Office of the State Appellate Defender

# Illinois Criminal Law Digest

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## APPEAL

**§2-2(a)**

**People v. Garcia**, 2015 IL App (1st) 131180 (Nos. 1-13-1180 & 1-13-1229 (cons.), modified upon denial of rehearing 2/2/16)

An appeal from a final judgment includes every previous ruling that represents a step in the procedural progression leading to the final judgment and every preliminary decision necessary to the ultimate relief.

Here all but one of defendant's post-conviction claims were dismissed on July 27, 2010 at the second stage of proceedings. The final claim was denied on March 28, 2013 after a third-stage evidentiary hearing. Following that denial, defendant filed a notice of appeal stating that an appeal was being taken from the trial court's order on March 28, 2013, describing it as follows: "Post-conviction petition denied after Stage III hearing."

On appeal defendant challenged the trial court's ruling on an issue that had been dismissed at the second stage. The State argued that the Appellate Court lacked jurisdiction to consider that claim because defendant failed to raise the claim in his notice of appeal by stating that he was appealing the denial of his claim on March 28, 2013 following the third-stage evidentiary hearing. The State argued that defendant affirmatively chose to only appeal the third-stage issue, not the entire judgment.

The court rejected the State's argument. Defendant could not appeal the July 27, 2010 ruling dismissing his claims at the second stage of proceedings until after there was a final and appealable judgment, which only occurred after the outcome of the third-stage hearing. The rules for post-conviction proceedings do not provide for interlocutory appeals, so defendant had to wait until the final judgment disposing of the entire petition before he could appeal.

The July 27, 2010 order partially dismissing defendant's petition and advancing the remaining claim to the third stage was both a step in the procedural progression of his case and a preliminary determination necessary to reach the final judgment. Defendant's notice of appeal thus included both rulings. But the court noted that when a petition raising several factually distinct claims that were not resolved in one hearing, the "better practice would be to specify all of the orders resolving the distinct claims in the notice of appeal."

(Defendant was represented by Assistant Defender Darrel Oman, Chicago.)

## ARMED VIOLENCE

**§3-2**

**People v. Ligon**, 2016 IL 118023 (No. 118023, 2/19/16)

1. The proportionate penalties clause of the Illinois Constitution provides that all penalties shall be determined according to the seriousness of the offense. Ill. Const. 1970, art. I, §11. A sentence violates the clause if it is: (1) so cruel, degrading, or disproportionate to the offense that it shocks the moral sense of the community; (2) greater than the sentence for an offense with identical elements.

Under the second, "identical elements" test, if the legislature provides two different penalties for the exact same elements, then one of the penalties has not been set in accordance with the seriousness of the offense. Where identical offenses yield different penalties, the penalties are unconstitutionally disproportionate and the greater penalty cannot stand.

2. Defendant was convicted of aggravated vehicular hijacking with a dangerous weapon other than a firearm (AVH/DW). Defendant was armed with a BB gun and the State charged this as "a dangerous weapon, to wit: a bludgeon." Since this was his third Class X felony conviction, the trial court adjudged him an habitual criminal and sentenced him to natural life imprisonment.

Defendant eventually filed a 2-1401 petition arguing that his sentence violated the proportionate penalties clause because AVH/DW had the identical elements as armed violence with a category III weapon but was punished as a Class X felony with a minimum of seven years imprisonment, while armed violence with a category III weapon was only punished as a Class 1 felony.

3. In the Supreme Court, the State first argued, citing **People v. Cummings**, 375 Ill. App. 3d 513 (1st Dist., 2007), that it was not appropriate in this case to conduct an identical elements comparison between AVH/DW and armed violence because defendant was not sentenced under the AVH/DW statute, but rather was sentenced as an habitual criminal. The court rejected the State's argument, holding that an identical elements test may be conducted where a defendant is ultimately sentenced as an habitual criminal.

The Habitual Criminal Act (Act) mandates the imposition of a natural life sentence on defendants convicted of three Class X felonies within a 20-year period. 720 ILCS 5/33B-1(a). The act does not create an independent offense, but simply prescribes the circumstances where a defendant may be more severely punished because of his prior convictions. The Act is a recidivist sentencing statute that does not define any crime and has no elements to compare with another statute. Since the identical elements test requires a comparison between the elements of different offenses, it cannot be applied to the Act.

The court thus overruled **Cummings** and held that a defendant's sentence as an habitual criminal has no effect on a court's determination of whether a qualifying offense violates the identical elements test.

4. But the court found that the offense of AVH/DW as charged in this case did not have the identical elements as armed violence with a category III weapon.

A defendant commits AVH/DW as charged here when he takes a motor vehicle from another person by force and is armed with a dangerous weapon other than a firearm. 720 ILCS 18-4. The charging instrument identified the dangerous weapon here as a bludgeon. In comparison, a defendant commits armed violence with a category III weapon when he commits any felony and is armed with "a bludgeon, black-jack, slungshot, sand-bag, sand club, metal knuckles, billy, or other dangerous weapon of like character." 720 ILCS 5/33A-1, 33A-2.

The AVH/DW statute does not define dangerous weapons. Instead, the definition is derived from common law and includes any object capable of being used in a manner likely to cause serious injury. Many objects, including the BB gun in this case, can be used in a deadly fashion as bludgeons and are thus properly classified as dangerous weapons even if they were not actually used in that manner. It is sufficient that they have the potential for such use.

By contrast, the armed violence statute specifically defines what constitutes a dangerous weapon. In **People v. Davis**, 199 Ill. 2d 130 (2002), the court held that a BB gun was not a bludgeon or other dangerous weapon of like character as defined by the statute. Although a BB gun might be used as a bludgeon, it is not typically identified as such and thus is not "of like character" to the bludgeon-type weapons included as category III weapons.

Accordingly, the elements of AVH/DW are not identical to the elements of armed violence with a category III weapon.

5. The court also held that the State was not equitably barred from arguing that the two statutes did not have identical elements. Defendant argued that since the State took the position during prior proceedings, including trial and direct appeal, that defendant was armed with a bludgeon, it could not now assert that defendant's weapon was not a bludgeon.

Under the common law, weapons are divided into four categories: (1) objects that are dangerous *per se*, such as knives and loaded guns; (2) objects that are never dangerous, such as a four-inch plastic toy gun; (3) objects that are not necessarily dangerous weapons, but can be used in a dangerous manner, such as an unloaded gun made of heavy material, that can be used as a bludgeon; and (4) objects that are not necessarily dangerous, but were actually used in a dangerous manner.

