2013 IL App (1st) 103255-U

FOURTH DIVISION
May 2, 2013

No. 1-10-3255

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, Illinois,
	)	County Department,
v.	)	Criminal Division.
	)	
TARWIN CARRINGTON,	)	No. 09 C6 61609
	)	
Defendant-Appellant.	)	Honorable
	)	Brian Flaherty,
	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Epstein concurred in the judgment.

ORDER

¶ 1 *Held:* It was neither error, nor plain error, to instruct the jury that to enhance the defendant's sentence from a misdemeanor to a felony resisting a peace officer pursuant to section 31-1(a-7) of the Criminal Code of 1961 (720 ILCS 5/31-1(a-7) (West 2008)), the jury had to find the defendant's actions were "a proximate cause" rather than "the proximate cause" of the officer's injuries. Counsel was not ineffective for failing to object to that instruction or offer an alternative one.

¶ 2 Following a jury trial in the circuit court of Cook county, the defendant, Tarwin Carrington, was found guilty of one count of aggravated battery to a police officer (720 ILCS

5/12-4 (b)(18) (West 2008)) and one count of felony resisting arrest (720 ILCS 5/31-1(a-7) (West 2008)). The defendant was sentenced to concurrent terms of two years' probation and 60 days' imprisonment. On appeal, the defendant challenges only his conviction for felony resisting arrest, arguing that the trial court failed to properly instruct the jury regarding that offense. The defendant specifically argues that the jury instructions defining the offense of felony resisting a peace officer failed to inform the jury that the State had to prove beyond a reasonable doubt that the defendant's actions were "*the* proximate cause" (*i.e.*, the sole and most immediate or direct cause) of the officer's injury. The defendant contends that instead the jury was tendered with modified instructions incorrectly informing them that the defendant's actions needed to be only "*a* proximate cause" of the officer's injury. According to the defendant, the jury should have been instructed with Illinois Pattern Jury Instruction (IPI), Criminal, No. 4.24, which specifically defines "proximate cause" as "any cause which, in the natural or probable sequence, produced the *** (injury to the peace officer)." Illinois Pattern Jury Instruction, Criminal, No. 4.24 (4th ed. Supp. 2011) (hereinafter IPI Criminal 4th No. 4.24 (Supp. 2011)). For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The record reveals the following pertinent facts and procedural history. The defendant was arrested on September 10, 2009, and subsequently charged with (1) four counts of aggravated battery to a peace officer (720 ILCS 5/12-4 (b)(18) (West 2008)) and (2) one count of felony resisting or obstructing a peace officer (720 ILCS 5/31-1(a-7) (West 2008)). The defendant was charged with two counts of aggravated battery to Officer Irwin Wierzbicki

(hereinafter Officer Wierzbicki): (1) for struggling with him and causing a broken hand (Count I) and (2) for striking his arm (Count II), while the officer was engaged in the performance of his duties and knowing him to be an officer of the Glenwood Police Department. 720 ILCS 5/12-4 (b)(18) (West 2008). In Count III, the defendant was charged with aggravated battery to Officer Tom Morache (hereinafter Officer Morache) for striking him in the face, while the officer was chasing him and knowing him to be a police officer. 720 ILCS 5/12-4 (b)(18) (West 2008). In Count IV, the defendant was charged with aggravated battery to Officer Corey Allen (hereinafter Officer Allen) for striking him in the chest, while the officer was engaged in the performance of his duties and knowing him to be an officer with the Glenwood Police Department. 720 ILCS 5/12-4 (b)(18) (West 2008). Finally, in Count V, the defendant was charged with "knowing[ly] resist[ing] or obstruct[ing] the performance of [Officer] Wierzbicki *** [in] effecting [his] arrest, and that "he was the proximate cause of [the officers's] injury." 720 ILCS 5/31-1(a-7) (West 2008).

¶ 5 On September 8, 2010, the case proceeded to a three-day jury trial. At trial, Officer Morache first testified that on the evening of September 10, 2009, he was in uniform and on patrol duty in his marked squad car. At about 11 p.m. that night, Officer Morache received a radio dispatch regarding a retail theft in progress. Officer Morache learned that two men had stolen a case of beer from a Speedway gas station located at the corner of Halsted Street and Holbrook Road in Glenwood and were now walking through a field behind the gas station. The two suspects were described as African-American males in their twenties, one wearing an orange and black Baltimore Orioles (hereinafter Orioles) baseball jersey and the other a multi-colored

plaid outfit.

¶ 6 Officer Morache testified that as a result of this dispatch, he proceeded to the parking lot of the Glenwood roller skating rink which was adjacent to the field behind the Speedway gas station. Officer Morache soon observed two men walking through the field, one carrying "something that resembled a case of beer." Officer Morache moved his squad car to a nearby apartment complex parking lot and proceeded on foot. He observed the two men again, now approaching him, and noted that their clothes matched the description of the clothes worn by the two suspected retail thieves. Officer Morache testified that the individual wearing the Orioles jersey also carried a case of beer. In court, Officer Morache identified the defendant as the man in the Orioles jersey.

¶ 7 Officer Morache testified that he next identified himself as a police officer and asked the two men approaching him to stop. At first, the men just kept walking. Officer Morache again identified himself as a police officer and told them to "come over here." After the offenders ignored him, Officer Morache radioed dispatch that he had observed two suspects who matched the description of the retail theft offenders in the apartment complex parking lot. He then began to approach the suspects and once again told them "police, stop, come towards me." The two men turned around and looked at Officer Morache. The defendant then set the case of beer onto the ground before both he and the other suspect took off running in opposite directions.

