

of seven and three years' imprisonment.

Defendant appeals, arguing (1) the trial court erred in admitting evidence of his prior convictions for DUI, (2) his trial counsel rendered ineffective assistance by failing to tender a proper limiting instruction on the use of his prior convictions for DUI, and (3) the State improperly argued during closing argument defendant failed to prove his innocence by refusing to perform field sobriety tests.

I. BACKGROUND

A. The Traffic Stop

On November 15, 2008, at approximately 3 a.m., Pontiac police corporal Robin Bohm stopped a vehicle defendant was driving for running a stop sign. Defendant exited the vehicle and walked around a van parked adjacent to his vehicle. As Bohm approached defendant, defendant turned his back to Bohm, placed his hands behind his back, and told Bohm to take him to jail because he did not have a driver's license. Bohm handcuffed defendant and placed him in his vehicle. Bohm smelled the odor of alcohol on defendant's breath. Bohm searched defendant's vehicle and found a partially full, open bottle of beer behind the front passenger seat.

On November 17, 2008, the State charged defendant with aggravated DUI and aggravated DWR. Defendant's DUI and DWR offenses were charged as aggravated offenses because of prior

convictions.

B. Defendant's Motion *In Limine*

Prior to trial, defendant's trial counsel filed a motion *in limine* to (1) preclude the use of the term "aggravated" when describing the charges and (2) exclude evidence of his prior convictions, which the trial court granted. The motion also requested the court exclude two statements regarding defendant's refusal to submit to field sobriety testing because he had been previously convicted of DUI. The State argued these statements were admissible because they were relevant to establish defendant's mental state and consciousness of guilt. The court denied this portion of defendant's motion *in limine*. Specifically, the trial court stated the following:

"These certainly are prejudicial. They are, for the most part, well, in relation to refusal of the test, that is clearly admissible. That is his reasoning for not taking the test. The declining of the test is admissible. It is arguable in here as far as guilt and innocence. So his response, it is in. Okay. It is an admission. That is fine. That is it. It is in.

As far as his response to the questions on the field sobriety tests, those are also

admissions. Apparently *Miranda* was given prior to his being asked those questions. From what I can tell in relation to the questioning, and I didn't get individual questions and responses, but from what I can tell, his answers appear to be unresponsive and volunteered.

But, in any event, all of it, they are all admissions, they are all relevant. I mean, you carry your record with you. So it is denied in its entirety. Obviously, the State cannot prove or attempt to prove by some other means other than the defendant's testimony or his statements what he said. They cannot bring in the abstract or prove up the conviction as you might with an impeachment. Also, as far as the charge being aggravated DUI, I will remove any reference to aggravated DUI from my comments. And I would grant the motion *in limine* of the defense in relation to your request to remove that word from the trial."

C. Trial Testimony

1. *The State's Witnesses*

During trial, Corporal Bohm testified she observed defendant's vehicle running a stop sign. After defendant pulled over but before Bohm was able to exit her squad car, defendant exited the driver's side door of his vehicle and walked in front of a van parked next to his vehicle. Bohm testified she approached defendant and asked him his name. Defendant turned around and put his hands behind his back, as if he was looking to be handcuffed. When defendant did not respond, Bohm again asked him his name. Defendant responded "just go ahead and take me to jail." Bohm asked defendant if he had a driver's license. Defendant responded, no, he was revoked. Bohm also testified that as soon as she approached defendant, she could smell the strong odor of alcohol on defendant's breath. Bohm placed defendant under arrest. Defendant still would not tell Bohm his name. Bohm eventually identified him from the identification she found in his wallet. During a search of his vehicle, Bohm found an open, partially full, 12-ounce bottle of beer directly behind the passenger seat, standing upright on the floorboard. Bohm testified because of her observations, namely defendant's slurred speech, glassy eyes, strong odor of alcohol and his erratic driving, she asked defendant if he would be willing to submit to field sobriety tests. Defendant indicated he would not. When Bohm asked defendant why he would not submit to the tests, defendant responded he had previous DUIs.

When defendant arrived at the jail, he also declined to submit to a Breathalyzer and a blood and urine test. Bohm asked defendant why he was declining breath and urine tests and Bohm testified defendant responded "he had previous DUIs, and he wasn't going to submit to any testing." During an interview at the jail, defendant admitted he had been drinking alcohol for the three hours leading up to the traffic stop and he felt slightly impaired.

The State also presented testimony from 15-year-old Diamonde Simmons, the passenger in defendant's vehicle at the time of the traffic stop. Simmons testified she observed a bottle of beer in one of the cup holders in front of where she was seated. Simmons explained she was sitting in the passenger's seat. According to Simmons' testimony, neither she nor defendant touched or drank the beer.

