2014 IL App (4th) 120920-U

NO. 4-12-0920

FILED
March 26, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Woodford County
KENNETH MEINDERS,	)	No. 11CF154
Defendant-Appellant.	)	
	)	Honorable
	)	John B. Huschen,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Harris and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err by refusing to allow the testimony of defendant's expert witness where defendant failed to show the relevancy of such testimony to his defense of self-defense.

¶ 2 The trial court did not err by refusing to give a jury instruction (1) stating a person is not criminally liable for an involuntary act, (2) defining the word "attempt," and (3) setting forth defendant's self-defense instruction.

¶ 3 In November 2011, a grand jury indicted defendant, Kenneth Meinders, with two counts of disarming a peace officer (720 ILCS 5/31-1a(b) (West 2010)), two counts of aggravated battery (720 ILCS 5/12-3.05(d)(4)(i) (West 2010) (text of section effective July 1, 2011)), one count of resisting a peace officer (720 ILCS 5/31-1(a), (a-7) (West 2010)), and two counts of domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2010) (text of section effective July 1, 2011)). At the State's request, the Woodford County circuit court dismissed one of the domestic-battery counts. After a July 2012 trial, a jury found defendant guilty of all of the charges, except for one

count of disarming a police officer and one count of aggravated battery. On August 20, 2012, defendant filed a posttrial motion. At a joint August 31, 2012, hearing, the court denied defendant's posttrial motion and sentenced him to 40 months' imprisonment for disarming a peace officer, 40 months' imprisonment for aggravated battery, 12 months' imprisonment for resisting a peace officer, and 360 days in jail for domestic battery, all to run concurrently.

¶ 4 Defendant appeals, asserting (1) the trial court denied him his right to present a defense by improperly limiting the testimony of his expert witness, Charles Drago; and (2) he was deprived of a fair trial by the court's refusal to instruct the jury (a) a voluntary act was required to establish guilt beyond a reasonable doubt, (b) on the definition of attempt, and (c) a person is justified in the use of force against a police officer when necessary to defend oneself against a police officer's use of excessive force. We affirm.

¶ 5 I. BACKGROUND

¶ 6 The seven grand jury indictments against defendant all related to his alleged actions on August 21, 2011, at the home of Jeremiah West in Lowpoint, Illinois. Counts I and II asserted defendant violated section 31-1a(b) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/31-1a(b) (West 2010)) by attempting to take a weapon from Officer Adam Ragon (count I) and Officer Nicholas Smith (count II). Counts III and IV alleged defendant committed the offense of aggravated battery against Officer Ragon (count III) and Deputy Rodney Douglas Fletcher (count IV). Count V contended defendant committed the offense of resisting a peace officer by resisting Officer Smith and, in doing so, broke Officer Smith's hand. Counts VI and VII alleged domestic battery against Laura Forney (count VI) and Charles Albertson (count VII). At the beginning of defendant's July 2012 jury trial, the trial court dismissed count VII on the State's motion.

¶ 7 At defendant's July 2012 trial, the State presented the testimony of (1) Forney; (2) Susan LeeAnn Grebner, West's neighbor; (3) Officer James Cunningham; (4) Jerod Grebner, Susan's husband and West's neighbor; (5) Illinois State Police Trooper Michael Conner; (6) Deputy Fletcher; (7) Officer Smith; (8) Dr. Timothy Schaefer, the emergency room physician who treated Officer Smith; and(9) Officer Ragon. Defendant testified on his own behalf and presented the testimony of the following: (1) Forney; (2) Drago, an expert witness on police practices; (3) Andrew Yedinak, a Woodford County sheriff's office employee; (4) Illinois State Police Trooper Matthew Vien; (5) West; (6) James Albertson, defendant's brother-in-law and father of Charles; (7) Deb Albertson, defendant's sister and mother of Charles; (8) Clint Kennell, who observed an earlier incident at which the police and defendant were both present; (9) Officer Cunningham; and (10) Dr. Anthony Horinek, the nephrologist that treated defendant. On rebuttal, the State presented the testimony of (1) Illinois State Police Sergeant Phillip Trompeter, (2) Susan Grebner, (3) Jerod Grebner, and (4) Deputy Marc Wright. The following is the evidence at defendant's trial relevant to the issues on appeal.