¶ 8 Officer Morache testified that he chased after the defendant. The officer watched the defendant run behind a bush, remove his Orioles jersey and continue to run. Officer Morache followed after the defendant, yelling, "Police, stop!" Soon thereafter, he caught up with the

defendant, grabbed his left arm and told him that he was under arrest, but the defendant turned around and punched him in the jaw and chest. Officer Morache lost his grip on the defendant and the defendant took off running again. The officer watched as the defendant jumped over a four-foot chain link fence into another section of the parking lot. Officer Morache radioed to dispatch what was going and pursued the defendant. He found an opening in the fence and gave chase, again yelling to the defendant to stop. The defendant fell but got up and continued to run towards the field. The defendant fell again in the field and the officer was able to catch up and "get on top of him."

¶ 9 Officer Morache testified that he held the defendant on the ground, while repeatedly ordering him to "stop resisting arrest." Officer Morache asked the defendant to put his hands behind his back, but the defendant just flailed his arms and continued to struggle, attempting to push Officer Morache off him. Using his radio, Officer Morache advised other officers of his location and requested assistance.

¶ 10 According to Officer Morache, Officers Allen and Wierzbicki soon arrived at the scene and assisted him in subduing the defendant by punching him in the shoulders. The defendant was placed under arrest and transported to the police station. Officer Morache testified that as a result of his struggle with the defendant he sustained minor scrapes to his knees from being on the ground. The officer also testified that the paramedics at the scene treated the defendant for "minor scrapes and cuts" on his neck, but that the defendant waived his right to undergo treatment at a hospital.

¶ 11 On cross-examination, Officer Morache acknowledged that the beer that the defendant

allegedly stole from the Speedway gas station was never recovered by the police.

¶ 12 On redirect examination, Officer Morache testified that during the incident he was carrying a gun, pepper spray and a baton, but chose not to use any of these items in subduing the defendant.

¶ 13 Officer Wierzbicki next testified that about 11 p.m., on September 10, 2009, he was on patrol in full uniform in his marked squad car, when he received a radio dispatch regarding a retail theft in progress at the Speedway gas station. Through the dispatch, Officer Wierzbicki learned that Officer Morache observed two suspects he believed were involved in the theft. As a result of this information, Officer Wierzbicki relocated to the apartment complex parking lot near the Speedway gas station. After reaching the parking lot, Officer Wierzbicki received another dispatch that Officer Morache was chasing a suspect through the field. Officer Wierzbicki then looked at the field and saw two silhouettes running, before they both "dropped to the ground." Officer Wierzbicki radioed Officer Allen and informed him of his location. He then proceeded to assist Officer Morache.

¶ 14 Officer Wierzbicki averred that when he reached Officer Morache, Officer Morache was on top of the defendant, who was face-down on the ground. According to Officer Wierzbicki, Officer Morache repeatedly told the defendant to "put his hands behind his back," but the defendant "thr[ew] his elbows" at the officer. Officer Morache also told the defendant to "stop fighting" because "it was a retail theft, [which] is not that serious," but the defendant continued to resist.

¶ 15 Officer Wierzbicki testified that he then went to the defendant's right side, got down on

his knees and tried unsuccessfully to grab the defendant's arm. The defendant hit him a couple of times with his elbows and then locked his arms underneath his body, preventing the officer from handcuffing him. Another, police officer, Officer Allen, arrived at the scene and knelt on the other side of the defendant. Officer Wierzbicki struck the defendant's right shoulder to try and force his arm free, while Officer Allen did the same to the defendant's left shoulder. Officer Wierzbicki explained that he was using a standard police technique and attempting to "achieve muscle failure" so that the defendant's arm "would loosen up and [the officer] could pull it back to handcuff him."

¶ 16 Officer Wierzbicki admitted that he hit the defendant's right shoulder at least three times. According to Officer Wierzbicki, while he was hitting the defendant, the defendant moved, and the officer, struck the back of the defendant's head, instead of his shoulder. In doing so, Officer Wierzbicki sustained an injury to his hand. After the defendant was finally subdued and placed into custody, the officer was transported to South Suburban Hospital, where doctors determined that he broke his fifth metacarpal–the bone located right behind his pinkie finger. Officer Wierzbicki testified that as a result of this injury he was "off work for approximately three months and had to undergo physical therapy."

¶ 17 On cross-examination, Officer Wierzbicki acknowledged that he is 5' 9" and weights about 250 lbs. He admitted that he regularly does upper body exercises and bench or military presses. He further acknowledged that he hit the defendant with sufficient force to break his hand, but explained that he never attempted to strike him "as hard as [he] could have."

¶ 18 On recross-examination, Officer Wierzbicki testified that all three officers at the scene

were carrying guns, batons and pepper spray, but that they did not use any of these items in subduing the defendant.

¶ 19 Officer Allen next testified consistent with the testimony of Officers Morache and Wierzbicki. In addition, he testified that it is very difficult to place someone in handcuffs who has locked his arms underneath himself and that the proper procedure to do so involves punching the person's shoulders to relax their muscles and free the locked hands.

¶ 20 After the testimony of the three officers, the State offered into evidence a photograph of the defendant taken at the police station upon his arrest. This photograph shows no bruising or injuries to the defendant's face. The State rested and the defense moved for a directed finding on all counts. The defense specifically argued that the defendant did not commit an aggravated battery against Officer Wierzbicki as alleged in Count I of the indictment because the defendant did not commit a battery; rather Officer Wierzbicki struck the defendant in the head as the defendant was on the ground. The trial judge granted the defendant's motion for a directed finding on Count I but denied the motion on the remaining four counts. In doing so, the judge declined to determine whether the defendant's actions constituted a battery; instead he held that "a broken hand *** under this scenario" does not constitute "great bodily injury."

¶ 21 After the judge's ruling, the defense proceeded with its case-in-chief and the defendant testified on his own behalf. The defendant stated that on the night in question, he was walking home through a field behind the Speedway gas station, when a police car pulled up and an officer approached him and stopped him. According to the defendant, the officer just threw him to the ground and pinned him down by placing a knee on the back of his neck. The officer then radioed

for assistance. The defendant testified that two other officers arrived and that all three took turns punching and kicking him in the face. He stated that he was kicked five times and punched about six. The defendant also stated that the officers took off his shirt before handcuffing him. The defendant denied having stolen beer from the Speedway gas station, and testified that he was not even carrying beer that night. He also denied resisting arrest or hitting any of the officers. The defendant further testified that he was not treated by paramedics at the police station and that he was never taken to the hospital.

