FIRST DIVISION
Rule 23 Order filed on April 10, 2017
Modified upon denial of rehearing on May 15, 2017.

No. 1-14-3526
2017 IL App (1st) 143526-U

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. 13 CR 10563
JAMES GOLDSMITH-FISHER,	)	
	)	Honorable
Defendant-Appellant.	)	Michael B. McHale
	)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held:* There was sufficient evidence presented to support defendant's conviction for aggravated battery of a peace officer; defendant's right to present a defense was not violated when the trial court excluded evidence of the officer's alleged motive to lie; it was not reversible error for the trial court to refuse to instruct the jury on self-defense or misdemeanor resisting; it was proper for the trial court to overrule defendant's objection to witness testimony regarding what defendant said while resisting arrest; defendant's right to remain silent was not violated when the trial court required him to decide whether to testify before a detective; defendant's sentence was not excessive; and the trial court was not impartial, but its comments did not rise to plain error.

¶ 2 Following a jury trial, defendant James Goldsmith-Fisher was convicted of aggravated battery to a peace officer and resisting a peace officer proximately causing injury. The trial court sentenced defendant to 10 years in prison for aggravated battery (Class 2 felony) and 3 years for resisting arrest (Class 4 felony), the sentences to run concurrently. Defendant now appeals, arguing that: (1) the State failed to prove him guilty of aggravated battery of a police officer, (2) the trial court denied him his due process right to present a defense, (3) his convictions should be reversed where the trial court refused to instruct the jury on self-defense, (4) his conviction for resisting a peace officer should be reversed where the trial court refused to instruct the jury on the lesser-included offense of misdemeanor resisting, (5) he is entitled to a new trial because the trial court erred by overruling his objection to a witness's testimony, (6) the trial court erred in requiring defendant to decide whether to testify before all of the defense witnesses had testified, (7) his sentence was excessive, and (8) the trial court's bias against him denied his right to a fair trial. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was arrested on May 18, 2013, following an altercation at defendant's house. On May 24, 2013, a preliminary hearing was held. Officer Anthony Gillespie testified that he was working on the date in question with Officer Sweis, and was assigned to the area of 6634 South Honore in Chicago. When they arrived, defendant and defendant's mother were present. Officer Gillespie testified that he informed defendant that he was under arrest for assault, but when he went to place defendant into custody, defendant pulled away and jumped off the steps. Officer Gillespie testified that his partner secured defendant "around his waist from the rear," and that he "grabbed [defendant's] right arm, at which point he struck me in the face with his left arm." Officer Gillespie testified that defendant hit the "right side of my mouth" and that there

was "[b]leeding inside my mouth." Officer Gillespie testified that after defendant continued to struggle while Officer Gillespie tried to place him into custody, and that after he placed defendant into custody, Officer Gillespie noticed that he sustained "bruising and an abrasion to [his] left arm."

¶ 5 Thereafter, a trial was held on June 4, 2014. At trial, Officer Gillespie testified that he was working on the date in question with his partner, Officer Sweis. Both men were in uniform, in a marked squad car. They received a dispatch to respond to "an assault in progress." Officer Gillespie testified that when they arrived at 6634 South Honore, he observed a man and a woman standing on the porch, and a man standing approximately one house south on the parkway grass with two dogs attached to leashes.

¶ 6 Officer Gillespie testified that when he and his partner exited their vehicle, the man one house away, Ray Riperton, approached them and explained why he called the police. Riperton showed Officer Gillespie a kitchen knife he had in his pocket. After speaking with Riperton and defendant, Officer Gillespie attempted to place defendant into custody. Defendant refused to comply and jumped off the porch. Officer Gillespie testified that he grabbed defendant's shirt as he jumped, and his partner grabbed defendant around the waist. Officer Gillespie again tried to place defendant into custody by grabbing his right arm. Officer Gillespie testified that after he grabbed defendant's right arm, defendant "punched me in the face with his left." Officer Gillespie stated that defendant's fist was closed when he punched him. After defendant punched him, Officer Gillespie "utilized strikes to end his attack and my partner and I were able to bring him to the ground and secure both his arms behind his back using handcuffs." Officer Gillespie further testified that after the initial strike, defendant "continued flailing his arms, he kept pulling away and trying [to] defeat the arrest."

¶ 7 Officer Gillespie testified that he sustained bleeding inside his mouth. He also testified that he had a "small cut on my left hand and I had an abrasion and bruise on my left forearm." Officer Gillespie was then shown pictures that were taken of him at the police station immediately after the incident. The pictures depicted a cut to his knuckle, a cut on the inside of his mouth, and bruising and scratching on his forearm.

¶ 8 On cross-examination, the following exchange occurred:

"[Q]: When you grabbed [defendant], he began to flail, is that correct?

[A]: Correct.

[Q]: At that point it was his flailing hand that hit you in the face?

[A]: His closed fist

[Q]: His flailing close fist; is that correct?

[ASSISTANT STATE'S ATTORNEY]: Objection.

THE COURT: Overruled.

If you understand the question, officer.

THE WITNESS:

[A] I believe his fist struck me in the face with force."

¶ 9 Defense counsel then read to Officer Gillespie his testimony from the preliminary hearing on May 24, 2013, in which he testified that defendant struck him in the face with his left arm.