¶ 8 At around 6 a.m., on August 21, 2011, Susan Grebner saw defendant attack a woman in the backyard of West's home and called 9-1-1. Officers from several different police agencies responded to the call. While Officers Smith and Bahnfleth watched the front of West's home, Officer Cunningham, Officer Ragon, and Deputy Fletcher entered West's home through the back door. Officer Ragon located defendant sleeping on a couch in the living room and notified the other officers. Officer Cunningham and Deputy Fletcher then went to the living room and instructed West to remain in the kitchen.

¶ 9 Officer Cunningham testified Officer Ragon and Deputy Fletcher attempted to wake up defendant by shaking him on the shoulder "a little bit" and "a little tap, 'hey, wake up,

wake up.' " Defendant responded by making several wavelike motions with his hands and said, " 'leave me alone, I'm sleeping.' " Officer Ragon then said, " 'wake up, police.' " As soon as Officer Ragon said, " 'police,' " defendant "reared back" and kicked Officer Ragon in the upper thigh. Officer Ragon attempted to pull defendant off the couch by defendant's arm. Defendant got to his feet and started pushing Officer Ragon away and throwing punches at Officer Ragon. Officer Ragon told Deputy Fletcher to get his Taser out and fire the Taser. Deputy Fletcher tased defendant in the front upper torso, but the tasing did not seem to have an effect on defendant. Officer Cunningham then went to take control of defendant by tackling him but was dropped to the ground and incapacitated for a few seconds when Officer Cunningham made contact with the Taser wires. At that point, defendant was struggling with Officer Ragon and Deputy Fletcher. Defendant eventually ended up lying on the ground.

¶ 10 Officer Cunningham further testified that, when he could move again, he jumped on defendant's legs to keep defendant from kicking the other officers. Officer Cunningham could not see what the other officers were doing but could hear them telling defendant to put his hands behind his back. According to Officer Cunningham, defendant was constantly told to put his hands behind his back and stop resisting. During the struggle, Officer Smith kicked in the front door, and he and Officer Bahnfleth entered West's home. Officer Bahnfleth helped Officer Cunningham control defendant's legs, and Officer Smith went to assist Officer Ragon and Deputy Fletcher in getting defendant under control. Officer Cunningham stated defendant was fighting like a "caged animal."

¶ 11 At some point, Officer Cunningham heard Officer Ragon yell that defendant had his hand on Officer Ragon's gun. Officer Bahnfleth got a leg restraint, and after a struggle, Officers Cunningham and Bahnfleth were able to get it on defendant's legs. Officer Cunningham

also testified he "drive-stun" tased defendant two or three times but did not recall if that was before or after the leg restraint. The tasings seemed to have no effect on defendant, and defendant stated, " 'go ahead, tase me again, it doesn't hurt.' " Shortly after the leg restraint was in place, Officer Cunningham heard Officer Smith yell that defendant was going for his gun. Officer Cunningham saw Officer Smith's arm go up and down. Officer Ragon had been able to get one handcuff on defendant, and "it was all he could do to hold [defendant's] one arm and hold onto the handcuffs." At that point, defendant was on his stomach and holding his left arm beneath him. Eventually, Officer Smith was able to get defendant's left arm out. As soon as the officers got defendant handcuffed, defendant stopped fighting and went limp.

