2017 IL App (1st) 142883-U
Order filed: May 26, 2017

SIXTH DIVISION

No. 1-14-2883



IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 13 CR 14340 |
| | ) | |
| TODD ADAMS, | ) | Honorable |
| | ) | Brian K. Flaherty, |
| Defendant-Appellant. | ) | Judge Presiding. |

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgement.

**ORDER**

¶ 1 *Held*: Defendant's two convictions for aggravated battery are reversed, and this matter is remanded for a new trial, where the trial court failed to properly instruct the jury regarding defendant's claim of self-defense.

¶ 2 Following a jury trial at which he represented himself *pro se*, defendant-appellant, Todd Adams, was convicted of two counts of aggravated battery and was sentenced to concurrent terms of five and six years' imprisonment. On appeal, defendant contends that the trial court improperly: (1) failed to provide all the admonishments required by Ill. S. Ct. R. 401(a) (eff. July 1, 1984); (2) failed to instruct the jury that the State was required to prove beyond a reasonable doubt that defendant was not justified in using force to defend himself; (3) considered the victim's age as both grounds to subject defendant to an extended prison term and as an

aggravating factor in sentencing; and (4) entered convictions on both counts of aggravated battery, in violation of the principles of the one-act, one-crime doctrine.

¶ 3 For the following reasons, we find that that the failure to properly instruct the jury regarding the State's burden of proof with respect to defendant's claim of self-defense requires us to reverse defendant's convictions and remand for a new trial.

¶ 4 I. BACKGROUND

¶ 5 Defendant was charged by indictment with two counts of aggravated battery. In count I, defendant was charged with committing aggravated battery by beating William Adams about the body and head, without legal justification and while defendant knew William was 60 years of age or older, in violation of section 12-3.05(d)(1) of the Criminal Code of 2012 (Criminal Code). 720 ILCS 5/12-3.05(d)(1) (West 2014). In count II, defendant was charged with committing battery by beating William Adams about the body and head, without legal justification and while defendant knew William was physically handicapped, in violation of section 12-3.05(d)(2) of the Criminal Code. 720 ILCS 5/12-3.05(d)(2) (West 2014). The indictment also indicated that, because William was 60 years of age or older, the State would seek an extended prison term with respect to Count II pursuant to section 5-5-3.2(b)(3)(ii) of the Unified Code of Corrections (Unified Code). 730 ILCS 5/5-5-3.2(b)(3)(ii) (West 2014). Each count related to defendant's alleged actions on or about June 21, 2013.

¶ 6 At a hearing held on August 15, 2013, defendant was represented by an assistant public defender. At a status hearing on September 20, 2013, the trial court noted that defendant had attempted to file "a couple things" despite the fact that he was represented by counsel. After defendant and his counsel indicated to the court that there was possibility that the public defender's office might reassign defendant's case to another attorney, defendant indicated that he

wanted to represent himself *pro se* while also receiving "technical assistance." After the trial court explained that no such technical assistance would be provided, questioned defendant about his education and legal experience, and admonished defendant about the charges he was facing, defendant responded that he still wanted to "go *pro se*" in light of what he and the trial court had discussed. The trial court granted defendant's request and granted the public defender leave to withdraw as defendant's attorney.

¶ 7 Following resolution of a host of pretrial matters not relevant to this appeal, the matter then proceeded to a jury trial in May 2014.

¶ 8 At trial, William testified that he was 81 years old and uses a walker because he had suffered a stroke eight years prior to trial. He lived in Steger, Illinois. Defendant was William's adult son, and he lived in the basement of William's home.

¶ 9 On June 21, 2013, William was seated at his dining room table when defendant came upstairs to complain about a malfunctioning toilet. A verbal argument ensued after defendant kicked William's dog, and William attempted to intervene before defendant again attacked the dog. William lost his balance and fell into defendant. Contending that William had hit him, defendant punched William in the face. William grabbed defendant by the neck and the two struggled and fell to the ground. William's dog bit defendant, and defendant twisted William's fingers to escape William's grasp. Defendant also kneed William in the chest, ribs and legs.