¶ 22 The defendant next identified several photographs of himself that his mother took two days after his arrest. He testified that these photographs depicted bruising to his eye and nose, and scratches to the side of his face, which were caused by the officers punches and kicking.

¶ 23 On cross-examination, the defendant acknowledged that he lived in the apartment complex adjacent to the empty field. He also admitted that on the night in question he was wearing jeans and an Orioles jersey with orange writing. The defendant acknowledged that he heard the first officer say, "Police," but stated that the officer identified himself only after he placed his knee on the defendant's back. The defendant finally admitted that after being released from custody, he did not go to a doctor or file any complaints against the officers with the police department.

¶ 24 During closing arguments, defense counsel argued that the defendant's actions were not "the proximate cause" of Officer Wierzbicki's hand fracture since the injury occurred because the officer punched the defendant in the head. In response, the State argued that the defendant proximately caused the injury because the hand fracture occurred as a result of the defendant's act

of resisting arrest.

¶ 25 At the jury instruction conference, the State requested that the jury be given modified versions of two criminal IPIs, Nos. 22.13 and 22.14. See Illinois Pattern Jury Instructions, Criminal, Nos. 22.13, 22.14 (4th ed. 2000) (hereinafter, IPI Criminal 4th Nos 22.13, 22.14). The instructions were modified to include language for "proximate cause," which they otherwise do not contain. Specifically, the jury was given the following modified IPI Criminal 4th No. 22.13:

> "A person commits the offense of resisting a peace officer when he knowingly resists the performance of any authorized act within the official capacity of one known to him to be a peace officer *and his conduct was a proximate cause of injury to a peace officer*." (Emphasis added.) IPI Criminal 4th No. 22.13.

The jury was also tendered modified IPI Criminal 4th No. 22.14, which stated:

> "To sustain the charge of resisting a peace officer, the State must prove the following propositions:
>
> *First Proposition*: That Officer Wierzbicki was a peace officer; and
>
> *Second Proposition*: That the defendant knew Officer Wierzbicki was a peace officer; and
>
> *Third Proposition*: That the defendant knowingly resisted the performance by Officer Wierzbicki of an authorized act within his official capacity; and
>
> *Fourth Proposition*: That the defendants [*sic*] conduct was *a proximate cause of an injury to Officer Wierzbicki*.
>
> 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." (Emphasis added.) IPI Criminal 4th No. 22.14.

¶ 26 The defendant did not object to the aforementioned instructions, nor did he offer any alternative instructions.

¶ 27 After deliberations, the jury found the defendant guilty of aggravated battery to Officer Morache (Count III) and felony resisting arrest by Officer Wierzbicki (Count V). The jury acquitted the defendant of the remaining charges. The trial court subsequently sentenced the defendant to concurrent terms of two years' probation and 60 days' in the Cook County Department of Corrections, time considered served. The now defendant appeals, challenging only his conviction for felony resisting arrest.

¶ 28 II. ANALYSIS

¶ 29 On appeal, the defendant contends that he was denied a fair trial because: (1) the trial court improperly instructed the jury that it had to find that the defendant was "a" proximate cause rather than "the" proximate cause of Officer Wierzbicki's injury; and (2) the jury was not given IPI Criminal 4th No. 4.24 (Supp. 2011)), which specifically defines "proximate cause" as "any cause which, in the natural or probable sequence, produced the *** (injury to the peace officer)."

¶ 30 A. Propriety of the Modified Jury Instructions

¶ 31 We begin by addressing the propriety of the instruction offered by the court, using "a"

instead of "the" proximate cause. The State initially argues, and the defendant concedes, that he has forfeited this issue for purposes of appeal because he did not object to the tendered instruction, nor raise this issue in his posttrial motion. See Ill. S. Ct. R. 366(b)(2)(i) (eff. Feb.1, 1994) ("[n]o party may raise on appeal the failure to give an instruction unless the party shall have tendered it"); see also *People v. Sargent*, 239 Ill. 2d 166, 188-89 (2010) ("a defendant will be deemed to have procedurally defaulted his right to obtain review of any supposed jury instruction error if he failed to object to the instruction or offer an alternative at trial and did not raise the issue in a posttrial motion."); see also *People v. Wilson*, 404 Ill. App. 3d 244, 246-47 (2010) ("It is well settled that a defendant forfeits review of any putative jury instruction error if she does not object to the instruction or offer any alterative instruction at trial and does not raise the particular instruction issue in her posttrial motion); see also *People v. Enoch*, 122 Ill. 2d 176, 186-87 (1988) (noting that in order to preserve an issue for appeal, a defendant must first make an objection to the alleged error at trial, and then raise it in a posttrial motion). The defendant nevertheless argues that we should review his claim either under the plain error doctrine or on the basis of his counsel's ineffectiveness for failing to object to the tendered instruction. We address plain error first.

¶ 32 Pursuant to Illinois Supreme Court Rule 451(c) "substantial defects" in criminal jury instructions "are not waived by failure to make timely objections thereto if the interests of justice require." Ill. S. Ct. R. 451(c) (eff.July1, 2006). "The purpose of Rule 451(c) is to permit correction of grave errors and errors in cases so factually close that fundamental fairness requires that the jury be properly instructed." *Sargent*, 239 Ill. 2d at 189. According to our supreme court

"[t]he rule is co-extensive" with the plain error doctrine articulated in Supreme Court Rule 615(a) (134 Ill.2d R. 615(a)) and is to be construed identically. *Sargent*, 239 Ill. 2d at 189.