At trial, defendant was properly convicted of using a BB gun as a common-law dangerous weapon of the third type, one that can be used as dangerous weapon. The court thus found that it was irrelevant that the indictment used the term "bludgeon" instead of "BB gun." The State consistently contended in the prior proceedings that defendant was armed with an object that could have been used as a bludgeon. It was not inconsistent for the State to also argue that the BB gun was not an actual bludgeon. Accordingly, the State was not equitably barred from making its current argument before the Supreme Court.

Defendant's conviction and sentence were affirmed.

(Defendant was represented by Assistant Defender Pat Cassidy, Chicago.)

## COLLATERAL REMEDIES

**§9-1(o)(1)**

**People v. Garcia**, 2015 IL App (1st) 131180 (Nos. 1-13-1180 & 1-13-1229 (cons.), modified upon denial of rehearing 2/2/16)

An appeal from a final judgment includes every previous ruling that represents a step in the procedural progression leading to the final judgment and every preliminary decision necessary to the ultimate relief.

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(Defendant was represented by Assistant Defender Darrel Oman, Chicago.)

**§9-2(b)**
**People v. Ligon**, 2016 IL 118023 (No. 118023, 2/19/16)

A voidness challenge based on the unconstitutionality of a criminal statute under the proportionate penalties clause may be raised at any time. A motion to vacate a void judgment is properly raised in a petition for relief from judgment under section 2-1401. Here, defendant properly challenged his sentence for aggravated vehicular hijacking with a dangerous weapon other than a firearm (AVH/DW) in a 2-1401 petition by arguing that it violated the proportionate penalties clause because AVH/DW had the identical elements as armed violence with a category III weapon but was punished as a Class X felony with a minimum of seven years imprisonment, while armed violence with a category III weapon was only punished as a Class 1 felony.

(Defendant was represented by Assistant Defender Pat Cassidy, Chicago.)

## COUNSEL

**§13-5(d)(3)(a)(2)**
**People v. Demus**, 2016 IL App (1st) 140420 (No. 1-14-0420, 2/10/16)

1. Where the defendant makes a post-trial *pro se* claim of ineffective assistance of counsel, the trial court should examine the factual basis underlying the claim. **People v. Krankel**, 102 Ill.2d 181, 464 N.E.2d 1045 (1984). The *Krankel* rule also applies to *pro se* motions alleging ineffective assistance of counsel at probation revocation hearings.

The first step in determining if **Krankel** applies is to ascertain whether the defendant has adequately raised a claim of ineffective assistance of counsel. To do so, the defendant must make an allegation of ineffective assistance and provide some factual specificity for the allegation. A bald allegation that counsel's representation was

ineffective does not trigger the trial court's duty to conduct a preliminary inquiry under **Krankel**.

2. Defendant sufficiently raised a *pro se* claim of ineffective assistance of counsel where he claimed that his attorney disregarded his requests to obtain documents which would have shown that the arresting officer committed perjury when he testified at defendant's trial. The court concluded that the claim was sufficiently specific to trigger the *Krankel* rule, that defendant repeated the claim at several post-trial appearances, and that the trial court recognized the claim when it stated that defendant could file a *pro se* motion alleging ineffective assistance of counsel. The Appellate Court concluded:

> [T]he trial court was aware Demus wanted his trial counsel to subpoena a document that would have allegedly provided evidence to impeach the officer who testified at his violation of probation hearing and which counsel failed to do. Therefore, despite the fact Demus did not file a written, *pro se* motion or even utter the words "ineffective assistance of counsel," he sufficiently alleged his trial counsel's ineffectiveness and brought his claim to the trial court's attention.

3. When the defendant makes an adequate allegation of ineffective assistance, the trial court must examine the factual basis of the claim. If the claim lacks merit or pertains to trial strategy, the trial court may deny the motion without appointing new counsel. However, if the allegations show possible neglect of the case, new counsel should be appointed.

Although the trial court held an evidentiary hearing, tried to help defendant explore the merits of his claim, and allowed great latitude in examining the police officer in question, the focus of the hearing was whether the underlying claim of perjury had merit rather than whether trial counsel was ineffective. In addition, the trial court allowed the defense attorney whose performance was being questioned to participate in the hearing, causing defendant to leave the courtroom "to express his disagreement with counsel's participation." The trial court then ruled that defendant had abandoned his ineffective assistance claim by leaving the courtroom.

The Appellate Court concluded that by failing to appoint new counsel and forcing defendant to proceed, the trial court deprived defendant of the assistance of new counsel in developing his claim of ineffective assistance. The court rejected the State's argument that the error pertained only to matters of trial strategy, noting that the claim stemmed from a failure to obtain a potentially impeaching document that was readily available and did not involve the strategic decision whether to use that document after it was obtained.

The cause was remanded for the appointment of new counsel and a hearing on defendant's *pro se* claim of ineffective assistance of counsel.

(Defendant was represented by Assistant Defender Chan Yoon, Chicago.)

## DISCOVERY

**§§15-1, 15-8**

**People v. Moore**, 2016 IL App (1st) 133814 (No. 1-13-3814, 2/18/16)

1. At defendant's trial, the State introduced the testimony of two witnesses who identified defendant in court. Both witnesses also viewed separate photo arrays. One picked defendant out of the array, while the other did not. By the time of trial, both arrays had been lost or destroyed, although there was no evidence the State had acted in bad faith by failing to preserve this evidence.

On appeal, defendant argued that he was denied his right to due process where the State had failed to preserve the photo arrays. The court disagreed, holding that since there was no evidence that the State had acted in bad faith and no evidence that the missing evidence would have been inherently exculpatory, defendant was not denied due process.

2. In **Arizona v. Youngblood**, 488 U.S. 51 (1988), the Supreme Court held that it is not necessarily a due process violation when the State fails to preserve evidence. When the missing evidence is not inherently exculpatory but is only potentially useful, the defendant must show the State acted in bad faith to establish a due process violation.

In **People v. Newberry**, 166 Ill. 2d 310 (1995), the Illinois Supreme Court held that the defendant did not need to show bad faith on the part of the State to establish a due process violation where defendant has made a discovery request and the destroyed evidence was essential to the outcome of the case.