¶ 12 Deputy Fletcher testified he shook defendant's shoulder and defendant pushed his arm away and said, " 'go to bed.' " Deputy Fletcher observed that defendant's shoulder was very hot and sweaty. Deputy Fletcher shook defendant again and asked him to wake up. Defendant pushed Deputy Fletcher's arm away more aggressively and kicked at Officer Ragon. Officer Ragon said, " 'wake up Kenny, it's the police.' " Defendant then jumped off the couch and started throwing punches and kicking at Officer Ragon. Since he had an actively fighting person, Deputy Fletcher then advised Officer Ragon to stand back and deployed the Taser, which struck defendant in the upper left shoulder. Deputy Fletcher testified the tasing had no effect on defendant. He also stated Officer Smith's later tasing also had no effect on defendant, as defendant continued to hit and kick and said, " 'do it again, it doesn't hurt me.' "

¶ 13 Officer Smith testified that, when he entered West's home, defendant was sitting upright on the ground and Officer Ragon was trying to get defendant on the ground. He also saw defendant's right hand on Officer Ragon's gun and heard Officer Ragon calling out that defendant was trying to disarm him. Officer Smith charged defendant and was able to get defendant

back on the floor. Officer Ragon was able to take hold of defendant's left arm and was trying to get a cuff on it, and Officer Smith was trying to get his right arm. Officer Smith got a Taser and used it in the drive-stun mode on defendant several times. Defendant continued to fight Officer Smith with one hand and even tried to pull the Taser toward Officer Smith. Defendant was able to punch Officer Smith in the face and knock off his glasses. According to Officer Smith, defendant laughed at and taunted the officers. Defendant also tried to eye-gouge Officer Smith. After defendant "stunned" Officer Smith in the face, Officer Smith gained control of defendant's right hand and applied six to seven hammer-fist strikes to defendant's face. Defendant then bucked Officer Smith off of him, rolled onto his stomach, and hid his left arm underneath him. Officer Smith tased defendant three more times, and again the tasing had no effect on defendant, who continued to taunt the officers. Officer Smith then dug his thumbs into pressure points on the back of defendant's head. Defendant started screaming, and Officer Smith let go and grabbed defendant's left arm. Officer Ragon then handcuffed defendant, and defendant tried to head-butt the couch before going limp. When asked why he struck defendant, Officer Smith explained it was the next step in the use-of-force continuum since the tasings were not effective on defendant.

¶ 14 Officer Ragon testified that, when he said, " 'police, wake up,' " defendant looked at him and kicked him in the upper thigh. After that, defendant started throwing punches and kicks in every direction. During the struggle, defendant grabbed Officer Ragon's gun and was "pulling on it hard enough to lift [Officer Ragon] up." Officer Ragon yelled at defendant to let go of the gun and told the other officers defendant had grabbed his gun. Officer Ragon then grabbed defendant's hand and began to smack his wrists. Officer Smith pushed defendant down, which took defendant's hand off Officer Ragon's gun.

¶ 15 Defendant testified he did not wake up until the second week of September 2011 and had no recollection of the incident. James Albertson testified that, when he entered West's residence that morning, he saw defendant on his stomach and the police beating him. James saw the police kick defendant. According to James, the police were not saying anything and defendant was screaming. Deb Albertson testified she saw officers punching defendant and one officer "took three stomps to the back of [defendant's] head." According to Deb, when defendant was brought out to the ambulance, he did not appear to be breathing and was bloody. Yedinak testified the logs for two Tasers used during the struggle on August 21, 2011, showed one Taser had been discharged 19 times and the other 7 times.

¶ 16 Defendant also tried to present the expert testimony of Drago. After Drago had testified about his training and experience, he testified about reviewing documents related to the August 21, 2011, incident involving defendant. The State objected, arguing the evidence did not support a defense of self-defense as it showed defendant was the initial aggressor. Outside the presence of the jury, the trial court asked on what the expert would opine. Defense counsel provided the court with a document listing 26 different opinions. The court asked if defense counsel had any authority for an expert opining on whether the police acted properly or improperly during an incident, and defense counsel replied in the negative. After a brief recess, defense counsel stated he could not find any cases addressing expert testimony and police procedures. The court found "any opinion tendered by the expert which would state the police officers did something wrong here, such as woke the defendant up in an improper manner, doesn't constitute a defense and is, therefore, irrelevant to whether defendant committed the crimes charged." However, the court did allow the expert to testify about the use-of-force continuum, which was discussed by Officer Smith. When specifically questioned about an opinion on how the human body reacts

when being tased, the court found the expert was not qualified to testify on that because it was "basically a medical opinion." The court accepted the document with the expert opinions as an offer of proof of what the expert was intending to opine. Dargo testified about the use-of-force continuum and that national guidelines recommend that a Taser should not be used on someone for "longer than 15 seconds or 3 full cycles of the [T]aser."