2. Defendant's Witness

Defendant presented testimony from Michael Atkinson, a correctional officer at the jail, who testified when he first observed defendant he did not think he was intoxicated. However, Atkinson also testified during his interview of defendant, defendant appeared to be under the influence of alcohol. According to Atkinson, defendant's eyes were bloodshot and he smelled alcohol on his breath. However, on the interview form, Atkinson marked "no" to the question of whether defendant was under the

influence of alcohol. Atkinson explained he must have marked the form incorrectly because he was rushing. He testified had he been paying attention and double checked the form, the "yes would have been there."

The jury found defendant guilty of DUI and DWR.

D. Motion for a New Trial

On April 6, 2009, defendant filed a motion for a new trial, arguing (1) the trial court erred in denying defendant's motion *in limine* seeking to bar evidence of his previous convictions for DUI made through defendant's statements to Bohm, and (2) the State made prejudicial remarks during closing argument regarding defendant's refusal to submit to testing.

Following an April 9, 2009, hearing, the trial court denied defendant's motion, finding (1) while "there is probably nothing more prejudicial in a DUI case than the suggestion of a prior DUI," such evidence is admissible to show defendant's consciousness of guilt, intent, motive, and the facts surrounding the charged crime. The court also found the prosecutor did not cross the line regarding statements made during the State's closing argument.

In June 2009, the trial court sentenced defendant as stated.

This appeal followed.

II. ANALYSIS

On appeal, defendant argues (1) the trial court erred in admitting evidence in the form of statements he made to Bohm regarding his prior convictions for DUI, (2) his trial counsel rendered ineffective assistance by failing to tender a proper limiting instruction on the use of his prior convictions for DUI, and (3) the State improperly argued during closing argument defendant failed to prove his innocence by refusing to perform sobriety tests.

A. Defendant's Prior Convictions

Defendant argues the trial court erred in admitting evidence of his prior convictions for DUI. Defendant contends the prejudicial effect of the statements outweighed any probative value.

The State argues the evidence was admissible under the continuing-narrative exception to the admission of other-crimes evidence. Specifically, the State contends the evidence was admissible as part of a continuing narrative of the events giving rise to the offense. In the alternative, the State contends any error was harmless as the evidence against defendant was overwhelming.

Prior to trial, defendant's trial counsel filed a motion *in limine* to (1) preclude the use of the term "aggravated" when describing the charges and (2) exclude evidence of his prior convictions, which the trial court *granted*. The motion also

requested the court exclude the two statements regarding defendant's refusal to submit to sobriety testing because he had prior convictions for DUI. Although the motion *in limine* asserts defendant's statements referred to prior convictions for DUI, Officer Bohm testified as follows with respect to the issue: "I asked him, obviously, why he wouldn't be willing to submit to tests. And he stated he had previous DUI's [sic]." The court denied this portion of defendant's motion *in limine*.

1. *Standard of Review*

Evidence of other crimes and offenses is inadmissible to show "the defendant's disposition or propensity to commit crime." *People v. Illgen*, 145 Ill. 2d 353, 364, 583 N.E.2d 515, 519 (1991). "However, evidence of other crimes, wrongs, or acts committed by a defendant is admissible to prove *modus operandi*, intent, identity, motive, absence of mistake, or any other relevant purpose other than to show a defendant's propensity to commit crimes." *People v. Johnson*, 262 Ill. App. 3d 565, 570, 634 N.E.2d 1285, 1289 (1994). Where such evidence is offered, the trial court must weigh the probative value of the evidence versus its prejudicial effect. *People v. Robinson*, 167 Ill. 2d 53, 63, 656 N.E.2d 1090, 1094 (1995). The admission of evidence pertaining to other crimes lies within the sound discretion of the trial court, and we will not overturn that decision absent an abuse of discretion. *Johnson*, 262 Ill. App. 3d at 571, 634

N.E.2d at 1289.

2. *Prejudicial Effect of Defendant's Statements*

"The erroneous admission of other crimes evidence carries a high risk of prejudice in that it over overpersuades the trier of fact." *People v. Robinson*, 368 Ill. App. 3d 963, 975, 859 N.E.2d 232, 245 (2006). This is particularly true when, as is the case here, an identity exists between prior crimes evidence and the charged crime. *Robinson*, 368 Ill. App. 3d at 975, 859 N.E.2d at 245. Allowing the evidence creates the impermissible inference that the defendant is more likely to have committed the crime in question because the defendant has previously committed the same crime. *Robinson*, 368 Ill. App. 3d at 975, 859 N.E.2d at 245.

In this case, defendant's statements pertaining to his prior DUIs carried a high degree of prejudice. The amount of prejudice was increased because of the identical nature of his prior crimes and the charged crime. We are unable to say the admission of defendant's statements regarding his prior DUIs in a case where he is on trial for DUI is not prejudicial. Thus, defendant's statements concerning his prior DUIs were erroneously admitted.