In **Illinois v. Fisher**, 540 U.S. 544 (2004), the Supreme Court expressly disagreed with the reasoning in **Newberry**, and re-affirmed that to establish a due process violation, the defendant must show that the State acted in bad faith, even if the defendant has made a discovery request and even if the destroyed evidence was essential to the outcome of the case. The only exception to the bad-faith requirement is where the evidence is materially exculpatory rather than simply potentially useful.

The Appellate Court noted that the Illinois Supreme Court had not yet addressed whether the holding in **Fisher** affected a due process analysis under the Illinois Constitution. But it agreed with previous Appellate Court decisions holding that there was no indication the Illinois Supreme Court intended to interpret the Illinois due process clause more broadly than the federal clause. Accordingly, **Fisher** was the controlling authority.

3. Here the photo arrays were only potentially useful, not materially exculpatory. And there was no evidence the State acted in bad faith by not preserving the evidence. Thus under **Fisher**, defendant could not show a due process violation.

## DISORDERLY, ESCAPE, RESISTING AND OBSTRUCTING OFFENSES

### §16-2

**People v. Jenkins**, 2016 IL App (1st) 133656 (No. 1-13-3656, 2/6/16)

To convict a defendant of felony resisting or obstructing a police officer, the State must prove that defendant knowingly resisted or obstructed an officer in the performance of an authorized act, and his violation proximately caused an injury to the officer. 720 ILCS 5/31-1(a), (a-7). Proximate cause of injury is the element that elevates this offense from a Class A misdemeanor to a Class 4 felony.

Here defendant was charged with and convicted of the felony version of this offense, but the trial court committed error by failing to instruct the jury on the proximate cause of injury element.

Although defendant failed to object, the Appellate Court found that the incorrect instruction constituted plain error under the closely balanced evidence prong of the plain error doctrine. The arresting officer testified that as he tried to arrest defendant, defendant struggled with him and kicked him in the face causing an injury. Defendant, by contrast, testified that he did not resist arrest, but only started kicking and screaming in pain after the officer sprayed mace in his face.

The conflicting testimony showed that the jury had to make a judgment of credibility about whether defendant kicked the officer while he was resisting arrest. Where a judgment depends solely on the credibility of witnesses at trial, the evidence is closely balanced.

Defendant's conviction was reversed and remanded for a new trial.

(Defendant was represented by Assistant Defender Phil Payne, Chicago.)

## HOMICIDE

**§26-4(a)**

**People v. Nibbe**, 2016 IL App (4th) 140363 (No. 1-14-0363, 2/10/16)

Second degree murder is first degree murder plus a mitigating factor. Defendant was charged with first degree murder under a knowing murder theory in that he killed with knowledge that his actions created a strong probability of death or great bodily harm.

The court reversed the conviction for second degree murder, finding that the evidence was insufficient to prove knowledge on defendant's part that a single punch to the decedent's face would create a strong probability of death or great bodily harm. The decedent's death was caused by hitting his head on the sidewalk as he fell.

The court stressed that under Illinois law, the striking of a blow with the fist on the side of the face or head is not considered likely to result in death or great bodily harm. Although courts have recognized exceptions to this principle where there is a great disparity in size and strength between the defendant and the decedent, or where the defendant inflicted multiple blows, neither situation applied here. Although defendant was slightly larger and slightly younger that the decedent, the disparity was not great enough that defendant should have known that striking the decedent in the face with his fist would cause death.

The court noted that the State did not cite any cases in which one blow with a bare hand by a single assailant was deemed sufficient to sustain a first degree murder conviction. In addition, death was caused by the decedent's head striking the concrete and not the blow to the face. Finally, defendant had been drinking and was in an excitable due to the decedent's attempt to enter the apartment occupied by defendant and his friends.

Because a second degree murder conviction requires proof of first degree murder, the court vacated the second degree murder conviction and remanded the cause for resentencing on aggravated battery.

(Defendant was represented by Assistant Defender Warner Brockett, Springfield.)

## INDICTMENTS, INFORMATIONS, COMPLAINTS

**§29-2**

**People v. Boston**, 2016 IL 118661 (No. 118661, 2/26/16)

1. A grand jury investigation is designed to both exonerate individuals suspected of criminal activity and to establish probable cause necessary to arrest suspected felons. The grand jury has the power to investigate crimes and may issue subpoenas regardless of whether a specific charge is pending. Matters occurring before a grand jury may be disclosed to the prosecution and other government personnel for use in the enforcement of criminal law. 725 ILCS 5/112-6.

In **In re May 1991 Will County Grand Jury**, 152 Ill. 2d 381 (1992), the court held that under the federal constitution, no preliminary showing of reasonableness is necessary for a grand jury to issue a subpoena for noninvasive physical evidence. Under the Illinois Constitution, which the court recognized as providing broader protections from unreasonable searches, there must be some showing of individualized suspicion before a subpoena for noninvasive physical evidence may be issued. This showing may be made by an affidavit from the prosecutor.

2. Here the police found a bloody palm print on a wall near the victim's body. The prosecutor investigating the case asked a grand jury to issue a subpoena for defendant's palm prints. The prosecutor informed the grand jury that defendant was the ex-boyfriend of the victim and "the police have received information that he may have been involved in her killing."

The grand jury issued a subpoena for a complete set of defendant's palm prints. Chicago police officers served the subpoena on defendant, obtained his palm prints, and delivered them to the Illinois State Police crime lab. The defendant's palm prints matched the palm print found at the scene and were used to convict defendant of first degree murder.

3. The court found that the State provided the grand jury with the requisite individualized suspicion to support the issuance of the subpoena. The prosecutor informed the grand jury that defendant was the ex-boyfriend of the victim and that the police had information that defendant may have been involved in the murder. Although the prosecutor did not provide this information in an affidavit, there was no allegation that any false statements were made to the grand jury.

4. The court also found that the procedures used in this case were "sloppy" and should not be repeated. The subpoena was prepared at the direction of the prosecutor rather than the grand jury. The evidence was made returnable to the prosecutor rather than the grand jury. And the evidence was delivered to the crime lab rather than the grand jury. But since the grand jury could have disclosed the evidence to the prosecution, defendant failed to show that he was prejudiced by these procedures.

5. The dissenting justice believed that the procedures used in this case were not simply "sloppy," but instead constituted "a complete breakdown of the procedures governing the grand jury process." As such, they undermined the integrity of the judicial process, requiring suppression of the evidence.