¶ 33 The plain error doctrine is a narrow and limited exception to the general rule of forfeiture (*People v. Bowman*, 2012 IL App (1st) 102010, ¶ 29 (citing *People v. Herron*, 215 Ill. 2d 167, 177 (2005)), which "allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Sargent*, 239 Ill. 2d at 189; see also *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *Herron*, 215 Ill.2d at186-87); see also Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967) ("[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. *Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court*") (emphasis added). Under either prong of the plain error doctrine, the burden of persuasion remains on the defendant. *Bowman*, 2012 IL App (1st) 102010 at ¶ 29 (citing *People v. Lewis*, 234 Ill.2d 32, 43 (2009)).

¶ 34 "The first step of plain-error review is to determine whether any error occurred." *Lewis*, 234 Ill. 2d at 43; see also *Wilson*, 404 Ill. App. 3d at 247 ("There can be no plain error if there was no error at all."). This requires "a substantive look" at the issue raised." *People v. Johnson*, 208 Ill. 2d 53, 64 (2003). We will therefore first review the defendant's claim to determine if there was any error before considering it under plain error.

¶ 35 We begin by noting that pursuant to section 31-1(a) of the Criminal Code of 1961 (Criminal Code) 720 ILCS 5/31-1(a) (West 2008)),"[a] person who knowingly resists or obstructs the performance by one known to the person to be a peace officer *** of any authorized act within his official capacity commits a Class A misdemeanor." The statute permits the defendant's misdemeanor conviction to be enhanced to a felony where the defendant's conduct is "the proximate cause" of the injury to the peace officer. See 720 ILCS 5/31-1 (a-7) (West 2008) ("A person convicted for a violation of this Section *whose violation was the proximate cause of an injury to a peace officer* *** is guilty of a Class 4 felony." (Emphasis added.)).[1]

¶ 36 In the present case, the defendant contends that the tendered modified IPI Criminal 4th Nos. 22.13 and 22.14, misstated the law and confused the jury because they failed to inform them that to find the defendant guilty of felony resisting a peace officer, the State had to prove beyond a reasonable doubt that the defendant's actions were "the proximate cause" of the officer's injuries. Instead of instructing the jury that it must find the defendant's actions were "the"

---

[1]We note that although subsection (a-7) is written as if "the proximate cause" is in the nature of a sentencing enhancement, which does not apply until after an offender has been "convicted" of the misdemeanor offense, the parties agree that because proximate cause elevates the sentencing range, it is in the nature of an element of the felony offense and the State was required to prove it beyond a reasonable doubt to the jury. See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

proximate cause of Officer Wierzbicki's injuries, the tendered modified instructions stated that to enhance the defendant's sentence from a misdemeanor to a felony resisting arrest, the jury merely had to find that his conduct was "a" proximate cause of the officer's injuries. See IPI Criminal 4th Nos. 22.13 and 22.14. The defendant argues that the definite article ("the") and the indefinite article ("a") have different meanings--"the" being exclusive" and "a" being inclusive. According to the defendant, when the legislature used the phase "the proximate cause" in the statute, it was referring only to the "single most immediate or direct cause." See 720 ILCS 5/31-1(a-7) (West 2008). Therefore, the defendant argues, replacing "the" with "a" in the modified jury instructions incorrectly apprised the jury that the defendant's actions need only be one of several causes of the officer's injury. For the reasons that follow, we are compelled to disagree.

¶ 37 We note that this same argument has already been addressed and rejected by the Third District of this appellate court in *People v. Wilson*, 404 Ill. App. 3d 244 (2010). In that case, the defendant was charged with, *inter alia*, felony resisting a peace officer (720 ILCS 5/31-1(a-7) (West 2008)), resulting from the officer's attempt to make his way through a crowded alley in front of a night club. *Wilson*, 404 Ill. App. 3d at 244-45. Evidence at the *Wilson* trial established that in order to make his way through the crowded alley, the officer launched pepper balls at the legs and feet of several individuals in the crowd. *Wilson*, 404 Ill. App. 3d at 245. The officer then began assisting another officer with crowd control when a glass bottle flew past his left side. *Id.* After the defendant was identified as the person responsible for throwing the bottle, the officer approached her and grabbed her arm. *Id.* The defendant failed to comply with orders to put her hands behind her back. *Id.* The officer forced her to the ground, whereupon she

attempted to pull her arms underneath her body to keep from being handcuffed. *Id.* While the officer tried to gain control of her left arm, the defendant "rolled along with the pile" and pinned the officer's arm against the ground, thereby spraining the officer's wrist. *Id.*

¶ 38 During the defendant's trial in *Wilson*, the following modified instruction for resisting a peace officer was tendered to the jury without objection:

> "To sustain a charge of Resisting or Obstructing a Peace Officer, the State must prove the following propositions:
>
> First Proposition: That Brad Scott was a peace officer; and
>
> Second Proposition: That the defendant knew Brad Scott was a peace officer; and
>
> Third Proposition: That the defendant knowingly resisted or obstructed the performance of Brad Scott of an authorized act within his official capacity; and
>
> Fourth Proposition: That the defendant's act of resisting was *a proximate cause* of an injury to Brad Scott." (Emphasis in original.) *Wilson*, 404 Ill. App. 3d at 246.

The jury found the defendant in *Wilson* guilty of felony resisting a peace officer and the defendant appealed. *Wilson*, 404 Ill. App. 3d at 246.

¶ 39 Just as in the present case, the defendant in *Wilson* argued that the modified jury instruction incorrectly stated the law since it utilized the indefinite article "a" instead of the definite article "the." Just as here, the defendant in *Wilson* also acknowledged that she had failed to preserve this issue for review but urged the court to consider her claim either under plain error or as a claim of ineffective assistance of counsel.

¶ 40 In a plurality opinion, all three justices of the *Wilson* court agreed that the modified

instruction contained an accurate statement of the law, and that therefore there could be no error, let alone plain error. *Wilson*, 404 Ill. App. 3d at 250. The justices, however, strongly disagreed as to why the tendered instruction was proper. *Wilson*, 404 Ill. App. 3d at 250-254.

