2019 IL App (2d) 160551
No. 2-16-0551
Order filed February 21, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of McHenry County.
Plaintiff-Appellee,	)	
	)	No. 15-CF-268
v.	)	
	)	
DAVID MAGNUSON,	)	Honorable
	)	Michael W. Feetterer,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Under the circumstances of this case, we conclude that plain error occurred by the trial court's failure to give a jury instruction requiring the State to prove beyond a reasonable doubt that defendant was not justified in using force. Although the error requires reversal, we hold that a rational fact finder could have found defendant guilty of aggravated battery of a police officer beyond a reasonable doubt and accordingly, retrial of defendant would not violate double jeopardy principles. Reversed and remanded.

¶ 2 Defendant, David Magnuson, was stopped by a police officer for speeding. The officer called for backup when defendant became argumentative. As the situation escalated, the officers attempted to turn off defendant's car to remove him. One of the officers testified that, when he reached through the window to turn off the car, defendant struck him. Defendant denied striking

the officer, testifying that the officer choked him. Defendant then fled the scene. Defendant was charged by indictment with aggravated battery of a police officer and fleeing or attempting to elude a police officer. He was also charged with speeding and unlawful transportation of alcohol. Defendant claimed self-defense and presented a cell phone video recording of the traffic stop.

¶ 3 Following a jury trial, defendant was found not guilty of speeding but guilty of aggravated battery, fleeing or attempting to elude, and unlawful transportation of alcohol. The trial court imposed a 24-month term of probation with 90 days in jail. Defendant only appeals the conviction for aggravated battery of a police officer. Specifically, defendant contends (1) the State failed to prove him guilty of aggravated battery of a police officer beyond a reasonable doubt based on the video; (2) although the trial court permitted a self-defense instruction, plain error occurred because the jury was not instructed that the State was required to prove beyond a reasonable doubt that defendant's actions were not justified; alternatively, his counsel provided ineffective assistance for failing to ask for such an instruction; (3) the prosecutor's closing argument rose to the level of plain error; (4) the court committed plain error by replaying the video in the courtroom with the parties present rather than allowing the jurors to view it in the jury room; and (5) he was denied a fair trial based on the multiple claims of error. We reverse and remand the cause for a new trial.

¶ 4 I. FACTS

¶ 5 Lieutenant William Lutz, with the McHenry County Sheriff's Office, testified that on April 10, 2015, he was on duty parked in an access entrance to Moraine Hills State Park. Around 2 a.m., a car drove by at a high rate of speed. Lutz's activated radar showed the car was driving at 81 miles per hour in a 50 mile per hour speed limit zone.

¶ 6 Lutz turned on his emergency lights and pulled the car over. Defendant was the driver of the car and Matthew Losey sat in the front passenger's seat. Lutz asked defendant for his

driver's license and informed him that he had been driving over the speed limit. Defendant denied he had been speeding and asked to see the radar reading. Lutz offered to show him the radar in his squad car, but defendant did not want to get out of the car. Losey began to video the stop with his cell phone.

¶ 7 Lutz smelled alcohol coming from inside the car. Lutz described defendant's eyes as glassy and bloodshot and that he was being "verbally confrontational" and "verbally aggressive." Lutz asked defendant to recite the alphabet and defendant was able to do so.

¶ 8 Lutz stated that he was concerned about defendant's ability to drive safely and for Lutz's own safety. Deputies Keith Sosnowski and Edward Zeman arrived at the scene as backup. Lutz was on the driver's side, and Zeman stood on his right toward the rear of the car. Sosnowski went to the passenger's side of the car and noticed a flask on the rear passenger's floor board area. When Lutz asked defendant to give him the flask, defendant denied having one and said he was not required to produce it.

¶ 9 After defendant refused to produce proof of insurance, Lutz arrested defendant for speeding and advised defendant that he was under arrest. He asked defendant to turn off the engine and step out of the car. Defendant protested that arresting a person for speeding was unlawful and refused to step out of the car. Defendant did not turn off his car or step out of the car.