¶ 17 During the jury-instruction conference, the State's instruction Nos. 16 and 17 set forth the elements of disarming a peace officer under section 31-1a(b) of the Criminal Code (720 ILCS 5/31-1a(b) (West 2010)) but did not define "attempt." Defendant objected, asserting the instructions should define "attempt" as an affirmative act and substantial step. The trial court gave the State's instruction Nos. 16 and 17 over defendant's objection. Moreover, defense counsel requested an instruction (defendant's instruction No. 1) based on *People v. Martino*, 2012 IL App (2d) 101244, 970 N.E.2d 1236, that indicated a person was not criminally liable for an involuntary act. The trial court refused the instruction. Defendant's instruction Nos. 2 and 3 both addressed the defense of self-defense in response to excessive force. At first, the court refused both of them but later reconsidered and allowed defendant's instruction No. 2.

¶ 18 At the conclusion of defendant's trial, the jury found defendant guilty of counts I (disarming of Officer Ragon), III (aggravated battery of Officer Ragon), V (resisting a peace officer), and VI (domestic battery of Forney), and not guilty of counts II (disarming of Officer Smith) and IV (aggravated battery of Deputy Fletcher). In August 2012, defendant filed a posttrial motion, asserting, *inter alia*, the trial court erred by (1) barring Drago's testimony and (2) refusing to give defendant's proposed jury instruction stating a person is not criminally liable for an involuntary act. At a joint August 31, 2012, hearing, the court denied defendant's posttrial motion and sentenced him to concurrent terms of 40 months' imprisonment for disarming a peace

officer, 40 months' imprisonment for aggravated battery, 12 months' imprisonment for resisting a peace officer, and 360 days in jail for domestic battery.

¶ 19 On September 27, 2012, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Mar. 20, 2009). Thus, this court has jurisdiction under Illinois Supreme Court Rule 603 (eff. Oct. 1, 2010).

¶ 20 II. ANALYSIS

¶ 21 A. Defendant's Expert Witness

¶ 22 Defendant first asserts the trial court denied him his constitutional right to present a defense by improperly limiting Drago's testimony. The State asserts the court did not err.

> "Generally, expert witnesses will be permitted to testify if their experience and qualifications afford them knowledge which is not common to lay persons and where such testimony will aid the trier of fact in reaching its conclusion. [Citation.] A trial court is given broad discretion when determining the admissibility of expert testimony, and when considering the reliability of the expert testimony, the court should balance its probative value against its prejudicial effect. [Citation.] The court should also consider the necessity and relevance of the expert testimony in light of the facts of the case before admitting it. [Citation.] [A] trial court's decision to allow or exclude *** expert testimony must be made on a case-by-case basis [citation] and such decision will not be reversed absent an abuse of discretion [citation]." (Internal quotation marks

omitted.) *People v. Aguilar*, 396 Ill. App. 3d 43, 51, 918 N.E.2d 1124, 1132 (2009).

¶ 23 Defendant begins his argument by noting the trial court gave his jury instruction No. 2, which, in the version given by the trial court, stated the following: "A person is not authorized to use force to resist an arrest which he knows is made by a peace officer even if he believes that the arrest is unlawful and the arrest is unlawful. This rule, however, does not apply to a situation in which an officer uses excessive force *prior* to a defendant's use of force to resist an arrest." (Emphasis added.) The use of the "prior" language in the jury instruction is consistent with *People v. Haynes*, 408 Ill. App. 3d 684, 691, 946 N.E.2d 491, 498 (2011), which held self-defense only applies when a "defendant resists arrest after the officers resort to using excessive force[,]" and not where the defendant resisted arrest and then the officers used force to effectuate the arrest.