(Defendant was represented by Assistant Defender Sarah Curry, Chicago.)

## JURY

**§32-8(a)**

**People v. Jenkins**, 2016 IL App (1st) 133656 (No. 1-13-3656, 2/6/16)

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The conflicting testimony showed that the jury had to make a judgment of credibility about whether defendant kicked the officer while he was resisting arrest. Where a judgment depends solely on the credibility of witnesses at trial, the evidence is closely balanced.

Defendant's conviction was reversed and remanded for a new trial.

(Defendant was represented by Assistant Defender Phil Payne, Chicago.)

## PROSECUTOR

### §§41-1, 41-10, 41-11, 41-12, 41-13

**People v. Mpulamasaka**, 2016 IL App (2d) 130703 (No. 2-13-0703, 2/17/16)

The court found that the prosecutors committed error in several respects during closing argument, and that it was "reasonably certain that but for the errors . . . the jury's verdict would have been not guilty."

1. The prosecutors erred where they used evidence that had been introduced on a count for which a directed verdict had been granted to establish an element of another count. Although the trial court neglected to tell the jury that a directed verdict had been ordered on the count to which the evidence was relevant, and defense counsel failed to request such an instruction, that oversight "did not give the State license" to use the evidence to confuse the jury concerning the remaining charges.

2. Where defendant was charged with aggravated criminal sexual assault, the prosecutors erred by referring to him in closing argument as a "predator" who took "a piece of meat" home. "Each of these remarks was clearly improper and an attempt to cultivate anger toward defendant."

3. The prosecutors erred in closing argument by making statements which attacked the integrity and denigrated the testimony of a defense expert. Although the State did not challenge the expert's qualifications, it argued that he "was at the rent-a-doctor agency sipping a latte" and sold his integrity "for three pieces of silver." At the same time, the State misstated the expert's testimony.

The court noted that the trial court overruled defense objections to the argument, giving the jury the impression that the statements accurately described the expert's opinion. Furthermore, some of the improper remarks were made in the State's rebuttal, when the defense had no chance to respond.

4. The prosecutors erred by arguing that the complainant's testimony on cross-examination, which supported defendant's claim of consent, was the result of misleading and confusing questioning by defense counsel. There was no evidence that the complainant had any trouble understanding defense counsel's questions, and urging the jury to ignore the testimony on cross-examination because it was "not [the complainant's] words" violated the right to confront witnesses and the right to a fair trial.

5. The prosecutor engaged in misconduct by sitting at the witness stand in closing argument while arguing about the complainant's "courage in testifying" and commenting on defendant's credibility (despite the fact that defendant did not testify). "Whether intentionally or not, by arguing S.B.'s courage and then transitioning to defendant's credibility, the prosecutor might have reminded the jury that defendant did not testify, especially when the argument was made from the witness chair."

Furthermore, the tactic of "leaving the podium and sitting in the witness chair . . . was designed to evoke sympathy for [the complainant] and disgust for defendant." In rejecting the State's argument that defendant cited no authority that a party cannot sit in the witness chair during closing argument, the court stated: "There does not need to be a case precedent to establish that certain conduct is improper. Many practices and customs have been historically followed in the trial process."

The court concluded that even in the absence of a defense objection, the trial court should have prevented the prosecutor from arguing from the witness stand.

6. Finally, the prosecution erred by ending its rebuttal with a "final appeal to sympathy" by calling defendant a "bully" who took advantage of the "weakest among us." "[G]uilty verdicts may not be based on sympathy."

(Defendant was represented by former Assistant Defender Barb Paschen, Elgin.)

## ROBBERY

**§43-4**

**People v. Ligon**, 2016 IL 118023 (No. 118023, 2/19/16)

1. The proportionate penalties clause of the Illinois Constitution provides that all penalties shall be determined according to the seriousness of the offense. Ill. Const. 1970, art. I, §11. A sentence violates the clause if it is: (1) so cruel, degrading, or disproportionate to the offense that it shocks the moral sense of the community; (2) greater than the sentence for an offense with identical elements.

Under the second, "identical elements" test, if the legislature provides two different penalties for the exact same elements, then one of the penalties has not been set in accordance with the seriousness of the offense. Where identical offenses yield different penalties, the penalties are unconstitutionally disproportionate and the greater penalty cannot stand.

2. Defendant was convicted of aggravated vehicular hijacking with a dangerous weapon other than a firearm (AVH/DW). Defendant was armed with a BB gun and the State charged this as "a dangerous weapon, to wit: a bludgeon." Since this was his third Class X felony conviction, the trial court adjudged him an habitual criminal and sentenced him to natural life imprisonment.

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minimum of seven years imprisonment, while armed violence with a category III weapon was only punished as a Class 1 felony.

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Accordingly, the elements of AVH/DW are not identical to the elements of armed violence with a category III weapon.

5. The court also held that the State was not equitably barred from arguing that the two statutes did not have identical elements. Defendant argued that since the State took the position during prior proceedings, including trial and direct appeal, that defendant was armed with a bludgeon, it could not now assert that defendant's weapon was not a bludgeon.

Under the common law, weapons are divided into four categories: (1) objects that are dangerous *per se*, such as knives and loaded guns; (2) objects that are never dangerous, such as a four-inch plastic toy gun; (3) objects that are not necessarily dangerous weapons, but can be used in a dangerous manner, such as an unloaded gun made of heavy material, that can be used as a bludgeon; and (4) objects that are not necessarily dangerous, but were actually used in a dangerous manner.

At trial, defendant was properly convicted of using a BB gun as a common-law dangerous weapon of the third type, one that can be used as dangerous weapon. The court thus found that it was irrelevant that the indictment used the term "bludgeon" instead of "BB gun." The State consistently contended in the prior proceedings that defendant was armed with an object that could have been used as a bludgeon. It was not inconsistent for the State to also argue that the BB gun was not an actual bludgeon. Accordingly, the State was not equitably barred from making its current argument before the Supreme Court.

Defendant's conviction and sentence were affirmed.

(Defendant was represented by Assistant Defender Pat Cassidy, Chicago.)