¶ 10 Lutz explained that they were going to have to remove defendant from the car. That led to a confrontation at defendant's car door, which was open. The police were trying to get defendant out of the car. Defendant was yelling and flailing his arms. He refused to comply and was saying that it was an illegal arrest. Defendant began swinging at Zeman and Sosnowski, who had moved to the driver's side in an effort to keep the driver's side door open.

¶ 11 Defendant then attempted to drive off while Zeman and Sosnowski were still standing at the car's doorway. Zeman and Sosnowski ran back to their cars, but Lutz told them not to pursue defendant, reminding them that he had defendant's driver's license in his possession. Defendant accelerated rapidly, squealing his tires.

¶ 12 The police found defendant's empty car crashed in a culvert. Lutz found a flask containing alcohol on the ground next to the car. Defendant and Losey eventually were located by another officer, who returned them to the scene of the crash. Defendant was placed under arrest.

¶ 13 Losey's video was played at trial during Lutz's testimony. The video contained three "snippets" of the traffic stop, two of them which appeared to be the same footage. Lutz testified that he recognized it and said that he had seen it the day he testified. He stated the segments accurately showed the portions of the stop that were recorded. The segments were played for the jury. Lutz stated that they were an accurate representation of the aggravated battery and the fleeing and eluding.

¶ 14 On cross-examination, Lutz stated that his hand was in defendant's open car window during the confrontation. When he told defendant that he was under arrest, defendant started to put up the window on Lutz's hand. The deputies opened his car door when defendant said that he was not coming out.

¶ 15 Lutz stated that informing defendant that he was under arrest seemed to escalate the situation. Lutz saw defendant swing at Zeman. He had not seen one of the deputies place a forearm to defendant's neck, but he observed it in the video. After the situation became physical, defendant shifted into drive and drove off. It all happened in a matter of seconds.

¶ 16 Deputies Zeman and Sosnowski responded to a call for assistance shortly after 2 a.m. When Zeman arrived, Lutz and Sosnowski were on the driver's side of the car, which had two people inside. Zeman approached the passenger's side and he could smell the odor of alcohol coming from the car. Zeman heard the explanation about the radar and observed that defendant was "angry, belligerent, and uncooperative."

¶ 17 Zeman was at the scene for about three to four minutes before he approached the driver's side. Lutz ordered defendant several times to get out of his car, and defendant refused. Lutz then placed his hand in the window and told defendant to turn off the car and hand Lutz his keys. Defendant began to close his window on Lutz's arm. Zeman grabbed the driver's side door handle to open the door. It opened about two to three inches, and then defendant pulled it closed on Zeman. Zeman forced the door open all the way. Zeman was standing in the doorway and asked defendant to get out of the car. Defendant refused to do so. Zeman tried to turn off the car and reached his hand through the steering wheel in an attempt to find defendant's keys. As he did so, defendant put the car in drive and began to strike Zeman's shoulder area with an open or closed fist.

¶ 18 Zeman stated that he never brandished or showed his service weapon to defendant and did not strike, punch, or threaten defendant in any way. Zeman found defendant's contact insulting and provoking. When he was struck, it did not hurt his feelings, but it physically hurt, and it interfered with his job.

¶ 19 Sosnowski was on the passenger's side and observed the car's occupants to ensure the safety of the other officers at the scene. He also observed a flask in the rear passenger compartment. Sosnowski stated that defendant became argumentative and began to discuss the validity of the stop. Lutz and Zeman had opened the car door, and Sosnowski moved to the

driver's side in an effort to keep the door open. It was being pulled open and closed by defendant and the other officers. Sosnowski stood in the doorway to keep the door open.

¶ 20 The officers continued to inform defendant that he was under arrest and that he needed to step away from the car. Zeman attempted to turn off the ignition by reaching across the steering wheel. At that point, defendant struck Zeman. Sosnowski tried to ensure that defendant could not continue to batter Zeman by grabbing defendant's hands and pinning them to his chest. Defendant then accelerated the car and left the scene with the deputies still attempting to restrain him.

