No. 1-08-2113

SECOND DIVISION
March 1, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 C4 40220
	)	
BIBIANO FAVELA,	)	The Honorable
	)	Carol A. Kipperman,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Karnezis concurred in the judgment and opinion.

O R D E R

HELD: Where the trial court failed to include the last two paragraphs of the elements jury instruction, Illinois Pattern Jury Instructions, Criminal, No. 11.16 (2000), which instruct the jury that the State must prove each element of the crime beyond a reasonable doubt to find defendant guilty, and that if any one of the elements has not been proven beyond a reasonable doubt the jury must find the defendant not guilty; the omission of said paragraphs was a severe threat to the fairness of defendant's trial and thus defendant's conviction must be reversed and the matter remanded for a new trial.

Defendant Bibiano Favela appeals his convictions on four counts of aggravated battery of two Stone Park, Illinois, police officers. On appeal, defendant raises multiple issues. However, we need only address one of defendant's arguments which is dispositive of this appeal.

Specifically, we are called upon to determine whether defendant was denied a fair trial where the trial court omitted the final two paragraphs of the Illinois Pattern Jury Instruction, Criminal, No. 11.16 (2000) (hereinafter IPI Criminal (2000) No. 11.16), which instruct the jury that the State must prove each element of the crime beyond a reasonable doubt and that if any one of the elements has not been proven beyond a reasonable doubt, the jury must find the defendant not guilty. Based on the specific facts presented in this case we find the trial court's omission of the concluding paragraphs of IPI Criminal (2000) No. 11.16 was a severe threat to the fairness of defendant's trial, and thus we reverse defendant's conviction and remand the matter for a new trial.

JURISDICTION

The circuit court sentenced defendant on July 8, 2008. Defendant timely filed his notice of appeal on August 1, 2008. Accordingly, this court has jurisdiction pursuant to Article VI, Section 6 of the Illinois Constitution and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case entered below. Ill. Const. 1970, art. VI, §6; Ill S. Ct. R. 603 (eff. Oct. 1, 2010); R. 606 (eff. March 20, 2009).

BACKGROUND

The State charged defendant with four counts of aggravated battery of two Stone Park, Illinois, police officers. At trial, Lieutenant Robert Keaty, Detective Christopher Pavini, and Deputy Chief Louis Fatta of the Stone Park police department testified for the State.[1] Officer Keaty testified that he was in uniform and on duty in a marked police car on February 15, 2007, when he received a call of a domestic disturbance at 1808 39th Avenue in Stone Park, Illinois.

[1] Corporal Ivano Mazzulla, one of the officers present during the incident, did not testify because he passed away before trial in an unrelated motorcycle accident.

Another uniformed police officer, Ivano Mazzulla met Officer Keaty at the scene. Officer Keaty testified that an "excited" and "yelling" Jeanette Favela at the house advised the officers that her brother, the defendant, was at it again and that her father wanted him out of the house.

Officers Keaty and Mazzulla followed Jeanette into the house, where the officers separated the victim, Sandra Michelle, who was holding a baby, and defendant. Officer Mazzulla stayed with Michelle and Jeanette in the kitchen area as Officer Keaty walked defendant to the front door. Following his conversation with Jeanette and Michelle, Officer Mazzulla advised defendant he was under arrest for domestic battery. Officer Mazzulla asked defendant to turn around, whereupon he put a handcuff on his left hand. Officer Keaty attempted to handcuff defendant's right hand, and he felt him tense up. Defendant then yelled out "Ivano," pulled away from Officer Keaty and struck Officer Mazzulla[2] two or three times in the face with a closed fist. Officer Mazzulla responded by striking defendant in the face. Officer Keaty tried to settle defendant down, but defendant began kicking his leg. All three men fell to the ground with Officer Keaty holding on to defendant's left, handcuffed hand. Defendant was now on his back with Officers Keaty and Mazzulla on his sides and defendant was kicking and trying to push the officers off him. Twice, Officer Mazzulla attempted to call for backup from his radio on his left shoulder, and both times defendant struck him in the face with his fist. Eventually Officer Keaty managed to call for backup. Defendant continued to flail and kick while the officers waited for backup to arrive. When Deputy Chief Fatta, Corporal Flowers, Detective Pavini, and several unidentified Melrose Park police officers arrived on the scene to assist, Officers Pavini and Flowers were able to handcuff and control defendant.

