No. 130919

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 4-23-0401.
Plaintiff-Appellee,	)	There on appeal from the Circuit Court of the Fourteenth Judicial
-vs-	)	Circuit, Rock Island County, Illinois, No. 22-CF-481.
COURTNEY VESEY,	)	Honorable Norma Kauzlarich,
Defendant-Appellant.	)	Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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ORAL ARGUMENT REQUESTED

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NATURE OF THE CASE

After a jury trial, Courtney Vesey was convicted of one count of aggravated battery of a peace officer and was sentenced to 24 months' probation. The Appellate Court, Fourth Judicial District, affirmed Vesey's conviction in a published opinion on June 26, 2024, over a dissent.

This is a direct appeal from the judgment of the court below. No issue is raised challenging the charging instrument.

ISSUES PRESENTED FOR REVIEW

I. Whether this Court should adopt the *Ammons* approach to determine if a jury should receive a self-defense instruction during a trial for resisting arrest or aggravated battery of a peace officer at which the defendant asserts self-defense. Also, whether the trial court abused its discretion under the *Ammons* approach when it refused to give the jury a self-defense instruction, as there was at least slight evidence that Taylor used excessive force when arresting Vesey.

II. Alternatively, whether Vesey was entitled to a jury instruction regarding self-defense under the facts of this case, as the evidence, including Taylor's use of excessive force, established at least slight evidence of each self-defense element, and both the trial and appellate courts used the wrong evidentiary standard to deny the instruction.

STATUTES AND INSTRUCTIONS INVOLVED

720 ILCS 5/7-1(a) (2022)

§ 7-1. Use of force in defense of person.

(a) A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony.

720 ILCS 5/7-4(c)(1) (2022)

§ 7-4. Use of force by aggressor.

The justification described in the preceding Sections of this Article is not available to a person who:

(c) otherwise initially provokes the use of force against himself, unless:

(1) such force is so great that he reasonably believes that he is in imminent danger of death or great bodily harm, and that he has exhausted every reasonable means to escape such danger other than the use of force which is likely to cause death or great bodily harm to the assailant.

720 ILCS 5/7-5(a), (c), (e)-(f) (2022)

§ 7-5. Peace officer's use of force in making arrest.

(a) A peace officer, or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes, based on the totality of the circumstances, to be necessary to effect the arrest and of any force which he reasonably believes, based on the totality of the circumstances, to be necessary to defend himself or another from bodily harm while making the arrest. However, he is justified in using force likely to cause death or great bodily harm only when: (I) he reasonably believes, based on the totality of the circumstances, that such force is necessary to prevent death or great bodily harm to himself or such other person; or (ii) when he reasonably believes, based on the totality of the circumstances, both that:

(1) Such force is necessary to prevent the arrest from being defeated by resistance or escape and the officer reasonably believes that the person to be arrested is likely to cause great bodily harm to another; and

(2) The person to be arrested committed or attempted a forcible felony which involves the infliction or threatened infliction of great bodily harm or is attempting to escape by use of a deadly weapon, or otherwise indicates that he will endanger human life or inflict great bodily harm unless arrested without delay.

As used in this subsection, "retreat" does not mean tactical repositioning or other de-escalation tactics.

A peace officer is not justified in using force likely to cause death or great bodily harm when there is no longer an imminent threat of great bodily harm to the officer or another.

(c) The authority to use physical force conferred on peace officers by this Article is a serious responsibility that shall be exercised judiciously and with respect for human rights and dignity and for the sanctity of every human life.

(e) The decision by a peace officer to use force shall be evaluated carefully and thoroughly, in a manner that reflects the gravity of that authority and the serious consequences of the use of force by peace officers, in order to ensure that officers use force consistent with law and agency policies.

(f) The decision by a peace officer to use force shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of circumstances known to or perceived by the officer at the time of the decision, rather than with the benefit of hindsight, and that the totality of the circumstances shall account for occasions when officers may be forced to make quick judgments about using force.

720 ILCS 5/7-7 (2022)

§ 7-7. Private person's use of force in resisting arrest.

A person is not authorized to use force to resist an arrest which he knows is being made either by a peace officer or by a private person summoned and directed by a peace officer to make the arrest, even if he believes that the arrest is unlawful and the arrest in fact is unlawful.

Illinois Pattern Jury Instructions, Criminal, No. 24-25.06

24-25.06. Use Of Force in Defense Of A Person.

A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend [(himself) (another)] against the imminent use of unlawful force.

[However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent [(imminent death or great bodily harm to [(himself) (another)]) (the commission of ____)].]

Illinois Pattern Jury Instructions, Criminal, No. 24-25.06A

24-25.06A. Issue In Defense Of Justifiable Use Of Force.

____ Proposition: That the defendant was not justified in using the force which he used.

STATEMENT OF FACTS

The State charged Courtney Vesey, by way of information, with two counts of aggravated battery of a peace officer. (C. 10-11). In the first count, the State alleged that Vesey made physical contact of an insulting or provoking nature with Sergeant Kristopher Kuhlman in that Vesey allegedly pushed Kuhlman's arm away on June 28, 2022. (C. 10). The second count charged Vesey for allegedly making physical contact of an insulting or provoking nature with Officer Brett Taylor as a result of Vesey allegedly wrapping his arm around Taylor's neck on June 28. (C. 10-11). On February 3, 2023, Vesey filed a notice of affirmative defense, asserting that he would rely upon the defense of justifiable use of force in defense of person under 720 ILCS 5/7-1. (C. 42).

A jury trial commenced on March 9, 2023. (R. 50). The evidence demonstrated that Judinetta Robinson, Vesey's ex-wife, had a nine-year-old daughter, A.V., with Vesey. (C. 52; R. 159-60). Robinson had full physical custody of A.V., and Vesey had visitation rights. (R. 161). Pursuant to a court order, Vesey would pick up A.V. on Mondays and return her to Robinson on Thursdays. (R. 161, 170). June 28, 2022, was a day on which Vesey had visitation rights with A.V. under the order. (R. 161, 168). That day, A.V. texted Robinson, "We're going to heaven." (R. 161-62). In response, Robinson called A.V., who said "some things of concern." (R. 162-63). In the background of the call, Vesey said, "Stop playing with me, Judy. You know who I am. I'm God. May [*sic*] chariot is coming. It's descending down and we are going to heaven." (R. 163). A.V. told Robinson that she and Vesey were at Longview Park in Rock Island. (C. 163-64). Robinson called the police, and she proceeded to Longview Park, where she saw the police, Vesey, and A.V. (R. 163-65).

Taylor, Kuhlman, and Officer Eugenio Barrera, all of whom employed by the Rock Island Police Department, responded to Longview Park. (R. 171, 173-75, 203). Taylor had only been a police officer for six months in June 2022, and he was undergoing field training at the time. (R. 172). Barrera was Taylor's field training officer, and he supervised Taylor and evaluated him on a daily basis regarding his job performance. (R. 172, 175).

When Taylor arrived at Longview Park, he searched Vesey and found no weapons on his person. (R. 176-77, 200). Vesey complied with the search. (R. 177). Vesey told Taylor things that Taylor did not understand. (R. 177). Specifically, Vesey told Taylor that Taylor "knew what happened on Fifth Street in the closet, along with their [*sic*] being reptiles and lizards in the closet." (R. 177). Vesey was also not providing responsive answers to Taylor's questions. (R. 178). Kuhlman tried to talk to A.V. alone, but Vesey raised his voice and told Kuhlman not to talk to her. (R. 178). As a result of Vesey's statements to both the police and Robinson as well as A.V.'s texts, the police decided that they would arrest no one, DCFS would be notified, and A.V. would go with Robinson. (R. 179, 207).

Footage from the officers' body-worn cameras showed Vesey sitting on a retaining wall while Taylor and Barrera explained that A.V. was going to be placed with Robinson. (People's Ex. No. 1.2 4:45-5:23). Eventually, Vesey stood up and started walking—with Barrera to his left and Taylor behind them—on the sidewalk toward Kuhlman, Robinson, and A.V. (People's Ex. No. 1.2 5:18-5:35). Barrera moved to Kuhlman's right, and Vesey stopped in front of both of them. (People's Ex. No. 1.2 5:36-5:40). Both Kuhlman and Barrera faced Vesey. (People's Ex. No. 1.2 5:40-5:44). Taylor faced his colleagues and Vesey, and Taylor was to Vesey's

right. (People's Ex. No. 1.1 0:03-1:08). A parking lot was behind Taylor and to Kuhlman's left, and it abutted the sidewalk. (People's Ex. No. 1.1 0:00-1:08). The parking lot extended behind Kuhlman, and a car was parked at the end of the lot behind Kuhlman. (People's Ex. No. 1.2 5:34-5:37). A concrete retaining wall approximately the height of Vesey's knees was immediately to Vesey's left, and a grassy, uphill slope was behind it. (People's Ex. No. 1.1 0:00-1:08). Robinson and A.V. sat on the retaining wall behind Barrera and Kuhlman. (People's Ex. No. 1.2 5:33-5:40).

Upon approaching Kuhlman, Vesey said something about his phone. (People's Ex. No. 1.1 0:00-0:02). Kuhlman told him he did not need Vesey coming over and becoming aggressive. (People's Ex. No. 1.1 0:03-0:07). Vesey stepped toward Barrera and said, "Excuse me, man, I'm talking to my daughter." (People's Ex. No. 1.1 0:06-0:08). The police told Vesey, "No." (People's Ex. No. 1.1 0:08-0:09). Vesey asked if he was being surrounded, and Barrera responded that Vesey was walking toward the officers. (People's Ex. No. 1.1 0:10-0:15). Vesey replied that he was walking through them. (People's Ex. No. 1.1 0:14-0:16). When Barrera told Vesey that he was not going to walk through the officers, Vesey twice said, "Excuse me," and officers continued to tell Vesey, "No." (People's Ex. No. 1.1 0:15-0:20). Kuhlman did not want Vesey to walk through officers, because he thought Vesey would try to take A.V. or yell at Robinson, escalating the situation. (R. 209-10). Vesey asked if he could walk through to his car, and Barrera told Vesey that he could walk to his car and leave. (People's Ex. No. 1.1 0:19-0:23).

Kuhlman asked Vesey if he wanted to hurt himself. (People's Ex. No. 1.1 0:22-0:24). Vesey answered, "Did I say I was gonna hurt myself?" (People's Ex.

No. 1.1 0:24-0:26). Vesey declined a mental health evaluation. (People's Ex. No. 1.1 0:25-0:28). Kuhlman again asked Vesey if he felt like hurting himself or others, and Vesey denied having such feelings. (People's Ex. No. 1.1 0:30-0:35). Vesey wanted to see the text message where he said that. (People's Ex. No. 1.1 0:35-0:37). Kuhlman responded that there was a text message in which Vesey said he was God. (People's Ex. No. 1.1 0:36-0:39). Vesey asked to see the text message multiple times, speaking in a firmer voice and crossing his arms over his chest. (People's Ex. No. 1.1 0:39-0:42). The police declined to show it to him. (People's Ex. No. 1.1 0:41-0:44). Vesey became more animated while continuing to ask to see the text messages. (People's Ex. No. 1.1 0:44-0:52). When the police told him they did not have the text message, Vesey, still animated, accused the officers of lying to him. (People's Ex. No. 1.1 0:51-1:01).

Kuhlman raised his right arm toward Vesey without making contact with him and told Vesey, "You're done, go," while waving toward the parking lot to Kuhlman's left. (People's Ex. No. 1.2 6:35-6:39). Vesey told Kuhlman that he did not want to talk to him anymore. (People's Ex. No. 1.2 6:37-6:39). Robinson and A.V. started to walk away. (People's Ex. No. 1.1 1:05-1:06). Kuhlman and Barrera turned around and likewise started to walk away. (People's Ex. No. 1.2 6:38-6:42). Vesey said, "No, give me my daughter." (People's Ex. No. 1.1 1:04-1:05). The officers refused to do so. (People's Ex. No. 1.1 1:05-1:06). Vesey responded, "Legal right! Legal right!" while following Kuhlman a step or two. (People's Ex. No. 1.1 1:06-1:08; People's Ex. No 1.2 6:40-6:43). Kuhlman turned back around and faced Vesey, continued to say, "No," placed his closed fist on Vesey's chest, and pushed Vesey away from him. (People's Ex. No. 1.1 1:05-1:08; People's Ex. No. 1.1A 0:02-0:04).

Vesey swatted Kuhlman's arm away with both hands, saying, "Hey, get your hand off of me!" (People's Ex. No. 1.1 1:07-1:09; People's Ex. No. 1.2 6:42-6:44). Kuhlman believed Vesey's contact with him affected his ability to perform his job, as Vesey could have gone through Kuhlman as a result of Kuhlman's arm not blocking Vesey anymore. (R. 212-13). Kuhlman was the first to make contact. (R. 218).

Taylor believed he just witnessed Vesey commit an aggravated battery to Kuhlman. (R. 184). Taylor testified that he decides how much force to use when arresting someone by considering the totality of the circumstances. (R. 185). Here, Taylor considered his backup, the number of officers present, the proximity of Robinson and A.V., and the circumstances of the area. (R. 185). Taylor further testified that he prefers to arrest someone by telling the arrestee that he is under arrest and having the arrestee place his hands behind his back. (R. 184). Because of Vesey's aggressive demeanor and the contact he made with Kuhlman, Taylor did not tell Vesey that he was under arrest or that he was being detained. (R. 184, 199). Instead, in a split-second decision, Taylor believed "going hands-on" was appropriate. (R. 184-85). Kuhlman also did not tell Vesey that he was under arrest or that he was being detained. (R. 218).