¶ 21 When Sosnowski saw defendant strike Zeman, he reached into the car. He tried to gain control of defendant's wrists and hold them to his chest so Zeman could make sure the car was off. Sosnowski was not trying to choke defendant, but he was trying to control his wrists.

¶ 22 Zeman was struck when Sosnowski entered the car to restrain defendant. There was a lot going on at the time and Sosnowski agreed with defense counsel's description that "with three bodies in a small area and lots of limbs, it can be sort of chaotic." However, Sosnowski remained sure of his observations at the scene.

¶ 23 While he was unsure which hand, or hands, defendant used, Sosnowski remembered defendant punching Zeman and then grabbing Zeman's arm. Sosnowski did not believe defendant was holding anything; both of defendant's hands were free.

¶ 24 Sosnowski did not recall placing his forearm against defendant's throat. He had seen the video the day before he testified, and Sosnowski stated that it was "an accurate depiction," but it seemed "broken." He thought that not all of the parts of the traffic stop were included. When he looked at the video, he did not see his arm on defendant's neck.

¶ 25 Losey testified for the defense that he had known defendant for seven years and they were good friends. On April 10, he called defendant and asked him to pick him up from a tavern where Losey had been drinking. Defendant picked him up and began driving toward defendant's home in Woodstock. Losey and defendant noticed a police car following them. Defendant pulled over when the emergency lights were activated. Lutz informed defendant that he had been speeding; defendant denied it and asked to see the radar reading. Lutz offered to have defendant view the radar in his car, but defendant asked for a photograph of the reading instead. Lutz replied that he did not have a smart phone.

¶ 26 Losey started videoing the event when more squad cars arrived. He thought "it was getting a little weird" because he had never seen so many officers at the scene for a speeding violation. Losey recorded some of the traffic stop. His recordings were not continuous. He turned off the cell when nothing was happening. He started to record again when there was discussion between the officers and defendant.

¶ 27 Lutz informed defendant that he was being placed under arrest for speeding 31 miles over the speed limit. Three officers were standing next to the car on the driver's side at that point. The police ordered defendant to turn the engine off and to get out of the car. When one officer reached his hand into the car to unlock the door, defendant told the officer to "get out of his car" and that he wanted to call his attorney. The officer then reached in to turn off the ignition while another officer had his arm pressed against defendant's neck and was "kind of choking him." Defendant grabbed one of the officer's arms and pulled it away so he could move. Losey stated that he was "pretty terrified" because the officers were becoming "very aggressive."

¶ 28 Defendant then drove away "to get somewhere safer." The roads were wet and he ended up in a culvert on a side road. Losey remembered telling defendant to stop; he thought the

officers were going to shoot them. When the police located Losey and defendant later, they took defendant into custody and drove both Losey and defendant to the station. Losey was told that he was not under arrest. Losey did not recall telling Lutz that the police had been "cordial the entire time." Losey stated that the flask found near the car was his and speculated that it must have fallen out of his coat when he retrieved his coat from the car.

¶ 29 Losey had seen the video and had made no alterations to it. It was played to the jury again and Losey stated that it reflected the events as he recalled them.

¶ 30 Losey continued to maintain that he saw defendant being choked, but he stated that the officer was holding defendant back against the seat with his arm. Defendant had been flailing around; the officer was holding defendant back against his Adam's apple. Losey saw defendant pull on an officer's arm, but he said defendant was not striking it. Rather, defendant was trying to pull away from him.

¶ 31 Defendant testified that, when he saw the police car behind him, he pulled over as soon as he could safely do so. Defendant told Lutz that he was "pretty sure" he was not speeding because he had set his cruise control and used his brake when turning on the road. Defendant asked to see the radar reading and Lutz insisted that defendant follow him to his squad car to see it. Lutz did not tell defendant how fast he was travelling.