¶ 10 Ray Riperton testified next, stating that he had never seen defendant before the day in question. On that day, he was going to 6634 South Honore to bring his two dogs to visit a puppy that he had given to defendant's brother. The dogs were a mix of a German Shepherd and a Black Labrador. Riperton testified that he trains dogs. On the date in question, he had a steak

knife in his pocket because he had recently taken to carrying one around at all times to protect himself.

¶ 11 Riperton testified that when he approached the house, defendant directed a pit bull to come out of his house. Riperton testified that he was scared because the dog was muscular and that his dogs were female and 60 pounds each. Riperton pulled his knife "half way out" but then the pit bull started wagging his tail and sniffing Riperton's dogs. Riperton testified that he pretended to call 9-1-1. Thereafter, defendant and his mother fought about something, and then defendant went inside. Riperton testified that he remained at the house training a dog for about 30 minutes, but when he went to leave, he saw defendant waiting for him down the street. When defendant approached, Riperton called 9-1-1. Riperton testified that when the police officers attempted to put defendant into custody, defendant stated, "I can't go back to jail," and was "swinging and stuff," and "flailing." The State then rested.

¶ 12 Defendant first called his mother to testify. She testified that she lives at 6634 South Honore Street, and that defendant and her other children live with her. On the date in question, she heard an altercation outside and went out onto the porch. Defendant's mother testified that Riperton had two dogs with him that were not on a leash. She testified that defendant and Riperton argued for a long time, and that Riperton threatened defendant. She testified that when police arrived, defendant jumped off the porch, but the police officers "snatched" defendant and began "kneeing him in his groin." Defendant's mother testified that she told defendant to relax because she was afraid he was going to get beat up. She testified that defendant's "arm hit the police because he was trying to still resist and talk, so that's when I told him to relax and then go ahead and cuff him."

¶ 13 Danielle Mailey testified next. She testified that on the day in question, she was at her godmother's home on the day in question, at 6632 South Honore Street. She knew Riperton previously because he was her neighbor. She was on the porch when she saw Riperton approach defendant's residence with two dogs, neither of them on leashes. Defendant and Riperton argued for "about an hour" before police arrived. Mailey testified that when the police approached, defendant was screaming, "Why am I going to jail? Why am I going to jail?" Defendant then jumped off the porch. Mailey testified that the police were "kneeing [defendant] and stuff." She never saw defendant punch the police officers, but he was "just trying to get away."

¶ 14 Defendant also called Chicago Police Detective David Garcia, who testified that on the date in question, he was assigned to investigate what occurred between Officer Gillespie and defendant. He spoke with Officer Gillespie, Officer Sweis, Ray Riperton, defendant, and defendant's mother, and then created a general progress report for each of his interviews except Riperton's, which was included in a supplemental report. Detective Garcia testified that Officer Gillespie told him that defendant began to flail his arms and his closed hands when they tried to arrest him, and that while doing so, defendant struck Officer Gillespie in the face with a fist. Officers Gillespie and Sweis reported that they used their fists and knees to bring defendant under control.

¶ 15 The jury found defendant guilty of aggravated battery and resisting or obstructing a peace officer, proximately causing injury.

¶ 16 At the conclusion of the sentencing hearing, the trial court sentenced defendant to 10 years in prison for aggravated battery and 3 years for resisting arrest, the sentences to run concurrently. Defendant now appeals.

¶ 17 ANALYSIS

¶ 18 On appeal, defendant argues that: (1) the State failed to prove him guilty of aggravated battery of a police officer, (2) the trial court denied him his due process right to present a defense, (3) his convictions should be reversed where the trial court refused to instruct the jury on self-defense, (4) his conviction for resisting a peace officer should be reversed where the trial court refused to instruct the jury on the lesser-included offense of misdemeanor resisting, (5) he is entitled to a new trial because the trial court erred by overruling his objection to a witness's testimony, (6) the trial court erred in requiring defendant to decide whether to testify before all of the defense witnesses had testified, (7) his sentence was excessive, and (8) the trial court's bias against him denied him his right to a fair trial.

¶ 19 Sufficiency of the Evidence

¶ 20 Defendant's first argument on appeal is that the State failed to prove him guilty of aggravated battery of a peace officer beyond a reasonable doubt. The due process clause of the fourteenth amendment to the United States Constitution requires that a person may not be convicted in state court "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). When a court reviews a conviction to determine whether the constitutional right recognized in *Winship* was violated, it must ask "whether the record evidence could reasonably support a finding of guilty beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318 (1979). In other words, the question is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Id.* at 319. Illinois has adopted the *Jackson* formulation of the standard of review for claims that the evidence was insufficient to sustain a conviction. *People v. Collins*, 106 Ill. 2d 237, 261 (1985).

¶ 21 Where the finding of guilty beyond a reasonable doubt depends on eyewitness testimony, a reviewing court must decide whether, in light of the record, a fact finder could reasonably accept the testimony as true beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 279 (2004). In conducting this inquiry, the reviewing court must carefully examine the record evidence while bearing in mind that it was the fact finder who saw and heard the witnesses. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). Testimony may be found insufficient under the *Jackson* standard, but only where the record evidence "compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *Cunningham*, 212 Ill. 2d at 280. However, the fact that a judge or jury did accept testimony does not guarantee it was reasonable to do so, so we "reaffirm that the fact finder's decision to accept testimony is entitled to great deference but is not conclusive and does not bind the reviewing court." *Id*. The reviewing court must view the evidence "in the light most favorable to the prosecution," which means we must allow all reasonable inferences from the record in favor of the prosecution. *Jackson*, 443 U.S. at 310.