¶ 24 In his opening and reply briefs, defendant left out the word "prior" from his quotation of the aforementioned jury instruction and argued his defense was the police officers attempting to arrest him were using excessive force so he was justified in resisting their improper actions. Excessive force and whether the police officers' use of Tasers constituted excessive force are only relevant issues if the police used force that arguably could have been excessive before defendant resisted arrest. Yet, defendant does not address that issue as it is not the same matter as who initiated the encounter. Moreover, defendant's argument basically equates not following standard police practices to using excessive force without sufficient analysis. While that may be true in some instances, we find it was incumbent on defendant to show that connection. Accordingly, we find defendant failed to demonstrate Drago's testimony was relevant to defendant's defense.

¶ 25 Moreover, on appeal, defendant argues the prosecutor's questioning of every police officer about his training and experience "opened the door" to Drago's opinions because the implication from the questioning was the officers' training was sufficient to qualify the officers to act properly when making an arrest. In other words, defendant argues Drago's testimony was admissible under the doctrine of "curative admissibility," which has been explained as, "[i]f A opens up an issue and B will be prejudiced unless B can introduce contradictory or explanatory evidence, then B will be permitted to introduce such evidence, even though it might otherwise be improper." *People v. Manning*, 182 Ill. 2d 193, 216, 695 N.E.2d 423, 433 (1998). However, the doctrine does not allow "a party to introduce inadmissible evidence merely because the opponent brought out some evidence on the same subject." *Manning*, 182 Ill. 2d at 216, 695 N.E.2d at 433. It "is limited in scope and design to those situations where its invocation is deemed necessary to eradicate *undue* prejudicial inferences which might otherwise ensue from the introduction of the original evidence." (Emphasis in original; internal quotation marks omitted.) *Manning*, 182 Ill. 2d at 217, 695 N.E.2d at 434 (quoting *People v. Chambers*, 179 Ill. App. 3d 565, 581, 534 N.E.2d 554, 563 (1989)). In this case, we do not find any undue prejudice, as it is common knowledge police officers go through training before becoming officers, and the testimony cited by defendant in his brief was just general background testimony about the officers' training and experience. Accordingly, we find Drago's testimony was not admissible under the curative-admissibility doctrine.

¶ 26 B. Jury Instructions

¶ 27 Defendant next raises three separate challenges to the trial court's handling of the jury instructions.

¶ 28 Jury instructions express "the legal rules applicable to the evidence presented at trial and thus guide the jury's deliberations toward a proper verdict." *People v. Mohr*, 228 Ill. 2d 53, 65, 885 N.E.2d 1019, 1025 (2008). The record must contain some evidence to justify an instruction, and the matters of which issues are raised by the evidence and whether an instruction should be given lie within the trial court's discretion. *Mohr*, 228 Ill. 2d at 65, 885 N.E.2d at 1025-26. Jury instructions that are not supported by either the evidence or the law should not be given. *Mohr*, 228 Ill. 2d at 65, 885 N.E.2d at 1026. A reviewing court determines "whether the instructions, considered together, fully and fairly announce the law applicable to the theories of the State and the defense." *Mohr*, 228 Ill. 2d at 65, 885 N.E.2d at 1026. Generally, the reviewing court applies the abuse-of-discretion standard of review. *Mohr*, 228 Ill. 2d at 66, 885 N.E.2d at 1026. " 'A trial court abuses its discretion if jury instructions are not clear enough to avoid misleading the jury ***.' " *Mohr*, 228 Ill. 2d at 66, 885 N.E.2d at 1026 (quoting *In re Timothy H.*, 301 Ill. App. 3d 1008, 1015, 704 N.E.2d 943, 948 (1998)). However, when the question is whether the jury instruction accurately conveyed the applicable law, the issue presents a question of law, which we review *de novo*. *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 13, 951 N.E.2d 1131. Moreover, we also review *de novo* the question of whether the record includes sufficient evidence to support the giving of a jury instruction. *People v. Washington*, 2012 IL 110283, ¶ 19, 962 N.E.2d 902.

