

No. 1-10-3365

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit
)	Court of Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 09 CR 14620
)	
PEDRO SUAREZ,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Rochford concurred in the judgment.

ORDER

- ¶ 1 *Held:* The defendant's convictions for aggravated battery of a police officer are affirmed. The trial court did not commit reversible error in instructing the jury as to resisting arrest and escape, despite the fact that the defendant was not charged with those offenses, and the defendant failed to establish plain error based on a jury instruction that equated aggravated battery of a police officer with a forcible felony.
- ¶ 2 Following a jury trial, the defendant, Pedro Suarez, was convicted of two counts of aggravated battery of a police officer (720 ILCS 5/12-4(b)(18) (West 2008)). The trial court sentenced the defendant to serve 42 months' imprisonment. On appeal, the defendant challenges his

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convictions, arguing that the trial court erred by instructing the jury regarding resisting arrest and escape after the commission of a forcible felony. For the reasons that follow, we affirm the defendant's convictions and sentence.

¶ 3 The record reflects that the defendant was charged in a 10-count indictment with attempted first-degree murder, possession of a controlled substance, and eight counts of aggravated battery. Four of the aggravated-battery counts charged that the defendant engaged in conduct against Chicago police officer Joseph Foley, while he was acting in the performance of his official duties, that caused bodily harm or was of an insulting or provoking nature. The remaining four aggravated-battery counts charged similar conduct against Chicago police officer Richard Toolis.

¶ 4 At trial, Ladonna Phillips, a 31-year-old public health administrator, testified that, on the evening of July 15, 2009, she was driving east on Harrison Street when she stopped at a red light at the intersection of Harrison and Damen Avenue. Her car was the first vehicle stopped at the light, and she was able to see the street and traffic to the north and the intersection at Damen and Congress Avenues. Phillips stated that, as she waited for the light to change, she saw a marked Chicago police car pass her and pull in front of a burgundy SUV. Two police officers jumped out, walked up to the SUV, and repeatedly yelled at the driver, whom she identified in court as the defendant, to get out of the car and to put his hands up. Phillips testified that neither officer had his weapon drawn. She was unable to see the defendant, but he did not get out of the SUV.

¶ 5 Phillips further testified that the officers continued to yell at the defendant to put his hands up and get out of the car. Officer Toolis placed his hand on his holster, but did not draw his weapon. The defendant then "yank[ed]" his steering wheel to the left and swerved his vehicle, as if "he was

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trying to get away." Phillips stated that Toolis, who was standing at the front of the SUV, slammed his hand on the hood and tried to back up "to defend himself," as the defendant accelerated. Toolis then pulled his gun out of its holster and fired at the defendant. Phillips testified that Toolis did not fire his gun until after the defendant had turned his steering wheel to the left and hit the officer with his vehicle. Phillips stated that, though she heard a total of two or three gunshots, she saw Toolis fire his weapon only once. After the shooting began, she reclined the back of her seat to avoid the gunfire and heard a bullet strike her car. When she raised her seat up, she saw the defendant turn his car into the lane of oncoming traffic and speed away.

¶ 6 Officer Toolis testified that, sometime after 5 p.m. on July 15, 2009, he and his partner, Victor Rodriguez, were traveling east on Harrison Street in a marked police vehicle, when he heard a city-wide radio communication regarding a robbery of a jewelry store at 21 North Wabash Avenue. The message indicated that the perpetrator of the robbery was driving a late-model maroon Mercedes-Benz SUV and was traveling southbound on Damen Avenue. The message also included the license-plate number of the vehicle, but Toolis testified that he did not write the plate number down. Toolis responded to the call and activated his emergency lights and siren. He turned onto Damen and was traveling north when he observed an SUV matching the radioed description near the intersection of Congress and Damen Avenues. Though a subsequent radio message indicated that the SUV's license plate did not match that of the vehicle used in the robbery, Toolis testified that he did not hear that message over the sound of his squad car's siren.