¶ 10 After the altercation ended, defendant told William several times not to call the police. William repeatedly told defendant that he would not do so. However, when defendant returned to the basement, William drove to the police station and filed a complaint. He returned home and was met by police officers. William let the officers into his home, and defendant was placed under arrest. As a result of the incident, William suffered a black eye and injuries to his ribs,

arm, chest and artificial hip. William identified photos of his injuries, and those photos were introduced into evidence.

¶ 11 Officer Michael Sauter of the Steger police department testified that he spoke with William at the police station, accompanied William to his home, and was present when defendant was placed under arrest by another officer. He noted that William's left eye was the size of a golf ball and was swollen shut, identifying that injury in a photo of William. He also noted that defendant had red marks on his neck when he was arrested and complained that William's dog had bitten him during the altercation.

¶ 12 Defendant testified that William began the physical altercation after defendant responded to a bite from William's dog by kicking the dog. William threw a punch that glanced off defendant and then he fell into defendant, the two lost balance, and they slammed into the refrigerator. Defendant physically "tried to get [William] off of me," and the two men then fell to the floor. William placed defendant in a "choke hold," and defendant twisted William's fingers until William let go. As defendant got up, William grabbed defendant's genitals and defendant fell back on top of William.

¶ 13 On cross-examination, defendant acknowledged that he was aware of William's age, the fact that William had suffered a stroke, and that William was physically handicapped. He also admitted that he caused William's black eye. Defendant denied kneeing William, contending that the only time he contacted William's body was when the two men fell and after William grabbed defendant's genitals. After two photos showing red marks on defendant's neck were introduced into evidence, defendant rested.

¶ 14 At a jury instruction conference, defendant requested that the jury be instructed on "reckless" conduct. The trial court concluded that defendant's assertions were more correctly framed as a claim of self-defense, and ruled that the jury would be instructed as to that defense.

¶ 15 Following closing arguments, the jury found defendant guilty on both counts of aggravated battery. Defendant's posttrial motions were denied, and he was subsequently sentenced to concurrent terms of five years' imprisonment on count I and an extended term of six years' imprisonment on count II. Defendant's motion to reconsider his sentence was denied, and he timely appealed.

¶ 16 II. ANALYSIS

¶ 17 As noted above, one of defendant's arguments on appeal is that the trial court failed to properly instruct the jury as to defendant's claim of self-defense. Because we agree with this contention and our resolution of that issue is dispositive, we reverse and remand for a new trial on this basis alone.

¶ 18 Defendant specifically contends that the trial court improperly failed to instruct the jury that, to establish the offenses of aggravated battery for which defendant was charged, *the State* was required to prove beyond a reasonable doubt that defendant did not act in self-defense. Acknowledging that he failed to seek such an instruction at trial or include this issue in his posttrial motion for a new trial, defendant concedes that he has forfeited this argument. See Ill. S. Ct. R. 366(b)(2)(i) (eff. Feb. 1, 1994) ("[n]o party may raise on appeal the failure to give an instruction unless the party shall have tendered it"); *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007) (finding that a defendant will be deemed to have procedurally defaulted his right to obtain review of any supposed jury instruction error if he fails to object to the instruction or offer an alternative at trial and did not raise the issue in a posttrial motion).

¶ 19 Nevertheless, defendant asks this Court to review this issue pursuant to Ill. S. Ct. R. 451(c) (eff. April 8, 2013), which provides that "substantial defects" in jury instructions "are not waived by failure to make timely objections thereto if the interests of justice require." As our supreme court has explained:

> "The purpose of Rule 451(c) is to permit correction of grave errors and errors in cases so factually close that fundamental fairness requires that the jury be properly instructed. The rule is coextensive with the plain-error clause of Supreme Court Rule 615(a) (134 Ill.2d R. 615(a)), which provides: 'Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.' [Citation.]
>
> The plain-error doctrine is a familiar one. It permits a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. [Citation.]" *People v. Sargent*, 239 Ill. 2d 166, 189 (2010).