¶ 32 Defendant gave Lutz his driver's license, which was valid, and Lutz went back to the squad car. When Lutz returned, he told defendant that he smelled alcohol and asked if defendant had been drinking. Defendant replied that he had not.

¶ 33 Other officers arrived at the scene. One officer repeatedly pulled on defendant's door handle and asked if the car was locked. Defendant told the police to contact former Kane

County Sheriff Pat Perez, with whom defendant was acquainted. He thought Perez might be able to advise him about being falsely accused of speeding.

¶ 34 When Lutz informed defendant that he was under arrest, defendant became very upset. He believed that he was wrongfully accused. Defendant started to close his window but stopped when Lutz told him not to close the window on his hand. An officer reached through the window, unlocked the car, and pulled the door handles open. Defendant remembered being choked. Defendant stated that an officer placed his forearm on his throat, that he was in pain, and had difficulty breathing. So, defendant grabbed what he thought was the officer's other arm. At the time, there were multiple arms and hands inside of the car and defendant was "literally being attacked." Defendant did not know which arm belonged to which officer. Defendant thought the same officer whose right arm was pressed against his throat had his left arm on the steering wheel. Once the forearm was pressed to his neck, defendant pulled on the officer's arm, hoping to release some pressure. Defendant denied punching, slapping, or striking any officer or attempting to "insult or provoke" them.

¶ 35 Defendant testified that he was scared so he put the car into drive and hit the gas pedal. Defendant lost control of his car on the wet road, hit a curb, and crashed.

¶ 36 Defendant admitted that his behavior during the incident was "not his finest hour" and that he lost his patience and temper. However, he felt the stop was unjustified and that as "a United States' citizen," he was not required to be "completely subservient" to the police.

¶ 37 During the jury instruction conference, defense counsel requested that the jury be instructed on the affirmative defense of self-defense. The State argued that defendant was required to show that the officer used excessive force against him and that the evidence did not support such a finding. Defense counsel replied that only "slight" evidence was necessary to

support the instruction and asserted that the evidence was "more than slight" given the video and the testimony of Losey and defendant that defendant was "choked" by the officer. The trial court granted defendant's request for a self-defense instruction over the State's objection.

¶ 38 During deliberations, the jury sent a note stating, "Aggravated Battery. We need to view the video again." The court determined that the jurors could view the video in open court. Defense counsel noted that two videos were played at trial and requested that the court ask the jurors what they actually wished to view. The court replied that the juror's note indicated it was the "aggravated battery" and that the court would "show them the whole thing." When the jurors returned to the courtroom, a "portion" of the videos were played for them in the presence of the judge and the parties.

¶ 39 The jury found defendant not guilty of speeding but guilty of aggravated battery, fleeing and eluding, and illegal transportation of liquor. In his motion for a new trial, defendant argued that the jury's verdict was against the manifest weight of the evidence because "the video recording depicts [defendant] being choked but does not depict him striking, punching or hitting any officer." The motion also alleged that defendant's use of force was justified as self-defense. The court denied the motion, finding that, although the video evidence was not before it, Zeman and Sosnowski testified that defendant hit Zeman and that therefore, the evidence was sufficient to sustain the conviction. The trial court subsequently sentenced defendant to 24 months' probation, 90 days in jail, 300 hours of public service work, and court costs. Defendant timely appeals.

¶ 40 II. ANALYSIS

¶ 41 A. Sufficiency of the Evidence

¶ 42 Defendant first contends that the State failed to prove him guilty beyond a reasonable doubt of aggravated battery to a police officer. The State has the burden of proving beyond a reasonable doubt each element of an offense. *Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979); *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). When a defendant challenges the sufficiency of the evidence, a court of review must determine "whether, [after] viewing the evidence in the light most favorable to the State, ' "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ' " (Emphasis omitted.) *People v. Belknap*, 2014 IL 117094, ¶ 67 (quoting *People v. Collins*, 106 Ill. 2d 237, 261 (1985), quoting *Jackson*, 443 U.S. at 319). It is not the role of the reviewing court to retry the defendant. *In re Q.P.*, 2015 IL 118569, ¶ 24. Rather, it is the responsibility of the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts. *People v. Bradford*, 2016 IL 118674, ¶ 12. Therefore, a court of review will not substitute its judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of the witnesses. *Id*. A criminal conviction will not be reversed for insufficient evidence unless the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt. *Belknap*, 2014 IL 117094, ¶ 67.