¶ 7 Officer Toolis stated that he stopped his squad car in the middle of the street in order to block traffic. He then got out of his car and approached an SUV that was stopped for a red light. At

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approximately the same time, Officer Foley and his partner also responded to the scene in an unmarked police car. Toolis stated that he approached the SUV to investigate whether he was involved in the jewelry robbery. He did not draw his weapon, but approached the front of the SUV, while Foley yelled at the driver to put his hands up. According to Toolis, Foley went to the driver's side window, reached inside the vehicle, and struggled with the driver, while ordering him to show his hands and to get out of the car. Toolis further testified that, as he was approaching the SUV, the driver, whom he identified in court as the defendant, turned his steering wheel to the left, accelerated, and pulled out of the southbound lane of traffic. Toolis stated that his upper torso was struck by the front bumper of the SUV on the driver's side. According to Toolis, he "bounced" off the vehicle, drew his weapon and, in English and Spanish, ordered the defendant to put his hands up. The defendant stopped the SUV and jerked his hand away from Foley's grasp. The defendant then turned the steering wheel all the way to the left, and "punch[e]d the gas pedal." Toolis stated that, as the SUV proceeded toward him, he was struck a second time by the side-view mirror as he stuck his gun through the open, driver's side window, and fired a single shot underneath the defendant's left arm. Thereafter, the defendant collided with the car that was directly in front of him, put the SUV in reverse and backed up, before pulling into the lane of oncoming traffic. Toolis testified that Foley fired his weapon at the rear of the SUV as the defendant sped away, traveling southbound in the northbound lane of Damen Avenue.

¶ 8 Toolis further testified that he ran back to his car and made a radio announcement regarding the incident and the defendant's direction of travel. He then pursued the defendant south on Damen Avenue and east on Harrison Street. After turning onto Harrison, he saw that the defendant's SUV

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was stopped and that other police officers had the defendant on the ground. Toolis testified that he walked over to the defendant and placed handcuffs on him. He later went to the hospital, but was not admitted for treatment. Toolis stated that he suffered minor injuries as a result of the incident with the defendant, including bruises to his arm and leg, and he underwent physical therapy for a strained back.

¶ 9 On cross-examination, Toolis explained that, because the defendant had struck him with his vehicle and "was trying to run [him] down," he feared for his life and determined that deadly force was warranted to save his own life and that of his partner. He also denied searching the defendant when he was on the ground and handcuffed. Toolis further denied telling independent investigators, who were assigned to investigate the circumstances surrounding the shooting, that he fired through the front windshield of the SUV.

¶ 10 Officer Joseph Foley testified that he was working in uniform with his partner, Vincent Vogt, on July 15, 2009. He stated that he monitored the robbery call and, because the license plate of the vehicle used in that crime was registered to an address in his district, responded to that address. After hearing another radio dispatch announce that the maroon Mercedes-Benz SUV was traveling southbound on Damen Avenue, he proceeded to the intersection of Damen and Jackson Boulevard. From there, he was able to observe a maroon SUV stopped at the traffic light at Damen and Van Buren. He turned right onto Damen, pulled up behind the SUV, and waited for the light to turn green. Foley testified that he did not hear the subsequent radio message indicating that the SUV that was stopped on Damen was not the one that had been involved in the robbery.

¶ 11 Foley stated that, after the light turned green, he activated the emergency lights of his

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unmarked police vehicle. At that point, the traffic was grid-locked, and the maroon SUV, which was straddling both of the southbound lanes, came to a stop. Foley testified that he then proceeded with the traffic stop. He got out of his vehicle, approached the rear of the SUV, and repeatedly ordered the driver, whom he identified in court as the defendant, to show his hands, but the defendant did not respond. The defendant eventually placed his left hand out the driver's side window, but kept his right hand concealed between the car seat and the center console. Though he ordered the defendant several more times to show his other hand and to get out of the car, the defendant did not comply. After Officers Toolis and Rodriguez arrived on the scene, Toolis approached the front, driver's side of the SUV.

¶ 12 Foley further testified that he reached into the open, driver's-side window and grabbed the defendant's right forearm, saying, "[d]on't do anything stupid, let me see your hand." According to Foley, the defendant was "fighting" and "resisting" while he tried to pull the defendant's arm up. The defendant then jerked his arm away and said, "f**k that," as he turned the steering wheel to the left, revved the engine and "aggressively accelerated *** towards Officer Toolis." Foley stated that he was still reaching into the SUV and was thrown backward when the defendant accelerated and struck Toolis with the SUV. Foley testified that, because he was in fear for Officer Toolis' life, he drew his weapon and, after hearing a gunshot, fired a single shot into the rear window of the SUV. According to Foley, he was trying to "stop the threat to Officer Toolis" by shooting at the defendant. The defendant drove into the lane of oncoming traffic and sped away. Foley testified that he suffered minor injuries, including bruising to his forearm, but he was not hospitalized.