[2] Ivano is Officer Mazzulla's first name. Both defendant and Jeanette testified that they knew Officer Mazzulla before the incident occurred.

Officer Keaty testified that during the incident with defendant, both his knee and his right elbow were injured. He experienced swelling in both his knee and elbow and a slight tear in his elbow. He did not have any problems with his knee or his elbow prior to the incident. Officer Keaty also testified that prior to the incident, Officer Mazzulla did not have any injuries but that after the incident he observed that Officer Mazzulla had bruising on his forehead and nose, cuts on his face and lip, and redness and swelling. At the police station, both officers' injuries were documented by photographs, which the State presented at trial.

Officer Pavini testified that on the day of the incident, he was doing paperwork at the police station when a request for assistance came in. He and Officer Flowers drove in an unmarked car to the scene. He aided in handcuffing defendant and that defendant continued to attempt to kick and headbutt the officers as he was placed in the police car. He took the photographs of Officers Mazzulla and Keaty. The defendant did not request medical treatment.

Officer Louis Fatta testified that he also responded to the scene and drove defendant back to the police station. He testified that defendant never requested to go to the hospital for treatment.

Defendant's sister, Jeanette Favela, testified on behalf of the defense that when the police officers told defendant they were going to arrest him, he asked them why, to which they responded, because he hit the baby. She testified that the officers and defendant argued back and forth about whether defendant had hit the baby. She claimed Officer Mazzulla struck defendant in the stomach and the two officers and defendant fell to the floor. She testified she never saw defendant strike a police officer. She also testified that after the incident with the police, she did not notice that defendant had sustained any injuries. On cross-examination, Jeanette testified that she called the police because she was concerned about her cousin Sandra and her baby. She

testified further on cross-examination that Officer Keaty did not arrive on the scene until after defendant was placed in the police car and that Officer Keaty never entered the residence. She also testified that she did not tell the other officers that defendant had been battered by Officer Mazzulla and she never filed a police report. Jeanette claimed Officer Mazzulla never had a conversation with her cousin Sandra. Jeanette testified that Officer Mazzulla entered the house without any injuries, and when confronted with the photograph of his injuries, she acknowledged they depicted what Officer Mazzulla looked like when he left the residence. On redirect examination, Jeanette testified that she told the police there had been a misunderstanding and that defendant never hit the baby.

Defendant testified on his own behalf and denied that he ever hit the police officers. Rather, he claimed that when he was handcuffed, the police forced him onto the floor. He testified that due to the altercation, he suffered a bruise to his left eyelid, a bruised eye, and a bump on his left cheek. He testified he was forced to the floor, punched in the mid-section, punched in the face, punched on his head, and was twisted around by the officers. He claimed he never hit the officers in response to their action. On cross-examination, defendant testified that the second arresting officer in the house was Officer Pavini. He testified that as Officer Mazzulla put handcuffs on his one arm, he was punched in the stomach and then taken down with the assistance of Officer Pavini. He testified that when he was forced to the ground, Officers Keaty, Fatta, and Melrose Park officers were present. He also testified that he told Officer Fatta as well as other officers at the scene that he needed an ambulance.

After a jury instruction conference, the jury received instructions. Defendant did not object to the instruction he now challenges, nor did he offer an alternative version of the instruction. The instruction at issue correctly apprised the jury of the respective elements of the

charges against him, but omitted the concluding paragraphs as required by IPI Criminal (2000) No. 11.16, that state:

> "If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.
>
> If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty."

The jury found defendant guilty of all counts. The trial court denied defendant's post-trial motions and sentenced him to four years in prison. Defendant timely appeals.