¶ 22 The essential elements of aggravated battery of a peace officer are contained in the descriptions of the offenses of both battery and aggravated battery. *People v. Phillips*, 392 Ill. App. 3d 243, 257-58 (2009). "A person commits battery if he or she knowingly without legal justification by any means (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual." 720 ILCS 5/12-3(a) (West 2012). That is, the State has to prove defendant's conduct was knowing or intentional. *People v. Lattimore*, 2011 IL App (1st) 093238, ¶ 42. The State also has to prove that defendant, in committing a battery, knew that Officer Gillespie was a peace officer performing his official duties. 720 ILCS 5/12-3.05(d)(4)(i) (West 2012).

¶ 23 Here, there is no dispute that defendant knew Officer Gillespie was a peace officer performing his official duties. Defendant claims, however, that the State failed to prove that he intentionally or knowingly struck Officer Gillespie. Defendant contends that the evidence shows that he unintentionally made contact with Officer Gillespie, and thus the "intentionally or knowingly" portion of the crime was not proven.

¶ 24 Statutory law defines the terms at issue here: intentionally, knowingly, and recklessly. A person "acts intentionally" if the "conscious objective or purpose is to accomplish [the] result." 720 ILCS 5/4-4 (West 2012). A person "acts knowingly" if "he is consciously aware that his conduct is of such a nature" that it is "practically certain" to cause the result proscribed by the offense. 720 ILCS 5/4-5(a), (b) (West 2012). In contrast, a person "acts recklessly" if "he consciously disregards a substantial and unjustifiable risk that * * * a result will follow." 720 ILCS 5/4-6 (West 2012). Recklessness is a "less culpable mental state" than knowledge, and evidence of recklessness is insufficient to prove that a person acted knowingly. *People v. Spears*, 112 Ill. 2d 396, 408 (1986).

¶ 25 Whether a person acted intentionally or knowingly with respect to bodily harm resulting from one's actions is, due to its very nature, often proved by circumstantial evidence, rather than by direct proof. *People v. Barnes*, 364 Ill. App. 3d 888, 896 (2006). Intent may be inferred from (1) the defendant's conduct surrounding the act and (2) the act itself. *People v. Begay*, 377 Ill. App. 3d 417, 421-22 (2007) (intent could be inferred from the defendant's conduct immediately prior to the battery). It is not necessary that a defendant intended the particular injury or consequence that resulted from his conduct. If a defendant "in the commission of a wrongful act commits another wrong not intended, or where in the execution of an intent to do wrong an unintended act resulting in a wrong ensues as a natural and probable consequence," a defendant

"acting with a wrongful intent is responsible for the unintended wrongdoing." *People v. Isunza*, 396 Ill. App. 3d 127, 132 (2009).

¶ 26 In the case at bar, we cannot say that the jury erred in finding that defendant acted knowingly beyond a reasonable doubt. Accordingly to several eyewitnesses, defendant attempted to get away from the officers and resisted arrest by struggling. Officer Gillespie testified that defendant "punched me in the face." Detective Garcia testified that Officer Gillespie told him that defendant flailed his arms and his closed hands when the police officers tried to arrest him and that while doing so, struck Officer Gillespie in the face with a closed fist. Pictures were entered into evidence that showed a cut inside Officer Gillespie's mouth and abrasions/bruising on his arm. A rational trier of fact could have found that, by resisting arrest by flailing his arms, defendant increased the likelihood that a police officer would be injured so that it became practically certain someone would be injured. See *Lattimore*, 2011 IL App (1st) 093238, ¶ 46.

¶ 27 We find this case to be similar to *People v. Rickman*, 73 Ill. App. 3d 755 (1979), in which the defendant was convicted of two counts of aggravated battery. In *Rickman*, a retail store security officer confronted the defendant believing he had taken an item of clothing without paying for it. *Rickman*, 73 Ill. App. 3d at 757. The defendant returned the clothing item and the security officer grabbed him. *Id*. The defendant escaped and fled, but then stopped running after the officer told him to stop. *Id*. The defendant then struggled with the security officer to resist his attempts to place the defendant in handcuffs. *Id*. Another security officer joined them and handcuffed one of the defendant's wrists. *Id*. During the struggle to handcuff the defendant's other wrist, the defendant fell on top of one of the security officers, fracturing his ankle. *Id*. The

defendant then stood up and continued to struggle with the other security officer by "shoving, hitting, and kicking" him. *Id*. at 758.

¶ 28 On appeal, the defendant argued that the trial court erred in finding that he was guilty beyond a reasonable doubt of knowingly causing great bodily harm to the officers, since he "was attempting to escape, not harm" the security officer. *Id*. at 759. This court affirmed both counts of battery because, "the State need only show that [defendant] knowingly scuffled with [the officer] and that [the officer] received great bodily harm as a result of the scuffle." *Id*. at 760. "That the defendant did not intent to break [the officer's] ankle is immaterial; he did intend to scuffle with [the officer] and he must accept responsibility for the result of the scuffle." *Id*. This court further held that "[a]nyone who engages in a scuffle must be deemed to be aware that someone may be injured as a result." *Id*.