¶ 41 The authoring judge, Justice Schmidt, initially acknowledged that section 31-1(a-7) of the Criminal Code (720 ILCs 5/31-1(a-7) (West 2008)) specifically provides that in order to enhance a conviction for resisting a peace officer from a misdemeanor to a felony, the defendant's conduct must be "*the* proximate cause of [the] injury to [the] peace officer." (Emphasis added.) *Wilson*, 404 Ill. App. 3d at 247. Justice Schmidt next opined that this statutory language is "unambiguous." *Wilson*, 404 Ill. App. 3d at 249, FN1. However, he then went on to find that there is no difference between the meaning of the phrases "a proximate cause" and "the proximate cause." *Wilson*, 404 Ill. App. 3d at 248-49.

¶ 42 In coming to this conclusion, Justice Schmidt first analyzed how Illinois statutes have used the term "proximate cause," noting:

> "The legislature has used the term 'proximate case' in 19 statutes. [Citations.] The phrase 'a proximate cause' appears in 10 of these statutes and 'the proximate cause' appears in 9. Nowhere within the Illinois Compiled Statutes does the legislature define 'proximate cause,' 'a proximate cause,' or 'the proximate cause.'
>
> However, the legislature has used the phrase 'more than 50% of the proximate cause' in at least two instances. In section 2-1107.1 of the Code of Civil Procedure, the legislature stated that, '[I]f the jury finds that the contributory fault of the plaintiff is more than 50% of the proximate cause,' then the plaintiff is barred from recovery. [Citation.]

> Similarly, in section 2(c)(2) and (2) of the Wrongful Death Act, the legislature again stated that if a beneficiary on whose behalf an action is brought 'is more than 50% of the proximate cause of the wrongful death of the decedent,' then recovery is barred. [Citation.] QUERY: if the legislature intended 'the proximate cause' to mean the 'one most immediate' cause, then how can there ever be less than 100% of 'the proximate cause?' If use of the phrase 'the proximate cause' means that there is but one singular cause of an injury, why would the legislature ever use the phrase 'more than 50% of the proximate cause,' when to do so would render the phrase self-contradictory nonsense?" " *Wilson*, 404 Ill. App. 3d at 248.

¶ 43 Justice Schmidt next relied on the definition of "proximate cause" in the civil IPI, which defines "proximate cause" not as the single most immediate cause, but rather as one of multiple possible causes. See *Wilson*, 404 Ill. App. 3d at 248 (quoting Illinois Pattern Jury Instructions, Civil, No. 15.01 (2008) (hereinafter, IPI Civil (2008) No. 15.01) (" 'When I use the expression 'proximate cause,' I mean a cause which, in the natural and ordinary course of events, produced the plaintiff's injury. It need not be the only cause, nor the last or nearest cause. It is sufficient if it combines with another cause resulting in injury.' ")). In light of this definition, Justice Schmidt concluded that changing the article immediately preceding "proximate cause" from "a" to "the" does not alter the definition; rather "[i]t matters not whether one speaks of 'the' proximate cause or 'a' proximate cause." *Wilson*, 404 Ill. App. 3d at 248.

¶ 44 In support of his conclusion, Justice Schmidt also quoted our supreme court's decision in *People v. Hudson*, 222 Ill. 2d 392 (2006), wherein our supreme court applied the civil IPIs

definition of "proximate cause" to felony murder:

> " 'In general, Illinois law provides that a defendant may be charged with murder pursuant to the 'proximate cause' theory of felony murder. [Citation.] The term 'proximate cause' describes two distinct requirements: cause in fact and legal cause. [Citation.] We have stated, 'We believe that the analogies between civil and criminal cases in which individuals are injured or killed are so close that the principle of proximate cause applies to both classes of cases. Causal relation is the universal factor common to all legal liability.' [Citation.] Legal cause 'is essentially a question of foreseeability;' the relevant inquiry is 'whether the injury is of a type that a reasonable person would see as a likely result of his or her conduct.' [Citation.] Foreseeability is added to the cause-in-fact requirement because 'even when cause in fact is established, it must be determined that any variation between the result intended *** and the result actually achieved is not so extraordinary that it would be unfair to hold the defendant responsible for the actual result.' [Citation.] Although foreseeability is a necessary component of a proximate cause analysis, it need not be specifically mentioned in a jury instruction to communicate the idea of 'proximate' to a jury. Thus, the IPI civil jury instruction communicates the definition of 'proximate cause,' as '[any] cause which, in natural or probable sequence, produced the injury complained of. [It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the injury.]' [Citation.]' " *Wilson*, 404 Ill. App. 3d at 249-50 (quoting *Hudson*, 222 Ill. 2d at 401-402).

¶ 45 Based upon the *Hudson* holding, the prior use of phrases "a proximate cause" and "the proximate cause" in the Illinois complied statutes, and the language of the civil IPI, Justice Schmidt concluded that the legislature intended that the two phrases be interchangeable. *Wilson*, 404 Ill. App. 3d at 248-50.

¶ 46 Writing separately, in a special concurrence, Justice Holdridge agreed with the outcome of the plurality. *Wilson*, 404 Ill. App. 3d at 252 (Holdridge, J., specially concurring). He, however, disagreed with Justice Schmidt that the plain language of the statute was clear and unambiguous, stating:

> "While it is possible that the legislature intended the definite article ("the") to signal an exclusive sort of proximate cause, it is also possible that the legislature intended no such exclusion--allowing more than the single most immediate or direct cause." *Wilson*, 404 Ill. App. 3d at 250 (Holdridge, J., specially concurring).

