 17 Defendant was among the first inmates searched during the shakedown. Fishel testified he asked defendant if he had any sharpened pencils in his possession. Fishel stated, "A lot of the inmates go up to the library, they sharpen their pencils up there and bring them back, and sometimes they're sticking up. We try to make sure we don't get poked with them." According to Fishel, defendant said he did not have pencils or anything else in his pockets. When Fishel brought his hand down into defendant's pocket, a sharpened pencil "impacted [Fishel] and went through the webbing in [his] right hand." According to Fishel, he took the pencil and told defendant if he wanted the pencil back he would receive a shakedown slip. Shakedown slips gave inmates proof when an officer took something so the inmate could file a grievance to get the item returned.

¶ 18 After Fishel took the pencil, defendant stated he wanted his pencil back and became "extremely agitated." Specifically, Fishel testified defendant clenched his hands into fists, paced in circles, said the officers were harassing him, and repeatedly asked for his pencil back in a hostile and threatening tone of voice. Fishel ordered defendant to return to his wing, and defendant refused to comply. Fishel testified,

> "I gave him several direct orders to return to his wing. He kept getting more agitated, throwing his hands up in a fairly threatening manner, getting more hostile, using a lot of abusive language to myself and Officer Woodward. And then I finally ended up, because of the situation, the safety of the officers and myself, we elected to go ahead and order him to put his hands up on the glass

> of the control center so we could restrain him and take him to [s]egregation because he was not complying."

Defendant put his hands up on the glass and spread his feet. Fishel reached for his restraint case and popped it open, at which point defendant "twirled around in a very hostile and threatening manner and struck Woodward in the forehead with his elbow." Fishel reached for his pepper spray, and defendant struck him in the face with his fist and broke Fishel's glasses.

¶ 19 Fishel testified he sprayed defendant with pepper spray, which had no effect. According to Fishel, defendant continued to assault Fishel and Woodward with his fists, elbows, and feet. Volk and Woodward stepped in to help bring defendant to the floor and defendant threw all three officers off. Fourteen correctional officers responded to the "Code 1" call for an officer needing assistance. Officers eventually restrained defendant and took him to segregation. Fishel denied assaulting or beating defendant.

¶ 20 Fishel testified he sustained various cuts and scrapes on his arms, legs, and body. Fishel's glasses broke, and he sustained a cut under his right eye. Once the housing unit was locked down, Fishel went to the health care unit for first aid. Fishel then filled out an incident report and a workers' compensation report.

¶ 21 2. *Shawn Volk*

¶ 22 Shawn Volk, a correctional officer at Western, testified that on May 9, 2013, he was signing in a line of inmates returning to housing unit three from the library. After he signed defendant in, Volk heard a commotion, and it appeared that Fishel had hurt his hand on something in defendant's pocket. Volk testified Fishel told defendant to go to his wing and defendant refused to comply. According to Volk, an inmate disobeying a command to return to his wing was grounds to order the inmate to be restrained and taken to segregation. Defendant

was ordered to "cuff up" and, as Volk approached, defendant turned and threw an elbow at Officer Woodward.

¶ 23 Volk testified the officers issued "[m]any, many orders: Stop resisting; cuff up; place your hands behind your back; give us your arms." Defendant disobeyed these orders and a struggle ensued. According to Volk, Woodward was incapacitated due to the pepper spray. Volk remembered trying to hold on to defendant's arm. Eventually, other officers appeared and took over because Volk could not see due to the pepper spray. Volk went to a staff bathroom to wash his eyes, filled out his reports, and filled out a workers' compensation packet for some minor injuries.

¶ 24 Volk denied trying "to put [defendant's] eye out." Volk further denied attacking defendant. Volk testified he did not fabricate his story nor did he work with Fishel and Woodward to put together their story.

¶ 25 3. *Michael Woodward*

¶ 26 Michael Woodward testified that on May 9, 2013, he was a wing officer in housing unit three at Western. According to Woodward, the housing unit was staffed by two wing officers, one foyer officer, one control room officer, and either a lieutenant or a sergeant. On the day in question, Volk was the foyer officer, Fishel was the lieutenant, and Woodward could not recall who the other wing officer was. Woodward testified he and Fishel were shaking down inmates returning from the library. Woodward recalled Fishel asking defendant if he had anything in his pockets and defendant stating he had nothing. According to Woodward, Fishel was stuck by a pencil in defendant's pocket. Fishel took the pencil and told defendant he would get a shakedown slip for the pencil.

¶ 27 Woodward testified defendant loudly demanded that his pencil be returned to him. At first, defendant was asked to return to his wing before officers worked up to giving three direct orders to return to his wing. According to Woodward, officers would inform inmates of a direct order so the inmate was aware of the need to comply. Once an inmate refused to comply with three direct orders, the inmate would be ordered to turn around and "cuff up."

¶ 28 Defendant disobeyed three or more direct orders to return to his wing, but it appeared he was going to comply with an order to turn around and put his hands behind his back. Woodward testified defendant suddenly swung around and hit Woodward across the head. A struggle ensued and Fishel released the pepper spray. The pepper spray did not seem to affect defendant, but it shocked and blinded Woodward. Woodward continued to struggle but eventually stepped away when he heard other officers responding to the "Code 1" call.