ANALYSIS

Defendant argues that the omission of the final two paragraphs of IPI Criminal (2000) No. 11.16 denied him a fair trial because the jury was not informed that they must find that each element of the crime must be proved beyond a reasonable doubt to find defendant guilty, and that if they find that the State has not proved any one of the elements of the crime beyond a reasonable doubt, they must find defendant not guilty. The State concedes that the elements instruction was improper as it omitted the final two paragraphs of IPI Criminal (2000) No. 11.16, but argues that defendant forfeited review of this claim as he did not object at trial to the instruction, he did not offer alternative versions of the instruction, nor did he raise the claim in a post-trial motion. The State argues that even with the omission of the final two paragraphs, the jury was properly instructed with Illinois Pattern Jury Instructions, Criminal No. 2.03 (2000) (hereinafter, IPI Criminal (2000) No. 2.03) as to the presumption of innocence and the State's

burden of proof. Defendant concedes that he did not properly preserve his contention for appellate review, but urges this court to excuse his procedural default and address the issue on the merits under the plain error doctrine.

Typically, where a defendant fails to object to a jury instruction at trial or in post-trial motion or offer an alternative instruction at trial, the defendant is procedurally defaulted from raising the objection on appeal. *People v. Piatkowski,* 225 Ill. 2d 551, 564 (2007). However, Illinois Supreme Court Rule 451(c) provides an exception to the waiver rule in criminal jury instructions. *People v. Sargent,* No. 108689, slip op. at 18 (Ill. Nov. 18, 2010), citing Ill. S. Ct. R. 451(c) (eff. July 1, 2006). Rule 451(c) states that "substantial defects are not waived by failure to make a timely objections thereto if the interests of justice require." Ill. S. Ct. R. 451(c) (eff. July 1, 2006). "Rule 451(c) is coextensive with the plain-error clause of Supreme Court Rule 615(a), and the two rules are to be construed identically." *Piatkowski,* 225 Ill. 2d at 564, citing Ill. S. Ct. R. 451(c) (eff. July 1, 2006); Ill. S. Ct. Rule 615(a) (eff. Aug. 1, 1987). We agree with the parties that there was an error in the jury instruction as provided, and, therefore, we will review the error under the plain error doctrine.[3]

The plain error doctrine allows this court to review a forfeited claim of error that affects a substantial right in two instances: "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" and "where the error is so serious that the defendant was denied a substantial right, and thus a fair trial." *People v. Herron,* 215 Ill. 2d 167, 178-79 (2005). The defendant bears the burden of persuasion under the

[3] Typically, a court of review's first step in plain error review is to determine whether an error even occurred. *People v. McLaurin*, 235 Ill. 2d 478, 489 (2009). However, the State concedes, and we agree that the failure to include the concluding paragraphs of IPI Criminal (2000) No. 11.16 was an error.

plain error doctrine. *Herron,* 215 Ill. 2d at 187. Under the second prong of a plain error analysis, prejudice is presumed but "the defendant must prove *** that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Id.* The second prong of plain error review provides protection "against errors that erode the integrity of the judicial process and undermine the fairness of the defendant's trial." *Sargent,* No. 108689, slip op. at 19 (Ill. Nov. 18, 2010). Omissions from jury instructions "rises to the level of plain error only when the omission creates a serious risk that the jurors incorrectly convicted defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial." *Id.,* see also *People v. Ogunsola,* 87 Ill. 2d 216, 222 ("The interests of justice demand that the rule of waiver be modified, in criminal cases, where necessary to ensure the fundamental fairness of the trial.") The standard does not require defendant to prove beyond a reasonable doubt that his trial was unfair due to the error. *People v. Hopp,* 209 Ill. 2d 1, 12 (2004). However, under this standard, the defendant must show the omission from the jury instructions was a severe threat to the fairness of his trial. *Id.*

Jury instructions aid the jury in making their verdict by providing them with the appropriate legal rules to be applied to the evidence. *People v. Lovejoy,* 235 Ill. 2d 97, 150 (2009). A trial court presiding over a criminal matter "is required to properly instruct the jury on the elements of the offense, the burden of proof, and the presumption of innocence." *Id.* Jury instructions are to be "construed as a whole, rather than read in isolation." *People v. Parker,* 223 Ill. 2d 494, 501 (2006). And, "taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury." *People v. Green,* 225 Ill. 2d 612, 622 (2007).