The body-worn camera footage established that, immediately after Vesey swatted Kuhlman's arm, without saying anything, Taylor stepped toward Vesey, raised his arms, grabbed Vesey, and pushed him toward the concrete retaining wall. (People's Ex. No. 1.1 1:08-1:10). Vesey attempted to push Taylor back. (People's Ex. No. 1.1 1:09-1:10; People's Ex. No. 1.1A 0:04-0:06). Taylor tackled Vesey over the concrete retaining wall and onto the grassy hill behind it, and as Taylor did so, Vesey wrapped both of his arms around Taylor's neck. (People's Ex. No. 1.1

1:09-1:11; People's Ex. No. 1.1A 0:08-0:09). Taylor was on top of Vesey on the hill. (People's Ex. No. 1.1 1:11-1:26). A struggle ensued, and officers twice ordered Vesey to let go of Taylor. (People's Ex. No. 1.1 1:16-1:24; People's Ex. No. 1.2 6:47-6:55). Vesey appeared to keep his arms wrapped around Taylor for about ten seconds until officers pulled them off. (People's Ex. No. 1.3 0:03-0:14). After Vesey's arms were removed from Taylor, officers told Vesey multiple times to stop resisting and to put his hands behind his back. (People's Ex. No. 1.1 1:44-2:17; People's Ex. No. 1.3 1:37-1:55). Vesey continued to resist. (People's Ex. No. 1.3 0:35-2:08). Eventually, officers were able to arrest Vesey. (R. 187). Taylor acknowledged while testifying that he made no effort to arrest Vesey peacefully. (R. 201).

At trial, the defense requested a jury instruction regarding self-defense, specifically Illinois Pattern Instruction 24-25.06. (R. 235, 238-47). The State objected. (R. 238-39). The parties disputed whether Kuhlman and Taylor used excessive force. (R. 239-41). In response, the trial court recognized the self-defense statute and noted that some evidence of each element of self-defense must be established for the jury to be instructed regarding self-defense. (R. 241-42). The trial court believed some evidence was established that force was threatened against Vesey, but it did not believe there was evidence of the other elements. (R. 241-43). As to the other elements, the trial court concluded that the video established that Vesey was the aggressor because he could have gone around the officers instead of stepping toward them. (R. 241-42, 244). The court could not "deem" Taylor's use of force unlawful, because "[t]hey were police officers acting within the scope of their official duties." (R. 242). The court added that there was no threat of imminent harm to Vesey, because Kuhlman pushed Vesey away only to keep him

from going through the officers and to Robinson and A.V., and Vesey reacted quickly by committing aggravated battery when he swatted at Kuhlman's arm. (R. 245-46). Also, the officers told Vesey to leave. (R. 246). Accordingly, the trial court denied the instruction. (R. 243, 247).

The jury found Vesey not guilty of aggravated battery to Kuhlman but guilty of aggravated battery to Taylor. (C. 108-09). Vesey timely filed a post-trial motion in which he asserted that the trial court erred in denying the self-defense instruction. (C. 111). The trial court denied the post-trial motion and sentenced Vesey to 24 months of probation. (C. 116; R. 287).

On appeal, Vesey's appointed counsel, the Office of the State Appellate Defender (OSAD), filed a motion for leave to withdraw as counsel pursuant to *Anders v. California*, 386 U.S. 738 (1967). *People v. Vesey*, 2024 IL App (4th) 230401, ¶ 18. The Appellate Court, Fourth Judicial District, denied the motion without prejudice, and it ordered OSAD to address whether a self-defense instruction was required in this case based on *People v. Ammons*, 2021 IL App (3d) 150743. *People v. Vesey*, No. 4-23-0401 (Ill. App. Ct. 4th Dist. Dec. 20, 2023) (denying OSAD's motion). The Fourth District noted that, in *Ammons*, the Third District held that, "where a defendant is charged with * * * the aggravated battery of a police officer during an arrest, a jury instruction on self-defense is required where * * * there is evidence that the arresting officer used excessive force." *Id.* (citing *Ammons*, 2021 IL App (3d) 150743, ¶ 21). The Fourth District ordered OSAD to file a merits brief or a new motion pursuant to *Anders* addressing the necessity of a self-defense instruction when an officer uses excessive force. *Id.* Appellate counsel filed a merits brief, and Vesey argued on appeal that the trial court erred when it did not instruct

the jury regarding self-defense. *Vesey*, 2024 IL App (4th) 230401, ¶¶ 1, 18-19.

The Fourth District affirmed Vesey's conviction over a dissent on June 26, 2024. The panel's majority "distance[d]" itself from the holding of *Ammons*. *Id.* at ¶ 29. Instead, the majority held that a two-step analysis applies to determine if a defendant is entitled to a self-defense instruction when he claims he used force in response to a police officer's use of excessive force to effectuate an arrest. *Id.* at ¶ 28. Under the Fourth District's first step, the trial court must determine if "the trial record contains sufficient evidence of excessive force." *Id.* If the record does not, the defendant cannot raise self-defense. *Id.* If the record contains "sufficient evidence" of excessive force, the trial court must then move to step two and determine if the record contains "sufficient evidence" of the six elements of self-defense. *Id.* According to the Fourth District, if "sufficient evidence" of the six elements is present, only then is a self-defense instruction appropriate. *Id.* at ¶¶ 28-30.

Applying its test to this case, the majority first found that the trial court did not address whether Taylor used excessive force, meaning it did not address the issue or implicitly found excessive force. *Id.* at ¶ 33. The majority turned to the second step and rested its decision there, finding that Vesey "fail[ed] to satisfy [the] element" of self-defense that he "actually and subjectively believed a danger existed which required the use of the force applied," thus "defeat[ing] his claim of self-defense." *Id.* at ¶¶ 33, 35-38 (quoting *People v. Jeffries*, 164 Ill.2d 104, 128 (1995)). In reaching this conclusion, the majority held that "the trial court could have reasonably concluded that [Vesey's] action of wrapping his arm around Taylor's neck was either the result of frustration [citation] or 'an automatic reaction.'" *Id.* at ¶ 37. The majority continued, citing to *People v. Wicks*, 355 Ill.App.3d 760, 764

(3d. Dist. 2005), "Either way, the court's conclusion that this record reflected something other than actual fear on [Vesey's] part was within the bounds of reason and justified its refusal to instruct the jury on self-defense." *Vesey*, 2024 IL App (4th) 230401, ¶ 37. The majority did not address the other self-defense elements. *Id.* at ¶ 38.

The dissent took issue with the majority's analysis, specifically its "bounds of reason" statement, as "such a conclusion does not govern the determination of whether a self-defense instruction should be given." *Id.* at ¶ 45 (Turner, J., dissenting). The dissent also did not believe that *Wicks* supported the majority's reliance on "the bounds of reason." *Id.* The dissent noted that merely slight evidence is necessary for a jury to receive a self-defense instruction, and the dissent further asserted that the majority's "interpretation of *Wicks* is contrary to existing case law" because it allows the trial court to weigh evidence in the light most favorable to the State and "invades the province of the jury." *Id.* Justice Turner also noted that the body-worn camera footage "indisputably shows Officer Taylor tackled [Vesey] straight on over a concrete retaining wall causing [Vesey] to fall backward. As [Vesey] was falling backward, his unprotected head and body were exposed to slamming into the ground or concrete." *Id.* at ¶ 44. Given the body-worn camera footage, the dissent believed it was "obvious a juror could infer [Vesey] acted instinctively out of fear for his safety and actually and subjectively believed a danger existed requiring the use of the force he applied to Officer Taylor." *Id.* Therefore, the dissenting justice would have reversed Vesey's conviction and remanded for a new trial. *Id.* at ¶ 45.

This Court granted leave to appeal on September 25, 2024.

ARGUMENT

I.

This Court should adopt the *Ammons* approach for determining whether a jury should be instructed regarding self-defense during a resisting arrest or aggravated battery of a peace officer trial at which the defendant claims self-defense. Under said approach, the trial court erred in declining to give Vesey's jury a self-defense instruction, as there was at least slight evidence that Taylor used excessive force against Vesey in arresting him.

A conflict exists in the Appellate Court as to what evidence must be put forth in order for the jury to receive a self-defense instruction during a resisting arrest or aggravated battery of a peace officer trial at which the defendant claims self-defense. The Third District's approach in *Ammons* is better than the Fourth District's test because it recognizes that, upon a showing of at least slight evidence that the police were using excessive force, the defendant has necessarily satisfied this Court's requirement to establish at least slight evidence of all elements of self-defense in order to receive an instruction. Not only is the Third District's approach consistent with the slight evidence test in this manner, it better protects the constitutional right to a trial by jury, as the jury is ultimately afforded the opportunity to decide whether the defendant's use of force was justified.

In contrast, in "distanc[ing]" itself from the *Ammons* approach, *People v. Vesey*, 2024 IL App (4th) 230401, ¶ 29, the Fourth District also distances itself from this Court's precedent and undermines it. Additionally, the Fourth District's test threatens public interest and safety in the process, as it will constrain the avenues for legal recourse in the eyes of the criminal justice system when the police use excessive force. This, in turn, will clear the path for the police to continue to use excessive force against the public while also sticking the public with the expensive bill for defending against excessive force lawsuits. For these reasons,

and because the *Ammons* approach is better under this Court's precedent, this Court should adopt the *Ammons* approach for determining whether a defendant is entitled to a self-defense jury instruction at a resisting arrest or aggravated battery of a peace officer trial when the defendant claims his use of force was in defense of his person.

In this case, the defense requested that the jury be instructed regarding self-defense, and the trial court refused to give the instruction. This was error under the *Ammons* approach because there was at least slight evidence that Taylor used excessive—and thus unlawful—force to arrest Vesey for the alleged battery of Kuhlman, and there was thus at least slight evidence of all elements of self-defense before the court. Also, the error was not harmless. Therefore, this Court should ultimately reverse Vesey's conviction and remand for a new trial.

A trial court's determination that there was not enough evidence to support a jury instruction is reviewed for an abuse of discretion. *People v. McDonald*, 2016 IL 118882, ¶ 42. A trial court abuses its discretion when it refuses an instruction regarding a defense despite there being sufficient evidence of the defense. *People v. Jones*, 175 Ill.2d 126, 131-32 (1997).

A criminal defendant enjoys the constitutional due process right to "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984); U.S. Const. amend. XIV. Therefore, a defendant is entitled to have the jury instructed at his trial regarding "any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988). If there is sufficient evidence for the court to give an instruction regarding a defense, the failure to give the instruction results

in a violation of the constitutional rights to due process and to a trial by jury. *Everette v. Roth*, 37 F.3d 257, 261 (7th Cir. 1994); *see also Ramos v. Louisiana*, 590 U.S. 83, 93 (2020) (incorporating the right of a trial by jury against the States); U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, §§ 2, 8.

It is well-established that a defendant is entitled to a jury instruction regarding an affirmative defense when even slight evidence supporting the defense is presented at trial. *People v. Everette*, 141 Ill.2d 147, 156 (1990). The State's evidence alone can be sufficient to raise the issue of self-defense. *See Jones*, 175 Ill.2d at 132. When applying the "very slight evidence" test, the trial court must consider the evidence in the light most favorable to the defendant. *People v. Alexander*, 250 Ill.App.3d 68, 76 (2d Dist. 1993). Additionally, this Court has held that the trial court should not weigh the evidence when determining if it should give a jury instruction, as it is for the jury to make the ultimate factual determination. *See McDonald*, 2016 IL 118882, ¶ 25 (citing *People v. Lockett*, 82 Ill.2d 546, 552-53 (1980)) (holding that the trial court is not to weigh evidence when determining whether to give an instruction and that requiring credible evidence would risk invading the jury's function). Likewise, when self-defense is at issue, the trial court should not ultimately determine whether the defendant acted in self-defense when deciding whether to give a self-defense instruction. *People v. Washington*, 2012 IL 110283, ¶ 43 (citing *Lockett*, 82 Ill.2d at 553) (holding it erroneous for the trial court to determine if the defendant's subjective believe in the need to use force was objectively reasonable).

Under the affirmative defense of self-defense, a person is lawfully permitted to use force against another person if he reasonably believes using force is necessary

to protect himself from the other person's imminent use of illegal force. 720 ILCS 5/7-1(a) (2022). This Court has recognized that self-defense typically contains six elements: (1) the defendant was threatened with unlawful force, (2) the defendant was not the aggressor, (3) the danger of harm to the defendant was imminent, (4) the defendant's use of force was necessary, (5) the defendant actually and subjectively believed his force was required because of a danger, and (6) the defendant's beliefs were objectively reasonable. *People v. Gray*, 2017 IL 120958, ¶ 50. If a defendant successfully raises self-defense, the State bears the burden of disproving it beyond a reasonable doubt. *People v. Lee*, 213 Ill.2d 218, 224 (2004).

Meanwhile, a police officer is justified to use force that he reasonably believes is necessary to protect himself or another while making an arrest or to make the arrest itself. 720 ILCS 5/7-5(a) (2022). One cannot use force to resist arrest when he knows a police officer is making the arrest—even if the person thinks the arrest is unlawful and the arrest is actually unlawful—unless the officer uses excessive force. *People v. Ammons*, 2021 IL App (3d) 150743, ¶ 21; 720 ILCS 5/7-7 (2022).