¶ 29 Woodward testified he sustained scratches from defendant's fingernails and other abrasions on his arms and hands as a result of the struggle. Health care staff treated Woodward for those injuries as well as the exposure to the pepper spray. Woodward filled out an incident report and a workers' compensation packet, reporting he had minor abrasions and defendant elbowed him in the head.

¶ 30 Woodward denied assaulting defendant or kicking defendant in the groin. Woodward also denied seeing Fishel or Volk jump on defendant or try to "pull [his] eye out."

¶ 31 4. *Sterling Edwards*

¶ 32 Sterling Edwards testified he was the control center officer on the day in question. As the control center officer, Edwards was responsible for controlling the doors to the wings and monitoring inmate movement. Edwards saw a pair of glasses go flying and realized Fishel and

Woodward were in a physical altercation with defendant. Edwards's testimony that defendant was combative and resisting being handcuffed was consistent with that of the other officers.

¶ 33 According to Edwards, it took seven or eight officers to restrain defendant. In describing defendant's "superhuman strength," Edwards stated, "There was three or four staff members on top of him, and he was able to stand up erect and still throw punches, even with one handcuff on, and was still able to kick and punch." Edwards testified defendant resembled "an NFL lineman, six foot six, approximately 300 pounds." Once defendant was restrained, another officer escorted him down a walkway and defendant continued to struggle, pull away, kick, and scream.

¶ 34 5. *Marty Lamaster*

¶ 35 Marty Lamaster, a correctional lieutenant at Western, testified that on May 9, 2013, he was in the dietary unit when he received a "Code 1" call on his radio. Lamaster ran to housing unit three and assisted other officers in restraining defendant. Lamaster escorted defendant from the foyer area in the housing unit to a gate. According to Lamaster, defendant struggled and tried to pull away. Once they reached the gate, Lamaster handed defendant over to two other security staff members. Lamaster testified none of the officers involved in the struggle at the housing unit were involved in taking defendant to segregation. Lamaster testified defendant resisted the whole way, twisting and turning about and refusing to cooperate.

¶ 36 6. *Timothy Tuter*

¶ 37 Timothy Tuter, a correctional officer at Western, testified he responded to a "Code 1" call in housing unit three on the day in question. When he arrived, Tuter saw other officers trying to restrain defendant. After officers restrained defendant, Tuter helped escort defendant to segregation. Tuter escorted defendant part of the way and was relieved by another

officer when he became worn out from defendant's struggling. Tuter did not observe any injuries to defendant and did not see officers hitting or punching him.

¶ 38 7. *Jennifer Johnson*

¶ 39 Jennifer Johnson, a licensed practical nurse, testified she was employed through a contractor at Western. On the day in question, Johnson received a "Code 1" call that health care was needed in housing unit three. Johnson responded to housing unit three and treated multiple officers with cuts and scrapes. According to Johnson, Fishel had a red mark from being hit on the right side of his face. Johnson testified she subsequently treated Fishel and Woodward in the health care unit, cleaning and covering cuts and abrasions. Woodward's right hand had an abrasion and swelling and his left forearm had an abrasion.

¶ 40 Johnson was called to segregation to evaluate defendant. Johnson asked defendant if he had any injuries and defendant said he did not hurt anywhere. According to Johnson, defendant had a circular abrasion "on his head" that she cleaned with soap and water. Johnson described a pea-sized area on the right top of defendant's head and "a little bit of edema above his right eye."

¶ 41 8. *Charles Coleman*

¶ 42 Charles Coleman, an inmate at Western, testified that on the day in question, he spent the morning at the prison library. At approximately 10 a.m., roughly 15 to 20 inmates were returning to the housing unit. Coleman testified officers checked him in and shook him down before directing him to stand by the door to his unit. Coleman estimated defendant was four or five people behind him in the line of inmates. As he waited at the door to his unit, Coleman heard an officer ask defendant if he had anything in his pockets. Coleman witnessed defendant

having words with an officer but he did not recall hearing officers order defendant to "cuff up." Coleman testified defendant was not agitated and did not threaten or curse at an officer.

¶ 43 Coleman testified a big commotion occurred and stated, "[N]ow, when it all—after the commotion, you know, they tried to take you [(defendant)] down. And I saw some things that I thought was very inappropriate of Lieutenant Fisher [*sic*]. They had you on the ground. I felt it was very inappropriate for him to try to put handcuffs in your eyes to detain you." According to Coleman, five or six officers pinned defendant to the floor. Coleman testified Woodward sprayed himself with the pepper spray.