¶ 47 Noting that the language was indeed ambiguous Justice Holdridge found it proper to look to the legislative history for guidance. *Wilson*, 404 Ill. App. 3d at 250 (Holdridge, J., specially concurring). He specifically focused on the following statements made on the Senate floor by the bill's sponsor, Senator Petka,:

> "When the disputed language was being considered on the Senate floor, Senator Petka explained that 'it raises the offense of resisting arrest to a Class 4 felony in circumstances where a peace officer suffers harm as a proximate result of the arrest.' 92d Ill. Gen. Assem., Senate Proceedings, April 3, 2002, at 115 (statement of Senator Petka). Later, the following colloquy occurred:

'SENATOR CULLERTON: Senator, for the purposes, I guess, of legislative intent, there's an amendment that we put on the bill that says a person convicted for a violation of this Section whose violation was the proximate cause of an injury to a peace officer is guilty of a Class 4 felony. Could you describe how the--what the burden of proof would be, who it would be on and what is the burden of proof in order for the State to--to prove that Section?

PRESIDING OFFICER (SENATOR WATSON): Senator Petka.

SENATOR PETKA: First of all, thank you for--asking that question. The burden of proof will be on the State. It'll be a burden of proof beyond all reasonable doubt. The--I envision a jury instruction which would hold that the individual to be found guilty of the offense must be found guilty beyond all reasonable doubt and must prove that the injury was proximately related to the action.

PRESIDING OFFICER (SENATOR WATSON): Further discussion. Senator Molaro?

SENATOR MOLARO: Thank you, Mr. President. Would the sponsor yield for a question?

PRESIDING OFFICER (SENATOR WATSON): Sponsor indicates he'll yield, Senator Molaro.

SENATOR MOLARO: For the crime of resisting arrest, where is that classified? Is that a Class A misdemeanor or is that a Class 1 felony, or what is resisting arrest?

PRESIDING OFFICER (SENATOR WATSON): Senator Petka.

> SENATOR PETKA: Resisting arrest will remain a Class A misdemeanor, Senator. In those circumstances where a peace officer in effectuating an arrest is injured as a result of that arrest, such as situations where there's a struggle for placing the handcuffs on or it's just a struggle in apprehending the individual who is running, the peace officer suffers great bodily harm, under those circumstances, the--the charge can be upgraded to a felony.' 92d Ill. Gen. Assem., Senate Proceedings, April 4, 2002, at 87-89 (statements of Senators Cullerton, Petka & Molaro)." *Wilson*, 404 Ill. App. 3d at 251-52 (Holdridge, J., specially concurring).

¶ 48 Based on the aforementioned statements by Senator Petka, Justice Holdridge concluded that "the legislature did not attach exclusive significance to the definite article in the phrase 'the proximate cause.' " *Wilson*, 404 Ill. App. 3d at 252 (Holdridge, J., specially concurring). Rather, he concluded, the legislature "simply meant 'proximate cause.' " *Wilson*, 404 Ill. App. 3d at 252 (Holdridge, J., specially concurring). In coming to this conclusion, Justice Holdridge stated:

> "Senator Petka (the sponsor) explained, the State must prove that the officer's injury was 'proximately related' to the defendant's resistence or occurred 'as a result of making the arrest.' Senator Petka explicitly used the phrase 'a proximate result,' and the bill passed with his explanation." *Wilson*, 404 Ill. App. 3d at 252 (Holdridge, J., specially concurring).

¶ 49 Writing separately, in a special concurrence, Justice McDade first agreed with Justice Holdridge that the phrase "the proximate cause" in the statute is ambiguous. *Wilson*, 404 Ill. App. 3d at 252 (McDade, J., specially concurring). She strongly criticized Justice Schmidt's

plurality opinion for finding that this phrase is unambiguous but then violating the most basic cannon of statutory construction in refusing to apply the clear language of the statute as written without resorting to extrinsic aids of statutory interpretation. *Wilson*, 404 Ill. App. 3d at 252, FN2 (McDade, J., specially concurring). As Justice McDade wrote:

> "Justice Schmidt has *** dropped a footnote asserting that he finds the statute unambiguous. It is legally incorrect to cite and discuss outside sources where the statute in question is itself unambiguous. *People v. Nunez*, 236 Ill. 2d 488, 495 (2010) ('When the statutory language is clear and unambiguous, it is unnecessary to resort to other aids of interpretation.'); *Solon v. Midwest Medical Records Ass'n*, 236 Ill. 2d 433, 440 (2010 ('When the statutory language is clear and unambiguous, it must be applied as written, without resort to extrinsic aids of statutory construction'); *In re J.L.*, 236 Ill. 2d 329, 339-40 (2010) ('Where the statutory language is clear and unambiguous, it will be given effect as written, without resort to other aids of construction.') Justice Schmidt has elected to 'plead guilty' to violating this cannon of statutory construction rather than conform the decision to the rule". See *Wilson*, 404 Ill. App. 3d at 252, FN2 (McDade, J., specially concurring)

¶ 50 Justice McDade then looked to the legislative history and agreed with Justice Holdridge that Senator Petka's statements signaled that the legislature did not intend to distinguish between "a" and "the" proximate cause. *Wilson*, 404 Ill. App. 3d at 254 (McDade, J., specially concurring). For this reason alone, Justice McDade agreed with the plurality's conclusion that the modified jury instruction containing the phrase "a proximate cause" was an accurate statement of

the law. See *Wilson*, 404 Ill. App. 3d at 253 (McDade, J., specially concurring).

¶ 51 Justice McDade, however, expressed her reservations with this holding:

> "I am left troubled , however, because a principle of statutory construction is that ' "the definite article 'the' particularizes the subject which it precedes. *It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an*.' " ' (Emphasis in original.) [Citations.] Applying this principle, a compelling argument can be made that the legislature's use of the language 'the proximate cause' illustrates an intent to focus on the one most immediate, efficient, and direct cause preceding an injury. [Citation.] Alternatively, the language 'a proximate cause' merely requires that the State establish that the accused's actions were a contributing cause of the victim's injuries. [Citation.]" *Wilson*, 404 Ill. App. 3d at 253-54 (McDade, J., specially concurring).