Reading the aforementioned sections of the Criminal Code, the Third District in *Ammons* held, "[W]here a defendant is charged with resisting arrest or with the aggravated battery of a police officer during an arrest, a jury instruction on self-defense is required where . . . there is evidence that the arresting officer used excessive force," and the defendant resisted only after the officer employed excessive force. *Ammons*, 2021 IL App (3d) 150743, ¶¶ 21-22. In this case, the Fourth District applied a new, different test. Under its test, there must be adequate evidence that the police used excessive force, and if such evidence exists, there must be adequate evidence of all aforementioned self-defense elements. *Vesey*, 2024 IL App (4th)

230401, ¶ 28. Only then is it proper to give a self-defense instruction to the jury under the Fourth District's test. *Id.* at ¶ 29. A conflict in authority has thus emerged. However, the *Ammons* approach is better because it is consistent with this Court's precedent with regard to a defendant's right to an affirmative defense instruction. Under the *Ammons* approach, the trial court erred in failing to give the instruction, and such error was not harmless.

A. The *Ammons* approach is superior to the Fourth District's test because it inherently considers all elements of self-defense in a manner that is consistent with this Court's precedent, and it is better at protecting the public's interests and safety during contacts with the police.

Ultimately, the Third District's approach in *Ammons* is superior because it assumes at least slight evidence of all elements of self-defense once any evidence of excessive force has been put forth, consistent with this Court's precedent concerning the low evidentiary standard that must be met in order to obtain a self-defense instruction. This is in stark contrast with the Fourth District's test, which requires evidence of the self-defense elements exclusive of an officer's use of excessive force and is detrimental to public interest and safety.

1. The Third District's *Ammons* approach is the better one to apply to determine if a defendant is entitled to a self-defense jury instruction when he claims he used self-defense in response to a police officer using excessive force.

The *Ammons* approach is consistent with this Court's precedent concerning the low evidentiary standard to receive an instruction for an affirmative defense and, in turn, better protects the right to a jury trial. As to the former, for the jury to be instructed regarding the affirmative defense of self-defense, there must be at least slight evidence of all six aforementioned elements of self-defense presented.

People v. Jeffries, 164 Ill.2d 104, 127-28 (1995).

But if evidence—even if slight—of a police officer's use of excessive force is presented, at least slight evidence of all six elements of self-defense has necessarily been presented, especially when a court is viewing the evidence in the light most favorable to the defendant, as it is required to do. *Alexander*, 250 Ill.App.3d at 76. Indeed, to use excessive force to accomplish a seizure *is* to use unlawful force under the United States Constitution. *See* U.S. Const. amend. IV (prohibiting *unreasonable* seizures); *Graham v. Connor*, 490 U.S. 386, 394-96 (1989) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)) (holding that the reasonableness of a seizure depends on the balancing of "the nature and quality of the intrusion on [an] individual's Fourth Amendment interests," including in how the seizure was made, "against the countervailing governmental interests at stake"). Likewise, under Illinois law, a police officer is justified in using only the force reasonably necessary to make an arrest or to protect himself or another while effecting the arrest. 720 ILCS 5/7-5(a) (2022). Furthermore, an officer can only use deadly force or force likely to cause great bodily harm under two extreme and limited circumstances. *See* 720 ILCS 5/7-5(a)(1)-(2) (2022) (allowing the police to use force likely to cause death or great bodily harm only when an officer reasonably believes such force is necessary to prevent death or great bodily harm or to prevent the resistance or escape of an arrestee who will likely cause great bodily harm to another and the arrestee committed or attempted a forcible felony involving the use or threat of great bodily harm or is trying to escape via the use of a deadly weapon or indicates he will endanger a life or cause great bodily harm unless arrested immediately). In turn, it is necessarily unlawful under Illinois law if an officer

uses more force than is reasonably necessary to make an arrest or to protect himself or another during the course of the arrest, including when using deadly force or force likely to cause great bodily harm when the circumstances do not reasonably call for the use of such force. *Id.* In short, the excessive nature of the force and the unlawful nature of it are inextricably intertwined.

Similarly, if the police use excessive force, there is at least slight evidence that the defendant was not the initial aggressor, or that even if he was, he would still be entitled to claim self-defense under one of the exceptions outlined in 720 ILCS 5/7-4 (2022). First, as *Ammons* implicitly recognizes, in cases in which the defendant was not resisting or using any force before the police used excessive force, the officer's use of the excessive force itself would render the officer as the aggressor instead of the defendant. *See Ammons*, 2021 IL App (3d) 150743, ¶ 22 (allowing a self-defense instruction only if the defendant resists after an officer's use of excessive force). Indeed, the police can only use the force reasonably necessary to make an arrest. *See* 720 ILCS 5/7-5(a) (2022). An officer can use dangerous or deadly force only under certain extreme and limited circumstances. *See* 720 ILCS 5/7-5(a)(1)-(2) (2022) (noting the two circumstances under which the police can use deadly force or force likely to cause great bodily harm).

In the other cases in which the defendant, by way of resisting or by virtue of his own use of force, provoked the police officer's use of force against him or was the initial aggressor, the excessive nature of the officer's force allows the defendant to thereafter use significant force in response himself. *See* 720 ILCS 5/7-4 (2022) (noting that a defendant cannot claim self-defense if he "initially provoke[d] the use of force against himself, unless" the force used against him

was so great he "reasonably believe[d] that he [was] in imminent danger of death or great bodily harm" and he exhausted all reasonable means of escape from the danger other than using great force himself). Indeed, although *Ammons* fails to recognize it, *see Ammons*, 2021 IL App (3d) 150743, ¶ 22, it would bely all common sense, if not be unconstitutional, for an officer to use excessive force when confronted with an arrestee's minimal use of force or resistance. *See Graham*, 490 U.S. at 395-96 (holding that whether a seizure is reasonable under the Fourth Amendment depends on the particular facts of a case, including how the arrest was effected, the severity of the alleged crime the arrestee committed, whether the arrestee posed an immediate threat to safety, and whether the arrestee was actively resisting his arrest or attempting to evade arrest via flight); *Garner*, 471 U.S. at 11-12 (holding that it is unconstitutional under the Fourth Amendment for the police to use deadly force to seize a suspect who is escaping unless the suspect presents a threat of serious physical harm to others). The mere fact that a defendant resists with or uses non-deadly or non-dangerous force does not make it open season for the police to respond with limitless force, including dangerous or deadly force, especially when considering the police typically outnumber arrestees and carry dangerous and deadly weapons as a matter of practice. Again, the police can only use the force reasonably necessary to effect an arrest, and the General Assembly authorized the police to use dangerous or deadly force only under certain limited and extreme circumstances. *See* 720 ILCS 5/7-5(a)(1)-(2) (2022). The General Assembly has also explicitly recognized that an officer's use of force "shall be exercised judiciously and with respect for human rights and dignity and for the sanctity of every human life." 720 ILCS 5/7-5(c) (2022).

So although true that the use of escalating force to apprehend a resisting arrestee is permissible, *see People v. Wicks*, 355 Ill.App.3d 760, 764 (3d Dist. 2005) (finding that, because the use of escalating force was the result of the defendant resisting, the defendant was not entitled to a self-defense instruction), such escalating force would likely constitute force reasonably necessary to make the arrest, as the General Assembly permits. *See* 720 ILCS 5/7-5(a) (2022). However, for the reasons just explained, this cannot entitle the police to use escalating force beyond what is reasonably necessary in light of the situation, or in other words, excessive force.

In sum, the determination of the question as to whether the defendant was the aggressor depends on the answer to the question of whether the police used excessive force. For the foregoing reasons, if the police use excessive force, the justification of self-defense is not unavailable to the defendant by virtue of his being the initial aggressor—if, in fact, he was. Accordingly, when evidence is presented that the police used excessive force, there is at least slight evidence that the defendant is not excluded from claiming self-defense as a result of being the aggressor, especially when considering that the evidence is to be viewed in the light most favorable to the defendant in determining whether there is slight evidence. *Alexander*, 250 Ill.App.3d at 76.

As for the danger of harm to the defendant being imminent, when the police use excessive force, in that moment, the defendant is subject to an injury or a harm greater than what is lawfully permitted. *See* 720 ILCS 5/7-5(a)(1)-(2) (2022) (allowing the police to only use the force reasonably necessary to make an arrest or to protect themselves or others from harm, and only allowing the police to use

deadly force or force likely to cause great bodily harm in limited circumstances). Further, the very use of the excessive force renders its resulting harm beyond imminent—it is already underway. Therefore, when there is evidence of excessive force, said evidence, in the light most favorable to the defendant, establishes slight evidence of an imminent danger of harm at the time the excessive force was used.

Next, when the police use excessive force against a civilian, it can be inferred that the civilian's use of force at the very least may be necessary to defend himself from the imminent harm and unlawful use of force. This is especially true when police officers outnumber a civilian, as is often the case. Further, and most importantly, a civilian confronted with a police officer's use of excessive force has little to no recourse in the heat of the moment other than perhaps using force to defend himself. As noted above, by the time excessive force is used, the harm to the defendant is already underway. Accordingly, viewing the evidence in the light most favorable to the defendant, a police officer's use of excessive force constitutes at least slight evidence that the defendant's use of force in response was necessary.

Likewise, when viewing evidence of excessive force in the light most favorable to the defendant, one can infer that, because of an officer's use of excessive force itself and the danger it inherently poses, the defendant actually and subjectively believed that he needed to use the force he applied. *See, e.g.*, *Vesey*, 2024 IL App (4th) 230401, ¶ 44 (Turner, J., dissenting) (finding that, based on the evidence of the level of force Taylor used, "it is obvious a juror could infer defendant acted instinctively out of fear for his safety and actually and subjectively believed a danger existed requiring the use of the force he applied" to Taylor). In other words, there is slight evidence of the element. After all, direct evidence of a defendant's

mental state is not required to support a self-defense claim, as "mental states . . . are more often inferred from the character of a defendant's acts and the circumstances surrounding the commission of the offense." *Jones*, 175 Ill.2d at 133. It is only reasonable to infer that one acted out of fear in using force when the police use excessive force. Indeed, it is difficult to conceive of a situation where excessive police force would *not* inspire fear for one's safety, especially considering the police are armed with various weapons capable of causing death or significant injury.

Finally, when there is evidence of excessive force, there is also slight evidence that the defendant's subjective belief in the need to use force was objectively reasonable. The very fact that one can infer, based on the use of excessive force alone, that a particular defendant acted out of a subjective fear when using force in the face of an officer's use of excessive force makes the defendant's subjective belief objectively reasonable; one makes the inference regarding the defendant's subjective beliefs *because* it is objectively reasonable to hold that belief in the first place. Also, when the police, armed with their dangerous and deadly weapons, resort to excessive and unlawful force, a reasonable person, who has done nothing to provoke that level of force, can only conclude that his safety is at risk and that he must use force to extricate himself from the situation. Again, it is difficult to imagine a situation in which the police use excessive force but such use of force does *not* cause one to fear for his safety.

As just demonstrated, when there is evidence of excessive force, there is at least slight evidence of all six elements of self-defense. Accordingly, the defendant is entitled to have the jury instructed regarding self-defense when evidence of excessive force is presented. *See Everette*, 141 Ill.2d at 156 (requiring an affirmative

defense instruction when there is slight evidence introduced at trial to support the defense); *Jeffries*, 164 Ill.2d at 127-28 (noting that a jury is to be instructed regarding self-defense when there is sufficient evidence of all six elements introduced at trial). This is something the *Ammons* approach recognizes and is entirely consistent with. *See Ammons*, 2021 IL App (3d) 150743, ¶ 21 ("[W]here a defendant is charged with resisting arrest or with the aggravated battery of a police officer during an arrest, a jury instruction on self-defense is required where . . . there is evidence that the arresting officer used excessive force."). Indeed, prior to *Ammons*, the Third District required additional evidence besides the police using excessive force to establish the defendant acted out of fear. *Wicks*, 355 Ill.App.3d at 764. In *Ammons*, that requirement is absent. *Ammons*, 2021 IL App (3d) 150743, ¶¶ 21-22. Instead, *Ammons* merely requires evidence of excessive force and that the defendant resisted after the excessive force in order for the jury to receive a self-defense instruction in a case involving a charge of resisting arrest or aggravated battery of a peace officer.[1] *Id.*

Additionally, the *Ammons* approach protects the defendant's rights to a jury trial and due process. U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I,

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[1] As to the latter requirement, *Ammons* failed to recognize that there may be situations in which a self-defense instruction is warranted where there is evidence that the police used excessive force in response to an arrestee's initial act of resistance, as discussed above. However, as explained below, it is evident that Vesey did not resist his arrest until *after* Taylor tackled him over the concrete retaining wall. Indeed, the State below never argued that Vesey did not resist his *arrest* before he was tackled, thus conceding the point. *See In re Deborah S.*, 2015 IL App (1st) 123596, ¶ 27 ("We note that respondent has argued these issues extensively in her brief, but that the State has failed to respond to or address them in any way in its brief. Accordingly, the State has essentially conceded these issues on appeal."); (St. Br. App. Ct. 9-12). So, this latter requirement is not at issue in this case.