3. *Continuing-Narrative Exception*

Contrary to the State's argument, "other-crimes evidence may not be admitted under the continuing-narrative excep-

tion, even when the crimes occur in close proximity, if the crimes are distinct and 'undertaken for different reasons at a different place at a separate time.'" *People v. Adkins*, 239 Ill. 2d 1, 33, 940 N.E.2d 11, 29 (2010) (quoting *People v. Lindgren*, 79 Ill. 2d 129, 139-40, 402 N.E.2d 238, 243 (1980)). Here, defendant's prior DUIs are distinct events, taking place at prior times and in different places. As a result, the continuing-narrative exception does not apply.

4. Defendant's Statements as Admissions

We also note the inconsistency in the trial court's ruling on defendant's motion *in limine*. The trial court precluded the admission of defendant's prior DUIs by the State by way of a certified copy of defendant's driving abstract because of their prejudicial effect. However, the court allowed defendant's statements into evidence because they were, in the court's words, "all admissions." We question whether defendant's statements concerning *prior* DUIs constituted an admission with respect to the current DUI. However, even if defendant's statements could be considered admissions for purposes of a hearsay exception, an admission is not a recognized exception to the other-crimes doctrine. Simply because a hearsay exception might apply does not mean that exception saves the evidence from the prohibition against other-crimes evidence. *People v. Dabbs*, 239 Ill. 2d 277, 289 940 N.E.2d 1088, 1096 (2010) ("a single evidentiary

issue may be subject to more than one rule").

5. Harmless Error

The State argues any error in admitting defendant's statements was harmless as the evidence against defendant was overwhelming. See *People v. Patterson*, 217 Ill. 2d 407, 428, 841 N.E.2d 889, 902 (2005) (error is harmless if the other evidence presented overwhelmingly supports a defendant's conviction). Here, defendant objected to the error and included it in his posttrial motion. As a result, it is the State's burden to show the trial court's error was harmless. See *People v. Johnson*, 218 Ill. 2d 125, 141-42, 842 N.E.2d 714, 724 (2005) (the State bears the burden of persuasion with respect to prejudice where the defendant has preserved the error).

To sustain a conviction for driving under the influence of alcohol, the State must prove the defendant (1) drove a vehicle and (2) did so while under the influence of alcohol. 625 ILCS 5/11-501(a)(2) (West 2008). Credible testimony by the arresting officer without any scientific proof of intoxication may be sufficient to sustain a conviction for DUI. *People v. Elliott*, 337 Ill. App. 3d 275, 281, 785 N.E.2d 545, 549 (2003). Relevant evidence of defendant's impairment includes but is not limited to testimony by an officer as to the defendant's appearance, speech, or conduct, and the odor of alcohol on the defendant's breath. *Elliott*, 337 Ill. App. 3d at 281, 785 N.E.2d at

549.

In this case, the record overwhelmingly demonstrates defendant was under the influence of alcohol. The evidence presented at trial showed (1) defendant ran a stop sign; (2) the officer was unable to immediately catch up to defendant's vehicle; (3) the officer detected the strong odor of alcohol on defendant's breath; (4) the officer testified observing defendant's glassy eyes and slurred speech; (5) defendant exhibited erratic behavior by exiting the vehicle, walking behind a van, and then approaching the officer asking to be taken to jail; (6) the officer recovered a half-empty bottle of beer from the backseat of the vehicle; (7) defendant refused to submit to field sobriety tests; and (8) defendant admitted drinking for three hours prior to being arrested and to being slightly impaired.

Further, defendant refused to submit to Breathalyzer, blood, and urine tests. Defendant's refusal is statutorily permitted evidence he knew he was intoxicated. 625 ILCS 5/11-501.2(c)(1) (West 2008) ("If a person under arrest refuses to submit to a chemical test *** evidence of refusal shall be admissible in any civil or criminal action ***").

Although the trial court erred in admitting defendant's statement regarding his prior DUIs, any error was harmless beyond a reasonable doubt as the evidence against him was overwhelming.

B. Closing Argument

Defendant contends the State improperly argued during closing argument defendant failed to prove his innocence by refusing to perform sobriety tests. Defendant maintains this misconduct was so prejudicial it warrants a new trial.

1. *Standard of Review*

Generally, a prosecutor has wide latitude in closing arguments and may comment upon the evidence presented and enunciate reasonable inferences arising from that evidence, even if the inferences are unfavorable to the defendant. *People v. Karim*, 367 Ill. App. 3d 67, 94, 853 N.E.2d 816, 838-39 (2006). Statements made in closing arguments must be viewed in context and in their entirety. *People v. Wheeler*, 226 Ill. 2d 92, 122, 871 N.E.2d 728, 745 (2007). This court reviews *de novo* whether a statement made in closing argument was so egregious that reversal is required. *Wheeler*, 226 Ill. 2d at 121, 871 N.E.2d at 744.