¶ 20 "As a matter of convention, [we] typically undertake[] plain-error analysis by first determining whether error occurred at all. If error is found, the court then proceeds to consider whether either of the two prongs of the plain-error doctrine have been satisfied. Under both prongs, the burden of persuasion rests with the defendant. [Citation.]" *Id*. at 189-90. We review

*de novo* the question of whether the jury instructions accurately stated the applicable law to the jury. *People v. Parker*, 223 Ill. 2d 494, 501 (2006).

¶ 21 Self-defense is a valid, recognized affirmative defense. 720 ILCS 5/7-14 (West 2014). "A defendant is entitled to a jury instruction on self-defense even if very slight or only some evidence exists to support the theory of self-defense." *People v. Cacini*, 2015 IL App (1st) 130135, ¶ 45. Indeed, a "theory of self-defense may properly be raised even if a defendant's own testimony is inconsistent with that theory." *Id*.

¶ 22 Defendant testified that William started a physical altercation by punching defendant and then placing defendant in a "choke hold" after William and defendant knocked into the refrigerator and fell to the ground. Defendant's testimony essentially indicated that William was injured solely as a result of defendant's struggle to defend himself from William and remove himself from William's grasp. While the State asserts that defendant denied making contact with William except for falling on him, thus negating any possible basis for a claim of self-defense, that argument does not accurately reflect the evidence. While defendant did specifically deny that he kicked or kneed William, he also testified that he and William struggled and that defendant physically "tried to get [William] off me." Defendant also admitted that he had caused William's black eye. Based upon this testimony, and despite any possible inconsistencies, defendant clearly presented the *very slight* evidence necessary to raise and support the theory of self-defense. *Id*.

¶ 23 "Once the defense properly raises the affirmative defense of self-defense, the State bears the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense, in addition to proving the elements of the charged offense. The jury, then, must be instructed as to

this defense and the State's corresponding burden of proof." (Internal citations and quotation marks omitted.) *People v. Getter*, 2015 IL App (1st) 121307, ¶ 38.

¶ 24 Illinois Supreme Court Rule 451(a) provides that "[w]henever Illinois Pattern Jury Instructions, Criminal, contains an instruction applicable in a criminal case, giving due consideration to the facts and the governing law, and the court determines that the jury should be instructed on the subject, the IPI Criminal Instruction shall be used, unless the court determines that it does not accurately state the law." Ill. S. Ct. R. 451(a) (eff. July 1, 2006). In accordance with this rule, based upon defendant's request, the State prepared and the trial court provided the jury with Illinois Pattern Jury Instructions, Criminal, No. 24-25.06 (4th ed. Supp. 2009 ) (hereinafter, IPI Criminal 4th No. 24-25.06 (Supp. 2009)), which sets forth the affirmative defense of self-defense. That instruction provides, in relevant part: "A person is justified in the use of force when and to the extent that he reasonably believes such conduct is necessary to defend himself against the imminent use of unlawful force." IPI Criminal 4th No. 24-25.06 (Supp. 2009).

¶ 25 However, the committee notes that accompany that instruction direct the circuit court to also "[g]ive Instruction 24-25.06A" when self-defense is properly before the jury. IPI Criminal No. 24-25.06, Committee Note. In turn, Illinois Pattern Jury Instructions, Criminal, No. 24-25.06A (4th ed. Supp. 2009) (hereinafter, IPI Criminal 4th No. 24-25.06A (Supp. 2009)), sets forth the following proposition: "That the defendant was not justified in using the force which he used." The committee notes accompanying this instruction direct the circuit court to "[g]ive this issue as the final proposition in the issues instruction for the offense charged." IPI Criminal 4th No. 24-25.06A (Supp. 2009), Committee Note. "Thus, beyond giving a general definition of self-defense and a general instruction on the State's burden of proof, the trial court should include an

issues instruction for each applicable offense that the State bears the burden of proving, beyond a reasonable doubt, that defendant lacked justification in using the force he used." *Getter*, 2015 IL App (1st) 121307, ¶ 40.