§§ 2, 8. In recognizing that evidence of self-defense establishes slight evidence of all elements of self-defense, as *Ammons* does, the jury is afforded the opportunity to determine whether the defendant acted in self-defense, consistent with the defendant's right to a jury trial and his right to have the jury instructed regarding "any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews*, 485 U.S. at 63; *accord Everette*, 37 F.3d at 261 (holding the failure to give a jury instruction when there is enough evidence to support it violates the rights to due process and a jury trial).

To be sure, the evidence presented as a whole at any given trial could be subject to different interpretations or could even conflict, even when there is evidence that the police employed excessive force. For example, in addition to evidence of excessive force being presented, perhaps there is evidence presented that the defendant had recourse other than using force in response to an officer's excessive force, making his use of force unnecessary. As another example, there could be a rare case in which the evidence suggests that a defendant's own use of force in response to an officer's excessive force was motivated more by retaliation than by fear. In fact, that is what the Appellate Court below believed was the case here. *Vesey*, 2024 IL App (4th) 230401, ¶ 37. But this Court has noted that this is where the jury is to step in as the finder of fact and make the factual determinations, including regarding whether the force was excessive in the first place. *See McDonald*, 2016 IL 118882, ¶ 25 (holding that it is inappropriate for the trial court to weigh evidence in determining whether to give a jury instruction regarding an affirmative defense, and noting that requiring credible evidence invades the province of the jury); *Washington*, 2012 IL 110283, ¶ 43 (holding that it is improper for the trial

court to determine whether the defendant's subjective belief in the need to use force was objectively reasonable); *People v. Moss*, 205 Ill.2d 139, 164 (2001) ("It is the function of the jury to assess the credibility of witnesses, weigh the evidence presented, resolve conflicts in the evidence, and draw reasonable inferences from the evidence."). A defendant's due process right to a jury determination on the issue of justification can only be exercised by keeping the threshold for obtaining an affirmative defense instruction purposefully low, which the *Ammons* approach facilitates by recognizing that slight evidence of all elements of self-defense are present upon a showing of excessive police force.

All in all, when a court is confronted with whether to instruct a jury regarding self-defense at a resisting arrest or aggravated battery of a peace officer trial when the defendant claims the police used excessive force against him, the *Ammons* approach is consistent with this Court's precedent regarding the low evidentiary standard to obtain an affirmative defense instruction and with the defendant's right to a jury trial.

2. The Fourth District's test undermines this Court's precedent and will wreak havoc on the public's safety and interest.

In contrast, the Fourth District test requires sufficient evidence of excessive force plus additional evidence of each element of self-defense. *Vesey*, 2024 IL App (4th) 230401, ¶ 28. In other words, an officer's use of excessive force alone is not enough to obtain a self-defense instruction. The Fourth District thus fails to recognize that the evidence of excessive force in fact establishes slight evidence of all elements of self-defense. Indeed, the Fourth District explicitly "distance[d]" itself from *Ammons*. *Id.* at ¶ 29.

But the Fourth District also distanced itself from this Court's precedent. By requiring additional evidence beyond the use of excessive force to establish sufficient evidence of each self-defense element, the Fourth District is necessarily requiring more than slight evidence of each self-defense element. It has been this Court's position for decades that merely slight evidence supporting a defense is necessary for the jury to receive an instruction regarding the affirmative defense. *Everette*, 141 Ill.2d at 156. The Fourth District's test effectively overrules this Court's precedent concerning the slight-evidence standard, something it does not have the authority to do. *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 28 ("[O]verruling a decision by the Illinois Supreme Court is an action the appellate court has no authority to take.").

By undermining the slight-evidence test, the Fourth District's test also undermines a criminal defendant's right to a jury trial and to due process. U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, §§ 2, 8; *Everett*e, 37 F.3d at 261 (holding that, "[w]hen there is evidentiary support for a defendant's theory of self-defense, failure to instruct on self-defense violates" the defendant's rights to due process and a jury trial). The jury is ultimately deprived of making the factual determination of whether the defendant was justified in using his own force as a matter of self-defense despite there being sufficient evidence to consider it. Again, the evidence may conflict in the end, but it is the jury's job to sort out the evidence and make a factual determination. *See McDonald*, 2016 IL 118882, ¶ 25; *Washington*, 2012 IL 110283, ¶ 43; *Moss*, 205 Ill.2d at 164.

It makes no sense to deprive the jury of a self-defense instruction just because the only evidence to support the instruction came in the form of evidence that

an officer's use of force was excessive. Indeed, just like it is hard to imagine that a defendant is acting on anything but fear in using force when the police use excessive force, it is difficult to imagine how the use of excessive force does not establish at least slight evidence of *all* self-defense elements. If a defendant testifies at trial that the police engaged in conduct that arguably constitutes unprovoked excessive and unlawful force, such as, for example, placing him in a chokehold after being suspected of unlawfully selling cigarettes, or being kneeled upon the neck for nine minutes while being pinned on the street during the course of an arrest for allegedly using a counterfeit $20 bill, under the Fourth District's test, this would not be enough to obtain a self-defense instruction, because the elements of self-defense must be established independently of the officer's use of excessive force. *Vesey*, 2024 IL App (4th) 230401, ¶ 28. The defendant would instead be criminally liable for his use of force if he fought back. This defies all common sense. After all, it is the excessive use of force that *creates* the need to use force to defend oneself in the first place.

Additionally, people like George Floyd and Eric Garner, who died under the circumstances in the two respective examples above, would be left without recourse; instead, if they tried to defend themselves, they would be imprisoned for attempting to protect their lives if they were not dead as a result of the excessive force employed against them. *See* Christina George, *5 years after Eric Garner's death, a look back at the case and the movement it sparked*, ABC NEWS (July 16, 2019, 4:42 AM), https://www.abcnews.go.com/US/years-eric-garners-death-back-case-movement-sparked/story?id=63847094 (discussing the death of Eric Garner in that an officer placed him in a chokehold after the police suspected he was illegally

selling cigarettes); *George Floyd: What happened in the final moments of his life*, BBC (July 15, 2020), https://www.bbc.com/ news/world-us-canada-52861726 (noting that George Floyd died during the course of his arrest for allegedly using a counterfeit $20 bill after an officer kneeled on his neck while pinning him to the street). In no sense of the word is that considered justice. Instead, it is a lose-lose situation for the citizen with his life on the line.

This is the reality the public faces under the Fourth District's test; when the police use excessive force, the citizen should submit—and potentially even die—instead of protecting himself, unless he can find something else justifying the use of force against the police officer in addition to the officer's use of excessive force. There is already an epidemic of the police using excessive force in this country. *See, e.g.*,Emma Tucker *et al.*, *'A momentous day': All 6 rogue Mississippi officers got long prison sentences in 'Goon Squad' torture of 2 Black men*, CNN, https://www.cnn.com/2024/03/21/us/mississippi-officers-sentencing-goon-squad-thursday/index.html (last updated Mar. 21, 2024, 9:49 PM) (discussing how officers used tasers on two handcuffed men, beat them with objects, and shot one in the mouth after being dispatched to a house for suspicious behavior); Lauren Victory *et al.*, *Officials release video of officer fatally shooting Sonya Massey in her home after she called 911*, CBS NEWS, https://www.cbsnews.com/chicago/ news/sonya-massey-bodycam-footage-illinois-911-fatal-police-shooting/ (last updated July 23, 2024, 12:30 PM) (noting how an officer shot Sonya Massey because she was carrying a pot of boiling water after the officer allowed her to move it); Jeanine Santucci, *Video of Phoenix police pummeling a deaf Black man with cerebral palsy sparks outcry*, USA TODAY (Oct. 17, 2024, 2:59 PM), https://www.usatoday.com/

story/news/nation/2024/10/17/tyron-mcalpin-case-cerebal-palsy-phoenix-police/75699727007/ (discussing how officers punched and tased a deaf man with cerebral palsy when he did not respond to their verbal commands and pushed back against the officers who grabbed him); Andrea J. Ritchie & Joey L. Mogul, *In the Shadows of the War on Terror: Persistent Police Brutality and Abuse of People of Color in the United States*, 1 DEPAUL J. FOR SOC. JUST. 175, 177 (2008) (noting that the use of excessive force is "widespread," especially against people of color). A citizen should have recourse in being able to protect himself as it occurs without being subject to criminal penalties for doing so. Otherwise, the police will only continue to use of excessive force. The Fourth District's test only makes it more difficult to nip it in the bud, as it clears the path for the police to continue to use excessive force unchecked.

Although a defendant may be able to recover monetary damages for an officer's use of excessive force, it does not relieve him of criminal liability under the Fourth District's test, because he cannot get the self-defense instruction from the use of excessive force alone. *Vesey*, 2024 IL App (4th) 230401, ¶ 28. Nor does the availability of civil remedies adequately protect the public, which ultimately foots the steep bill for an officer's misconduct. *See* Heather Cherone, *Final Tally: Chicago Taxpayers Spent At Least $74M to Resolve Police Misconduct Lawsuits in 2023, Analysis Finds*, WTTW (Feb. 26, 2024, 5:00 AM), https://news.wttw.com/2024/02/26/final-tally-chicago-taxpayers-spent-least-74m-resolve-police-misconduct-lawsuits-2023. As a result, the police still do not have an incentive to avoid using excessive force, and a cycle emerges under the Fourth District's test: The police use excessive force against a civilian because there is nothing to

deter them, the civilian is criminally liable if he fights back because he cannot get a self-defense instruction, and the public pays the bill for the use of excessive force.

3. Conclusion.

In sum, the Fourth District's test contains significant drawbacks in that it is in conflict with this Court's longstanding precedent and the constitutional rights to a jury trial and due process. It is also against the public's interests and safety. On the other hand, the *Ammons* approach aligns with this Court's precedent, and as it does not have the public safety drawbacks compared to the Fourth District's test, it better protects the public. Therefore, this Court should adopt the *Ammons* approach for determining whether a defendant is entitled to a self-defense instruction in a resisting arrest or aggravated battery of a peace officer case.

B. Vesey was entitled to a self-defense jury instruction at his aggravated battery of a peace officer trial because there was at least slight evidence that Taylor used excessive force in arresting Vesey.

The testimony and video footage presented at trial, when viewed in the light most favorable to Vesey, established that there was at least slight evidence that Taylor employed excessive force when he chose to tackle Vesey over a concrete retaining wall without warning and with Vesey's head and body exposed. At least arguably, tackling Vesey over the concrete retaining wall was not reasonably necessary to effect Vesey's arrest or to protect Taylor or others during the course of the arrest. Taylor's action was also at least arguably excessive because it violated the Fourth Amendment of the United States Constitution. Accordingly, the trial court erred when it refused to instruct the jury regarding self-defense at Vesey's trial, as the evidence of excessive force necessarily established slight evidence

of all elements of self-defense.

The General Assembly has provided guidance for evaluating an officer's use of force:

> The decision by a peace officer to use force shall be evaluated carefully and thoroughly, in a manner that reflects the gravity of that authority and the serious consequences of the use of force by peace officers, in order to ensure that officers use force consistent with law and agency policies.
>
> The decision by a peace officer to use force shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time of the decision, rather than with the benefit of hindsight, and that the totality of the circumstances shall account for occasions when officers may be forced to make quick judgments about using force.

720 ILCS 5/7-5(e)-(f) (2022).

Under these standards, the evidence at least slightly demonstrated that Taylor's force was excessive when he tackled Vesey over the concrete retaining wall. First, it is arguable that tackling Vesey was not reasonably necessary to effect his arrest. *See* 720 ILCS 5/7-5(a) (2022) (noting a police officer can use reasonable force to make an arrest). Taylor did not even give Vesey a chance to submit to a peaceful arrest from the start. Indeed, despite preferring to tell someone they are under arrest and to put their hands behind their back to effectuate a peaceful arrest, Taylor testified that he made no attempt at a peaceful arrest here and did not even tell Vesey that he was under arrest. (R. 184, 199, 201). Instead of telling Vesey to place his hands behind his back, Taylor, who was an officer still in training, resorted to suddenly tackling Vesey over a retaining wall made of concrete without saying *anything*, a dangerous action that could have led to serious injury. *See Vesey*, 2024 IL App (4th) 230401, ¶ 44 (Turner, J., dissenting)

(noting that Vesey's head and body were unprotected and "exposed to slamming into the ground or concrete"); (R. 172, 199; People's Ex. No. 1.1 1:08-1:11). Vesey was told to put his hands behind his back only *after* the altercation with Taylor. (People's Ex. No. 1.1 1:44-2:17; People's Ex. No. 1.3A 1:37-1:55).

Furthermore, this is a case in which Vesey's actions arguably did not even invite an escalation in the amount of force needed to effect the arrest. As noted above, resistance can make escalating force reasonable. *See* 720 ILCS 5/7-5(a) (2022) (allowing the police to use the force reasonably necessary to make an arrest *under the circumstances*); *Wicks*, 355 Ill.App.3d at 764 (holding no self-defense instruction was required, because the police were allowed to use an escalating level of force in the face of the defendant's resistance to his arrest). However, Vesey did not resist his arrest until after he was tackled. (People's Ex. No. 1.1 1:08-2:17). In fact, he did not even know he was under arrest to begin with until after Taylor tackled him, because neither Taylor nor Kuhlman told him he was under arrest. (R. 199, 218; People's Ex. No. 1.1 1:08-1:11).