¶ 52 Justice McDade was also concerned that a holding equating the phrase "a proximate cause" with the phrase "the proximate cause" necessarily violated the well-established rule of lenity, according to which ambiguous penal statutes are to be strictly construed in favor of the accused, " 'with nothing taken by intendment or implication beyond the obvious or literal meaning of the statute.' " *Wilson*, 404 Ill. App. 3d at 254 (McDade, J., specially concurring) (quoting *People v. Perry*, 224 Ill. 2d 312 333 (2007)). She, therefore, urged the legislature to be more clear in writing its statutes and expressing its intent, stating:

> "While I am wary of ignoring the rule of lenity simply on the basis of other irrelevant statutes and Senator Petka's sparse statement that the State must prove that the officer's injury was 'proximately related' to the defendant's resistance (92 Ill. Gen. Assem.,

> Senate Proceedings, April 4, 2002, at 87-89), I acknowledge that we ultimately do in fact look to the legislative history of a statute when attempting to ascertain its intent. [Citation.] It is my sincere hope, however, that the legislature takes the opportunity in the future to clarify its intent so that other important cases like this one, where an individual's conviction is being enhanced from a misdemeanor to a felony, are not determined on the basis of a senator's two-word utterance." *Wilson*, 404 Ill. App. 3d at 254 (McDade, J., specially concurring)

¶ 53 The defendant acknowledges the decision in *Wilson*, but urges us to follow Justice McDade's suggestion and use the rule of lenity to construe the statute in his favor. Although we acknowledge the rule of lenity and have much reservation about interpreting the definite article ("the") as being equivalent to the indefinite article ("a"), our analysis is confined to interpreting the legislature's intent. As such, just as Justices McDade and Holdridge, we are bound by the statements made by Senator Petka on the senate floor: (1) that the statute "raises the offense of resisting arrest to a Class 4 felony in circumstances where a peace officer suffers harm as *a proximate result* of the arrest," (92d Ill. Gen. Assem., Senate Proceedings, April 3, 2002, at 115 (statement of Senator Petka)); and (2) that it is the State's burden of proof to establish that the officer's injury was "*proximately related*" to the defendant's resistence or occurred "as a result of making the arrest." (92d Ill. Gen. Assem., Senate Proceedings, April 4, 2002, at 87-89 (statements of Senator Petka)). Based on these statements by the bill's sponsor, we are compelled, albeit reluctantly, to conclude, just as Justices McDade and Holdridge did, that the legislature did not intend the phrase "the proximate cause" in section 31-1(a-7) of the Criminal

Code (720 ILCS 5/31-1(a-7) (West 2008)) to mean the sole and most immediate cause. Accordingly, we hold that the modified IPIs tendered to the jury below using the phrase "a proximate cause" instead of "the proximate cause" accurately stated the law, and there was no instructional error. See *Wilson*, 404 Ill. App. 3d at 252-54 (Holdridge, J., and McDade J., specially concurring).[2]

---

[2]We note that the in urging us to find that "the proximate cause" in section 31-1(a-7) of the Criminal Code (720 ILCS 5/31-1(a-7) (West 2008)) is equivalent to "a proximate cause," the State cites to *People v. Cervantes*, 408 Ill. App. 3d 906 (2011). However, we are very troubled with the reasoning of that case. There, the defendant was convicted of felony resisting a peace officer after the officer was injured while chasing him on ice and snow. *Cervantes*, 408 Ill. App. 3d at 910. On appeal, the defendant argued that because the statue for felony resisting a peace officer states that the defendant must be "the proximate cause" of the officer's injuries, it should be interpreted to require that the defendant's actions be the sole proximate cause of the officer's injuries. *Cervantes*, 408 Ill. App. 3d at 910. The court in *Cervantes*, accepted the general principle that the article" the" suggests a limiting interpretation, but nonetheless rejected the defendant's argument by stating that section 31-1(a-7) "does not refer to 'the proximate cause,' but rather refers only to an injury 'proximately caused' by the defendant's conduct." *Cervantes*, 408 Ill. App. 3d at 910. This finding, however, is incorrect and brazenly misquotes the statute, which explicitly states that "[a] person convicted for a violation of [section 31-1] whose violation was *the proximate cause* of an injury to a peace officer *** is guilty of a Class 4 felony." 720 ILCS 5/31-1 (a-7) (West 2008). For this reason, we reject the State's invitation to rely on the holding

¶ 54 Because we find no error, there can also be no plain error. See *Wilson*, 404 Ill. App. 3d at 250. Nor can there be ineffective assistance of counsel since it is well-accepted that "failure to object to proper conduct cannot render counsel constitutionally ineffective." *Wilson*, 404 Ill. App. 3d at 250 (citing *People v. Johnson*, 218 Ill. 2d 125, 139 (2005)).

¶ 55 B. IPI Criminal 4th No. 4.24 (Supp. 2011))

¶ 56 The defendant next argues that it was error not to instruct the jury with IPI Criminal 4th No. 4.24 (Supp. 2011), which defines "proximate cause" in the following manner:

> "The term 'proximate cause' means any cause which, in the natural or probable sequence, produced the [(great bodily harm) (permanent disability) (permanent disfigurement) (death of another person) (death of the child) (injury to a peace officer)]. [It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause which in combination with it, causes the [(great bodily harm) (permanent disability) (permanent disfigurement) (death of another person) (death of the child) (injury to a peace officer)]]. IPI Criminal 4th No. 4.24 (Supp. 2011).

The defendant again acknowledges that he has forfeited this issue for purposes of review by failing to request this instruction at trial or raising this claim in his posttrial motion. He, nevertheless, urges us to consider his claim under the plain error doctrine or as ineffective assistance of his trial counsel.

¶ 57 We again begin by considering whether the failure to utilize IPI Criminal 4th No. 4.24 (Supp. 2011) constituted error. See *Wilson*, 404 Ill. App. 3d at 247 ("There can be no plain error

---

in *Cervantes*.

if there was no error at all."); see also *Lewis*, 234 Ill. 2d at 43 ("[t]he first step of plain-error review is to determine whether any error occurred.")