¶ 43 Defendant claims that he was not proven guilty beyond a reasonable doubt based on the evidence presented in the video that he did not punch or strike Zeman in the shoulder as charged or that other physical contact he had with Zeman was of an insulting or provoking nature.

¶ 44 Defendant was charged by indictment with the offense of aggravated battery of a police officer, in that he knowingly made physical contact of an insulting or provoking nature with Zeman, a peace officer, in that defendant struck Zeman in the arm and/or shoulder area, knowing Zeman to be a peace officer engaged in the performance of his official duties in violation of

section 12-3.05 of the Criminal Code of 2012 (Code) (720 ILCS 5/12-3.05(d)(4)(i) (West 2014)). A person commits battery when a defendant "intentionally or knowingly *** makes physical contact of an insulting or provoking nature." 720 ILCS 5/12-3(a) (West 2014). A person "acts knowingly" if he is "consciously aware" that his conduct is "practically certain" to cause the result proscribed by the offense. 720 ILCS 5/4-5(b) (West 2014); *People v Lattimore*, 2011 IL App (1st) 093238, ¶ 43.

¶ 45 To determine whether physical contact is "insulting or provoking," the trier of fact may consider the context in which the defendant's contact occurred, including the parties' relationship. *People v. Fultz*, 2012 IL App (2d) 101101, ¶ 49. The person with whom the defendant has contact does not have to explicitly testify that he was insulted or provoked; his reaction at the time of contact may enable the trier of fact to infer that he was insulted or provoked. *Id*.

¶ 46 The testimony at trial gave different versions of the event. According to Zeman, defendant "punched" or "hit" him in the shoulder. Sosnowski testified that he saw defendant "punch" Zeman with a "closed fist." On the other hand, defendant denied punching or striking any of the officers. He said Sosnowski's forearm was pressed against his throat, that he was in pain, and had difficulty breathing. Defendant stated that he grabbed the arm of the officer who he believed was choking him to release the pressure on his neck. Defendant claims the video of the incident supports his version of the incident and contradicts the officers' testimony. Defendant argues that, because the video is inconsistent with the officers' version of events, their testimony was too unconvincing and unsatisfactory to prove the act charged in the indictment.

¶ 47 The fact finder's assessment of witnesses "is not conclusive," but given great deference (*People v. Cunningham*, 212 Ill. 2d 274, 280 (2004)) because the fact-finder can see and hear the witnesses while the reviewing court must necessarily rely on the written record. See *People v.*

Ortiz, 196 Ill. 2d 236, 267 (2001). When a conviction depends on eyewitness testimony, the testimony is insufficient "where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *Cunningham*, 212 Ill. 2d at 280. Defendant cites *People v. Shaw*, 2015 IL App (2d) 123157, ¶ 29, in which the Appellate Court, First District, after a thorough review of a surveillance video, called into question a witness's account of an encounter with the defendant, which did not corroborate the essential elements of a robbery. *Id.* Viewing the interactions captured by the surveillance video, the witness's various statements to the officers, and his explanation of events at trial, the court found that the evidence was simply too improbable, unconvincing, and contrary to human experience to sustain the conviction. *Id.*

¶ 48 Although our review of the video shows that it does somewhat impeach the testimony of the officers; it also supports the jury's verdict. Everything on the video happens very quickly. However, it simply is not clear enough to either contradict or corroborate defendant's testimony. Thus, it was up to the jury to weigh the evidence and to resolve the conflicts in the testimony. Zeman had every right to reach inside of the car, and defendant did not have the corresponding right to resist. Additionally, given the testimony that there were multiple arms and hands in the car, and defendant's acknowledgment that he lost his patience and temper, the jury could reasonably infer that defendant punched or struck Zeman. If the jury did not believe defendant was being choked, then defendant's act of grabbing at the officer's arm certainly can be viewed by the jury as insulting and provoking conduct as well. When considering all of the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found the essential elements of aggravated battery of a police officer beyond a reasonable doubt.