Although Taylor used force only to effect an arrest, (R. 185), it is worth noting that the officers also arguably faced no safety threat at the time of Vesey's arrest. *See* 720 ILCS 5/7-5(a) (2022) (noting that a police officer can use reasonable force to protect himself from bodily harm when making an arrest). The officers outnumbered Vesey, who had already been subjected to a pat-down and determined to be unarmed. (R. 175-77, 200; People's Ex. No. 1 0:00-1:08). Although Vesey briefly made contact with Kuhlman, there was no dispute that Kuhlman initiated the contact, and Vesey's contact was minimal and not dangerous; he simply swatted Kuhlman's arm away. (R. 212-13, 218; People's Ex. No. 1.1 1:07-1:10; People's

Ex. No. 1.2 6:42-6:44). Not even the jury believed Vesey committed an aggravated battery to Kuhlman, as it found Vesey not guilty of that charge. (C. 108).

In the event Vesey's demeanor or superficial contact with Kuhlman could be seen as provoking Taylor's use of force, dangerously tackling Vesey over a concrete retaining wall with Vesey's head and body unprotected and exposed was still arguably excessive. As discussed in detail above, a defendant's provocation or use of force cannot invite the use of *excessive* force; it merely invites the use of a *reasonable escalation* of force. *See* 720 ILCS 5/7-5(a) (2022) (emphasis added) ("[A police officer] is justified in the use of any force *which he reasonably believes, based on the totality of the circumstances, to be necessary* to effect [an] arrest and of any force *which he reasonably believes, based on the totality of the circumstances, to be necessary* to defend himself or another from bodily harm while making the arrest."). It is arguable that this is not a case in which the police used a proper escalating level of force. Again, Vesey's contact with Kuhlman was superficial. (People's Ex. No. 1.1 1:07-1:10). Vesey made no further attempts to make contact with Kuhlman after swatting Kuhlman's arm away. (People's Ex. No. 1.2 6:42-6:44). In fact, he did not even reapproach Kuhlman. (People's Ex. No. 1.1 1:08-1:10). Vesey was upset—and reasonably so—because he was being denied his court-ordered visitation time with his daughter. (R. 161, 179). He may have been suffering from a mental health issue given the comments he made to Robinson and the police. (R. 163, 177). Meanwhile, Taylor did not make an attempt to grab at Vesey's arms or to move Vesey away from Kuhlman with the help of other officers to prevent further escalation. (People's Ex. No. 1.1 1:08-1:11). Instead, Taylor dramatically escalated the situation himself in that he opted to employ significant and dangerous

force—if not force likely to cause great bodily harm—from the start. Simply put, the circumstances arguably did not call for tackling Vesey, with his head and body unprotected and exposed, over a concrete retaining wall even if Vesey provoked some use of force on Taylor's part. It also arguably did not justify the use of force likely to cause great bodily harm. *See* 720 ILCS 5/7-5(a)(1)-(2) (2022) (listing the limited circumstances under which a police officer can use deadly force or force likely to cause great bodily harm). To be sure, Taylor arguably did not exercise his use of force "judiciously and with respect for human rights and dignity and for the sanctity of every human life." 720 ILCS 5/7-5(c) (2022).

It was also arguably unreasonable for Taylor to tackle Vesey for the safety of Robinson and A.V. *See* 720 ILCS 5/7-5(a) (2022) (noting a police officer can use reasonable force to protect another from bodily harm when making an arrest). By the time Vesey was tackled, Kuhlman had already pushed Vesey backward away from Robinson and A.V., who were behind Kuhlman. (People's Ex. No. 1.1 1:05-1:11; People's Ex. No. 1.2 5:33-5:40). Further, Robinson and A.V. started leaving the area before the situation became physical. (R. 167; People's Ex. No. 1.1 1:05-1:06).

Even under the Fourth Amendment, the force used here was arguably excessive. U.S. Const. amend. IV. When determining whether force employed by police was excessive under the Fourth Amendment, courts balance "'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake" under the specific circumstances of the case. *Graham*, 490 U.S. at 396 (quoting *Garner*, 471 U.S. at 8). In making this determination, it is proper to look at "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and

whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*

Here, the severity of the alleged crime Vesey supposedly committed was at least arguably minimal. Taylor thought Vesey committed aggravated battery of a peace officer when Vesey swatted Kuhlman. (R. 184). But the jury acquitted Vesey of this alleged crime, and the nature of the alleged offense was just that—a swat. (C. 108). This is not a case where a defendant was railing against a helpless police officer.

Also, Vesey arguably did not pose an immediate threat to the officer's safety or to that of others. As noted previously, Vesey posed no threat to Robinson and A.V., as Kuhlman had pushed Vesey away from them, and they left before the incident was physical. (R. 167; People's Ex. No. 1.1 1:05-1:11). Vesey also posed little to no threat to the officers, because the officers, who outnumbered and surrounded him, already determined he was unarmed. (R. 175-77, 200; People's Ex. No. 1.1 0:00-1:08).

Lastly, it is at least arguable that Vesey was not "actively resisting arrest or attempting to evade arrest by flight" at the time Taylor tackled him. *Graham*, 490 U.S. at 396. Indeed, Vesey did not resist arrest until *after* Taylor tackled him. (People's Ex. No. 1.1 1:08-2:41; People's Ex. No. 1.3 0:05-2:08). Vesey did not even have a chance to resist, as Taylor immediately tackled Vesey without telling him he was under arrest. (R. 199; People's Ex. No. 1.1 1:08-1:11).

In short, there was at least slight evidence that Taylor used excessive force against Vesey both under the United States Constitution and Illinois law when viewing the evidence in the light most favorable to Vesey. Accordingly, there was

at least slight evidence of all elements of self-defense in the case at bar when viewing the evidence in the light most favorable to him. Therefore, the trial court was required to give the self-defense instruction. *See Everette*, 141 Ill.2d at 156 (mandating that the jury be instructed regarding an affirmative defense when there is even slight evidence to support the defense); *Alexander*, 250 Ill.App.3d at 76 (requiring that the court look at the evidence in the light most favorable to the defendant when determining whether there is slight evidence to support an affirmative defense instruction). Because it did not, it abused its discretion. *Jones*, 175 Ill.2d at 131-32.

C. The trial court's error was not harmless beyond a reasonable doubt.

As noted, the trial court erred in failing to provide Vesey's jury with a self-defense instruction. This issue was preserved, as it was litigated below during the instructions conference and raised in the post-trial motion. *See People v. Denson*, 2014 IL 116231, ¶ 13 (noting an issue is preserved when "the trial court is given a full and fair opportunity to consider and rule upon the issue" and it is included in a post-trial motion); (C. 111; R. 235, 238-47). Thus, the issue is subject to harmless error analysis, and it is the State's burden to prove the error was harmless beyond a reasonable doubt. *People v. Thompson*, 238 Ill.2d 598, 611 (2010); *People v. French*, 2020 IL App (3d) 170220, ¶ 28. "[I]nstructional errors are deemed harmless if it is demonstrated that the result of the trial would not have been different had the jury been properly instructed." *Washington*, 2012 IL 110283, ¶ 60.

The State cannot meet its burden here. Indeed, the State did not argue below that the error was harmless. *See In re Deborah S.*, 2015 IL App (1st) 123596, ¶ 27 ("We note that respondent has argued these issues extensively in her brief,

but that the State has failed to respond to or address them in any way in its brief. Accordingly, the State has essentially conceded these issues on appeal."); (St. Br. App. Ct. 9-12). Also, for all of the reasons stated above, a reasonable jury could find that Taylor used excessive force to effectuate Vesey's arrest and that Vesey's use of force was accordingly justifiable to defend himself. Further, by finding Vesey not guilty of aggravated battery to Kuhlman, (C. 108), the jury did not fully accept the State's theory of the case and may have been sympathetic to an affirmative defense. Accordingly, a reasonable jury could have found that Vesey acted in self-defense against Taylor, and the State in turn cannot demonstrate the trial's result would not have been different if the jury was properly instructed. Because the error was not harmless beyond a reasonable doubt, this Court should reverse Vesey's conviction and remand for a new trial at which the jury is instructed regarding self-defense.

D. Conclusion.

The *Ammons* approach is better for analyzing whether a defendant should receive a self-defense instruction when he claims he used self-defense because the police employed excessive force, as it is consistent with this Court's precedent, while the Fourth District's test is not and is detrimental to the public's interests. This Court should thus adopt the *Ammons* approach. Under the *Ammons* approach, the trial court abused its discretion when it failed to instruct Vesey's jury regarding self-defense, an error that was not harmless beyond a reasonable doubt. Therefore, this Court should reverse Vesey's aggravated battery conviction and remand for a new trial at which the jury is instructed regarding self-defense.

II.

Alternatively, if this Court does not adopt the *Ammons* approach, under the facts of this case, the trial court abused its discretion in failing to instruct the jury regarding self-defense, as the evidence, including Taylor's use of excessive force, established at least slight evidence of all six self-defense elements, and it employed the wrong evidentiary standard in denying the instruction, something the Appellate Court also did in affirming Vesey's conviction.

Should this Court choose not to adopt the *Ammons* approach for determining whether a defendant is entitled to a self-defense instruction in a trial for resisting arrest or aggravated battery of a peace officer, Vesey was still entitled to the instruction because, under the facts of this case, there was at least slight evidence of all six elements of self-defense presented, including when considering the evidence of Taylor's use of excessive force. The trial court thus still abused its discretion in refusing the instruction. The trial court further abused its discretion because it used the wrong evidentiary standard under this Court's precedent to come to its decision to not instruct the jury, as it affirmatively decided that some elements of self-defense were not established. Additionally, the Fourth District did the same thing in affirming Vesey's conviction. Once more, the trial court's error was not harmless beyond a reasonable doubt, and this Court should accordingly reverse Vesey's conviction and remand for a new trial at which the jury is instructed regarding self-defense.

Again, a trial court's determination that there was not enough evidence to support a jury instruction is reviewed for an abuse of discretion, and a trial court abuses its discretion by refusing an affirmative defense instruction when sufficient evidence is in the record to support it. *People v. McDonald*, 2016 IL 118882, ¶¶ 32, 42; *People v. Jones*, 175 Ill.2d 126, 131-32 (1997). Notably, a trial court

also abuses its discretion when "it fails to apply the proper criteria when it weighs the facts." *People v. Ortega*, 209 Ill.2d 354, 360 (2004). The determination of whether the trial court abused its discretion "must consider both the legal adequacy of the way the trial court reached its result as well as whether the result is within the bounds of reason." *Id.*

Here, the trial court abused its discretion because, under the facts of this case, the evidence, including evidence of Taylor's use of excessive force, established sufficient evidence of all six elements of self-defense, warranting an instruction. The trial court further abused its discretion because it did not apply the proper criteria when refusing the instruction and reached that result in a legally inadequate manner. The Appellate Court also applied the wrong criteria and affirmed Vesey's conviction in a legally inadequate manner. Ultimately, the error in refusing the instruction was still not harmless beyond a reasonable doubt.

A. Under the facts of this case, the evidence established at least slight evidence of all elements of self-defense.

In this case, the evidence presented, including of Taylor's use of excessive force, established slight evidence of all six self-defense elements. *See People v. Gray*, 2017 IL 120958, ¶ 50 (identifying the elements of self-defense). As discussed in Issue I, there is evidence that Taylor used excessive force. Also discussed in Issue I, because there is evidence that Taylor used excessive force, there is necessarily evidence that the force employed was unlawful; the two are inextricably intertwined.

The trial court believed force was threatened against Vesey, but it stated that it could not "deem" Taylor's force unlawful, because he was a "police officer[] acting within the scope of [his] official duties." (R. 242). But as even the Appellate

Court majority recognized, the fact that an officer was acting within the scope of his duties does not make the force he used automatically lawful. *See People v. Vesey*, 2024 IL App (4th) 230401, ¶ 34 (holding that, because 720 ILCS 5/7-5(a) (2022), does not allow an officer to use unlimited force when making an arrest while performing his official duties, a trial court cannot require evidence that an officer exceeded the scope of his duties to be in the record "as a prerequisite for finding that the record contains sufficient evidence of excessive force"). Instead, he can only use the force *reasonably necessary* to effect the arrest or to protect himself or others in making the arrest. *See* 720 ILCS 5/7-5(a) (2022); *Graham v. Connor*, 490 U.S. 386, 395-96 (1989) (noting that the force the police use to make an arrest must be reasonable under the Fourth Amendment).

As for the element of Vesey not being the aggressor, the trial court found that Vesey was the aggressor because Vesey could have gone around the officers instead of taking a step toward them. (R. 244). But this is entirely irrelevant. Although Vesey was argumentative and upset, (People's Ex. No. 1.1 0:03-1:08), Kuhlman was the *physical* aggressor, as he put his hands on Vesey first. (R. 218). Just because someone is merely argumentative and upset does not give others permission to start throwing hands; physicality should be deterred and not encouraged. Indeed, it is only a crime once someone *does* put their hands on another, *See* 720 ILCS 5/12-3(a) (2022) (defining the offense of battery), and one's force is only legally justified under certain limited circumstances, none of which include another party being upset. *See* 720 ILCS 5/7-1 *et seq*. (2022) (defining the limited circumstances in which one can legally use force against another). To the extent Vesey taking a step may render him the aggressor, it is notable that the police

gave conflicting instructions on how to get to his car: They told Vesey he could not walk through them, but Barrera also told him that he could go to his car and leave, and a car was visible in the parking lot behind Kuhlman. (People's Ex. No. 1.1 0:15-0:23; People's Ex. No. 1.2 5:34-5:37). Even so, because there is evidence Taylor used excessive force, there is necessarily evidence that Taylor was the aggressor for the reasons discussed in Issue I. This still holds true if Vesey initially provoked the use of force with his superficial contact with Kuhlman, also as discussed above.