¶ 29 In this case, defendant attempted to escape and then struggled with police officers who tried to place him under arrest. Defendant knowingly struggled with the police officers and therefore must accept responsibility for the result of the scuffle. *Id*. It was practically certain that someone would be hurt during defendant's repeated struggles to resist arrest. Therefore, reviewing the evidence in the light most favorable to the prosecution, we find that the jury could have rationally found that defendant acted knowingly beyond a reasonable doubt.

¶ 30 Due Process Right to Present a Defense

¶ 31 Defendant's next argument is that he was denied his due process right to present a defense when the trial court refused to allow defendant to demonstrate that Officer Gillespie had a reason to lie because he was facing the possibility of being disciplined for using excessive force. The State responds that there is absolutely no evidence suggesting an alleged motive to lie, as there

was no evidence of excessive force or any disciplinary proceedings arising from this case. We agree with the State.

¶ 32 During opening statements, defense counsel attempted to argue that Officer Gillespie had a motive to lie. The State objected and the trial court sustained the objection and told the jury to disregard the argument. The trial court explained that unless there was evidence of a complaint against the officer, the defense would not be allowed to go into motive to lie or bias based on the possibility of a misconduct investigation. Later, defendant asked to recall Officer Gillespie to allow the defense to address Officer Gillespie's bias in closing arguments. The trial court found that defense counsel would not be able to go into the possible disciplinary explanations for the use of excessive force because it was "speculative."

¶ 33 The next day, the trial court stated that it wanted to clarify its ruling:

> "There should be no argument about potential or possible bias or motive to testify falsely regarding Officer Gillespie. There's no evidence whatsoever that there's any pending civil suit. That might not even matter even if there was. But there's no disciplinary proceeding and there's been no evidence of that at all. I find any argument regarding that would be speculative and improper, so don't go there."

¶ 34 During closing arguments, defense counsel attempted to talk about the force Officer Gillespie used by stating that he kneed defendant for three minutes, which is longer than a round of boxing. The State objected and the court sustained the objection. Defense counsel then stated:

> "The real work of what that officer did and the problem with his story, why you can't trust him, why he couldn't tell the full truth and nothing but the truth was

> that he showed up, talked to one person, got no other story, and eventually had to use a lot of force. And he did not want to come here * * *."

¶ 35 The State objected and the trial court told the jury to disregard defense counsel's argument. Defense counsel continued:

> "[Defendant] was on his porch when the officers arrived. He had just been threatened by a man with a knife, saying I'll cut the life out of you. That man wouldn't leave in front of his porch, and that man had two big dogs. When the officers arrived, they talked to one man and nobody else, and then tell him, I'm placing you under arrest. No explanation, no opportunity to explain, no opportunity to explain, no opportunity to say please ask somebody else. One's feeling at that point is shock."

¶ 36 The State again objected and the trial court sustained the objection stating, "don't go there." Defense counsel continued, arguing, "It would make – the reaction that was given at that point was jumping off a porch. We're coming to arrest you, you didn't get to explain, didn't get to ask anybody else * * *." The State objected and the trial court sustained the objection.

¶ 37 Defendant contends that the trial court's ruling was incorrect, and that evidence of a specific investigation or civil suit was not necessary here. Defendant argues that he wanted to call Officer Gillespie to testify that he could be disciplined by the police department if he was found to have used excessive force, and that such testimony, combined with the evidence that Officer Gillespie punched and kneed defendant for three minutes, and defendant's mother's testimony that the officers started kneeing defendant forcefully after he landed in the yard, gave rise to the inference that Officer Gillespie could be disciplined for use of excessive force.

¶ 38 The partiality or bias of a witness is always relevant in discrediting a witness and affecting the weight of his testimony. *Davis v. Alaska*, 415 U.S. 308, 314 (1974). The trial court should give the widest latitude to the defense on cross-examination when trying to establish a witness' bias or motive. *People v. Wilkerson*, 87 Ill. 2d 151, 156 (1981). However, a trial court may exercise its discretion to preclude repetitive or unduly harassing interrogation and confine the extent of cross-examination to a proper subject matter. *Id*. "To be admissible, evidence showing bias must be direct and positive, not remote or uncertain." *People v. Davis*, 193 Ill. App. 3d 1001, 1004 (1990). A trial court's decision will be disturbed on review only upon a finding of a clear abuse of discretion resulting in manifest prejudice. *Id*. at 1004-05.

¶ 39 Here, the trial court did not abuse its discretion in restricting defense counsel's cross examination of Officer Gillespie. Defense counsel failed to demonstrate to the court how legal police action and general police protocol demonstrates bias or motive on the part of Officer Gillespie. See *People v. Rivera*, 307 Ill. App. 3d 821, 833 (1999) (defense counsel failed to demonstrate how officer would have been biased against defendant as a result of police search; this presumptively legal police action did not demonstrate bias or motive). Defendant does not cite to any similar cases in which evidence of police protocol was admissible to show bias or motive to testify falsely on the part of an officer. In general, evidence that police officers *can* be reprimanded for using excessive force is remote and uncertain. If, however, there was actual evidence that a complaint had been filed against Officer Gillespie for using excessive force in this case, or that he was under investigation for using excessive force in this case, such evidence could be relevant. But the mere fact that police officers can be subject to an excessive force investigation does not amount to evidence of bias or a motive to testify falsely, and thus we are unwilling to find that the trial court abused its discretion in denying such evidence to be

introduced at trial. See *People v. Coleman*, 206 Ill. 2d 261, 271-73 (2002) (refusal to allow defendant to impeach officer with two civil settlements obtained against him was not an abuse of discretion where evidence was irrelevant as they did not provide an inference that the officer had a motive to testify falsely or was biased).