¶ 13 Officer Adam Lato testified that, at the time of the incident, he was driving a squad car that

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was equipped with a video camera. He and his partner were driving south on Damen Avenue in the vicinity of Congress Avenue and Harrison Street, where he saw several police cars converge and stop traffic near Congress. After turning left onto eastbound Harrison Street, he heard gunshots coming from the direction of the place where the police cars had converged. Lato testified that he immediately put his car in reverse and backed up into the intersection. As he did so, the defendant's maroon SUV turned onto Harrison in front of him, traveling in the left-turn lane of oncoming traffic at a high rate of speed. Lato stated that he activated his emergency equipment, which initiated the video recorder, and pursued the defendant. After driving about a block on Harrison, the defendant stopped his car and got out of the SUV, with his hands raised. Lato stated that he and his partner ordered the defendant to get down on the ground, and he complied with that order. Lato also stated that he observed blood on the defendant's shirt in the area of his midsection and that the rear window of the SUV had been shot out. Shortly thereafter, Officer Toolis arrived and placed handcuffs on the defendant. According to Lato, the defendant was not searched while he was on the ground. When the ambulance arrived, the defendant was transported to the hospital. The recording of the encounter, taken by the video camera on Lato's squad car, was introduced into evidence and played for the jury.

¶ 14 Detective Greg Swiderek testified that he was assigned to investigate the shooting and went to Stroger Hospital to interview the defendant. At the hospital, he observed several medical professionals, who were busy treating the defendant for a gunshot wound to his chest. Swiderek stated that, while he was standing near the area where the defendant was being treated, he heard a nurse tell another hospital employee to inventory the defendant's clothes and personal items, which

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were in a plastic bag under his hospital bed. Swiderek further stated that he saw the hospital employee take a pair of jean shorts from the plastic bag and then remove a smaller plastic bag from a front pocket of the defendant's shorts. According to Swiderek, that bag contained a plant material that he suspected was cannabis, as well as a substance resembling white rocks that he suspected was cocaine. Swiderek testified that he took control of these items, which were delivered to a forensic investigator. The two substances were later tested and found to contain 3.1 grams of cannabis and 1.1 grams of cocaine, respectively.

¶ 15 The defendant called Dawn Marie Jauga, the nurse who had treated Officer Toolis after the shooting. Jauga testified that Officer Toolis complained of arm and leg pain, but she did not observe that he had any obvious injuries.

¶ 16 The defendant also called Roberto Soto and Brian Killen, both of whom were assigned to investigate the shooting for the Independent Police Review Authority. The testimony of Soto and Killen indicated that the investigation did not include a bullet-trajectory analysis. According to Killen, his written report of the investigation did not include verbatim statements by the officers, but was a summary of his notes. Killen also testified that Toolis reported he had been hit twice by the defendant's SUV before he fired his weapon.

¶ 17 The defendant testified that, on July 15, 2009, he was wearing a black t-shirt, dark blue denim shorts, black sneakers, white socks, and a red baseball cap. At approximately 5 p.m., he was driving his girlfriend's Mercedes Benz SUV and was traveling south on Damen Avenue. At Harrison Street, he got into the left-turn lane, intending to turn east onto Harrison. As he was waiting to turn left, a police car came and blocked off the intersection. The two police officers exited their vehicle, and

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Officer Toolis approached the driver's side of the SUV and ordered him to get out of the vehicle. According to the defendant, Toolis' weapon was drawn and was pointed directly at him.

¶ 18 The defendant testified that he was confused by Toolis' orders, and it took him a while to comprehend what the officer was telling him. Because Toolis' commands to exit the vehicle and "freeze" were conflicting, he did not know what to do. The defendant stated that, as he reached over to the gearshift to put the SUV in park, he suddenly felt a shot hit him in the chest. The bullet entered his chest, passed a few inches from his heart, and exited his right side. He then jerked the steering wheel to the left and heard another shot whizz past his ear. According to the defendant, he turned his vehicle so he could leave the scene, and the SUV grazed Toolis in the process. The defendant testified that he did not hit any other police officer with his vehicle and that he did not intend to hit Toolis, but he was in fear for his life and trying to get to the nearest hospital.