¶ 44 9. *Jerry Harrington*

¶ 45 Jerry Harrington testified that on May 9, 2013, he was an inmate at Western. According to Harrington, he was behind defendant in line and watched defendant get shaken down. Fishel went into defendant's pockets and said, "[W]hat you stab me with?" Fishel told defendant to empty his pockets and, as defendant took out his pens and pencils, Fishel snatched the pencils and threw them on the ground. After Fishel shook him down, defendant tried to retrieve his pencils from the ground. According to Harrington, Fishel threatened to take defendant to segregation so defendant asked for a shakedown slip. Harrington went on to describe the incident as follows:

> "And so as this was happening, Officer Volk got up and shut the door, locked the door. And as he proceeded to lock the door, the other officer, the other inmates went on the deck on 3-wing, 3-D. And I looked and seen Officer Volk signal to the other—Woodward, that's what his name was—he signaled to him. That's when he upped the spray, can of spray, and basically sprayed

> himself. And once he sprayed himself, he charged, football charged, tackle[d] you [(defendant)], tried to take you down to the ground. And while he was trying to take you down to the ground, you stood back up. And as you stood back up, Fishel was trying to gouge you in the eye with the handcuffs."

Harrington testified other officers came in and tackled defendant, kicked him, and kneed him in the head.

¶ 46 10. *James Lezine*

¶ 47 James Lezine, an inmate at Western, testified he was returning from the library on the day in question. Lezine saw a lieutenant search defendant. According to Lezine, the lieutenant found a pencil in defendant's pocket and threw it in the garbage. After the officer finished the search, defendant went to get the pencil from the garbage. Lezine testified that was when officers slammed defendant up against the control center. Officers made Lezine "go on the wing," where Lezine observed officers piling on top of defendant and kicking him. Lezine did not see defendant punch the officers.

¶ 48 Lezine admitted he heard officers ask defendant to "cuff up." At no point did defendant put his hands behind his back to be restrained. According to Lezine, the officers did not give defendant a chance to "cuff up" before slamming him into the control center. Lezine testified that between six to eight officers subdued defendant and some officers dragged defendant out.

¶ 49 11. *Charles Smith*

¶ 50 Charles Smith, an inmate at Western, testified he was present at the time of the incident. Smith was standing next to defendant when officers selected them for a shakedown.

Smith testified he did not hear Fishel ask defendant if he had anything in his pockets. According to Smith, defendant did not try to hit officers or get aggressive with anybody.

¶ 51 While Smith was being shaken down, he heard Fishel say, "Ow." Smith turned and heard Fishel say, "You made me poke myself." Fishel then threw the pencil down and started laughing about it. According to Smith, Fishel's first comments about defendant "cuffing up" or going to segregation were made "in a joking manner because he just laughed it off."

¶ 52 12. *Defendant*

¶ 53 Defendant testified Fishel asked to perform a pat-down search when he returned from the library. Defendant raised his hands and Fishel began to search him. Fishel placed his hands in defendant's pocket and was poked by a pencil defendant forgot was there. According to defendant, Fishel got mad, threw the pencil, and began cursing. Defendant asked if he could have his pencil back and Fishel told him to "get the F on." At that point, defendant tried to walk away and Fishel attacked him. Defendant testified officers threw him to the ground and began hitting and kicking him. According to defendant, he tried to apologize and begged the officers to stop hitting him.

¶ 54 Defendant was hit with a small amount of pepper spray in his nose and eyes and began choking. Officers pulled defendant's coat over his head and he began suffocating. Officers eventually removed defendant's coat, handcuffed him, and dragged him out of the unit. According to defendant, the officers dragged him down a small hallway and slammed his head against the side of a door. Once the officers got defendant to segregation, they took his clothing and started kicking and stomping him. Defendant was then ordered to go "up in the cage," where he lay naked. Defendant called for a crisis team and spoke with a mental health doctor. Later that day, defendant was transferred to Menard Correctional Center.

¶ 55 The State asked defendant if Lieutenant Jay Korte visited him shortly after 11 a.m. on the day of the incident to question him about his version of the incident. Defendant testified someone came to talk to him about the incident. Defendant stated, "I tried to explain to him what happened, but he didn't want to hear it, so I didn't talk to him no more." The State asked about a document titled "Constitutional Rights of Person to be Questioned," which had defendant's name written on it and the note "refused" on the signature line. The State asked defendant if that would have been the opportunity to give information to support his position, including names of witnesses. Defendant stated he did give information but the lieutenant did not document the information. Defendant testified he did not refuse to talk to the lieutenant but he refused to sign the "rights" form.

¶ 56 C. Jury Instructions

¶ 57 During the jury instruction conference, the State offered instructions regarding the charges against defendant. One instruction stated defendant was charged with resisting or obstructing a correctional institution employee (a Class A misdemeanor) and the other instruction stated defendant was charged with resisting or obstructing a correctional institution employee causing injury (a Class 4 felony). The State withdrew the first instruction and asked the court to instruct the jury that defendant was charged with resisting or obstructing a correctional institution employee causing injury. Defendant did not object and the court gave people's instruction No. 8 (Illinois Pattern Jury Instructions, Criminal, No. 2.01 (approved Dec. 8, 2011) (hereinafter IPI Criminal No. 2.01)).

¶ 58 The State offered an issues instruction that contained the following: "Fourth Proposition: That the defendant's resisting or obstructing the performance of Lt. Robert Fishel of an authorized act within his official capacity was the proximate cause of an injury to Lt. Robert

Fishel or another correctional institution employee." The State offered an identical issues instruction naming Officer Woodward in place of Lieutenant Fishel. Defendant objected to these instructions because there were no pictures of the injuries and there was insufficient evidence to show injuries occurred.