¶ 29 1. *Voluntary Act*

¶ 30 Defendant first asserts the trial court erred by refusing to give defendant's jury instruction No. 1, which stated the following: "Every offense is comprised of both a voluntary act and a mental state. A defendant is not criminally liable for an involuntary act. Involuntary acts are those that occur as bodily movements which are not controlled by the conscious mind."

Defense counsel based the instruction on the Second District's discussion in *Martino*, 2012 IL App (2d) 101244, ¶ 13, 970 N.E.2d 1236, about (1) the fact a criminal conviction must be based on a voluntary act and not an involuntary one and (2) what was an involuntary act. There, the reviewing court reversed the defendant's aggravated-domestic-battery conviction, finding the State had failed to prove the defendant's act of falling on the victim and breaking her arm was voluntary where the defendant had been tased, rendering him incapable of controlling his muscles. *Martino*, 2012 IL App (2d) 101244, ¶ 15, 970 N.E.2d 1236. The State argues *Martino* is distinguishable, and the court's refusal to give the instruction was proper.

¶ 31 A defendant is entitled to an instruction on his theory of the case if the evidence provides some foundation for the instruction. *People v. Jones*, 175 Ill. 2d 126, 131-32, 676 N.E.2d 646, 649 (1997). "Very slight evidence upon a given theory of a case will justify the giving of an instruction." *Jones*, 175 Ill. 2d at 132, 676 N.E.2d at 649. However, our supreme court has stated "we must be wary so as not to permit a defendant to demand unlimited instructions based upon the merest factual reference or witness' comment." *People v. Everette*, 141 Ill. 2d 147, 157, 565 N.E.2d 1295, 1299 (1990).

¶ 32 In support of defendant's argument he was entitled to his instruction No. 1 based on him being a sleep when the incident commenced, defendant cites the testimony of Officer Cunningham. Officer Cunningham testified Deputy Fletcher and Officer Ragon attempted to wake up defendant by shaking defendant "on the shoulder a little bit, a little tap, 'hey wake up, wake up.' " Defendant waved them off and said, " 'leave me alone, I'm sleeping.' " Officer Ragon then said " 'wake up, police.' " As soon as Officer Ragon said "police," defendant kicked Officer Ragon in the upper thigh. Officer Cunningham testified defendant "reared back" and kicked Officer Ragon. Officer Ragon then tried to pull defendant off the couch by the arm to

take control of defendant. Defendant got to his feet and started fighting. Defendant claims based on the aforementioned facts a jury could have found he kicked Officer Ragon and began fighting while he was still asleep. The State notes the other officers' testimony was consistent with Officer Cunningham's and Officer Ragon testified defendant looked at him before kicking him in the thigh. The facts defendant's eyes were open and he reared back before kicking indicate he was not sleeping when he kicked Officer Ragon and began fighting. Accordingly, we do not find any evidence in the record defendant was sleeping when he kicked Officer Ragon.

¶ 33 Defendant also argues the instruction should have been given because the police tased defendant at least 24 times and tasing causes one's muscles to lock. However, the officers that were present all testified the tasing had no effect on defendant. Moreover, defendant does not explain what alleged criminal act of his would have been involuntary based on the tasing. Accordingly, we find defendant has also not shown he was entitled to his instruction No. 1 based on tasing. Thus, we find the trial court did not err by refusing to give defendant's instruction No. 1.

¶ 34 2. *Definition of Attempt*

¶ 35 Defendant also asserts the trial court erred by giving an instruction on the offense of disarming a peace officer without the definition of attempt. The grand jury had charged defendant with two counts of the offense of disarming a peace officer under section 31-1a(b) of the Criminal Code (720 ILCS 5/31-1a(b) (West 2010)), which makes it unlawful for a person, without a peace officer's consent, to *attempt* to take a weapon from a person known to be a peace officer while the peace officer is engaged in his official duties. We note the jury only found defendant guilty of the count involving Officer Ragon. Defendant recognizes he did not include this issue in his posttrial motion and thus did not preserve it for review. See *People v. Enoch*,

122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988). However, he requests we ignore his forfeiture or review the matter under the plain-error doctrine (Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)). We will analyze defendant's argument in the context of the plain-error doctrine.