¶ 19 The defendant further stated that he knew there was a hospital in the area, so he turned his car around and headed north. He noticed a police car following him with its lights on, and decided to stop his car out of fear that the police would keep shooting at him if he did not. After stopping the SUV, he exited the car with his hands up and asked the officers who pulled up behind him, "why did you shoot me?" The officers ordered him to get down on the pavement, and he complied. While he was on the ground, an officer came over, searched his pockets, patted him down, and handcuffed him. The defendant testified that he did not have anything in his pockets except a couple of dollars in change.

¶ 20 The defendant admitted that he had two prior felony convictions. He also acknowledged that he knew Officer Toolis, who was dressed in full uniform, was a police officer and that he saw Toolis'

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partner and heard police sirens when Toolis approached the SUV. The defendant denied seeing Officer Foley and further denied that Foley ever grabbed his arm while he was in the SUV.

¶ 21 After the defense rested, the parties stipulated that the defendant had previously been convicted in 2008 of burglary and possession of a controlled substance.

¶ 22 At the jury instructions conference, the court ruled that the jury should receive Illinois Pattern Jury Instructions, Criminal, No. 24-25.10 (4th ed. 2000) (IPI 24-25.10) (a person is not entitled to use force in escaping after the commission of forcible felony), Illinois Pattern Jury Instructions, Criminal, No. 24-25.12 (4th ed. 2000) (IPI 24-25.12) (peace officer's use of force in making arrest), and Illinois Pattern Jury Instructions, Criminal, No. 24-25.20 (4th ed. 2000) (IPI 24-25.20) (private person's use of force in resisting arrest). Defense counsel objected, arguing that these instructions relate to resisting arrest, an offense that had not been charged. In overruling the defendant's objection, the court stated that the jurors also would be instructed on self defense and that the evidence raised a disputed issue of fact as to whether Officer Toolis shot the defendant before or after being struck by the SUV. The court also indicated that resisting arrest can be a lesser-included offense of aggravated battery to a police officer.

¶ 23 During their deliberations, the jury sent the trial judge a note asking the following questions: "Is it protocol to search a suspect on the scene of the crime? Would it matter if he was injured?". With the agreement of the parties, the court responded by stating, "[y]ou have heard all the evidence and received the law that applies to this case. Please continue deliberation."

¶ 24 Following closing arguments, the jury found the defendant not guilty of attempted murder and of possession of a controlled substance, but convicted him of two counts of aggravated battery

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based on his conduct against Officers Foley and Toolis. The defendant filed a motion for a new trial, asserting, *inter alia*, that the court erred by instructing the jury on resisting arrest and escape, where he had not been charged with those offenses and where neither of those offenses was a lesser-included offense of aggravated battery. The court denied the defendant's motion for a new trial and sentenced him to a term of 42 months' imprisonment. This appeal followed.

¶ 25 On appeal, the defendant asserts that the trial court committed reversible error by giving the following instructions:

"A person is not justified in the use of force if he is escaping after the commission of aggravated battery." See Illinois Pattern Jury Instructions, Criminal, No. 24-25.10 (4th ed. 2000) (hereinafter IPI 24-25.10).

"A peace officer need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest or to defend himself from bodily harm while making the arrest.

However, he is justified in using force likely to cause death or great bodily harm only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself;

or

the arrest from being defeated by resistance or escape and the person to be arrested has committed attempted murder or aggravated battery which involves the infliction or threatened infliction of great bodily harm." Illinois Pattern Jury

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Instructions, Criminal, No. 24-25.12 (4th ed. 2000) (hereinafter IPI 24-25.12).

"A person is not authorized to use force to resist an arrest which he knows is being made by a peace officer, even if he believes that the arrest is unlawful and the arrest in fact is unlawful." Illinois Pattern Jury Instructions, Criminal, No. 24-25.20 (4th ed. 2000) (hereinafter IPI 24-25.20).

¶ 26 The defendant claims that these three instructions were improper because they interjected irrelevant issues into the jury deliberations, where he had not been charged with the offense of resisting arrest or escape. The defendant also contends that these instructions might have confused or misled the jury as to whether he was entitled to use force in leaving the scene, where he claimed that the police used excessive force in effecting the stop and presented evidence that he was shot before striking Officers Toolis and Foley with his vehicle. These assertions are without merit.