¶ 59 Defendant did not object to the verdict forms tendered by the State for count I, but he did object to the verdict forms for count II. Defendant objected because the prosecutor did not consult him on the jury instructions and defendant wanted a lesser-included instruction on the misdemeanor offense. The State's instructions were given over objection. Defendant did not offer a lesser-included instruction.

¶ 60 D. Verdict and Sentence

¶ 61 The jury found defendant guilty of both counts of resisting or obstructing a correctional institution employee causing injury. The convictions were both Class 4 felonies and defendant was extended-term eligible based on a prior murder conviction, resulting in a possible sentence between one to six years' imprisonment. The trial court sentenced defendant to concurrent terms of three years' imprisonment to be served consecutively to the sentence that defendant was currently serving.

¶ 62 This appeal followed.

¶ 63 II. ANALYSIS

¶ 64 On appeal, defendant argues (1) the State improperly filed felony charges against him, (2) the trial court improperly handled his discovery requests, (3) the court erred by improperly instructing the jury and refusing defendant's requested instructions, (4) the court erred by allowing defendant and inmate witnesses to be shackled during trial, and (5) he was

denied a fair trial where the prosecutor elicited improper testimony and commented on defendant's silence.

¶ 65 A. Felony Charges

¶ 66 In his opening brief, defendant contends he should not have "been criminally charged or convicted for anything where he was excessively punished within the IDOC or the felony convictions reduced to misdemeanor[s] as being overcharged." The State argues prison disciplinary proceedings do not bar a subsequent criminal prosecution. In his reply brief, defendant argues this court should find his felony conviction to be void because "he was unfairly treated through the prison administration process and that led to prosecution that should be void."

¶ 67 We conclude defendant's claim that he should not have been criminally charged because he was excessively punished by DOC officials is without merit. "It is well settled that disciplinary sanctions imposed by prison authorities for infractions of prison regulations do not generally bar subsequent criminal prosecution for the same conduct." *People v. Baptist*, 284 Ill. App. 3d 382, 384, 672 N.E.2d 398, 400 (1996). Accordingly, we decline to reverse the trial court's judgment on this basis.

¶ 68 B. Void Conviction

¶ 69 Defendant also argues his conviction is void because he was treated unfairly during the administrative disciplinary process. None of the authorities cited by defendant stand for the proposition that a subsequent criminal conviction is void because the inmate was treated unfairly during administrative disciplinary proceedings. Defendant argues he was not represented by an attorney during the prison disciplinary proceedings, which hampered his ability to obtain evidence or an adequate investigation. Defendant cites no authority to support this argument.

¶ 70 Defendant further contends he was unable to perform an adequate investigation of potential witnesses, possible video footage of the incident, or photographs of the correctional officers' injuries. The record shows the trial court repeatedly explained to defendant that an attorney would be able to perform the investigation he wanted. Nonetheless, defendant persisted in representing himself but acquiesced to having standby counsel for discovery purposes. Standby counsel toured the prison and interviewed witnesses identified by defendant. Counsel was unable to obtain video footage of the incident, either because it did not exist or because it had been destroyed. Similarly, no photographs of the officers' injuries existed. The fact that this evidence was unavailable, if it ever existed in the first place, fails to render defendant's conviction void.

¶ 71 Defendant argues the lack of photographs or video footage should somehow operate to void his conviction. This argument appears to suggest the evidence was insufficient to prove the officers were injured. We disagree. Multiple witnesses testified to the officers' injuries, including Fishel's testimony that he sustained various cuts and scrapes, Woodward's testimony that he sustained scratches from defendant's fingernails and other abrasions, and Johnson's testimony that she treated Fishel and Woodward for these wounds. "It is well settled that the testimony of even one witness, if positive and credible, is sufficient to convict, even though it is contradicted by the accused [citation], and the witness need not be the victim of the crime." *People v. Diaz*, 101 Ill. App. 3d 903, 913, 428 N.E.2d 953, 961 (1981). Although defendant argues the lack of photographs of the injuries somehow fails to prove injury happened, we reject this argument. There is no requirement that the State present photographic evidence of injuries taken contemporaneously with the incident in order to prove defendant's guilt beyond a reasonable doubt.

¶ 72 C. Discovery Requests

¶ 73 Next, defendant appears to argue he was denied his constitutional rights where (1) he was not offered an attorney during the DOC disciplinary procedures, (2) the trial court never ruled on his discovery requests, and (3) the trial court "invalidated" defendant's discovery requests and did not allow defendant to argue in favor of his motions as a *pro se* litigant before the court ruled on the motions. Defendant's reply brief focuses on his argument that he was denied his right to proceed *pro se* where the trial court "rescinded" all of his *pro se* motions at a hearing on April 17, 2015.

¶ 74 Defendant's first argument essentially mirrors his argument above that his conviction is void where he was treated unfairly during the prison disciplinary process. For the reasons stated above, we conclude defendant's claims do not equate to a discovery violation.