¶ 40 Jury Instruction – Self-Defense

¶ 41 Defendant's next argument is that his convictions for resisting a peace officer and aggravated battery to a peace officer should be reversed where the trial court refused to instruct the jury on self-defense principles. The State responds that there was no foundation for such an instruction.

¶ 42 A defendant is entitled to a jury instruction on his theory of the case if there is some foundation for the instruction in the evidence. *People v. Jones*, 175 Ill. 2d 126, 131-32 (1997). Only a slight amount of evidence is necessary to justify giving an instruction. *People v. Robinson*, 92 Ill. App. 3d 972, 974 (1981). An instruction on self-defense is required in a resisting arrest case when the defendant has presented some evidence of excessive force on the part of the arresting officer. *People v. Williams*, 267 Ill. App. 3d 82, 88 (1994).

¶ 43 This case is similar to *People v. Haynes*, 408 Ill. App. 3d 684 (2011). In *Haynes*, the defendant did not submit peacefully to the officers to be handcuffed. She refused to follow the officers' orders and it was only after the defendant failed to cooperate with the officers by keeping her hands clenched in front of her that the officers resorted to using force. *Haynes*, 408 Ill. App. 3d at 691. The court found that the evidence in the case did not support the giving of a self-defense instruction because a self-defense instruction is inappropriate where "defendant resisted arrest and then officers used force to effectuate the arrest." *Id*.

¶ 44 Similarly, in *People v. Wicks*, 355 Ill. App. 3d 760 (2005), the defendant argued that the trial court erred when it refused the defendant's request for a self-defense instruction in a resisting arrest case. The *Wicks* court affirmed the decision of the trial court, finding that the evidence adduced at trial showed that the defendant refused from the outset to cooperate with police. The police officers' efforts were designed to get the defendant's hands out of his pockets, and as such, the police officers' use of force was justified and not excessive. Consequently, the trial court did not err when it refused to give a self-defense instruction. *Id.* at 764.

¶ 45 Here, defendant did not submit peacefully to the officers either. He leaped off the porch when Officer Gillespie tried to arrest him, and then flailed or punched to further resist arrest. There was simply no evidence of excessive force presented, and therefore we find that the trial court did not err in refusing to give the jury an instruction on self-defense.

¶ 46 Jury Instruction – Misdemeanor Resisting Arrest

¶ 47 Defendant's next argument on appeal is that his conviction for resisting a peace officer should be reversed and remanded for a new trial where the trial court refused to instruct the jury on the lesser-included offense of misdemeanor resisting arrest. The Class 4 felony offense of resisting a peace officer requires that defendant knowingly resisted or obstructed the performance by one known to the person to be a peace officer, and was the proximate cause of an injury. 720 ILCS 5/31-1(a-7) (West 2012). Defense counsel argued at trial that the jury could find defendant guilty of misdemeanor resisting arrest, which is committed when a person knowingly resists or obstructs the performance by one known to the person to be a peace officer. 720 ILCS 5/31-1(a) (West 2012) (does not include injury and proximate cause). The State maintains that the jury could not have rationally convicted defendant of misdemeanor resisting

arrest and acquitted him of felony resisting arrest, and therefore the trial court properly refused the lesser-included offense instruction.

¶ 48 A defendant generally may not be convicted of an offense for which he has not been charged. However, in an appropriate case, the defendant is entitled to have the jury instructed on a less serious offense that is included in the charged offense. *People v. Ceja*, 204 Ill. 2d 332, 359 (2003). If a jury believes that a defendant is guilty of something, but uncertain of whether the charged offense has been proved, the jury might convict the defendant of the lesser offense rather than convict or acquit the defendant of the greater offense. *Id*. at 359-60. However, "[a] defendant is entitled to a lesser-included offense instruction only if an examination of the evidence reveals that it would permit a jury to rationally find the defendant guilty of the lesser offense yet acquit the defendant of the greater offense." *People v. Hamilton*, 179 Ill. 2d 319, 324 (1997). In addition, where the evidence shows that a defendant is either guilty of the more severe offense or not guilty of any offense, an instruction on the lesser-included offense is unnecessary and properly refused. *People v. Austin*, 216 Ill. App. 3d 913, 917 (1991).

¶ 49 In the instant case, the trial court properly refused to instruct the jury on the lesser-included offense of misdemeanor resisting arrest. Based on the evidence, the jury could not have rationally convicted defendant of misdemeanor resisting arrest and acquitted him on felony resisting arrest. The evidence showed that Officer Gillespie was injured – he had both a cut in his mouth and bruising/abrasions on his arm. Defense counsel claimed that the jury could believe that the officer received his injuries "in some other way at some other time," or caused by a different person. The trial court stated that for defense counsel to say "[Officer Gillespie] might have showed up with an injury on his mouth is incredibly disingenuous," and denied defense counsel's request for the lesser-included offense. We agree. There was simply no

evidence presented that Officer Gillespie's injuries were inflicted before the altercation with defendant. The evidence presented showed that defendant purposely resisted arrest and that an altercation ensued, resulting in injuries to Officer Gillespie. We find that the trial court properly denied defense counsel's request for a lesser-included offense instruction.