¶ 26 Here, the defendant did not request, the State did not prepare, and the trial court did not provide the jury with IPI Criminal 4th No. 24-25.06A (Supp. 2009). The jury was therefore not instructed that the State was also required to prove beyond a reasonable doubt that defendant was not justified in the force that he used against William in order to convict defendant of the offenses of aggravated battery for which he was charged. This omission constitutes error (see *Cacini*, 2015 IL App (1st) 130135, ¶ 52; *Getter*, 2015 IL App (1st) 121307, ¶ 41), a conclusion the State concedes on appeal. Having found error, we must now determine whether that error constitutes plain error.

¶ 27 Defendant initially asserts plain error under the first prong, arguing that 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 him. However, our ability to conduct a full evaluation of the closeness of the evidence is impeded by the fact that the record on appeal does not include the photos introduced into evidence by the State and defendant.

¶ 28 It is well recognized that "an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch v. O'Bryant*, 99 Ill.2d 389, 391-92 (1984); see also *People v. Fair*, 193 Ill.2d 256, 264 (2000) (applying *Foutch* in the context of a criminal appeal). In light of the incomplete record, we decline defendant's invitation to find plain

error on the basis that the evidence is so closely balanced that the error alone threatened to tip the scales of justice against him.

¶ 29 What we do find is plain error under the second prong of the analysis.[1] In this context, it has been recognized that "in order to show second-prong plain error resulting from the omission of a jury instruction under Rule 451(c), defendant must establish that there was a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law. Defendant need not prove beyond doubt that [his] trial was unfair because the omitted instruction misled the jury to convict [him]. Rather, defendant must show that the omitted instruction created a severe threat to the fairness of [his] trial." (Internal citations and quotation marks omitted.) *Getter*, 2015 IL App (1st) 121307, ¶ 62. Error of this type is also referred to as "grave error." *Berry*, 99 Ill. 2d at 505.

¶ 30 It is also well recognized that "to ensure a fair trial, the trial court must instruct the jury on such basic matters as the elements of the offense, the presumption of innocence, and the burden of proof. It is of the essence of a fair trial that the jury not be permitted to deliberate a defendant's guilt or innocence of the crime charged without being told the essential characteristics of that crime." (Internal citations and quotation marks omitted.) *Getter*, 2015 IL App (1st) 121307, ¶ 38.

¶ 31 Defendant's claim of self-defense was the central issue in dispute at trial. However, the jury was never instructed that *the State* had the burden to prove, beyond a reasonable doubt, that defendant was not justified in using the force which he used. We find that the failure to provide

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[1] While the State contends that the error at issue here cannot constitute plain error under the second prong because it is not among those errors that have been deemed "structural," that argument has been repeatedly rejected and second-prong analysis has been repeatedly applied to such issues. See *Getter*, 2015 IL App (1st) 121307, ¶ 58-61; *Cacini*, 2015 IL App (1st) 130135, ¶ 54-57; *Sargent*, 239 Ill. 2d at 190; *People v. Berry*, 99 Ill. 2d 499, 505 (1984).

the omitted instruction on such a central issue created a severe threat to the fairness of defendant's trial, such that the failure to provide the jury with IPI Criminal 4th No. 24-25.06A constituted plain error (or "grave error") under the second prong.