¶ 49 B. Jury Instructions

¶ 50 At trial, defendant denied punching or striking Zeman as charged in the indictment. He asserted that any physical contact that he made with the police was in response to their use of excessive force against him. Based on this, he requested and the court agreed, to allow the self-defense instruction to be given to the jury. See Illinois Pattern Jury Instructions, Criminal, No. 24-25.06 (4th ed. 2000) ("a person is justified in the use of force" when "he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force."). However, the jury was not given an instruction that the State bore the burden of proving beyond a reasonable doubt that defendant's actions were not justified. Defendant contends that, once the jury was instructed on self-defense, the jury should have been given such an instruction. See *People v. Cacini*, 2015 IL App (1st) 130135, ¶ 49. Defendant acknowledges that this issue was not properly preserved for review and requests that it be considered as plain error pursuant to Supreme Court Rule 451(c) (eff. April 8, 2013) or because trial counsel was ineffective for failing to tender it.

¶ 51 A defendant generally waives any error contained in jury instructions if he fails to object or proffer alternative instructions at trial, and issues not properly raised in a defendant's posttrial motion will not be considered on appeal. *People v. Reddick*, 123 Ill. 2d 184, 198 (1988). However, Illinois Supreme Court Rule 451(c) provides that "substantial defects [in jury instructions in criminal cases] are not waived by failure to make timely objections thereto if the interests of justice require." Ill. S.Ct. R. 451(c) (eff. April 8, 2013); *People v. Hopp*, 209 Ill. 2d 1, 7 (2004). The exception to the waiver rule for substantial defects under Rule 451(c) "applies when there is a grave error or when the case is so factually close that fundamental fairness requires that the jury be properly instructed." *Hopp*, 209 Ill. 2d at 7.

¶ 52 Rule 451(c) is coextensive with the "plain error" clause of Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967), 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." *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). We construe these rules "identically." *People v. Herron*, 215 Ill. 2d 167, 175 (2005).

¶ 53 Under the plain error analysis, we must first determine whether error occurred at all. If there was error, we then consider whether either of the two prongs of the plain error doctrine has been satisfied. Reversible error occurs 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. *Piatkowski*, 225 Ill. 2d at 565. The burden of persuasion rests with the defendant under both prongs.

¶ 54 On appeal, the State does not argue that the self-defense instruction should not have been given or that it was not error to omit the additional issue instruction. The State argues that it was not plain error and relies on *People v. Huckstead*, 91 Ill. 2d 536 (1982). In *Huckstead*, the defendant had been charged with murder. The jury received the issues instruction for a murder case and an instruction on self-defense. However, like this case, the jury was not given an instruction providing that, in addition to the elements of the crime, the State must prove beyond a reasonable doubt "[t]hat the defendant was not justified in using the force which he used." *Id.* at 543. The defense counsel failed to tender such an instruction or include this omission in his posttrial motion as error. *Id.* The *Huckstead* court applied the plain error test to the facts and

circumstances of that case. It held that the instructions, in combination with the closing arguments by counsel for both sides, apprised the jury that the State had the burden of proving that the defendant was not justified in the force he used. The record revealed that, in closing argument, defense counsel "repeatedly and specifically impressed upon the jury the necessity of the State proving that the defendant was not justified in the force he used." *Id*. at 545. Further, the record showed that the State, during rebuttal, also reiterated that it was its burden to show that the force used was not justified. *Id*. at 545. As a result, the court found that the failure of the trial court to give the instruction did not constitute "grave error." *Id*. (citing *Henderson v. Kibbe*, 431 U.S. 145 (1977); *United States v. Jackson*, 569 F.2d 1003 (7th Cir. 1978), cert. denied 437 U.S. 907 (where the court, utilizing a plain-error standard found that failure of the trial court to give an instruction that specifically placed the burden of proof on the self-defense issue on the government did not constitute plain error where (1) the court read the self-defense instruction to jury, (2) defense counsel stated, without objection, in closing argument that the prosecution had the burden of proof on the self-defense issue and (3) the evidence of defendant's guilt was overwhelming)). Moreover, with respect to the "factually-close" prong of the plain-error test, the court's review of the record led to the conclusion that the evidence in the case was not factually close. *Huckstead*, 91 Ill. 2d at 546-47.