There is at least slight evidence that the harm against Vesey was imminent because there is evidence that Taylor's use of excessive force was already under way by the time Vesey wrapped his arms around Taylor's neck; when Taylor tackled Vesey over the concrete retaining wall, there was a danger of significant harm and injury to Vesey, as his "unprotected head and body were exposed to slamming into the ground or concrete." *Vesey*, 2024 IL App (4th) 230401, ¶ 44 (Turner, J., dissenting); (People's Ex. No. 1.1 1:08-1:11; People's Ex. No. 1.1A 0:08-0:09). It does not matter that Kuhlman pushed Vesey to keep Vesey from going through the officers and that Vesey reacted by swatting at Kuhlman's arm, or that the officers told Vesey to leave. (R. 245-46). It goes without saying that someone is subject to imminent harm—and potentially even serious and great bodily harm—when tackled without warning over a concrete barrier and with his head and body unprotected and exposed.

It can at least be inferred that Vesey's use of force in wrapping his arms around Taylor's neck was necessary because of the use of excessive force. In other words, there is slight evidence of the element. Indeed, there were three officers

outnumbering Vesey, and there is nothing in this case to suggest Vesey had any other recourse but to wrap his arms around Taylor's neck to brace himself for the fall, especially when the tackle was so sudden and without warning. (R. 175-77; People's Ex. No. 1.2 6:29-6:46; People's Ex. No. 1.1 1:08-1:11). Also, as just stated, Taylor's use of excessive force in tackling Vesey over the wall was already underway. (People's Ex. No. 1.1 1:08-1:11).

Likewise, when viewing the evidence in the light most favorable to Vesey, it can be reasonably inferred that, when Vesey was tackled suddenly and without warning over a concrete retaining wall with his head and body unprotected and exposed, he may have put his arms around Taylor's neck as a means to brace himself for the fall or to otherwise protect himself from serious injury; that is simply what one would reasonably do under the circumstances. Indeed, it was "obvious a juror could infer [Vesey] acted instinctively out of fear for his safety and actually and subjectively believed a danger existed requiring the use of the force he applied to Officer Taylor." *Vesey*, 2024 IL App (4th) 230401, ¶ 44 (Turner, J., dissenting). It is difficult to imagine that the situation Vesey found himself in does *not* make one subjectively believe that his own force is necessary to protect himself. Although there is no direct evidence of Vesey's subjective belief, such is not required, because "mental states . . . are more often inferred from the character of a defendant's acts and the circumstances surrounding the commission of the offense." *Jones*, 175 Ill.2d at 133. In sum, there is slight evidence that Vesey actually and subjectively believed his use of force was required because of a danger.

Finally, Vesey's use of force was objectively reasonable because of the fact that one can make the inference regarding the subjective belief in the need to

use force in the first place, discussed in more detail in Issue I. Further, when one is being tackled over a concrete retaining wall with head and body exposed and unprotected and without warning like Vesey was, (R. 199, 218; People's Ex. No. 1.1 1:08-1:11), a reasonable person can only conclude that his safety is at risk and that he must use force to protect himself from the danger presented.

Because the evidence in this case, including of Taylor's use of excessive force, established at least slight evidence of all six self-defense elements, the trial court abused its discretion in refusing the self-defense instruction. *Jones*, 175 Ill.2d at 131-32.

B. The trial court abused its discretion because it applied the wrong evidentiary standard when deciding the jury should not receive a self-defense instruction.

Further demonstrating the trial court's abuse of discretion is its reasoning as to why it refused the instruction. In noting that it could not "deem" Taylor's use of force unlawful because the officers were "acting within the scope of their official duties," the trial court made the ultimate determination that Taylor's use of force was lawful. (R. 242). It also definitively decided that Vesey was the aggressor because of the video footage, specifically because it showed Vesey step toward the officers when he had room to go around them. (R. 241-42, 244). The court finally definitively determined that there was no imminent danger of harm to Vesey. (R. 245-46). But this was not for the trial court to decide: "It is not the province of the trial court to weigh the evidence when deciding whether a jury instruction is justified." *McDonald*, 2016 IL 118882, ¶ 25; *accord People v. Washington*, 2012 IL 110283, ¶ 43 (citing *People v. Lockett*, 82 Ill.2d 546, 553 (1980)) (holding that the trial court is not to determine whether the defendant's subjective belief that

his use of force was necessary was objectively reasonable). Instead, the court must give the instruction if there is slight evidence to support the affirmative defense when viewing the evidence in the light most favorable to Vesey. *People v. Everette*, 141 Ill.2d 147, 156 (1990); *People v. Alexander*, 250 Ill.App.3d 68, 76 (2d Dist. 1993). For the reasons discussed above, at least slight evidence existed in this case that the police used unlawful force, Vesey was not the aggressor, and the danger of harm was imminent to Vesey. Accordingly, the trial court abused its discretion because it "fail[ed] to apply the proper criteria" and did not reach its decision in a legally adequate manner. *Ortega*, 209 Ill.2d at 360. What the trial court did was usurp the role of the jury in making the factual determination of whether Vesey acted in self-defense. *McDonald*, 2016 IL 118882, ¶ 25.

C. The Fourth District similarly applied the wrong evidentiary standard in affirming Vesey's conviction.

It must be noted that the trial court is not the only court that erred in this case. In affirming the trial court, the Appellate Court also disregarded this Court's precedent for analyzing the trial evidence and was guilty of committing the same fundamental mistakes the trial court committed. In holding that the trial court did not err in refusing to give the self-defense instruction, the majority below found that Vesey "fail[ed] to satisfy" the element that he subjectively believed his use of force was necessary. *Vesey*, 2024 IL App (4th) 230401, ¶¶ 35-38. The majority added that this "defeat[s] his claim of self-defense." *Id.* at ¶ 38. But Vesey was merely attempting to obtain a self-defense instruction. Accordingly, he was under no obligation to "satisfy" the self-defense element or establish beyond a reasonable doubt his claim of self-defense. All that needed to be established was slight evidence of all elements of self-defense. *Everette*, 141 Ill.2d at 156.

This Court's precedent establishes that it is not for the court to make the ultimate determination regarding whether the defendant acted in self-defense when determining whether to give an instruction. *See McDonald*, 2016 IL 118882, ¶ 25; *Washington*, 2012 IL 110283, ¶ 43. Given the language the majority employed, though, that is exactly what the majority did.

The majority also found that it was "within the bounds of reason" that Vesey acted out of frustration or per an automatic reaction instead of out of fear in putting his hands around Taylor's neck. *Vesey*, 2024 IL App (4th) 230401, ¶ 37. Even if true, as demonstrated above, given that Taylor arguably employed excessive force against Vesey, it was also "within the bounds of reason" that Vesey acted based on a subjective belief that he needed to use force to protect himself. As the dissenting justice recognized, Vesey was tackled over a concrete retaining wall with his head and body exposed with no warning. *Vesey*, 2024 IL App (4th) 230401, ¶ 44 (Turner, J., dissenting). All that was necessary was slight evidence, considered in the light most favorable to Vesey, to establish the element, which the arguable use of excessive force did. *Everette*, 141 Ill.2d at 156; *Alexander*, 250 Ill.App.3d at 76.

As the dissent recognized, the majority weighed the evidence and made factual findings to conclude Vesey was not entitled to the instruction. *Vesey*, 2024 IL App (4th) 230401, ¶ 45 (Turner, J., dissenting). This is against this Court's precedent, which holds that it is not the trial court's role to weigh the evidence in determining whether an instruction is permissible; that is instead the jury's role in determining guilt. *McDonald*, 2016 IL 118882, ¶ 25; *see also People v. Moss*, 205 Ill.2d 139, 164 (2001) ("It is the function of the jury to assess the credibility of witnesses, weigh the evidence presented, resolve conflicts in the evidence, and

draw reasonable inferences from the evidence."). In deciding whether the trial court erred in refusing to allow the jury to decide whether Vesey's actions were justified, the majority usurped the jury's role and wrongly endorsed a practice of the trial court making the final factual determination itself. *See McDonald*, 2016 IL 118882, ¶ 25 (holding that requiring credible evidence in the record to obtain an instruction risks invading the province of the jury); *Vesey*, 2024 IL App (4th) 230401, ¶ 45 (Turner, J., dissenting). Instead of applying the slight evidence test, the trial court looked at the evidence in the light most favorable to the State and drew all reasonable inferences in favor of the State to determine whether any rational fact finder could have found the elements of aggravated battery beyond a reasonable doubt. *Vesey*, 2024 IL App (4th) 230401, ¶ 45 (Turner, J., dissenting). In other words, the Appellate Court employed the reasonable doubt standard to determine whether Vesey was entitled to a self-defense instruction. *See People v. Harvey*, 2024 IL 129357, ¶ 19 ("When reviewing a challenge to the sufficiency of the evidence, [a reviewing court] must determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [citation]. In making this determination, we review the evidence in the light most favorable to the prosecution. [citation]. This means that all reasonable inferences from the record in favor of the prosecution will be allowed.").

The majority disregarded this Court's precedent, thus implicitly overruling it. Again, the Appellate Court has no authority to do that. *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 28. At the very least, if the Appellate Court was the trial court, it would have abused its discretion; it "fail[ed] to apply the proper criteria" when weighing the facts. *Ortega*, 209 Ill.2d at 360. Its method of finding that no self-

defense instruction was required was not determined in a legally adequate manner. *Id.* Although a court of review can consider whether a *result* was "within the bounds of reason" when determining whether a trial court abused its discretion, *id.*, that is not what the majority did. Instead, it determined that a *fact* was "within the bounds of reason." *Vesey*, 2024 IL App (4th) 230401, ¶ 37. For all of the reasons previously discussed, that was improper, as that was not the majority's role.[2]

D. The trial court's error was not harmless.

As noted, the trial court abused its discretion when it denied Vesey a self-defense jury instruction because, under the facts of this case, there was at least slight evidence of all six elements of self-defense, including when considering Taylor's arguable use of excessive force. The trial court further abused its discretion in denying the instruction because its reasoning for denying the instruction was legally erroneous. The trial court's error was not harmless beyond a reasonable doubt for the same reasons as discussed in Issue I. Therefore, this Court should reverse Vesey's conviction and remand for a new trial with the jury receiving a self-defense instruction.

E. Conclusion.

Under the facts of this case, the trial court erred in not instructing the jury regarding self-defense because the evidence established at least slight evidence of the six self-defense elements. The trial court further abused its discretion because

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[2] The majority's heightened evidentiary standard to obtain an affirmative defense instruction adds to the danger the public faces in its contacts the police, especially when combined with the Fourth District's test. For as difficult as it already was under the Fourth District's test, discussed above, the heightened evidentiary standard makes it even more difficult for the citizen's use of force against a police officer to be justifiable when the officer uses excessive force.

of the erroneous reasoning it employed in denying the instruction, something the Appellate Court also did in affirming Vesey's conviction. The trial court's error was not harmless beyond a reasonable doubt. Therefore, this Court should reverse Vesey's conviction and remand for a new trial during which the jury receives a self-defense instruction.

CONCLUSION

For the foregoing reasons, Courtney Vesey, Defendant-Appellant, respectfully requests that this Court adopt the *Ammons* approach for determining whether a jury should receive a self-defense instruction when the defendant claims he used force in response to a police officer's use of excessive force in an aggravated battery to a peace officer or resisting arrest case. Vesey also respectfully asks that this Court reverse his conviction and remand for a new trial at which the jury is instructed as to self-defense.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 50 pages.

/s/ Elliott A. Borchardt
ELLIOTT A. BORCHARDT
Assistant Appellate Defender

APPENDIX TO THE BRIEF

Courtney Vesey No. 130919

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
ROCK ISLAND COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-23-0401
	)	Circuit Court No: 2022CF481
	)	Trial Judge: Norma Kauzlarich
v	)	
	)	
	)	
VESEY, COURTNEY B	)	
Defendant/Respondent	)	

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
ROCK ISLAND COUNTY, ILLINOIS

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VESEY, COURTNEY B	)	
Defendant/Respondent	)	

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People v. Courtney Vesey,
Rock Island County Case No.: 22-CF-481
Fourth Judicial District Appellate Court No.: 4-23-0401

Report of Proceedings ("R")

E-FILED
Transaction ID: 4-23-0401
File Date: 7/5/2023 2:47 PM
Carla Bender, Clerk of the Court
APPELLATE COURT 4TH DISTRICT

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
ROCK ISLAND COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-23-0401
	)	Circuit Court No: 2022CF481
	)	Trial Judge: Norma Kauzlarich
v	)	
	)	
	)	
VESEY, COURTNEY B	)	
Defendant/Respondent	)	

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STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
201 W. MONROE STREET
SPRINGFIELD, IL 62704

CLERK OF THE COURT
(217) 782-2586

RESEARCH DIRECTOR
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FILED
December 20, 2023
APPELLATE
COURT CLERK

4-23-0401

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. COURTNEY VESEY, Defendant-Appellant	Rock Island County Case No.: 22CF481

ORDER

This cause coming to be heard with proper notice having been served, and the Court being fully advised in the premises:

IT IS ORDERED that the Office of the State Appellate Defender's motion to withdraw is denied without prejudice. By January 26, 2024, the Office of the State Appellate Defender shall file a merits brief or a renewed motion to withdraw addressing *People v. Ammons*, 2021 IL App (3d) 150743, ¶ 21, and the cases cited therein for the proposition that "where a defendant is charged with *** the aggravated battery of a police officer during an arrest, a jury instruction on self-defense is required where *** there is evidence that the arresting officer used excessive force."