¶ 32 We find support for this conclusion in our supreme court's decision in *Berry*, 99 Ill. 2d 499. In that case, the defendant claimed self-defense but the jury was not provided a prior version of IPI Criminal 4th No. 24-25.06A. *Id*. at 503. The court found that "that the jury was not apprised that the State had the burden of proving, beyond a reasonable doubt, that defendant was not justified in the force he used and, therefore, grave error resulted." *Id.* at 506. While the State contends that *Berry* is distinguishable because in that case the court found the evidence to be closely balanced, it is clear that in *Berry* our supreme court found plain error, separately and independently under both prongs, because "the evidence presented in the instant case reveals that there was 'grave error' *as well as* circumstances that were so close factually as to require the tendering of proper jury instructions." *Id*. at 505.

¶ 33 This court came to a similar conclusion in *Cacini*, 2015 IL App (1st) 130135, ¶ 53, even where the evidence was not closely balanced. In that case the defendant claimed self-defense but the jury was not provided IPI Criminal 4th No. 24-25.06A. *Id.* As we stated in that case:

> "Because the instructions failed to address the State's burden of proof concerning the self-defense claim, if the jury had relied upon the erroneous instructions as correct statements by the court of the task the jury was to perform, the jury could have concluded that it was incumbent on defendant to prove that he acted in self-defense and not held the State to the standard of proof beyond a reasonable doubt on all elements of the *** offenses. *** Under the circumstances of the case before us, the credibility of defendant's self-defense testimony was an issue for the jury to decide and it would be speculation for

> this court to conclude the jury made the factual finding that the State met its burden to disprove defendant's justification of his use of force." *Id*. ¶ 57.

We come to the same conclusion here, despite any questions raised by the State with respect to defendant's credibility, reiterating that "defendant is not required to prove beyond any doubt that he would have been acquitted with a proper jury instruction." *Getter*, 2015 IL App (1st) 121307, ¶ 69.

¶ 34 In so ruling, we reject the State's reliance upon the decision in *People v. Huckstead*, 91 Ill. 2d 536 (1982). While in that case our supreme court found no "grave error" with respect to the failure to properly instruct the jury regarding the defendant's claims of self-defense with a prior version of IPI Criminal 4th No. 24-25.06A, the court relied in significant part upon the fact that "in closing argument, defense counsel repeatedly and specifically emphasized that the State had the burden of proving defendant was not justified in the force he used. Additionally, the record discloses that the State, in rebuttal argument, also acknowledged this burden." *Id*. at 545. The court ultimately concluded that the instructions actually given, "in combination with the closing arguments by counsel for both sides, apprised the jury that the State had the burden of proving that defendant was not justified in the force he used. Consequently, the failure of the trial court to give [prior version of IPI Criminal 4th No. 24-25.06A] did not constitute 'grave error.' " *Id*.

¶ 35 A review of the closing arguments in this case reveals that it was *never* emphasized to the jury that the State had the burden of proving defendant was not justified in the force he used, and such emphasis was certainly not provided repeatedly and specifically. The decision in *Huckstead* is therefore inapposite. We note that the *Huckstead* decision was distinguished on the same grounds in *Berry*, 99 Ill. 2d at 505-06, and *Cacini*, 2015 IL App (1st) 130135, ¶ 55.

¶ 36 For the reasons stated above, we hold that the trial court committed plain error in omitting IPI Criminal 4th No. 24-25.06A from the issues instructions for the charges of aggravated battery. We therefore reverse defendant's convictions for aggravated battery and remand for a new trial. As the evidence against defendant, if believed, was sufficient to convict him of aggravated battery, double jeopardy does not bar his retrial for those offenses. *People v. Ward*, 2011 IL 108690, ¶ 50. Moreover, while our resolution of this issue makes it unnecessary for us to address the remaining issues raised on appeal, we also conclude that—should defendant again seek to represent himself *pro se*—he should receive full and complete admonishments required by Ill. S. Ct. R. 401(a) (eff. July 1, 1984).

¶ 37 III. CONCLUSION

¶ 38 For the foregoing reasons, we reverse defendant’s convictions and sentences for aggravated battery and remand for a new trial.

¶ 39 Reversed and remanded.