¶ 50 Ray Riperton's Testimony

¶ 51 Defendant's next argument is that the trial court erred when it overruled defense counsel's objection to Ray Riperton's testimony that defendant said, "I can't go back to jail," and that defendant was waiting for him down the street when he left. Defendant argues that such testimony informed the jury that defendant had been previously incarcerated, and therefore constituted other crimes evidence. The State responds that the testimony in question did not amount to other crimes evidence, and that even if it was error to allow the testimony, it was not reversible error because defendant was not prejudiced or denied a fair trial as a result.

¶ 52 On direct examination, the prosecutor asked Riperton about what happened with the police officers attempted to arrest defendant. The following colloquy took place between the prosecutor and Riperton:

"[Q]: [The officers] kept politely asking – what was that?

[A]: The defendant to put his hands behind his back.

[Q]: Did the defendant do that?

[A]: He said, Hell, no. He said, I can't go back to jail.

[Q]: What happened next?"

Defense counsel objected, but the trial court overruled the objection.

¶ 53 In general, evidence of other crimes is not admissible if it is relevant merely to establish defendant's propensity to commit crimes. *People v. Nieves*, 193 Ill. 2d 513, 529 (2000).

Evidence that suggest or implies that the defendant has engaged in prior criminal activity should not be admitted unless relevant. *Id*.

¶ 54 The State maintains that Riperton's testimony regarding defendant's statement and regarding defendant waiting for Riperton down the block, was not purposely elicited by the prosecutor to show other crimes evidence, but rather was relevant in explaining the circumstances of defendant's arrest and what defendant did when officers attempted to arrest him. The trial court agreed when it ruled that the evidence in question went to the circumstances of the arrest. We agree as well. Riperton's testimony was not offered to show defendant's propensity to commit crimes, but rather his motive for fleeing the officers and resisting arrest. Accordingly, we find that the trial court did not commit reversible error in letting Riperton's testimony into evidence. See *People v. Pikes*, 2013 IL 115171, ¶ 14 (other crimes evidence properly admitted to prove a matter other than propensity that was relevant including motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident).

¶ 55 Right to Remain Silent

¶ 56 Defendant next argues that the trial court's requirement that he decide whether he was going to testify before all the defense witnesses testified denied him of his right to remain silent and due process. The State responds, and defendant does not deny, that defendant failed to raise this issue at trial and has therefore forfeited it on appeal. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (both a contemporaneous objection and a written posttrial motion are required to preserve an issue for review). Defendant nevertheless urges us to review the issue pursuant to the plain error doctrine. The plain error doctrine allows a reviewing court to address a forfeited claim in two circumstances: "(1) where 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 and (2) where 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." *People v. Belknap*, 2014 IL 117094, ¶ 48. "In applying the plain error doctrine, it is first appropriate to determine whether error occurred, because absent reversible error, there can be no plain error." *People v. Smith*, 2016 IL 119659, ¶ 39.

¶ 57 Accordingly, we must first address whether error occurred in this case. At trial, after defendant's mother and Mailey testified on behalf of defendant, defense counsel informed the court that the next witness, Detective Garcia, was not present. The prosecutor stated that Detective Garcia would be present the following morning at 9 a.m. The trail court noted that it was 3 p.m. and asked defense counsel whether defendant wanted to testify. When counsel responded that they had not talked to defendant yet, the following exchange occurred:

> "THE COURT: Do it now. We'll give you whatever time you need. If he's going to testify he's going to testify today not tomorrow morning. He doesn't have to testify but if he's going to, he's going to do it today.
>
> DEFENSE COUNSEL: Just for the record I did ask the State to have the detective come –
>
> THE COURT: So be it. So be it. He's not here. He will be here tomorrow. It's for impeachment. It's obviously going to be for impeachment purposes, that's fine. I don't even care that he's not here. Talk to your client. We will take ten minutes. We'll decide if he is going to testify or not."

¶ 58 After a break in the proceedings, defense counsel informed the court that defendant chose not to testify. The trial court confirmed this with defendant. Defendant now contends, relying

on *Brooks v. Tennessee*, 406 U.S. 605 (1972), that the trial court's ruling forced him to prematurely decide whether to testify, denying him his right to remain silent and his right to due process. In *Brooks*, the Supreme Court considered the constitutionality of a Tennessee statute that required a criminal defendant who chose to testify to present his testimony first before other witnesses. The Supreme Court held that the statute "exacts a price for [the defendant's] silence by keeping him off the stand entirely unless he chooses to testify first." *Brooks*, 406 U.S. at 610. The Court found that the statute violated a defendant's constitutional right to remain silent as well as due process, and that a defendant and his attorney may not be restricted in determining whether, and when in the course of the defense, the defendant should testify. *Id*. at 610-13.

¶ 59 The State contends that *Brooks* is inapposite because here the trial court did not make defendant choose between testifying first or not testifying at all. Rather, defendant had already presented two of his three witnesses, and the third witness was unavailable. The State argues that there is no indication that defendant's reason for not testifying was because he did not want to testify before Detective Garcia, or that his decision not to testify was made as the result of the trial court's direction rather than independently.