If the Office of the State Appellate Defender elects to file a merits brief, the State's brief will be due March 1, 2024, The reply brief, if any, is due March 15, 2024.

Order entered by the court.

2024 IL App (4th) 230401

NO. 4-23-0401

FILED
June 26, 2024
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Rock Island County
COURTNEY B. VESEY,	)	No. 22CF481
Defendant-Appellant.	)	
	)	Honorable
	)	Norma Kauzlarich,
	)	Judge Presiding.

JUSTICE DOHERTY delivered the judgment of the court, with opinion.
Justice Harris concurred in the judgment and opinion.
Justice Turner dissented, with opinion.

OPINION

¶ 1 Defendant Courtney B. Vesey appeals from his conviction for aggravated battery of a peace officer (720 ILCS 5/12-3.05(d)(4) (West 2022)) for wrapping his arm around a police officer's neck after the officer tackled him onto a grassy hill behind a concrete retaining wall. At trial, defendant requested a jury instruction on self-defense, but the trial court found that there was insufficient evidence to support a self-defense instruction. On appeal, defendant argues that the court's decision was an abuse of discretion. We disagree and affirm.

¶ 2 I. BACKGROUND

¶ 3 This case revolves around an altercation between defendant and three police officers on June 28, 2022. Defendant and his ex-wife Judinetta Robinson have a daughter, A.V.,

who was nine years old at the time. Pursuant to the terms of their divorce, Robinson had full physical custody of A.V., with defendant retaining court-ordered visitation rights on certain days, including the day of the altercation.

¶ 4 That morning, A.V. texted Robinson, saying, "We're going to heaven." Robinson immediately called A.V., who said some concerning things and told Robinson that she was at Longview Park in Rock Island. Robinson also heard defendant in the background saying, "Stop playing with me, Judy. You know who I am. I'm God. M[y] chariot is coming. It's descending down and we are going to heaven." Robinson immediately called 911 and left her home to go to the park, a 15- to 20-minute drive away.

¶ 5 Three Rock Island police officers went to the park in response to the call: Kristopher Kuhlman; Brett Taylor, who had worked for the police department for about six months and was undergoing field training; and Taylor's field training officer, Eugenio Barrera. All three officers were wearing body cameras that recorded the following events.

¶ 6 The officers parked in a parking lot adjacent to a sidewalk that wound into the park. A concrete brick retaining wall, approximately three feet high, ran along the opposite side of the sidewalk. Behind the retaining wall was a grassy hill. When the officers arrived, defendant was sitting with A.V. on the retaining wall. Defendant consented to a pat-down search, and the officers did not find weapons on his person. He emphasized that A.V. was safe but would not let the officers speak to her one-on-one.

¶ 7 Defendant said several disturbing things in front of the officers and A.V. He confirmed that he had said, "it's our day to go to heaven," but he would not explain to the officers what that meant. He referred to a time when he was a in a closet on Fifth Street, "fighting off all that s*** that was coming through them things." He continued, "Yesterday, they did the same

s***, saying motherf*** lizards, reptiles, all that s*** through my apartment." The officers asked defendant to explain the Fifth Street incident and whether he was "feeling down today," but he declined to clarify. He also wondered aloud why three officers had surrounded him and stated that he had previously dealt with the police at some point when he had tried to check on his daughter at Robinson's house.

¶ 8 Approximately 15 minutes later, Robinson arrived at the park and saw the police, defendant, and A.V. After the police talked with Robinson and A.V., they decided that A.V. should go with Robinson based on the disturbing things that defendant had said, and they would report the incident to the Department of Children and Family Services, who could determine whether A.V. would be safe with defendant. The officers approached defendant to explain this decision. In response, he emphasized that he had a legal right to time with his daughter.

¶ 9 From defendant's standpoint, the scene was as follows. He was standing on the sidewalk with the retaining wall to his left and Taylor on his right; behind Taylor was the parking lot. Barrera was in front of defendant on the left, and Kuhlman was in front of him on the right. Robinson and A.V. were sitting on the retaining wall behind Barrera and Kuhlman. The officers informed defendant that he was free to go, but he could not talk to A.V. and could not walk between Barrera and Kuhlman to get to his car in the parking lot. When asked, defendant said that he did not feel like hurting himself and did not want a mental health evaluation. As the officers stood in his way, he began to raise his voice, demanding that the officers show him the text messages where he said that he was God and that they give him his daughter.

¶ 10 Defendant shouted "legal right" and approached Barrera and Kuhlman. Kuhlman held out his arm and touched defendant's chest; defendant pushed Kuhlman's arm away. Taylor, having witnessed this, rushed defendant and tackled him onto the hill behind the retaining wall.

Taylor did not inform defendant that he was being arrested for aggravated battery against Kuhlman and did not make any effort to arrest defendant in a peaceful way. Taylor later testified at trial that he "thought that going hands-on was the most appropriate action at that time" based on a split-second decision. As defendant and Taylor were falling onto the hill, defendant wrapped his arm around Taylor's neck and continued holding his neck for approximately five seconds after they landed. The three officers pulled defendant and Taylor apart and arrested defendant.

¶ 11 Defendant was charged with two counts of aggravated battery of a peace officer: one count for pushing Kuhlman's arm and one count for wrapping his arm around Taylor's neck. Before trial, defendant filed a notice of intent to raise the affirmative defense of self-defense at trial. See Ill. S. Ct. R. 413(d) (eff. July 1, 1982) (requiring that "defense counsel shall inform the State of any defenses which he intends to make at *** trial").

¶ 12 The court proceeded to a jury trial in March 2023. The State called Robinson, Kuhlman, and Taylor to testify and introduced video from the body cameras worn by Kuhlman, Taylor, and Barrera. Defendant declined to testify or introduce any evidence in his defense. At the jury instruction conference, defendant sought an instruction on aggravated battery that incorporated an instruction on self-defense. See Illinois Pattern Jury Instructions, Criminal, No. 24-25.06A (4th ed. 2000). Over defendant's objection, the trial court declined to instruct the jury on self-defense, concluding that the evidence of self-defense was insufficient.

¶ 13 The jury acquitted defendant on count I for aggravated battery against Kuhlman but convicted him on count II for aggravated battery against Taylor. Defendant argued in a posttrial motion that the trial court should have instructed the jury on self-defense; the court denied the motion and sentenced defendant to 24 months' probation.

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 We note at the outset that we are only reviewing defendant's conviction on count II; defendant's acquittal on count I is unreviewable. See Ill. Const. 1970, art. VI, § 6.

¶ 17 A. Appellate Counsel's *Anders* Motion

¶ 18 Prior to filing an opening brief, defendant's counsel moved to withdraw from representing defendant pursuant to *Anders v. California*, 386 U.S. 738 (1967), asserting that this appeal did not present any issues of arguable merit. After conducting the full examination of the proceedings required by *Anders* (*id.* at 744), we could not conclude that an argument regarding a possible self-defense instruction would be wholly frivolous, so we denied appellate counsel's motion without prejudice, allowing counsel to file a renewed motion or an opening brief on the issue. See *People v. Teran*, 376 Ill. App. 3d 1, 5 (2007) ("On a motion to withdraw, the ultimate responsibility to determine the frivolity of potential issues lies with this court rather than appellate counsel."); see, *e.g.*, *In re Alexa J.*, 345 Ill. App. 3d 985, 990 (2003) (denying appellate counsel's *Anders* motion without prejudice).

¶ 19 Defendant and the State have now fully briefed this issue. With the benefit of adversarial briefing, we conclude that the trial court did not commit reversible error. Nevertheless, we commend appellate counsel for zealously advocating on defendant's behalf with respect to this issue, which we believe is deserving of some clarification. See *Teran*, 376 Ill. App. 3d at 2 ("[A] nonfrivolous issue is not necessarily one that will be successful; it is merely an issue with arguable merit.").

¶ 20 B. Standard of Review

¶ 21 When a defendant is charged with the aggravated battery of a police officer during an arrest, he may be able to raise the affirmative defense that his use of force was justified, *i.e.*,

that he acted in self-defense. See 720 ILCS 5/7-14 (West 2022). If the affirmative defense is properly raised, then the State has the burden of proving beyond a reasonable doubt that the defendant's use of force was *not* justified. *Id.* § 3-2(b); see, *e.g.*, *People v. Gray*, 2017 IL 120958, ¶ 50. The jury is responsible for deciding whether the State has met this burden; if the State has not, the jury should find the defendant not guilty. However, the jury will not know that it can acquit the defendant on this basis unless the trial court instructs the jury on the law governing self-defense. See *People v. Jones*, 175 Ill. 2d 126, 134 (1997) (explaining that a jury instruction on an affirmative defense supplies the jury with "the necessary tools to analyze the evidence fully and to reach a verdict based on those facts").

¶ 22 A defendant is entitled to a jury instruction on self-defense whenever there is some evidence of self-defense in the trial record, even if, as in this case, the defendant himself did not introduce any evidence on the issue. 720 ILCS 5/3-2(a) (West 2022); see, *e.g.*, *Jones*, 175 Ill. 2d at 132 (finding that a jury instruction was required on an affirmative defense when "the State's evidence alone was sufficient to raise the issue"). When determining whether to instruct the jury on self-defense, the trial court does not determine whether the defendant *in fact* acted in self-defense; that decision would be for the jury. See *People v. Washington*, 2012 IL 110283, ¶ 43. Rather, the court must provide the instruction "if there is some evidence, however slight, in the record to support th[e] defense." *Id.* The trial court may not invade the province of the jury by weighing the evidence or engaging in a credibility analysis. *People v. McDonald*, 2016 IL 118882, ¶ 25. Moreover, the evidence can be sufficient even if it is contradicted. *People v. Sims*, 374 Ill. App. 3d 427, 435 (2007).

¶ 23 The supreme court has held that, "when the trial court, after reviewing all the evidence, determines that there is insufficient evidence to justify the giving of a jury instruction,

the proper standard of review of that decision is abuse of discretion." *McDonald*, 2016 IL 118882, ¶ 42. In so holding, the supreme court disclaimed language from earlier opinions suggesting that the standard of review was *de novo*. See *id.* ¶ 41 (citing *Washington*, 2012 IL 110283, ¶ 56). Accordingly, we will reverse the trial court's determination that the evidence was insufficient only "where the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *Id.* ¶ 32. When reviewing the trial court's decision for an abuse of discretion, we " 'must look to the criteria on which the trial court should rely.' " *People v. Ortega*, 209 Ill. 2d 354, 360 (2004) (quoting *Boatmen's National Bank of Belleville v. Martin*, 155 Ill. 2d 305, 314 (1993)).

¶ 24 C. The Applicable Criteria

¶ 25 In a case such as this, the trial court's decision is governed by several sections of the Criminal Code of 2012 (720 ILCS 5/1-1 *et seq.* (West 2022)). First is section 7-7, which states:

> "A person is not authorized to use force to resist an arrest which he knows is being made either by a peace officer or by a private person summoned and directed by a peace officer to make the arrest, even if he believes that the arrest is unlawful and the arrest in fact is unlawful." *Id.* § 7-7.

¶ 26 The peace officer's use of force when making an arrest is governed by section 7-5, which provides, among other things:

> "[A peace officer] is justified in the use of any force which he reasonably believes, based on the totality of the circumstances, to be necessary to effect the arrest and of any force which he reasonably believes, based on the totality of the circumstances, to be necessary to defend himself or another from bodily harm while making the arrest." *Id.* § 7-5(a).

See *id.* § 7-5.5 (prohibiting certain uses of force by peace officers without reference to arrests). Section 7-5 further provides:

> "The decision by a peace officer to use force shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time of the decision, rather than with the benefit of hindsight, and that the totality of the circumstances shall account for occasions when officers may be forced to make quick judgments about using force." *Id.* § 7-5(f).

¶ 27 If the officer's use of force is not justified under section 7-5, then it is considered excessive, and section 7-7 no longer applies to the arrest. *People v. Bailey*, 108 Ill. App. 3d 392, 398 (1982). After the officer uses excessive, unlawful force—but not before (see *People v. Haynes*, 408 Ill. App. 3d 684, 691 (2011))—the arrestee's own use of force is instead governed by section 7-1(a), the general self-defense statute, which states, "[a] person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force." 720 ILCS 5/7-1(a) (West 2022). Section 7-1 is limited in turn by section 7-4, which provides that a person's use of force is generally not justified if he is the aggressor, except in certain specific circumstances. *Id.* § 7-4.

¶ 28 Putting these sections together leads to a two-step inquiry. First, the trial court must consider whether the trial record contains sufficient evidence of excessive force, as governed by section 7-5; if not, section 7-7 prohibits the defendant from raising the affirmative defense that his use of force was justified. If the evidence of excessive force *is* sufficient, then the trial court must still determine whether the trial record contains sufficient evidence of self-defense, as governed

by a six-element test established by the supreme court for evaluating claims under section 7-1. Stated another way, an officer's use of excessive force removes the protection of section 7-7, but that does not mean he loses the protection that would be afforded under section 7-1 to any other victim of aggravated battery who has used unlawful force on the defendant.