## SEARCH & SEIZURE

**§§44-1(a), 44-2**

**People v. Boston**, 2016 IL 118661 (No. 118661, 2/26/16)

1. A grand jury investigation is designed to both exonerate individuals suspected of criminal activity and to establish probable cause necessary to arrest suspected felons. The grand jury has the power to investigate crimes and may issue subpoenas regardless of whether a specific charge is pending. Matters occurring before a grand jury may be disclosed to the prosecution and other government personnel for use in the enforcement of criminal law. 725 ILCS 5/112-6.

In **In re May 1991 Will County Grand Jury**, 152 Ill. 2d 381 (1992), the court held that under the federal constitution, no preliminary showing of reasonableness is necessary for a grand jury to issues a subpoena for noninvasive physical evidence. Under the Illinois Constitution, which the court recognized as providing broader protections from unreasonable searches, there must be some showing of individualized suspicion before a subpoena for noninvasive physical evidence may be issued. This showing may be made by an affidavit from the prosecutor.

2. Here the police found a bloody palm print on a wall near the victim's body. The prosecutor investigating the case asked a grand jury to issue a subpoena for defendant's palm prints. The prosecutor informed the grand jury that defendant was the ex-boyfriend of the victim and "the police have received information that he may have been involved in her killing."

The grand jury issued a subpoena for a complete set of defendant's palm prints. Chicago police officers served the subpoena on defendant, obtained his palm prints, and delivered them to the Illinois State Police crime lab. The defendant's palm prints matched the palm print found at the scene and were used to convict defendant of first degree murder.

3. The court found that the State provided the grand jury with the requisite individualized suspicion to support the issuance of the subpoena. The prosecutor informed the grand jury that defendant was the ex-boyfriend of the victim and that the police had information that defendant may have been involved in the murder. Although the prosecutor did not provide this information in an affidavit, there was no allegation that any false statements were made to the grand jury.

(Defendant was represented by Assistant Defender Sarah Curry, Chicago.)

**§44-1(c)(2)**

**People v. Harrison**, 2016 IL App (5th) 150048 (No. 5-15-0048, 2/18/16)

Since the sole purpose of the exclusionary rule is to deter future violations of the Fourth Amendment, it only applies when there is some degree of police culpability and the deterrence benefits of suppression outweigh its heavy costs. Therefore under the good faith exception, the exclusionary rule does not apply when the police obtain evidence through a search conducted in reasonable reliance on binding precedent.

An officer arrested defendant on suspicion of driving under the influence of alcohol. When defendant refused to take a breath test, the officer transported him to a hospital where a nurse drew two blood samples without a warrant and without defendant's consent. The samples were tested and showed that defendant had a blood alcohol level of .161.

At the time the blood samples were taken, Illinois law permitted warrantless, non-consensual blood tests such as the one taken in this case. Subsequently, the United States Supreme Court held that in drunk driving cases, the natural dissipation of alcohol does not necessarily create an exigency sufficient to justify blood tests without a warrant. Instead, the question of whether a warrantless blood test is permissible "must be determined case by case on the totality of the circumstances." **Missouri v. McNeely**, 560 U.S. ___, 133 S.Ct. 1552 (2013).

The Appellate Court applied the good faith exception and found that the officer reasonably relied on binding precedent in Illinois when he ordered the blood tests. Moreover, the State had no need to demonstrate that the officer actually knew about this binding precedent when he ordered the tests. An officer's subjective knowledge is irrelevant. Instead, the proper inquiry is whether a reasonably well-trained officer would have known the search was illegal. Here, the officer could have objectively relied on Illinois law as authorizing the blood tests.

Defendant's conviction was affirmed.

**§§44-4(c), 44-6(d), 44-12(c)**

**People v. Zayed**, 2016 IL App (3d) 140780 (No. 3-14-0780, 2/24/16)

1. When an officer makes a valid traffic stop, he does not necessarily have the authority to search an occupant unless he discovers specific, articulable facts which provide a reasonable suspicion that the occupant has committed a crime. In **People v. Stout**, 106 Ill. 2d 77 (1985), the Supreme Court held that when an officer, who has training and experience in the detection of controlled substances, detects the odor of a controlled substance, he has probable cause to search a vehicle. Later Appellate Court cases extended that authority to passengers of the vehicle.

2. Here an officer initiated a valid traffic stop on a car. After he initiated the stop, the officer noticed defendant, who was in the rear passenger seat, making furtive movements as if he were hiding weapons or drugs. As he approached the vehicle, the officer, who had training and experience in identifying the odor of cannabis, detected the strong odor of cannabis. After dealing with the driver, the officer ordered defendant out of the vehicle and conducted a pat-down search for weapons or narcotics.

During the pat-down, the officer detected what he suspected were narcotics in defendant's genital area. The officer testified that people frequently hide narcotics in their genital area. The officer donned rubber gloves and continued searching defendant's genital area. The officer handcuffed defendant, and since it was after dark, moved him in front of the police car's headlights for better illumination. He ordered defendant to unzip his pants, pulled on the waistband of defendant's underwear, and eventually retrieved a plastic bag.

During the search, defendant fidgeted and complained about the officer exposing his genitals. The officer said there were no cars around, but immediately halted the search while nine cars passed. The officer continued the search and eventually pulled another bag from defendant's genital region. One of the bags contained cocaine.

3. The Appellate Court first held that the officer, who was trained and experienced in the detection of narcotics, had probable cause to search defendant once he smelled the odor of burnt cannabis coming from the car. But the court further found that even with probable cause, the search itself was unreasonable.

To determine whether a particular search is unreasonable, courts should consider the following four factors: the scope of the intrusion, the manner in which it was conducted, the justification for initiating the search, and the place where it was conducted. Strip searches are not *per se* unreasonable, but they do constitute an extremely significant intrusion into a person's privacy.

The court found that three of the four factors strongly favored suppression. The only factor favoring the State was that the officer had probable cause for initiating the search. But the officer made only inadequate attempts to reduce the intrusiveness of the search, which was conducted on a busy street with streetlights and the headlights of the squad car illuminating defendant. The officer exposed defendant's underwear and defendant showed visible discomfort during the search, including fearing that his genitals would be exposed. The search "involved extremely intrusive means" and "should have been performed in a manner that respected defendant's privacy."

Since the officer failed to conduct the search in "a minimally intrusive nature," the court found the search unreasonable and affirmed the trial court's order suppressing the evidence.

(Defendant was represented by Assistant Defender Dimitri Golfis, Ottawa.)