¶ 27 The purpose of jury instructions is to provide the jurors with the legal principles that apply to the evidence so they can reach a correct verdict. *People v. Lovejoy*, 235 Ill. 2d 97, 150, 919 N.E.2d 843 (2009); *People v. Pierce*, 226 Ill.2d 470, 475, 877 N.E.2d 408 (2007). In a criminal case, the trial court is obligated to properly instruct the jury on the elements of the offense, the burden of proof, and the presumption of innocence. *Lovejoy*, 235 Ill. 2d at 150; *Pierce*, 226 Ill.2d at 475. Also, the jury may be instructed as to any theory of the case that may be reasonably inferred from the facts. *People v. Wells*, 241 Ill. App. 3d 141, 148, 608 N.E.2d 578 (1993). Instructions in criminal cases must be read as a whole and are sufficient if they fully and fairly announce the law applicable to the respective theories of the State and the defense. *People v. Terry*, 99 Ill. 2d 508, 516, 460 N.E.2d 746 (1984); *People v. Monroe*, 366 Ill. App. 3d 1080, 1088, 852 N.E.2d 888 (2006).

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It is for the trial court to determine, after considering the facts and the governing law, whether the jury should be instructed on a particular subject. *People v. Simms*, 192 Ill. 2d 348, 412, 736 N.E.2d 1092 (2000). The decision to give a particular jury instruction is a matter within the sound discretion of the trial court and will be reversed on review only if the trial court abused its discretion. *Lovejoy*, 235 Ill. 2d at 150; *People v. Mohr*, 228 Ill. 2d 53, 66, 885 N.E.2d 1019 (2008). A trial court abuses its discretion if the jury instructions given are unclear, misleading, or are not justified by the evidence and the law. *Lovejoy*, 235 Ill. 2d at 150; *Mohr*, 228 Ill. 2d at 65-66.

¶28 An individual is prohibited from resisting or obstructing a person who is known to be a police officer and is performing an authorized act within his or her official capacity. 720 ILCS 5/31-1 (West 2008). Illinois courts have repeatedly held that this rule is applicable in prosecutions for aggravated battery of a police officer, as well as in prosecutions for resisting arrest. See *People v. Taylor*, 112 Ill. App. 3d 3, 5, 444 N.E.2d 1151 (1983); *People v. Witanowski*, 104 Ill. App. 3d 918, 922, 433 N.E.2d 334 (1982); *People v. Taylor*, 53 Ill. App. 3d 810, 818-19, 368 N.E.2d 950 (1977); *People v. Paez*, 45 Ill. App. 3d 349, 351-52, 359 N.E.2d 1083 (1977); *People v. Gnatz*, 8 Ill. App. 3d 396, 399, 290 N.E.2d 392 (1972). Consequently, the jury may be instructed that a person may not resist or obstruct an authorized act by a known police officer, even where the defendant has not been charged with the offense of resisting arrest. *Witanowski*, 104 Ill. App. 3d at 922; *Taylor*, 53 Ill. App. 3d at 819; *Paez*, 45 Ill. App. 3d at 351-52.

¶29 Applying these principles to the instant case, we find that the mere fact that the defendant had not been charged with resisting arrest does not compel the conclusion that the court erred in giving the resisting-arrest instruction. The same reasoning applies with respect to the challenged escape

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instructions. Because a person does not have the right to oppose an authorized act by a police officer, such a person may not use force to escape after commission of a forcible felony, even where the detention originated as an investigatory stop. See IPI 24-25.10. Also, a police officer is justified in using force likely to cause death or great bodily harm to prevent the subject of a valid investigatory stop from escaping, where that person has committed aggravated battery which involves the infliction or threatened infliction of great bodily harm. See IPI 24-25.12. Contrary to the defendant's assertion, there was evidence warranting the resisting-arrest and escape instructions where Officer Toolis testified that, after initially swerving the SUV to the left and striking him, the defendant stopped his vehicle momentarily and then pulled into the lane of oncoming traffic, striking Toolis a second time.