In the instant case, we agree with defendant that, taken as a whole, the jury instructions given by the trial court failed to correctly convey the concept of reasonable doubt to the jury. See

Green, 225 Ill. 2d at 622. Therefore, under Supreme Court Rule 451(c), we will relax the waiver rule and address defendant's argument on the merits because the omission of the final paragraphs of IPI Criminal (2000) No. 11.16 threatened the fundamental fairness of this defendant's trial. Ill. S. Ct. R. 451(c) (eff. July 1, 2006); see also *Ogunsola,* 87 Ill. 2d at 222 ("The interests of justice demand that the rule of waiver be modified, in criminal cases, where necessary to ensure the fundamental fairness of the trial." IPI Criminal (2000) No. 2.03 informs the jury that the State bears the burden of proving defendant guilty beyond a reasonable doubt, and our supreme court has previously stated that this instruction is sufficient to satisfy the requirements of due process. *Green*, 225 Ill. 2d at 623-624, citing *People v. Layhew,* 139 Ill. 2d 476, 486 (1990). However, IPI Criminal (2000) No. 2.03 does not give the jury any guidance in answering the perennial question "just what is reasonable doubt?" This is where the two paragraphs omitted by the trial court are essential; they explain one way in which the jury must find reasonable doubt. Reasonable doubt exists if the State fails to prove *any* element of the crime charged beyond a reasonable doubt, and the jury must therefore find defendant not guilty.

Defendant stressed at oral argument that intent, one element of the crime charged, was disputed at trial, while the other two elements were not in dispute. Where the State had clearly established the majority of the necessary elements in this case, we believe that defendant suffered a severe threat to the fairness of his trial when the jury had not been instructed that proving two of the three elements is not enough. See *Hopp,* 209 Ill. 2d at 12. The proving or disproving of the element of intent was a focus of the trial. The final two paragraphs of IPI Criminal (2000) No. 11.16 ensure that the jury knows that every single element must be proven beyond a reasonable doubt, and the trial court's failure to include the paragraphs in question create the risk of juror confusion. *Sargent,* No. 108689, slip op. at 19 (Ill. Nov. 18, 2010) (Omissions from jury

instructions "rise[] to the level of plain error only when the omission creates a serious risk that the jurors incorrectly convicted defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial.")

Defendant relies on *People v. Green* in support of this argument and we find that decision instructive here. Our supreme court in *Green* found that an instruction on IPI Criminal (2000) No. 2.03 satisfied due process where the trial court in the elements instruction omitted the identical paragraphs omitted in this case. *Green,* 225 Ill. 2d at 615- 25. However, in *Green,* although the jury was not given a written instruction on the omitted paragraphs, "the jury was twice *told* by the trial court that the State must prove 'each and every element' of the offense beyond a reasonable doubt." (Emphasis in original) *Id.* at 624. That is not the case here. In this case, the jury was never informed of the vital information in the omitted paragraphs, that the State must prove *every* element of the offense beyond a reasonable doubt and that if even one element has not been proved beyond a reasonable doubt, then the defendant must be found not guilty.

Additionally, the supreme court stated in *Green* that "no one should construe our decision in this case as a license to dispense with the two reasonable doubt paragraphs ordinarily found at the conclusion of criminal elements instructions." *Id.* at 625. The trial court in this case ignored this directive and omitted the final two paragraphs. It is difficult to find any procedure during a trial that has more importance in determining the structural integrity of the trial than the jury instructions. That is why the instructions must be accurate and complete. The omission of the paragraphs in question in this case severely threatened the fairness of the trial, especially considering that defendant's argument at trial focused on a single element, intent.

CONCLUSION

Accordingly, because we find that the omission of the reasonable doubt paragraphs required by IPI Criminal (2000) No. 11.16 severely threatened the fairness of defendant's trial, we reverse defendant's conviction and remand the matter for a new trial.

Reversed and remanded.