2. *Plain-Error Doctrine*

The State argues defendant waived the alleged error by failing to object to the error during trial. We agree. Defendant has forfeited this issue by failing to object during trial. See *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988) (holding both a (1) trial objection and (2) written posttrial motion raising the issue are required to preserve an issue for review). However, defendant contends this court should

review the issue under the plain-error doctrine.

"[T]he plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *People v. Herron*, 215 Ill. 2d 167, 186-87, 830 N.E.2d 467, 479 (2005). Because defendant failed to preserve the error, the burden is his to show the error affected the outcome of the trial. See *Johnson*, 218 Ill. 2d at 142, 842 N.E.2d at 724 (it is the defendant rather than the State who bears the burden of persuasion with respect to prejudice under a plain-error analysis). Because "there can be no plain error if there is no error," we must first determine whether the prosecutor's comments were improper. *Johnson*, 218 Ill. 2d at 139, 842 N.E.2d at 722.

3. *Prosecutor's Comments*

During closing argument, the prosecutor stated the following:

"Breath test. Going to prove some objective evidence. The defendant refuses to do that as well. So the requests, okay, will you submit to blood and urine testing? Again, a simple thing. Might be a little more complicated than the breath test. No,

not doing that. And you heard what he said when he is asked why. When the why comes up to everything. Well, I have been there, done that. I am not letting that happen. I am not going to give you the evidence. What he is really saying is I know I am guilty. I know what the result is going to be. I know I am alcohol impaired. And I am not going to help you prove it. I am not going to give you the objective evidence, as opposed to the person who's saying, I know I am fit to drive. I will trust the test because it will show a low number. Not this man. Because he knows something very different. And he knows from experience. He told the police officer that."

Defendant's second claim of error took place during the rebuttal portion of the prosecutor's argument. During rebuttal, the prosecutor stated the following:

"I mean, this is the flaw in [defendant's] argument [that defendant's refusal indicated that he was thinking clearly]. It doesn't work. If he is sharp enough to think it through. I am sober. This is my chance

to show [it]. Let me go. Yes, I mean, I was driving on a revoked [license] and I showed some rather poor judgment there. But the breath test will show I am under. Oh, but what do we want to forget about in this thought process that shows he is so smart to not take it *when it would have proved his innocence to the policeman?*" (Emphasis added.)

In *Johnson*, the supreme court found a prosecutor's comments during opening and closing argument suggesting the defendant failed to prove his innocence to a police officer by failing to take a breath test were improper. *Johnson*, 218 Ill. 2d at 140, 842 N.E.2d at 723. The court found such an argument goes beyond any legitimate purpose and "'blur[s] the distinction between the defendant's state of mind and the State's burden of proof.'" *Johnson*, 218 Ill. 2d at 140, 842 N.E.2d at 723.

Like the prosecutor in *Johnson*, the prosecutor in this case blurred the line in suggesting a shift in the burden of proof from the State at trial to the defendant at the scene of the incident. Following the supreme court's reasoning in *Johnson*, we find the prosecutor's statements were improper and resulted in error.

While the supreme court in *Johnson* found error, it

declined to find plain error because the prosecutor's improper comments, when viewed in the context of the closing argument as a whole, did not deprive the defendant of a fair trial. *Johnson*, 218 Ill. 2d at 142-43, 842 N.E.2d at 724-25. The court reasoned that the prosecutor did not rely exclusively on the fact the defendant did not take a breath test to prove his case against the defendant. *Johnson*, 218 Ill. 2d at 142-43, 842 N.E.2d at 724-25. Instead, the prosecutor reviewed all the evidence against the defendant. *Johnson*, 218 Ill. 2d at 142-43, 842 N.E.2d at 724. Further, the prosecutor also ended his closing argument by explaining the State's burden of proof. *Johnson*, 218 Ill. 2d at 143, 842 N.E.2d at 724.

In this case, the prosecutor's remarks, considered in the context of the entire closing argument, were not exclusively relied upon to establish defendant's guilt. During closing argument, the prosecutor also reviewed the facts surrounding defendant's arrest and the evidence against defendant--evidence, which for the reasons stated previously, was overwhelming. While the prosecutor's remarks here, as in *Johnson*, blurred the burden of proof, the prosecutor in both cases also referenced the jury instructions and noted the State had the burden to prove the elements of the charged offense beyond a reasonable doubt. The prosecutor in this case additionally stated defendant did not have to prove anything. Considering the prosecutor's remarks in

context, and the overwhelming evidence against defendant, we are unpersuaded defendant would been acquitted had the remarks been omitted. Thus, no plain error occurred.

III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State its statutory assessment of \$50 against defendant as costs of this appeal.

Affirmed.