**§44-8(b)**

**People v. Jarvis**, 2016 IL App (2d) 141231 (No. 2-14-1231, 2/23/16)

A search warrant must particularly describe both the place to be searched and the person or things to be seized. The particularity requirement is designed to prevent overly broad searches and to ensure that the scope of the search is narrowly tailored. In looking for items named in the search warrant, an officer is free to search anywhere it would be reasonable to find the objects.

Here the police obtained a search warrant to search defendant's "person" for controlled substances and paraphernalia associated with such substances. The police arrested defendant and conducted a strip-search which included having defendant squat

and cough and spread his legs so the officers could better view the area between his "butt cheeks." As a result of this procedure, the police discovered contraband. The police did not touch defendant's buttocks or conduct a cavity search.

The Appellate Court held that the search was constitutionally permissible since it was within the scope of the search warrant. The warrant specified the places to be searched as including defendant's person and the term person included defendant's body. The warrant specified contraband as one of the items to be seized. The police were permitted to search anywhere it would be reasonable to find contraband and this would include parts of the body made visible during a strip search. Accordingly, the warrant authorized the police to strip-search defendant. There was no further need for the warrant to expressly authorize a strip-search.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

## SENTENCING

**§§45-1(b)(2), 45-10(b)**

**People v. Ligon**, 2016 IL 118023 (No. 118023, 2/19/16)

1. The proportionate penalties clause of the Illinois Constitution provides that all penalties shall be determined according to the seriousness of the offense. Ill. Const. 1970, art. I, §11. A sentence violates the clause if it is: (1) so cruel, degrading, or disproportionate to the offense that it shocks the moral sense of the community; (2) greater than the sentence for an offense with identical elements.

Under the second, "identical elements" test, if the legislature provides two different penalties for the exact same elements, then one of the penalties has not been set in accordance with the seriousness of the offense. Where identical offenses yield different penalties, the penalties are unconstitutionally disproportionate and the greater penalty cannot stand.

2. Defendant was convicted of aggravated vehicular hijacking with a dangerous weapon other than a firearm (AVH/DW). Defendant was armed with a BB gun and the State charged this as "a dangerous weapon, to wit: a bludgeon." Since this was his third Class X felony conviction, the trial court adjudged him an habitual criminal and sentenced him to natural life imprisonment.

Defendant eventually filed a 2-1401 petition arguing that his sentence violated the proportionate penalties clause because AVH/DW had the identical elements as armed violence with a category III weapon but was punished as a Class X felony with a minimum of seven years imprisonment, while armed violence with a category III weapon was only punished as a Class 1 felony.

3. In the Supreme Court, the State first argued, citing **People v. Cummings**, 375 Ill. App. 3d 513 (1st Dist., 2007), that it was not appropriate in this case to conduct an identical elements comparison between AVH/DW and armed violence because defendant was not sentenced under the AVH/DW statute, but rather was sentenced as an habitual criminal. The court rejected the State's argument, holding that an identical elements test may be conducted where a defendant is ultimately sentenced as an habitual criminal.

The Habitual Criminal Act (Act) mandates the imposition of a natural life sentence on defendants convicted of three Class X felonies within a 20-year period. 720 ILCS 5/33B-1(a). The act does not create an independent offense, but simply prescribes the circumstances where a defendant may be more severely punished because of his prior convictions. The Act is a recidivist sentencing statute that does not define any crime and has no elements to compare with another statute. Since the identical elements test requires a comparison between the elements of different offenses, it cannot be applied to the Act.

The court thus overruled **Cummings** and held that a defendant's sentence as an habitual criminal has no effect on a court's determination of whether a qualifying offense violates the identical elements test.

4. But the court found that the offense of AVH/DW as charged in this case did not have the identical elements as armed violence with a category III weapon.

A defendant commits AVH/DW as charged here when he takes a motor vehicle from another person by force and is armed with a dangerous weapon other than a firearm. 720 ILCS 18-4. The charging instrument identified the dangerous weapon here as a bludgeon. In comparison, a defendant commits armed violence with a category III weapon when he commits any felony and is armed with "a bludgeon, black-jack, slungshot, sand-bag, sand club, metal knuckles, billy, or other dangerous weapon of like character." 720 ILCS 5/33A-1, 33A-2.

The AVH/DW statute does not define dangerous weapons. Instead, the definition is derived from common law and includes any object capable of being used in a manner likely to cause serious injury. Many objects, including the BB gun in this case, can be used in a deadly fashion as bludgeons and are thus properly classified as dangerous weapons even if they were not actually used in that manner. It is sufficient that they have the potential for such use.

By contrast, the armed violence statute specifically defines what constitutes a dangerous weapon. In **People v. Davis**, 199 Ill. 2d 130 (2002), the court held that a BB gun was not a bludgeon or other dangerous weapon of like character as defined by the statute. Although a BB gun might be used as a bludgeon, it is not typically identified as such and thus is not "of like character" to the bludgeon-type weapons included as category III weapons.

Accordingly, the elements of AVH/DW are not identical to the elements of armed violence with a category III weapon.

5. The court also held that the State was not equitably barred from arguing that the two statutes did not have identical elements. Defendant argued that since the State took the position during prior proceedings, including trial and direct appeal, that defendant was armed with a bludgeon, it could not now assert that defendant's weapon was not a bludgeon.

Under the common law, weapons are divided into four categories: (1) objects that are dangerous *per se*, such as knives and loaded guns; (2) objects that are never dangerous, such as a four-inch plastic toy gun; (3) objects that are not necessarily dangerous weapons, but can be used in a dangerous manner, such as an unloaded gun made of heavy material, that can be used as a bludgeon; and (4) objects that are not necessarily dangerous, but were actually used in a dangerous manner.

At trial, defendant was properly convicted of using a BB gun as a common-law dangerous weapon of the third type, one that can be used as dangerous weapon. The court thus found that it was irrelevant that the indictment used the term "bludgeon" instead of "BB gun." The State consistently contended in the prior proceedings that defendant was armed with an object that could have been used as a bludgeon. It was not inconsistent for the State to also argue that the BB gun was not an actual bludgeon. Accordingly, the State was not equitably barred from making its current argument before the Supreme Court.

Defendant's conviction and sentence were affirmed.

(Defendant was represented by Assistant Defender Pat Cassidy, Chicago.)