¶ 75 Defendant's remaining arguments appear to raise a claim that he was denied his constitutional right to represent himself where the trial court appointed standby counsel for the discovery process. Defendant asserts the trial court "invalidated" his *pro se* discovery requests, thereby denying his right to represent himself. Defendant appears to argue that he did not validly waive his right to counsel until he signed a written waiver in April 2015, just one month before his trial. Subsequently, defendant filed a motion to "re-do" all of the pretrial hearings. On appeal, defendant asserts the trial court denied his right to self-representation by only obtaining a written waiver shortly before trial. Defendant argues he wished to represent himself through all stages of his criminal case, including during discovery.

¶ 76 Our review of the record shows defendant was not in any way denied his right to self-representation during any stage of the proceedings. Although the trial court did appoint standby counsel during discovery, defendant expressly agreed to that appointment. Moreover,

defendant asked standby counsel to perform certain discovery functions, including interviewing witnesses that defendant was unable to interview. Indeed, the record clearly shows defendant was permitted to represent himself at every stage, file any motions he wished to file, and present argument on those motions. Accordingly, we reject any suggestion that defendant was somehow denied the right to represent himself because the court obtained a written waiver of his right to counsel before trial.

¶ 77 D. Jury Instructions

¶ 78 Defendant next contends the trial court erred by (1) not ordering the State and defendant to prepare jury instructions together and (2) refusing defendant's proposed instructions.

¶ 79 On appeal, defendant specifically challenges the instruction that stated defendant was charged with resisting or obstructing a correctional institution employee causing injury. Defendant did not object to this instruction at trial or offer an alternative instruction. Therefore, defendant has forfeited this claim. *People v. Piatkowski*, 225 Ill. 2d 551, 564, 870 N.E.2d 403, 409 (2007).

¶ 80 Defendant objected to the issues instructions containing the proposition that the State must prove defendant's resisting or obstructing Fishel and Woodward was the proximate cause of injuries to Fishel, Woodward, or another correctional institution employee. Defendant's objection was based on the lack of photographic evidence of the injuries. As discussed above, there is no requirement that the State prove injury by photographic evidence. Moreover, the sufficiency of the evidence to prove a proposition in an instruction is for the jury's determination.

¶ 81 Defendant objected to the verdict form for count II, arguing (1) the prosecutor did not consult him on the jury instructions and (2) he wanted a lesser-included offense instruction. Defendant argues a lesser-included instruction should be given where any evidence, however slight, is introduced to support the instruction. We note defendant did not offer alternative instructions or a lesser-included offense instruction. To the extent that defendant did not forfeit this argument, we conclude the trial court did not err in instructing the jury.

¶ 82 "A defendant is entitled to a lesser-included offense instruction only if the evidence at trial is such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater." *People v. Medina*, 221 Ill. 2d 394, 405, 851 N.E.2d 1220, 1226 (2006). In this case, no rational jury could have found defendant guilty of the lesser-included offense of resisting or obstructing a correctional institution employee, yet acquit him of resisting or obstructing a correctional institution employee causing injury.

¶ 83 The evidence here unequivocally established that correctional institution employees sustained injuries as a result of the struggle with defendant. As discussed above, multiple witnesses testified to the officers' injuries, including Fishel's testimony that he sustained various cuts and scrapes, Woodward's testimony that he sustained scratches from defendant's fingernails and other abrasions, and Johnson's testimony that she treated Fishel and Woodward for these wounds. Once the jury found that defendant resisted or obstructed a correctional institution employee's authorized act, a guilty verdict on the greater offense of causing injury was inescapably indicated. *Id.* at 410. Moreover, including an instruction on the lesser-included offense would have been directly contrary to defendant's theory of the case. Defendant's entire defense was that he never resisted or obstructed. Rather, defendant premised his entire defense on the theory that he did nothing wrong and the correctional officers attacked

him for no reason. Finally, we note that defendant did offer alternate jury instructions, which made no mention whatsoever of the lesser-included offense. Accordingly, we conclude the trial court did not abuse its discretion in instructing the jury.

¶ 84 E. Shackling

¶ 85 Defendant next argues the court erred by allowing defendant and inmate witnesses to be shackled during trial without conducting a hearing under *People v. Boose*, 66 Ill. 2d 261, 362 N.E.2d 303 (1977). Initially, we note, defendant provides no authority to support his position that the inmates who testified possessed any right to appear in street clothes. Thus, we only address the shackling issue as to the defendant.

¶ 86 "[T]he shackling of the accused should be avoided if possible because: (1) it tends to prejudice the jury against the accused; (2) it restricts his ability to assist his counsel during trial; and (3) it offends the dignity of the judicial process." *Id.* at 265. However, a defendant may be shackled under certain circumstances, including where there is reason to believe he or she may try to escape or pose a threat to the safety of people in the courtroom. *Id.* at 266.