¶ 30 In reaching this conclusion, we are unpersuaded by the defendant's argument that this case is governed by *People v. English*, 287 Ill. App. 3d 1043, 679 N.E.2d 494 (1997), and *People v. McCauley*, 2 Ill. App. 3d 734, 277 N.E.2d 541 (1972), which held that it was improper to give a resisting-arrest instruction where the defendant was tried for aggravated battery and had not been charged with resisting arrest. See *English*, 287 Ill. App. 3d at 1047; *McCauley*, 2 Ill. App. 3d at 736. Neither *English* nor *McCauley* referenced the rule that prohibits resistance to authorized police action and protects officers from violence in a broad range of police activity, including circumstances that do not involve arrests. Because it does not appear that this rule was considered in either *English* or *McCauley*, we find that these cases are not controlling here.

¶ 31 We also find that the defendant's reliance on *People v. McDonald*, 401 Ill. App. 3d 54, 927 N.E.2d 253 (2010), is unavailing. In *McDonald*, the defendant was charged with intentional and

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knowing murder, and he asserted self defense. *McDonald*, 401 Ill. App. 3d at 55-56, 58. The trial court instructed the jury as to the elements of armed robbery, an offense that had not been charged, and that a claim of self defense was not available if the killing was committed in the course of an armed robbery. *McDonald*, 401 Ill. App. 3d at 58. On appeal, this court found that these two instructions constituted reversible error because they introduced the issue of armed robbery at the close of the trial, despite the fact that the defendant had not been charged with that offense and no evidence of armed robbery was presented at trial. *McDonald*, 401 Ill. App. 3d at 61-64. *McDonald* did not involve the use of force by a police officer or by a person who is the subject of a valid investigatory stop. Therefore, it is readily distinguishable on its facts and has no bearing here, where the prosecution presented evidence that the defendant used force to oppose a valid investigative stop.

¶ 32 In addition, we reject the defendant's contention that the resisting-arrest and escape instructions were improper because he was not being arrested at the time he struck Officers Foley and Toolis with his vehicle. In advancing this claim, the defendant has misapprehended the law governing an individual's right to use force to resist a lawful "Terry stop" (see *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)) and the import of asserting self defense in a prosecution for aggravated battery committed during an investigatory stop in accordance with *Terry*.

¶ 33 In Illinois, a lawful investigative stop by a police officer constitutes an authorized act within his or her official capacity as a peace officer. See 725 ILCS 5/107-14, 108-1.01 (West 2008) (codifying the standards set forth in *Terry*); see also *People v. Johnson*, 285 Ill. App. 3d 307, 309, 674 N.E.2d 487 (1996). A police officer is entitled to use such force as is necessary to carry out a *Terry* investigative stop in a safe and effective manner. See *People v. Johnson*, 387 Ill. App. 3d 780,

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791, 901 N.E.2d 455 (2009), citing *People v. Starks*, 190 Ill. App. 3d 503, 509, 546 N.E.2d 71 (1989); *People v. Roberts*, 96 Ill. App. 3d 930, 934, 422 N.E.2d 154 (1981); see also *People v. Walters*, 256 Ill. App. 3d 231, 237, 627 N.E.2d 1280 (1994); *People v. Paskins*, 154 Ill. App. 3d 417, 421, 506 N.E.2d 1037 (1987). For purposes of determining whether a person can resist the authorized actions of a police officer, a lawful *Terry* stop is equivalent to an arrest and may not be resisted by the use of force. See 720 ILCS 5/31-1(a) (West 2006); see also *Johnson*, 285 Ill. App. 3d at 309-10; *People v. Agnew-Downs*, 404 Ill. App. 3d 218, 231-33, 936 N.E.2d 166 (2010) (O'Malley, J., specially concurring). An exception to this rule exists where a person uses force to protect himself or herself from excessive force by the officer, and it is the use of excessive force by an officer that invokes the right of self defense. See *People v. Sims*, 374 Ill. App. 3d 427, 432, 871 N.E.2d 153 (2007); *People v. Williams*, 267 Ill. App. 3d 82, 88, 640 N.E.2d 981 (1994).

¶ 34 A necessary element of the crime of aggravated battery against a police officer engaged in an authorized act, such as an arrest or a valid *Terry* stop, is that the defendant acted without legal justification. *Taylor*, 53 Ill. App. 3d at 819; *Paez*, 45 Ill. App. 3d at 351; *Gnatz*, 8 Ill. App. 3d at 399. A resisting-arrest instruction is directly related to the defendant's lack of justification. *Taylor*, 53 Ill. App. 3d at 819; *Paez*, 45 Ill. App. 3d at 351. Thus, in a prosecution for aggravated battery against a police officer who is performing an authorized act such as an investigatory stop, it is proper to instruct the jury regarding the defendant's lack of legal justification to resist, where such an instruction is based on the evidence adduced at trial. See *Paez*, 45 Ill. App. 3d at 351; see also *Agnew-Downs*, 404 Ill. App. 3d at 231-33 (O'Malley, J., specially concurring).