¶ 60 The State cites to *People v. Boland*, 205 Ill. App. 3d 1009 (1990), as instructive on this issue. In *Boland*, the court found that the denial of defense counsel's request for a continuance for an alleged alibi witness to testify before the defendant testified was not plain error. The court acknowledged, relying on *Brooks*, that a criminal defendant cannot be forced to choose whether to testify before all of the other evidence has been presented, and that the denial of a criminal defendant's fifth amendment right is automatically reversible error unless the error is harmless beyond a reasonable doubt. *Boland*, 205 Ill. App. 3d at 1015. The court noted that the question is whether there is a reasonable possibility that the evidence complained of might have

contributed to the conviction. *Id*. The court ultimately found that defendant was not required to choose whether to testify, and therefore the trial court did not err in denying the defense a continuance. *Id*. See also *People v. Phillips*, 186 Ill. App. 3d 668, 676 (1989) (trial judge's requirement that defendant had to testify immediately, if he were to testify, although erroneous, was harmless error under the circumstances since there was no prejudice to the defendant as a result of this error).

¶ 61 In the case at bar, we find that the trial court's requirement that the defendant had to testify before Detective Garcia, if he were to testify, was erroneous. However, we note that while *Boland* and *Phillips* then addressed this exact error under the "harmless error" analysis, such an analysis is inappropriate when the defendant has not made a timely objection to the issue. See *People v. Nitz*, 219 Ill. 2d 400, 410 (2006) (a harmless-error analysis applies to a timely objection, while a plain-error analysis applies when a defendant has failed to object to an error). The difference, our supreme court noted, lies in the burden of proof: under a harmless-error analysis, the State must prove beyond a reasonable doubt that the result would have been the same absent the error, while under a plain error analysis, the defendant must persuade the court that the error was prejudicial.

¶ 62 Looking at this error pursuant to the plain error doctrine, we find that defendant has not persuaded us that it was prejudicial. Under the first prong of plain error, the defendant must establish that the evidence was so closely balanced that the alleged error alone would tip the scales of justice against him, *i.e*., that the verdict "may have resulted from the error and not the evidence" properly adduced at trial. *People v. Adams*, 2012 IL 111168, ¶ 22. Here, the evidence was simply not closely balanced. It showed that while Officer Gillespie attempted to place defendant under arrest, defendant jumped off the porch and engaged in a scuffle, which resulted

in defendant striking and causing injury to Officer Gillespie. Defendant has not shown that the verdict would have been different if the trial court had not told defendant that he had to testify before Officer Garcia.

¶ 63 Under the second prong of plain error review, "[p]rejudice to the defendant is presumed because of the importance of the right involved, '*regardless* of the strength of the evidence.' " (Emphasis in original.) *People v. Herron*, 215 Ill. 2d 167, 187 (3005) (quoting *People v. Blue*, 189 Ill. 2d 99, 138 (2000)). Our supreme court has equated the second prong of plain-error review with structural error, asserting that "automatic reversal is only required where an error is deemed 'structural', *i.e.*, a systematic error which serves to 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.' " *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009) (quoting *Herron*, 215 Ill. 2d at 186). Here, defendant has not presented any evidence that the trial court's requirement that he testify before Detective Garcia affected his right to a fair trial or challenged the integrity of the judicial process. See *People v. Averett*, 237 Ill. 2d 1, 13 (2010) (a trial court's policy of refusing to rule on motions *in limine* to bar prior convictions before the defendant made a decision on whether to testify was "serious," but "not comparable to the errors recognized by the Supreme Court as structural.") Because defendant has not met his burden of persuasion, we find that this error did not amount to plain error.

¶ 64 Excessive Sentence

¶ 65 Defendant's next argument on appeal is that his 10-year prison sentence is excessive. The State responds that the trial court properly considered all factors when determining defendant's sentence. Although the legislature has prescribed the permissible ranges of sentences, great discretion still resides in the trial judge in each case to fashion an appropriate sentence within the statutory limits. *People v. Wilson*, 143 Ill. 2d 236, 250 (1991). The Illinois

Constitution requires that penalties be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. Ill. Const. 1970, art. I, § 11. This constitutional mandate calls for the balancing of the retributive and rehabilitative purposes of punishment. *People v. Center*, 198 Ill. App. 3d 1025, 1033. This balancing process requires careful consideration of all factors in aggravation and mitigation, including the defendant's age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education, as well as the nature and circumstances of the crime and of defendant's conduct in the commission of it. *Id*. at 1033. The trial court is not required to articulate its consideration of mitigating factors nor is it required to make an express finding that a defendant lacked rehabilitative potential. *People v. Redmond*, 265 Ill. App. 3d 292, 307 (1994). The seriousness of the crime is the most important factor in determining an appropriate sentence, not the presence of mitigating factors. *Id*. A reviewing court gives great deference to the trial court's judgment regarding sentencing because the trial judge, having observed the defendant and proceedings, has a far better opportunity to consider these factors than the reviewing court, which must rely on the "cold" record. *People v. Streit*, 142 Ill. 2d 13, 18-19 (1991).

¶ 66 In considering the propriety of a sentence, the reviewing court must proceed with great caution and must not substitute its judgment for that of the trial court merely because it would have weighed the factors differently. *Id*. at 19. A sentence within statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *People v. Cabrera*, 116 Ill. 2d 474, 493-94 (1987).