> "Factors to be considered by the trial court in making this determination may include: (1) the seriousness of the present charge against the defendant, (2) the defendant's temperament and character, (3) the defendant's age and physical characteristics, (4) the defendant's past record, (5) any past escapes or attempted escapes by the defendant, (6) evidence of a present plan of escape by the defendant, (7) any threats by the defendant to harm others or create a disturbance, (8) evidence of self-destructive tendencies on the part of the defendant, (9) the risk of mob violence or of

> attempted revenge by others, (10) the possibility of rescue attempts by other offenders still at large, (11) the size and mood of the audience, (12) the nature and physical security of the courtroom, and (13) the adequacy and availability of alternative remedies." *People v. Allen*, 222 Ill. 2d 340, 347-48, 856 N.E.2d 349, 353 (2006).

¶ 87 The State asserts the record shows defendant forfeited his claim on appeal that the trial court erred by allowing him to remain shackled during trial without holding a *Boose* hearing or making any findings in accordance with *Boose*. The State contends defendant did not object to being shackled—indeed, defendant stated at the hearing on his pretrial motion that it was "guaranteed" that he would be shackled—and he was satisfied with the arrangements made by the trial court to keep his handcuffs from the jury's sight.

¶ 88 Prior to addressing the State's forfeiture argument, we are constrained to remind the trial court of its obligation under Illinois Supreme Court Rule 430 (eff. July 1, 2010). Once the trial court becomes aware defendant is wearing restraints, and before the defendant appears before the jury, the court is to conduct a separate hearing on the record and make specific findings. The court is to balance those findings and impose the use of a restraint only where the need for restraint outweighs the defendant's right to be free from restraint. Ill. S. Ct. R. 430 (eff. July 1, 2010). Here, the trial court neglected to comply with the requirements of Rule 430.

¶ 89 However, ultimately, we conclude defendant has forfeited this claim on appeal. Although defendant asked the court to prevent observation of his shackles by the jury, the record shows he did not object to the trial court's arrangement to keep his handcuffs from the jury's sight. See *Allen*, 222 Ill. 2d at 350 (defense counsel's statement that he would prefer the

defendant be seated in the witness stand before the jury returned unless the restraint could be removed was not an objection but an alternative to the court's suggestion on how to keep the jury from seeing the restraint). In fact, defendant appeared to agree to wear the shackles. Also, defendant failed to raise the issue of his handcuffs or shackles in his posttrial motion.

¶ 90 The failure to object to an alleged error at trial and raise the issue in a posttrial motion results in the forfeiture of the issue on appeal. *People v. Enoch*, 122 Ill. 2d 176, 187-88, 522 N.E.2d 1124, 1130 (1988). We review a forfeited issue under the plain-error doctrine. *People v. Herron*, 215 Ill. 2d 167, 178, 830 N.E.2d 467, 475 (2005). Accordingly, we may reach a forfeited error in the following circumstances:

> "First, where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence, a reviewing court may consider a forfeited error in order to preclude an argument that an innocent person was wrongly convicted. [Citation.] Second, where the error is so serious that the defendant was denied a substantial right, and thus a fair trial, a reviewing court may consider a forfeited error in order to preserve the integrity of the judicial process. [Citations.] This so-called disjunctive test does not offer two divergent interpretations of plain error, but instead two different ways to ensure the same thing—namely, a fair trial." *Id.* at 178-79.

¶ 91 In light of the court's error in failing to conduct a *Boose* hearing, we turn to the first prong of the plain-error doctrine. According to the State, the evidence was not closely balanced and the error was not so serious that it denied defendant a fair trial.

¶ 92 Here, the evidence was not closely balanced. Four correctional officers (Fishel, Volk, Woodward, and Edwards) all testified that defendant was involved in a physical altercation with officers and he punched, kicked, and pulled away from the officers. The officers all testified defendant was told to "cuff up" and he disobeyed that order. Volk testified defendant disobeyed "many, many orders." Fishel testified defendant appeared to comply at first by putting his hands on the glass of the control center and spreading his feet. But when Fishel approached to restrain him, defendant turned and struck both Woodward and Fishel. Although defendant called witnesses that testified that they did not hear officers order defendant to "cuff up," at least one of the inmates recalled hearing that order. Additionally, the inmates' testimony established that Fishel was conducting a pat-down search and confiscated a pencil he found on defendant's person when the altercation occurred. This testimony supports a finding that Fishel was engaged in an authorized act within his official capacity when defendant engaged in the altercation. We conclude the evidence is not so closely balanced that the guilty verdict was a result of the error and not the evidence.

¶ 93 We also conclude the error was not so serious that it denied defendant a fair trial. There is no evidence in the record that the jury ever saw defendant's restraints. The trial court took steps to ensure defendant would be seated at a table with a covering that prevented the jury from seeing his restraints and order defendant not be handcuffed during the trial. Defendant specifically raised his concern regarding his ability to sort through papers during trial, and the court clarified that defendant would not be handcuffed. Additionally, defendant took the witness stand and left the witness stand outside of the presence of the jury. He was similarly not handcuffed while testifying. While the record implies defendant had ankle cuffs on, it is never specifically stated on the record what restraints defendant had. It was repeatedly stated that

defendant would not be handcuffed and the jury would not see any restraints. Where, as here, the jury never caught sight of any restraints, we conclude the error was not so serious as to deprive defendant of a fair trial.