¶ 29 In this respect, we distance ourselves from language in *People v. Ammons*, 2021 IL App (3d) 150743, ¶ 21, and other cases suggesting that "a jury instruction on self-defense is *required* where *** there is evidence that the arresting officer used excessive force." (Emphasis added.) Rather, we view the proposition that the "[u]se of excessive force by a police officer invokes the arrestee's right of self-defense" (*id.*) as meaning that section 7-1 provides the arrestee the same right of self-defense when excessive force is used on him as in any other situation where unlawful force is used on him. See *Bailey*, 108 Ill. App. 3d at 398-99; see also *People v. Bratcher*, 63 Ill. 2d 534, 538-39 (1976) (applying section 7-1 in a case involving an arrestee charged with aggravated battery of the police officer who arrested him). Although the officer's conduct is obviously central to the trial court's inquiry, the record must nevertheless contain sufficient evidence of all six elements of self-defense for a self-defense instruction to be appropriate under section 7-1. See, *e.g.*, *People v. Wicks*, 355 Ill. App. 3d 760, 764 (2005) (noting that, in addition to some evidence of excessive force, "there must be some evidence that the defendant acted out of fear for his safety in order to justify a self-defense instruction in these circumstances").

¶ 30 The trial court in the present case relied on the following formulation of the six-element test for self-defense:

> "In order to instruct the jury on self-defense, the defendant must establish some evidence of each of the following elements: (1) force is threatened against a person; (2) the person threatened is not the aggressor; (3) the danger of harm was imminent;

(4) the threatened force was unlawful; (5) he actually and subjectively believed a danger existed which required the use of the force applied; and (6) his beliefs were objectively reasonable." *People v. Jeffries*, 164 Ill. 2d 104, 127-28 (1995).

If the record lacks sufficient evidence of any one of these six elements, then the defendant cannot prevail on his claim of self-defense, so a jury instruction on self-defense is not warranted. See *id.* at 128.

¶ 31 We recognize that the supreme court has used a different formulation of the six-element test in some of its more recent cases, combining the first and fourth elements from *Jeffries* into a new first element that "unlawful force [was] threatened against a person" and adding a new fourth element, that "the use of force was necessary." See *Gray*, 2017 IL 120958, ¶ 50 (citing *People v. Lee*, 213 Ill. 2d 218, 225 (2004)); but see *Washington*, 2012 IL 110283, ¶ 35 (citing *Jeffries*, 164 Ill. 2d at 127-28). Neither party has challenged the trial court's reliance on *Jeffries*, and in any event, we may decide this case by addressing only the elements common to both formulations. Compare *Jeffries*, 164 Ill. 2d at 127-28, with *Gray*, 2017 IL 120958, ¶ 50.

¶ 32 D. The Present Case

¶ 33 Here, the trial court considered section 7-1 without first explicitly addressing whether the officers' use of force was excessive under section 7-5. Assuming the trial court's silence reflected a failure to consider section 7-5, defendant cannot have been prejudiced because the error worked to his benefit by removing section 7-7 as a barrier to his effort to obtain a self-defense instruction. See *People v. Jordan*, 116 Ill. App. 3d 269, 274 (1983) ("The defendant cannot complain of error which favors his case."). On the other hand, the trial court may have tacitly concluded that there was sufficient evidence of excessive force to render section 7-7 inapplicable. In either event, our inquiry turns to the trial court's application of the six-element test.

¶ 34 However, we pause to point out the trial court's statement that the officers were acting within the scope of their duties. Although the scope of an officer's duties could be relevant when the trial court considers whether his use of force was excessive under the totality of the circumstances (see 720 ILCS 5/7-5(a), (f), (h)(3) (West 2022)), we caution that a trial court may not *require* the record to contain evidence that the officer exceeded the scope of his duties as a prerequisite for finding that the record contains sufficient evidence of excessive force. The reason is that section 7-5 expressly *does not* authorize an officer to use unlimited force when making an arrest in the course of his official duties; if it did, no amount of force could ever be described as "excessive." See *id.* § 7-5; *id.* § 7-5.5; see also *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (finding a state statute unconstitutional to the extent it authorized "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances").

¶ 35 Despite our concerns with some other aspects of the trial court's analysis, we choose to resolve this appeal on the fifth element of self-defense, whether defendant "actually and subjectively believed a danger existed which required the use of the force applied." *Jeffries*, 164 Ill. 2d at 128. On the facts of this case, the question is whether, even assuming defendant was responding to excessive force by Taylor, defendant actually and subjectively believed that wrapping his arm around the Taylor's neck was necessary to defend himself. The trial court ruled that the body camera footage and trial testimony did not include "some evidence" going to this element; if this ruling was not an abuse of discretion, then the court's refusal to instruct the jury on self-defense was not erroneous because the six-element test was not satisfied. See *id.* at 127-28. Our analysis is deferential; we do not independently review the facts (see *McDonald*, 2016 IL 118882, ¶ 42), and we consider only the evidence introduced at trial, which in this case did not include any testimony by defendant regarding his state of mind (see *Sims*, 374 Ill. App. 3d at 435

(reversing trial court's refusal to provide self-defense instruction when the record showed that the defendant "specifically testified that he was afraid during his encounter with the officers")).

¶ 36 We find that the trial court's ruling was not an abuse of discretion. Under the law, the use of force in one's defense is justified only in situations involving fear for one's safety, as opposed to situations merely involving frustration, anger, or astonishment. For example, in *Wicks*, 355 Ill. App. 3d at 764, this court upheld the denial of a self-defense instruction because "there was no evidence that [the] defendant acted out of fear," noting that the defendant "testified that he was upset and agitated, but never testified that he was afraid of the officers." Similarly, in *Bratcher*, 63 Ill. 2d at 540, the supreme court upheld the denial of a self-defense instruction even though the State's evidence included the defendant's statement "that he felt the officers 'were going to whip him' " because the defendant's "own testimony disclose[d] that he was not in fear at the time he struck the officer, and that his action was an automatic reaction to the officer's touch." However, in neither case was the defendant's inconsistent testimony dispositive; the reviewing court's focus was on the entire trial record. See *Wicks*, 355 Ill. App. 3d at 764; *Bratcher*, 63 Ill. 2d at 540 ("[T]his court has repeatedly held that '[a] defendant is entitled to the benefit of any defense shown by the entire evidence, even if the facts on which such defense is based are inconsistent with the defendant's own testimony' [citations] ***.").

¶ 37 After reviewing the trial record in the present case, which consists only of the State's evidence, we find that the trial court could have reasonably concluded that defendant's action of wrapping his arm around Taylor's neck was either the result of frustration (*Wicks*, 355 Ill. App. 3d at 764), or "an automatic reaction" (*Bratcher*, 63 Ill. 2d at 540). Either way, the court's conclusion that this record reflected something other than actual fear on defendant's part was

within the bounds of reason and justified its refusal to instruct the jury on self-defense. See *Wicks*, 355 Ill. App. 3d at 764.

¶ 38 Because defendant's failure to satisfy this element was sufficient to defeat his claim of self-defense, we need not address his arguments on the remaining elements.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm the trial court's judgment.

¶ 41 Affirmed.

¶ 42 JUSTICE TURNER, dissenting:

¶ 43 I respectfully dissent. I would reverse the trial court's judgment and remand for a new trial because of the trial court's failure to instruct the jury on self-defense.

¶ 44 The advent of police body cameras provides courts with an evidentiary firsthand view of incidents previously only described by eyewitness testimony. In this case, the State presented body camera footage from all three officers involved in the incident, as well as a version in slow motion of footage from the cameras of Officers Barrera and Kuhlman. The body camera footage indisputably shows Officer Taylor tackled defendant straight on over a concrete retaining wall causing defendant to fall backward. As defendant was falling backward, his unprotected head and body were exposed to slamming into the ground or concrete, and defendant wrapped his arms around the tackling officer. The unrefuted evidence is Officer Taylor made a face-to-face tackle of defendant without alerting defendant in any way of the action he was about to take. From watching the footage, it is obvious a juror could infer defendant acted instinctively out of fear for his safety and actually and subjectively believed a danger existed requiring the use of the force he applied to Officer Taylor.

¶ 45 Notwithstanding the foregoing, the majority finds the trial "court's conclusion that this record reflected something other than actual fear on defendant's part *was within the bounds of reason and justified its refusal to instruct the jury on self-defense.*" (Emphasis added.) *Supra* ¶ 37. However, even if it was within the bounds of reason for the trial court to conclude defendant did not act out of fear, such a conclusion does not govern the determination of whether a self-defense instruction should be given. As the majority appropriately observes, some evidence defendant was acting in self-defense, however slight, obligates the court to give a self-defense instruction. *Supra* ¶ 22; see *McDonald*, 2016 IL 118882, ¶ 25 (noting the standard for giving a lesser-offense instruction is "whether there is *some evidence* in the record that, if believed by the jury, will reduce the crime charged to a lesser offense, not whether there is *some credible* evidence" (emphases in original)); *McDonald*, 2016 IL 118882, ¶ 40 (explaining the consideration for whether the defendant is entitled to a self-defense instruction is whether "there is some evidence in the record that, if believed by a jury, would support the defense"). Moreover, unlike in *Wicks*, 355 Ill. App. 3d at 764, and *Bratcher*, 63 Ill. 2d at 539, defendant did not testify his response to the officer's tackle was simply due to him being upset or agitated. See *supra* ¶ 36. Also, as pointed out by the majority, the law entitles a defendant to a self-defense instruction even if the defendant himself did not introduce any evidence on the issue. *Supra* ¶ 22. In addition, I note the majority's citation of *Wicks* (*supra* ¶ 37) is entirely misplaced. First, the defendant in *Wicks* was tried and convicted of resisting a peace officer, whereas here, the State elected to charge defendant with aggravated battery, a Class 2 felony (720 ILCS 5/12-3.05(h) (West 2022)), and opted not to pursue resisting charges. Second, the paragraph in *Wicks* cited by the majority simply does not support the proposition a trial court may refuse to give a self-defense instruction merely because it was "within the bounds of reason" for the court to conclude the defendant did not act out of fear. *Supra*

¶ 37. This interpretation of *Wicks* is contrary to existing case law. In essence, it endorses the trial court's weighing of the video evidence in a light most favorable to the State and against defendant and thus improperly invades the province of the jury. See *McDonald*, 2016 IL 118882, ¶ 25. Accordingly, unlike the majority, I would find the trial court abused its discretion by failing to instruct the jury on self-defense. As a result of the court's failure, I would reverse defendant's aggravated battery conviction and remand for a new trial.

People v. Vesey, 2024 IL App (4th) 230401

Decision Under Review:	Appeal from the Circuit Court of Rock Island County, No. 22-CF-481; the Hon. Norma Kauzlarich, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Christopher McCoy, and Elliott A. Borchardt, of State Appellate Defender's Office, of Elgin, for appellant.
Attorneys for Appellee:	Dora Villarreal, State's Attorney, of Rock Island (Patrick Delfino, David J. Robinson, and Connor Goetten, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

FILED In the CIRCUIT COURT
of ROCK ISLAND COUNTY
GENERAL DIVISION

MAY 5 2023

Clerk of the Circuit Court

IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
ROCK ISLAND COUNTY, ILLINOIS

People of the State of Illinois
Plaintiff-Appellee

VS.

CASE #: 2022CF481

Courtney Vesey
Defendant – Appellant

NOTICE OF APPEAL

An appeal is taken from the Order or Judgment described below.

1. Court to which appeal is taken: **Fourth Judicial District, 201 West Monroe Street, Springfield, IL 62704**
2. Name of appellant and address to which notice shall be sent.
   NAME: **Courtney Vesey**
   ADDRESS: **509 13th Avenue Rock Island, IL 61201**
3. Name and address of Appellant's Attorney on appeal.
   NAME: **Catherine Hart**
   ADDRESS: **400 W Monroe Ste. 303 Springfield, IL 62704**
   TELEPHONE: **217-782-3654**
   If appellant is indigent and has no Attorney, does he want one appointed? **Yes**
4. Date of order or judgment: **5/2/2023**
5. Offense of which convicted: **Agg Battery/Peace Officer**
6. Sentence: **24 Months Probation**
7. If appeal is not from a conviction, nature of order appealed from: _____

SIGNED:

C 129

No. 130919

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 4-23-0401.
Plaintiff-Appellee,	)	There on appeal from the Circuit Court of the Fourteenth Judicial
-vs-	)	Circuit, Rock Island County, Illinois, No. 22-CF-481.
COURTNEY VESEY,	)	Honorable Norma Kauzlarich,
Defendant-Appellant.	)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 115 S. LaSalle St., Chicago, IL 60603, eserve.criminalappeals@ilag.gov;

Mr. David J. Robinson, Deputy Director, State's Attorneys Appellate Prosecutor, 725 South Second Street, Springfield, IL 62704, 4thdistrict@ilsaap.org;

Dora Villarreal, Rock Island County State's Attorney, 1317 3rd Ave, 2nd Floor, Rock Island, IL 61201, statesattorneysoffice@rockislandcounty.il.gov;

Mr. Courtney Vesey, 509 13th Ave, Rock Island, IL 61201

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On December 3, 2024, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Elgin, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Kimberly Maloney
LEGAL SECRETARY
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