¶ 67 Defendant was convicted of aggravated battery of a peace officer (720 ILCS 5/12-3.05(d)(4) (West 2012)), and resisting a peace officer (720 ILCS 5/31-1(a-7) (West 2012). Defendant had two prior felony convictions for possession of a stolen motor vehicle, which made him a Class X offender for sentencing purposes. Therefore, defendant's potential sentence range was 6 to 30 years. 730 ILCS 5/5-4.5-25 (West 2012). We cannot say that the trial court's imposition of a 10-year sentence in this case was excessive. The trial court weighed both the aggravating and mitigating factors and read aloud a letter by defendant which the trial court noted it "definitely" took into consideration. The trial court noted that the injuries to the officers were "minor" but that defendant was only 25 years old and already "has now three Class 2 convictions." The trial court also noted that defendant's record included a 2011 resisting arrest misdemeanor, "plus three more misdemeanors that I don't need to list here." The trial court stated that defendant did not seem to be changing his behavior. The trial court then stated that it was going to give defendant 12 years, but "[b]ecause of your letter, I'll give you ten years, day for day." While we also acknowledge that the injuries suffered by Officer Gillespie were minor, we simply cannot find that the trial court abused its discretion in sentencing defendant to 10 years in prison when the sentence was within the statutory range and the trial court considered all the mitigating factors presented. See *People v. Alexander*, 239 Ill. 2d 205, 214 (2010) (it is not our duty to reweigh the factors involved in the sentencing decision).

¶ 68 Trial Court Bias

¶ 69 Defendant's final contention on appeal is that the trial exceeded the bounds of judicial propriety, thereby denying him a fair trial. Defendant argues that the trial court demonstrated antagonism and hostility toward the defense throughout trial by making inappropriate and offensive remarks.

¶ 70 A trial judge "must not interject opinions or comments reflecting prejudice against or favor toward any party." *People v. Williams*, 209 Ill. App. 3d 709, 718 (1991). "Improper comments include those which reflect disbelief in the testimony of defense witnesses, confidence in the credibility of the prosecution witnesses or an assumption of defendant's guilt. In addition, a hostile attitude toward defense counsel or remarks that defense counsel has presented his case in an improper manner may also be prejudicial and erroneous." *Id*. A defendant must show that comments made by the trial judge were prejudicial and that he was harmed by the comments for them to constitute reversible error. *Id*. "Where it appears that the comments do not constitute a material factor in the conviction, or that prejudice to the defendant is not the probable result, the verdict will not be disturbed." *Id*. at 718-19. "[I]n each case an evaluation of the effect upon the jury of a trial court's interjections must be made in the light of the evidence, the context in which they were made and the circumstances surrounding the trial." (Internal quotation marks omitted.) *Id*. at 719.

¶ 71 As an initial matter, defendant forfeited this issue by failing to object and by failing to include the issue in a posttrial motion. *Enoch*, 122 Ill. 2d at 186. However, defendant urges us to review this issue pursuant to the plain error doctrine. As discussed above, defendant bears the burden of persuasion under each prong of the plain-error test. Defendant asserts that the alleged errors here constituted clear errors under both prongs.

¶ 72 Defendant first claims that the trial court refused to let defense counsel finish her offer of proof. At a sidebar, outside the presence of the jury, defense counsel argued that Riperton was the initial aggressor in his confrontation with defendant, and that she should be allowed to prove that. The trial court stated that an altercation between Riperton and defendant was irrelevant. The trial court stated, "This is not a case of self-defense between Mr. Riperton and defendant.

That's completely irrelevant. That's denied. Anything else?" After again attempting to finish her offer of proof, the trial court stated that she kept "bring[ing] up the same thing, so just stop talking." Then, in front of the jury, defense counsel asked Detective Garcia if Officer Gillespie had told him about Riperton's knife. The trial court interjected, "Sustained. Let's have a sidebar." Outside of the hearing of the jury, the trial court said, "Let's get something straight, this witness is for impeachment only. I have in my notes two comments that you asked * * *. There's two times where he said he doesn't recall saying something or he did or didn't say something to the detectives. Those are your questions. Get them over with and move on." When defense counsel stated that she disagreed, the trial court said, "You're entitled to that. I don't care." Defense counsel then asked Detective Garcia whether he was sure who suggested that the dogs fight. The State objected and the trial court said, in front of the jury, "Overruled, for whatever it's worth. Go ahead."

¶ 73 Additionally, defendant contends that when defense counsel requested instructions on self-defense, the trial court refused, and that during the argument regarding the lesser-included instruction, the trial court called defense counsel's arguments "incredibly disingenuous," and that the arguments had become "quite tiresome." Defendant also takes issue with a series of sustained objections and the trial court's instruction to defense counsel to "just stick to the facts and the law, please."

¶ 74 We have concerns about the trial court's comments towards defense counsel, especially his comment of "I don't care." Defendant is absolutely correct that a judge must be impartial and that because the trial judge has great influence over the jury, the judge must take care to avoid displaying any unnecessary display of antagonism toward a party. See *People v. Johnson*, 2012 IL App (1st) 091730, ¶ 76. Because this particular comment occurred outside the hearing

of the jury, we are not going to find that it rose to the level of plain error, however, we emphasize that this kind of language is totally inappropriate for a trial judge. In regards to the rest of the comments, we do not find that they constitute a clear or obvious error in the case at bar. The complained-of comments do not demonstrate judicial bias against defendant or his counsel, as it cannot be said that the comments constituted a material factor in defendant's conviction. See *People v. Johnson*, 2012 IL App (1st) 091730. Most of the comments made by the trial court were in response to defense counsel's repeated attempts to pursue an inappropriate line of questioning, or to argue something that had already been ruled on.

¶ 75 CONCLUSION

¶ 76 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 77 Affirmed.