¶ 94 F. Deprivation of a Fair Trial

¶ 95 Finally, defendant contends he was denied a fair trial where the prosecutor elicited improper testimony and commented on defendant's silence. Specifically, defendant argues the prosecutor elicited improper testimony by asking defendant about the waiver of constitutional rights form he refused to sign when a prison official interviewed him regarding the incident.

¶ 96 "The Illinois Supreme Court has held that evidence of a defendant's post-arrest silence is inadmissible because such evidence is neither material nor relevant, having no tendency to prove or disprove the charge against a defendant." *People v. McMullin*, 138 Ill. App. 3d 872, 876, 486 N.E.2d 412, 415 (1985). This is so because "an accused is within his rights when he refuses to make a statement, and the fact that he exercised such right has no tendency to prove or disprove the charge against him ***." *People v. Lewerenz*, 24 Ill. 2d 295, 299, 181 N.E.2d 99, 101 (1962).

¶ 97 As a constitutional matter, the use of a defendant's silence following warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), violates the due process clause of the fourteenth amendment. *People v. Quinonez*, 2011 IL App (1st) 092333, ¶ 25, 959 N.E.2d 713. This is so because "the *Miranda* warnings carry the implicit assurance that his silence will carry no penalty, [and] it would be fundamentally unfair to allow a defendant's post-*Miranda* silence to impeach his trial testimony." *Id.* However, that "prohibition applies only to a defendant's silence after being advised of his *Miranda* rights." *Id.* In Illinois, it does not matter whether a

defendant's silence comes before or after *Miranda* warnings because the prohibition is an evidentiary matter, rather than a constitutional matter. *Id.* ¶ 26. That is, a defendant's silence prior to *Miranda* warnings is inadmissible not because it violates his or her due process rights but because it is not considered relevant or material. *Id.* ¶ 27. "[A] defendant's postarrest silence may be used to impeach his trial testimony: (1) when defendant testified at trial that he made an exculpatory statement to the police at the time of his arrest; and (2) when he makes a postarrest statement that is inconsistent with his exculpatory trial testimony." *Id.*

¶ 98 We first note the State correctly points out that defendant cites no authority that the prohibition against the use of defendant's postarrest silence (whether before or after *Miranda* rights are read) has any application to a defendant's response to a prison disciplinary investigation.

¶ 99 Additionally, defendant opened the door to this line of questioning where he repeatedly testified that prison officials failed to conduct any investigation into inmate witnesses to the incident. The State did not elicit this evidence to infer defendant's silence was proof of guilt or an indication of guilty knowledge. Instead, the State sought to impeach defendant's testimony that the prison investigation was inadequate and prison officials did not investigate his version of events by showing that a prison official did indeed speak to defendant. There was no improper use of this evidence to argue defendant refused to speak with the prison official because defendant did not want to incriminate himself. Indeed, the State elicited this testimony not to show defendant's silence but to show prison officials did investigate this incident beyond just the officials' version of events.

¶ 100 Moreover, even if we were to assume an error occurred here, it was harmless beyond a reasonable doubt. *People v. Hart*, 214 Ill. 2d 490, 514, 828 N.E.2d 260, 273 (2005).

Defendant's testimony regarding the lack of interest by prison officials or the adequacy of their investigation has little relevance to defendant's defense that he did not resist or obstruct a correctional institution officer. This testimony related solely to events that occurred after the incident. Additionally, defendant's theory that the prison officials were engaged in an elaborate cover-up scheme to shield their unprompted attack on him had no basis beyond defendant's speculation. Impeachment on this point did not go to the crux of his defense. Given the overwhelming evidence of defendant's guilt that we have discussed at length in other portions of this disposition, we conclude that any error in eliciting defendant's testimony about the rights form he refused to sign was harmless beyond a reasonable doubt.

¶ 101 III. CONCLUSION

¶ 102 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2016).

¶ 103 Affirmed.

¶ 104 JUSTICE STEIGMANN, specially concurring.

¶ 105 Although I agree with everything the majority has written in this Rule 23 order affirming defendant's conviction, I specially concur to express my personal views that the trial court's appointment of standby counsel in this case was both unnecessary and unwise. Although a trial court's decision whether to appoint standby counsel is left to its broad discretion (*People v. Gibson*, 136 Ill. 2d 362, 379, 556 N.E.2d 226, 233 (1990)), nothing about this case suggests that the appointment of standby counsel was appropriate.

¶ 106 In *People v. Williams*, 277 Ill. App. 3d 1053, 1058-62, 661 N.E.2d 1186, 1190-92 (1996), this court discussed at length what a trial court should consider when addressing a defendant's request for the appointment of standby counsel. We rejected the defendant's argument in that case that the trial court abused its discretion by denying his request. *Id.* at 1059. In so concluding, this court wrote the following:

> "A trial court may appoint standby counsel despite a defendant's decision to proceed *pro se*, but a defendant who chooses to represent himself must be prepared to do so.
>
> * * *
>
> In our judgment [based upon the facts of this case], the trial court did not abuse its discretion when it denied defendant's request for standby counsel.
>
> In fact, we believe the trial court acted wisely by not appointing standby counsel. The appointment of standby counsel frequently creates more problems than it solves and often is viewed by defendants as an important factor in making the decision to proceed *pro se*. Given the problems inherent in a defendant's

representing himself, particularly in a serious case, trial courts ought not act as 'enablers' for this unwise course of conduct.