¶ 36 The plain-error doctrine permits a reviewing court to consider unpreserved error under the following two scenarios:

> "(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." *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1058 (2010).

Under both prongs, the defendant bears the burden of persuasion. *Sargent*, 239 Ill. 2d at 190, 940 N.E.2d at 1059. Here, defendant argues the failure to define attempt in this case meets the second prong of the plain-error test.

¶ 37 Even if the trial court should have included the definition of attempt as set forth in section 8-4(a) of the Criminal Code (720 ILCS 5/8-4(a) (West 2010)), defendant has failed to show plain error. Our supreme court has emphasized the omission of the definition of a term used to instruct the jury on an essential issue in the case is not necessarily plain error. *People v. Hopp*, 209 Ill. 2d 1, 10, 805 N.E.2d 1190, 1196 (2004). "[E]ven an incorrect instruction on an element of the offense is not necessarily reversible error." *Hopp*, 209 Ill. 2d at 10, 805 N.E.2d at 1196. "[A]n omitted jury instruction constitutes plain error only when the omission creates a se-

rious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial." *Hopp*, 209 Ill. 2d at 12, 805 N.E.2d at 1197. Moreover, the supreme court noted it had never found the omission of a definition of a term in a jury instruction to be plain error without considering the effect the omission had on defendant's trial. *Hopp*, 209 Ill. 2d at 10, 805 N.E.2d at 1196.

¶ 38 In both his opening brief and reply brief, defendant fails to explain how the lack of instruction on the statutory definition of attempt affected the fairness of his trial. He does not even discuss the facts surrounding his alleged attempted disarming of Officer Ragon. In attempting to show plain error, defendant only cites *People v. Delgado*, 376 Ill. App. 3d 307, 316, 876 N.E.2d 189, 198 (2007), and asserts the reviewing court found plain error for failing to give a jury instruction defining "sexual conduct" because the "error in the instruction went to a fundamental issue that prevented the jury from properly determining if the defendant was guilty of the crime charged." *Delgado*, 376 Ill. App. 3d at 316, 876 N.E.2d at 198. However, the reviewing court found a clear and obvious error based on the aforementioned finding, then went on to assess the facts of the case before determining the error rose to the level of plain error. See *Delgado*, 376 Ill. App. 3d at 316, 318-21, 876 N.E.2d at 198-202. Without any discussion of how the definition's omission related to the facts of defendant's case, defendant has failed to show plain error.

¶ 39 3. *Excessive Force*

¶ 40 Defendant last contends the trial court erred by not giving his instruction No. 3, which stated the following: "A person is justified in the use of force against a peace officer when and to the extent that he reasonably believes the peace officer has used excessive force in arresting the person and the person reasonably believes that such conduct is necessary to defend

himself against the peace officer's imminent use of excessive force." Defendant again acknowledges he has not preserved this issue for review because he failed to include the issue in his posttrial motion (see *Enoch*, 122 Ill. 2d at 186, 522 N.E.2d at 1130) and requests we ignore his forfeiture or review the matter under the plain-error doctrine (Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)). We again will review this matter in the context of the plain-error doctrine as set forth above.

¶ 41 Defendant argues his instruction No. 3 was his self-defense instruction. However, as stated earlier, "[a] self-defense instruction should only be given in a resisting arrest case when a defendant resists arrest *after* the officers resort to using excessive force." (Emphasis added.) *Haynes*, 408 Ill. App. 3d at 691, 946 N.E.2d at 498. A self-defense instruction is inappropriate when the defendant resisted arrest and then the officers used force to effectuate the arrest. *Haynes*, 408 Ill. App. 3d at 691, 946 N.E.2d at 498. Unlike defendant's instruction No. 2, defendant's instruction No. 3 does not indicate a person is justified to use force only when the police were the first to use force. Accordingly, defendant's instruction No. 3 is not an accurate statement of law, and the trial court's refusal was proper.

¶ 42 III. CONCLUSION

¶ 43 For the reasons stated, we affirm the Woodford County circuit court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 44 Affirmed.