¶ 35 Here, the defendant admitted at trial that he knew that Toolis was a police officer, but he

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asserted that his conduct in driving from the scene was justified because he was acting in self defense after having been shot in the chest. In accordance with the defendant's theory, the trial court instructed the jury that "[a] person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force." Illinois Pattern Jury Instructions, Criminal, No. 24-25.06 (4th ed. 2000).

¶ 36 An essential component of the defendant's affirmative defense was that he reasonably believed the force used by the police was unlawful. However, the prosecution maintained a consistent theory throughout the trial that the defendant was not justified in using force. In support of this theory, the prosecution presented evidence that the officers were engaged in an investigatory stop to determine whether the defendant was involved in the jewelry robbery and that he struck them with his vehicle before Officer Toolis discharged his weapon. A valid investigatory stop under *Terry* may be accompanied by such force as is reasonably necessary to protect the officer. See *Walters*, 256 Ill. App. 3d at 237.

¶ 37 We note that the defendant has asserted that the investigatory stop was not valid. This assertion is based on evidence that the second radio message notified the officers that they had stopped the wrong car and that Foley knew this information before the shooting. Yet, Foley testified that he did not recall hearing the second message, and he testified that, at the time of that transmission, they were already engaged in the traffic stop of the defendant's vehicle. In addition, Toolis testified that he did not hear the second radio message over the sound of his siren. Thus, the defendant's contention that the investigatory stop was invalid because the officers had actual knowledge that the defendant's SUV was not involved in the jewelry robbery is refuted by the

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uncontroverted testimony of Toolis and Foley.

¶ 38 In light of the evidence presented at trial, the State was entitled to have the jury instructed that the defendant could not use force to resist the officers' attempt to conduct an investigative stop and could not take action to escape either before or after striking them with his vehicle. The resisting-arrest and escape instructions were directly related to the jury's assessment of the defendant's theory of self defense (see *Taylor*, 53 Ill. App. 3d at 819; *Paez*, 45 Ill. App. 3d at 351), and it was proper for the court to instruct the jury as to the law that applies where an individual has used force to oppose an authorized act by a police officer.

¶ 39 Though the defendant argues that giving the resisting-arrest instruction was improper because his affirmative defense was dependent upon the jury finding that he attempted to leave the scene only after he had been shot in the chest, the prosecution was not required to adopt the defense theory. See *People v. Gibson*, 385 Ill. 371, 379, 52 N.E.2d 1008 (1944); *People v. Dauphin*, 53 Ill. App. 2d 433, 442, 203 N.E.2d 166 (1964). The State is entitled to have the jury instructed on the law that is applicable to its theory of the case if there is evidence in the record to support that theory. *Simms*, 192 Ill. 2d at 412; see also *People v. Janik*, 127 Ill. 2d 390, 398, 537 N.E.2d 756 (1989); *People v. Williams*, 57 Ill. 2d 239, 242, 311 N.E.2d 681 (1974) (holding that self defense is an affirmative defense, and, once raised, the State bears the burden of proving beyond a reasonable doubt that the defendant's use of force was not justified).

¶ 40 The defendant next argues that the trial court erred in instructing the jury that "[a] person is not justified in the use of force if he is escaping after the commission of aggravated battery." He claims that this instruction, which is based on IPI 24-25.10, is only proper where the defendant has

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committed a forcible felony and that aggravated battery does not constitute a forcible felony unless it results in great bodily harm or permanent disability or disfigurement. The defendant argues that the trial court erred in giving this instruction because there was no evidence that his striking of Officers Toolis and Foley resulted in great bodily harm or permanent disability or disfigurement and because the instruction substituted the phrase "aggravated battery" for the phrase "forcible felony."

¶ 41 In response, the State argues that the defendant has forfeited this issue. We agree.