¶ 55 Defendant relies on *People v. Berry*, 99 Ill. 2d 499 (1984). In *Berry*, the defendant argued self-defense at a trial in which he was convicted of murder and armed violence. The jury instructions included general instructions on the burden of proof, the elements of the crimes charged, and the definition of self-defense. The jury, however, was not given an instruction which, in addition to proving the elements of the crime, requires the State to prove, beyond a reasonable doubt, that the defendant was not justified in using the force which he used. The

State in *Berry* maintained that *Huckstead* " 'put to rest' " the opinions of the appellate court on the question of whether the failure to give the instruction amounts to plain error. *Id*. at 504.

¶ 56 The *Berry* court distinguished *Huckstead* by reasoning that (1) the defendant's attorney had never told the jury—either in closing argument or at any other time—that the State had the burden to disprove the defendant's affirmative defense; and (2) the case was factually close. *Id*. at 506. The *Berry* court observed that the defense counsel simply made a general reference to the State's burden " 'of proving [the defendant] guilty of each and every allegation that is charged beyond a reasonable doubt.' " The court further pointed out that this "instructional gap" was not filled by the prosecutor who, in rebuttal, only acknowledged that the State had the burden of proof. *Id.* at 505-06. The court reversed the defendant's convictions, finding the failure to instruct the jury on the State's burden to disprove self-defense was a "critical error which severely threatened the fundamental fairness of the defendant's trial." *Id*. at 507 (internal quotation marks omitted).

¶ 57 We conclude that this case is closer to *Berry* than it is to *Huckstead.* Like *Berry*, neither the State nor the defense specifically argued that the State bore the burden of proving the lack of self-defense beyond a reasonable doubt. The State points out that, while the closing arguments here were not as clear as those in *Huckstead*, the trial court introduced the arguments by explaining that the State had the burden of proof and that the arguments did not constitute evidence. The State notes in support that defense counsel reminded the jurors that defendant is presumed innocent, and the prosecutor acknowledged the State's responsibility of proving defendant guilty beyond a reasonable doubt. The State additionally claims that the instruction "without legal justification" was sufficient. We disagree with the State's reasoning. None of these points specifically impressed upon the jury the necessity that the State must prove beyond a

reasonable doubt that defendant was not justified in the use of force. These were merely general references to the State's burden of proving defendant guilty of the charges against him. As pointed out in *Berry*, the case upon which defendant relies, the instructional gap was not filled by the prosecutor or the defense. *Berry*, 99 Ill. 2d at 505-06.

¶ 58 Also, similar to *Berry*, the evidence here is close. The video in some ways impeaches the officer's testimony that defendant struck him in the shoulder. Moreover, it is unclear whether or not defendant is clutching at the officer's arm to relieve the pressure on his throat. We conclude that this case requires reversal.

¶ 59 Because we hold that a rational finder of fact could find defendant guilty of aggravated battery of a police officer beyond a reasonable doubt based on the evidence presented, retrial of defendant would not violate double jeopardy principles. Since we have reversed defendant's conviction of aggravated battery of a police officer, we need not address defendant's other claims of error.

¶ 60 III. CONCLUSION

¶ 61 For the foregoing reasons, the judgment of the circuit court of McHenry County finding defendant guilty of aggravated battery of a police officer is reversed and the cause is remanded for a new trial.

¶ 62 Reversed and remanded.