**§45-4(b)**

**People v. Smith**, 2016 IL App (2d) 130997 (No. 2-13-0997, 2/8/16)

At defendant's sentencing for armed robbery with a firearm, the trial court erred by considering as aggravation a prior conviction for aggravated unlawful use of a weapon under 720 ILCS 5/24-1.6(a)(3)(A). The prior AUUW was a Class 2 felony due to defendant's prior convictions.

1. The court acknowledged that in **People v. Aguilar**, 2013 IL 112116, the Supreme Court invalidated only the Class 4 version of aggravated unlawful use of a weapon. However, in **People v. Burns**, 2015 IL 117387, the court reconsidered the issue and found that the statute is facially unconstitutional in its entirety. Thus, both the Class 2 and Class 4 versions of aggravated unlawful use of a weapon violate the constitution.

2. A sentencing court may not consider, as a factor in aggravation, a prior conviction that was based on a statute which was later declared unconstitutional. Because the prior aggravated unlawful use of a weapon conviction was based on the statute held unconstitutional in **Aguilar** and **Burns**, defendant's sentence was vacated and the cause remanded for re-sentencing.

(Defendant was represented by Assistant Defender Fletcher Hamill, Elgin.)

**§§45-7(a), 45-7(b), 45-7(c)**

**People v. Ford**, 2016 IL App (3d) 130650 (No. 3-13-0650, 2/22/16)

1. The restitution statute authorizes courts to order restitution when a defendant through a criminal act has damaged another person's property. A "victim" under the statute is someone who has incurred property damage or financial loss. 730 ILCS 5/5-5-6.

The vast weight of authority holds that a police department is not considered a victim under the restitution statute and should not be compensated for the public money it spends for law enforcement. There are two reasons for this rule: (1) merely investigating offenses does not make the police a "victim" of the offenses; and (2) were the rule otherwise, the police would receive restitution in almost every criminal case, and would thus be compensated twice for performing their basic function, once by the taxpayers and once by the offender

But there is no per se rule prohibiting police from receiving restitution. Here defendant recklessly damaged a police van. The trial court ordered defendant to pay restitution to repair the van. The Appellate Court upheld the order since it did not reimburse the police for their normal costs of investigating crime, but instead covered their out-of-pocket cost of repair required because of defendant's criminal act.

2. The parties and the court agreed that the circuit court clerk improperly imposed fines and fees against defendant. The imposition of a fine is a judicial act and the circuit clerk has no authority to impose fines, even if they are mandatory. Any fine imposed by the circuit clerk is void. The proper remedy is to vacate the assessments in full and remand to the trial court to properly impose the appropriate fines and fees.

(Defendant was represented by Assistant Defender Julianne Johnson, Chicago.)

**§45-10(e)**
**People v. Smith**, 2016 IL App (1st) 140496 (No. 1-14-0496, 2/24/16)

Defendant was convicted of Unlawful Use of a Weapon by a felon, which carries a Class 2 felony sentence when committed by a person who is not confined in a penal institution but who has been convicted of a forcible felony. 720 ILCS 5/24-1.1(e). A "forcible felony" is defined as treason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnaping, kidnaping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement, and "any other felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8. Defendant contended that his prior conviction for aggravated battery of a peace officer was not a forcible felony and therefore could not be used to enhance his conviction.

The court concluded that because in 1990 the legislature amended the definition of "forcible felony" to include only aggravated batteries resulting in great bodily harm or permanent disability or disfigurement, it did not intend that all aggravated batteries were included in the definition of "forcible felonies." Thus, where defendant's prior conviction of aggravated battery to a peace officer was based on aggravated battery causing bodily harm to a police officer and not on great bodily harm or permanent disability or disfigurement, it was not a forcible felony.

The court rejected the argument that aggravated battery of a peace officer is a forcible felony under the residual clause for felonies that are not specifically listed but which involve the use or threat of violence or force. The court concluded that the residual clause is limited to offenses that are not specifically listed in the statute.

Because the trial court erred by using the prior conviction to enhance the aggravated battery conviction to a Class 2 offense, the cause was remanded for re-sentencing on a Class 3 felony.

(Defendant was represented by Assistant Defender Adrienne River, Chicago.)

## SEX OFFENSES

**§46-2(a)**
**People v. Mpulamasaka**, 2016 IL App (2d) 130703 (No. 2-13-0703, 2/17/16)

1. To prove defendant guilty of aggravated criminal sexual assault as charged in this case, the State was required to prove that he committed an act of sexual penetration by the use of force and caused bodily harm. In addition, because defendant

raised sufficient evidence of consent, the State had to prove beyond a reasonable doubt that the complainant did not consent.

"Consent" means a freely given agreement to the act of sexual conduct in question. Lack of verbal or physical resistance, or submission resulting from the use or threat of force by the accused, does not constitute consent. In addition, where the complainant initially consents to sexual activity but subsequently withdraws that consent, the withdrawal of consent is effective once it is communicated in some objective manner so that a reasonable person would have understood that consent had been withdrawn.

2. The evidence was insufficient to establish beyond a reasonable doubt that defendant acted without the complainant's consent. At trial, the State conceded that the complainant's testimony on cross-examination was consistent with consent. On cross-examination, the complainant stated that at her request she and defendant changed positions twice because she was uncomfortable, and that defendant ceased all sexual activity when she stated that the intercourse was causing her pain. In addition, the complainant did not say that she feared defendant, the sexual encounter took place in the backseat of a car in the parking lot of a restaurant that was open for business, after the incident the complainant drove off instead of seeking help from persons inside the restaurant, and the complainant reported the incident only because she experienced pain and bleeding.

The complainant initially told medical personnel that the bleeding was spontaneous, and an expert testified that the complainant's injuries could have been caused by consensual sex. In addition, the complainant admitted that she and defendant kissed. Under these circumstances, the evidence was insufficient to show a lack of consent.

The court acknowledged that some of defendant's actions after the incident (i.e., laundering clothes, telling the complainant not to tell anyone, destroying carry-out containers from the restaurant outside which the incident occurred, and lying to police about not having been at the restaurant or meeting the complainant) could have indicated consciousness of guilt. Such evidence, however, is not a substitute for credible evidence of the elements of the offense. In addition, defendant's explanation that both he and the complainant were married and wanted to hide their actions was not unreasonable.

Defendant's conviction for aggravated criminal sexual assault was reversed.

(Defendant was represented by Assistant Defender Barb Paschen, Elgin.)