¶ 42 To preserve an issue for review, a defendant is required to make a timely objection at trial and raise the issue in his post-trial motion. *People v. Wheeler*, 226 Ill. 2d 92, 122, 871 N.E.2d 728 (2007). The post-trial motion must specifically state the grounds for a new trial. *People v. Lewis*, 223 Ill. 2d 393, 400, 860 N.E.2d 299 (2006). Due to the defendant's failure to specifically raise this issue in the circuit court, we conclude that it has been forfeited on appeal.

¶ 43 Despite this forfeiture, the defendant urges us to consider this issue under the plain-error doctrine, which permits review of unpreserved errors where (1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403 (2007); see also Ill. S. Ct. R. 451(c) (eff. July 1, 2006); Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999)). Under both circumstances, the burden of persuasion remains with the defendant. *Piatkowski*, 225 Ill. 2d at 565.

¶ 44 In this case, the defendant has failed to satisfy either prong of the plain-error doctrine. First, contrary to the defendant's assertion, we do not find the evidence to be closely balanced. Officers

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Toolis and Foley testified that, in conducting the investigatory stop, they ordered the defendant to display his hands and exit his vehicle, but he refused to comply. He swerved the SUV to the left and struck both officers, before Toolis shot him through the open driver's-side window. After stopping momentarily, he then struck Toolis a second time as he pulled into the northbound lane of traffic. The defendant testified that he was confused by the officers' directions and was attempting to comply when he was shot by Toolis and drove from the scene in an attempt to get to a hospital, accidentally grazing Toolis as he did so.

¶ 45 Thus, the jury's determination essentially depended upon credibility findings and its decision to accept the prosecution's version of events over the contrary version presented by the defendant. Yet, this circumstance does not compel the conclusion that the evidence was closely balanced because the police officers' testimony was corroborated by Ladonna Phillips. Phillips witnessed the encounter between the officers and the defendant, and her unequivocal testimony was consistent with the account described by Toolis and Foley. Admittedly, the mere fact that two police officers gave testimony that conflicted with that of the defendant does not mean that the evidence cannot be considered closely balanced. See *People v. Naylor*, 229 Ill. 2d 584, 607-08, 893 N.E.2d 653 (2008) (holding that evidence was closely balanced where it boiled down to the testimony of the two police officers against that of the defendant). In this case, however, Phillips' testimony provided substantial independent corroboration of the prosecution's version of events. Consequently, we find that the evidence was not closely balanced.

¶ 46 Second, we do not find that the issuance of the challenged escape instruction can be characterized as an error that was so serious that it affected the fundamental fairness of the

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defendant's trial and challenged the integrity of the judicial process. See *Piatkowski*, 225 Ill. 2d at 565. "[A] jury instruction error rises to the level of plain error only when it 'creates a serious 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.'" *People v. Herron*, 215 Ill. 2d 167, 193, 830 N.E.2d 467 (2005) (quoting *People v. Hopp*, 209 Ill. 2d 1, 8, 805 N.E.2d 1190 (2004)). Even when a trial court gives faulty instructions, a reviewing court will not review a trial court's decision unless the instruction clearly misled the jury and resulted in prejudice to the defendant. *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 273, 775 N.E.2d 964 (2002); *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 45.

¶ 47 Here, the defendant asserts second-prong plain error, arguing that the jury "could have thought that [the defendant] was not justified in striking the officers with his car in self-defense when he was trying to flee for his life after he was shot by the officers[,] even if it believed his version of events." This argument necessarily fails where the record demonstrates that the jury did not believe the defendant's version of events. The jury convicted the defendant of the aggravated battery of Officer Foley, despite the defendant's testimony that he did not see Foley on the date of the shooting and that he grazed Toolis but did not strike any other officer with his SUV.

¶ 48 Based on these circumstances, we do not believe that the challenged escape instruction severely threatened the fundamental fairness of the defendant's trial and created a serious risk that he was incorrectly convicted of aggravated battery because the jurors did not understand the applicable law. See *Herron*, 215 Ill. 2d at 193; *Hopp*, 209 Ill. 2d at 8. Because the defendant has not established plain error, his procedural default must be honored. *People v. Keene*, 169 Ill. 2d 1,

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17, 660 N.E.2d 901 (1995); *People v. Vargas*, 409 Ill. App. 3d 790, 794, 949 N.E.2d 238 (2011).

¶ 49 For the foregoing reasons, we affirm the defendant's convictions and sentence.

¶ 50 Affirmed.