¶ 58 The defendant is correct when he asserts that the circuit court is required to use those pattern jury instructions that are available at the time of trial. Supreme court rules require a circuit court to use those IPIs that are both (1) applicable to the facts and law of the case; and (2) correct statements of law. *People v. Polk*, 407 Ill. App. 3d 80, 108 (2010) ("Although pattern instructions are not themselves law and are open to challenge if they are inaccurate statements of the law, the instructions are mandatory, if applicable and accurate.") Specifically, Supreme Court Rule 451(a) states unequivocally that a circuit court "shall" use "the Illinois Pattern Jury Instructions, Criminal (4th ed. 2000)" when it is "applicable in a criminal case, giving due consideration to the facts and the governing law *** unless the court determines that it does not accurately state the law." 210 Ill.2d R. 451(a); see also *Polk*, 407 Ill. App. 3d at 108. The use of the word "shall" in the rule makes clear that the use of the IPI is not optional, but mandatory. See *Polk*, 407 Ill. App. 3d at 108 (citing *Ultsch v. Illinois Municipal Retirement Fund*, 226 Ill.2d 169, 179(2007)).

¶ 59 In the present case, inauspiciously for the defendant, IPI Criminal 4th No. 4.24 (Supp. 2011)) was not published until June 2011, more than nine months after the defendant's September 2010 trial. See IPI Criminal 4th No. 4.24 (Supp. 2011).[3] As such, it would have been

[3]We note that *Cervantes*, cited to by the State, incorrectly cites IPI Criminal 4th No. 4.24 (Supp. 2011) as having been in existence in 2008. See *Cervantes*, 408 Ill. App. 3d at 910. Our research, however, has revealed that this IPI was not officially approved for publication until

impossible for either counsel or the court *sua sponte*, to use this jury instruction. Accordingly, there can be no error here, or ineffective assistance by defense counsel.

¶ 60 Moreover, even if IPI Criminal 4th No. 4.24 (Supp. 2011) had been available at the defendant's trial, we fail to see how it would have aided the defendant's cause. The parties agree that the committee note to this instruction states that "the instruction should be given when causation is an issue" in an enumerated set of statutory offenses and sentencing enhancements, including, relevant to this appeal, section 31-1(a-7) of the Criminal Code (720 ILCS 5/31-(a-7) (West 2008)). IPI Criminal 4th No. 4.24, Committee Note (Supp. 2011). However, the committee note also instructs that:

> "The first part of this instruction should be given where the evidence shows that the sole cause of te injury or death was the conduct of the defendant. The instruction in its entirety, however, should be given when there is evidence of a concurring or contributing cause of the injury or death." IPI Criminal 4th No. 4.24, Committee Note (Supp. 2011).

Since the defendant here argues that Officer Wierzbicki's injury was caused not merely by the defendant's act of resisting arrest (*i.e.*, his continued attempt to keep his hands underneath his body to prevent being handcuffed) but also by an intervening cause (*i.e.*, the officer punching the defendant's shoulder but missing and instead hitting the defendant's head, thereby breaking his fifth metacarpal bone), it appears that the trial court would have been required to tender the full instruction to the jury, including language stating that the proximate cause of the officer's injury

---

January 19, 2010, and published until June 2011. For this reason, and the ones already articulated above, we again reject the State's request to rely upon this decision.

"need not be the only cause, nor the last or nearest cause" but rather that it "is sufficient if it concurs with some other cause which in combination with it, causes the *** injury to a peace officer." IPI Criminal 4th No. 4.24 (Supp. 2011). We fail to see how this language could have done anything but undermine the defendant's cause.

¶ 61 On appeal, the defendant contends that it is not clear from the committee note to IPI Criminal 4th No. 4.24 (Supp. 2011) whether the court would have been required to tender the full instruction to the jury. The defendant points out that the committee note states that "the language regarding 'proximate cause' [has been] variously stated" in the statutes to which this instruction would apply, as "proximately caused," "proximately causes," "a proximate cause," and "the proximate cause." The committee note then makes the following comment, upon which the defendant relies:

> "The Committee believes that there is no significance to the variation in the phraseology that affects the applicability of this definition with one possible exception. When using 720 ILCS 5/31-1(a-7) the Committee directs the user to *Sibenaller v. Milschewski*?? [*sic*], 379 Ill. App. 3d 717, 721-22 (2nd Dist. 2008), where the appellate court discusses a principle fo statuary construction when 'the' is used instead of 'a." The Committee takes no position as to whether the bracketed second sentence should be given when defining 'the proximate cause.' " IPI Criminal 4th No. 4.24, Committee Note (Supp. 2011).

The defendant argues that since the committee note essentially remains silent on the issue of whether the entire jury instruction should be tendered in a cause, such as this one, involving

section 31-1(a-7) of the Criminal Code (720 ILCs 5/31-1(a-7) (West 2008)), we should hold that only the first sentence of the instruction should be tendered. In doing so, the defendant contends, as he already did above, that we should construe the language "the proximate cause" in section 31-1(a-7) of the Criminal Code (720 ILCS 5/31-1(a-7) (West 2008)) to mean "the sole cause" and not "any" or "a proximate cause." For the reasons already articulated above, however, we are not at liberty to do so. Rather, pursuant to the holding in *Wilson*, which equates the phrases "a proximate cause" and "the proximate cause" in the context of section 31-1(a-7) of the Criminal Code (720 ILCS 5/31-1(a-7) (West 2008)), we would be compelled to conclude that IPI Criminal 4th No. 4.24 (Supp. 2011) should be given in its entirety. However, since that IPI was not available at the time of the defendant's trial, we need not make that determination here.

¶ 62 III. CONCLUSION

¶ 63 For all of the aforemetioned reasons, we affirm the judgment of the circuit court.

¶ 64 Affirmed.