Further, because a defendant's right to represent himself has constitutional roots (see *Faretta v. California*, (1975), 422 U.S. 806, 818-21, *** 95 S. Ct. 2525, 2532-34), the conduct of standby counsel might inadvertently infringe upon that right. For instance, in *McKaskle v. Wiggins* (1984), 465 U.S. 168, *** 104 S. Ct. 944, the trial court appointed standby counsel to assist the defendant who had chosen to represent himself at trial. Following his conviction, he obtained *habeas* relief from the Federal circuit court of appeals (*Wiggins v. Estelle* (5th Cir. 1982), 681 F.2d 266) on the ground that his right to self-representation was violated by the unsolicited participation of an overzealous standby counsel. The court explained as follows:

> '[T]he rule that we established today is that court-appointed standby counsel is "to be seen, but not heard." By this we mean that he is not to compete with the defendant or supersede his defense. Rather, his presence is there for advisory purposes only, to be used or not used as the defendant sees fit.' *Wiggins*, 681 F.2d at 273.

The United States Supreme Court reversed, explaining that standby counsel does not abuse a defendant's *Faretta* rights

> '[i]n overcoming routine procedural or evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony, that the defendant has clearly shown he wishes to complete. Nor are they infringed when counsel merely helps to ensure the

> defendant's compliance with basic rules of courtroom protocol and procedure.' *McKaskle*, 465 U.S. at 183, *** 104 S. Ct. at 953-54.

* * *

A careful reading of *McKaskle* and *Gibson* demonstrates that (1) no 'bright line' exists regarding the role of standby counsel, and (2) appointing standby counsel provides a convicted *pro se* defendant the opportunity to argue on appeal that standby counsel either violated the defendant's *Faretta* right to proceed *pro se* or otherwise acted improperly. ***

While trial courts may think they risk reversal if they exercise their discretion not to appoint standby counsel, these cases show the opposite is true: the decision to appoint standby counsel puts any resulting conviction at risk because of the ambiguity of counsel's role. Further, trial courts should be mindful that a defendant might claim that standby counsel improperly interfered with the defendant's preparation for—or presentation at—trial based upon conversations that, by definition, the court was not and could not be privy to. This means that those trial courts which are sensitive to the *McKaskle* problem and which exercise control over the courtroom proceedings to ensure that standby counsel does not overstep his bounds (whatever they may be) still are at the mercy of counsel for actions counsel may take out of the court's presence.

* * *

> *** [*N]o* trial court in Illinois has been reversed for exercising its discretion to *not* appoint standby counsel, and this absence of reversals appears consistent with nationwide experience." (Emphasis in original.) *Id.* at 1058-61.

¶ 107 I note that defendant in the case before us argues on appeal that the trial court did not allow him "to argue in favor of his motions as a *pro se* litigant before the court ruled on the motions. Defendant's reply brief focuses on his argument that he was denied his right to proceed *pro se* where the trial court 'rescinded' all of his *pro se* motions at a hearing on April 17, 2015." See ¶ 73. Thus, one of the concerns this court expressed 26 years ago as a reason for not appointing standby counsel—namely, that the defendant on appeal would argue that his *Faretta* right to proceed *pro se* under the sixth amendment was improperly interfered with—has in fact arisen in this very case. That this court properly rejects that argument *on the facts of this case* does nothing to diminish the concerns inherent whenever the trial court appoints standby counsel.

¶ 108 In the 26 years since this court rendered *Williams*, no court of review has ever expressed any disagreement with it. To the contrary, it has frequently been cited approvingly. See *People v. Mazar*, 333 Ill. App. 3d 244, 249-50, 775 N.E.2d 135, 140-41 (2002), abrogated on other grounds by *People v. Breedlove*, 213 Ill. 2d 509, 821 N.E.2d 1176 (2004); *People v. Pratt*, 391 Ill. App. 3d 45, 57, 908 N.E.2d 137, 148 (2009); *People v. Ellison*, 2013 IL App (1st) 101261, ¶ 44, 987 N.E.2d 837; *People v. Caudle*, 2015 IL App (4th) 130942-U, ¶¶ 26, 31.

¶ 109 I also note that this court wrote in 1991 that if a defendant requested to go *pro se* and the trial court (in its discretion) was not going to appoint standby counsel, then the court should specifically inform the defendant that there will be no standby counsel to assist him at any stage during trial. *People v. Ward*, 208 Ill. App. 3d 1073, 1082, 567 N.E.2d 642, 648 (1991).

¶ 110 Given that this appeal arises from charges brought in the circuit court of Brown County regarding an inmate at the Western Illinois Correctional Center, and given further the frequency with which inmates charged with criminal offenses try to "game" the system, I write this special concurrence to provide some helpful guidance for the next time a Brown County trial court is presented with a similar situation.