## UNLAWFUL USE OF WEAPONS

**§53-1**

**People v. Smith**, 2016 IL App (2d) 130997 (No. 2-13-0997, 2/8/16)

At defendant's sentencing for armed robbery with a firearm, the trial court erred by considering as aggravation a prior conviction of aggravated unlawful use of a weapon under 720 ILCS 5/24-1.6(a)(3)(A). The prior AUUW was a Class 2 felony due to defendant's prior convictions.

1. The court acknowledged that in **People v. Aguilar**, 2013 IL 112116, the Supreme Court invalidated only the Class 4 version of aggravated unlawful use of a weapon. However, in **People v. Burns**, 2015 IL 117387, the court reconsidered the issue and found that the statute is facially unconstitutional in its entirety. Thus, both the Class 2 and Class 4 versions of aggravated unlawful use of a weapon violate the constitution.

2. A sentencing court may not consider, as a factor in aggravation, a prior conviction that was based on a statute which was later declared unconstitutional. Because the prior aggravated unlawful use of a weapon conviction was based on the statute held unconstitutional in **Aguilar** and **Burns**, defendant's sentence was vacated and the cause remanded for re-sentencing.

(Defendant was represented by Assistant Defender Fletcher Hamill, Elgin.)

**§§53-1, 53-2**

**People v. Smith**, 2016 IL App (1st) 140496 (No. 1-14-0496, 2/24/16)

Defendant was convicted of Unlawful Use of a Weapon by a felon, which carries a Class 2 felony sentence when committed by a person who is not confined in a penal institution but who has been convicted of a forcible felony. 720 ILCS 5/24-1.1(e). A "forcible felony" is defined as treason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnaping, kidnaping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement, and "any other felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8. Defendant contended that his prior conviction for aggravated battery of a peace officer was not a forcible felony and therefore could not be used to enhance his conviction.

The court concluded that because in 1990 the legislature amended the definition of "forcible felony" to include only aggravated batteries resulting in great bodily harm or permanent disability or disfigurement, it did not intend that all aggravated batteries

were included in the definition of "forcible felonies." Thus, where defendant's prior conviction of aggravated battery to a peace officer was based on aggravated battery causing bodily harm to a police officer and not on great bodily harm or permanent disability or disfigurement, it was not a forcible felony.

The court rejected the argument that aggravated battery of a peace officer is a forcible felony under the residual clause for felonies that are not specifically listed but which involve the use or threat of violence or force. The court concluded that the residual clause is limited to offenses that are not specifically listed in the statute.

Because the trial court erred by using the prior conviction to enhance the aggravated battery conviction to a Class 2 offense, the cause was remanded for re-sentencing on a Class 3 felony.

(Defendant was represented by Assistant Defender Adrienne River, Chicago.)

**§53-2**

**People v. McGee**, 2016 IL App (1st) 141013 (No. 1-14-1013, 2/16/16)

To convict a defendant of being an armed habitual criminal (AHC), the State must prove that defendant possessed a firearm after having two or more convictions for any qualifying offense, including various weapons offenses. 720 ILCS 5/24-1.7(a). To convict a defendant of unlawful use of weapons by a felon (UUWF), the State must prove that defendant possessed a firearm after having any previous felony conviction. 720 ILCS 5/24-1.1(a).

Defendant was convicted of AHC based on prior convictions for aggravated unlawful use of weapons (AUUW) in 2007 and several weapons offenses in 2008. Defendant was also convicted of UUWF based on the prior convictions for weapon offenses in 2008. The trial court merged the two convictions and sentenced defendant for AHC.

On appeal, defendant argued that his convictions were improper because the prior felony convictions were based on statutes that were declared facially unconstitutional in **People v. Aguilar**, 2013 IL 112116 and **People v. Burns**, 2015 IL 117387. The Appellate Court agreed that the AHC conviction was improper but found that the UUWF conviction was not.

The 2007 AUUW conviction was based on a portion of the AUUW statute that had been declared facially unconstitutional making it void *ab initio*. That particular AUUW conviction thus could not serve as one of the necessary predicate offenses for the AHC conviction. The AHC conviction was vacated.

In the 2008 case, however, defendant was convicted of multiple weapons offenses, including two counts of AUUW without a valid firearm owner's identification (FOID) card. The statute for that particular portion of AUUW was upheld in People v. Mosley, 2015 IL 115872. Since defendant had a constitutionally valid qualifying felony in the 2008 case, the State proved all the elements of UUWF.

The court specifically held that the charging instrument did not need to identify the correct prior felony to properly charge and obtain a conviction for UUWF. All the charging instrument needed to allege was that defendant had a prior felony conviction. Here the State did not identify the form of AUUW that had passed constitutional muster. Instead, it identified another offense that was unconstitutional. But the identity of the exact offense was mere surplusage, and thus unnecessary to properly charge and obtain a conviction for UUWF.

The court affirmed the UUWF conviction and remanded for sentencing on that offense.

(Defendant was represented by Assistant Defender Adrienne River, Chicago.)

## WAIVER - PLAIN ERROR - HARMLESS ERROR

**§56-2(b)(1)(a)**

**People v. Jenkins**, 2016 IL App (1st) 133656 (No. 1-13-3656, 2/6/16)

To convict a defendant of felony resisting or obstructing a police officer, the State must prove that defendant knowingly resisted or obstructed an officer in the performance of an authorized act, and his violation proximately caused an injury to the officer. 720 ILCS 5/31-1(a), (a-7). Proximate cause of injury is the element that elevates this offense from a Class A misdemeanor to a Class 4 felony.

Here defendant was charged with and convicted of the felony version of this offense, but the trial court committed error by failing to instruct the jury on the proximate cause of injury element.

Although defendant failed to object, the Appellate Court found that the incorrect instruction constituted plain error under the closely balanced evidence prong of the plain error doctrine. The arresting officer testified that as he tried to arrest defendant, defendant struggled with him and kicked him in the face causing and injury. Defendant, by contrast, testified that he did not resist arrest, but only started kicking and screaming in pain after the officer sprayed mace in his face.

The conflicting testimony showed that the jury had to make a judgment of credibility about whether defendant kicked the officer while he was resisting arrest.

Where a judgment depends solely on the credibility of witnesses at trial, the evidence is closely balanced.

Defendant's conviction was reversed and remanded for a new trial.

(Defendant was represented by Assistant Defender Phil Payne, Chicago.)