NOTICE
Decision filed 06/03/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-09-0452

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | St. Clair County. |
| | ) | |
| v. | ) | No. 08-CF-1256 |
| | ) | |
| MICHAEL MOSLEY, | ) | Honorable |
| | ) | John Baricevic, |
| Defendant-Appellant. | ) | Judge, presiding. |

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Chapman and Justice Goldenhersh concurred in the judgment.

**RULE 23 ORDER**

*Held*: Where the evidence was closely balanced, the circuit court's failure to properly instruct the jury on the burden of proof constituted plain error and deprived the defendant of a fair trial, mandating that his conviction be reversed and the cause remanded for a new trial.

The defendant, Michael Mosley, was convicted by a jury, sitting in the circuit court of St. Clair County, of burglary and retail theft, based on a single act of entering a convenience store and shoplifting a bottle of wine. After the conviction, the retail theft charge was dismissed and the defendant was sentenced to serve a six-year, three-month term of imprisonment on the burglary charge.[1] He appeals, raising a single issue: whether the circuit court's failure to properly instruct the jury on the burden of proof denied him a fair trial. For reasons that follow, we reverse the defendant's conviction and remand this cause for a new trial.

[1]The defendant was sentenced as a Class X offender based on prior felony convictions. See 730 ILCS 5/5-4.5-95(b) (West 2008).

At the trial, Brian Roberson testified that he was working as the manager of a MotoMart convenience store on September 30, 2008. At approximately 2 p.m. on that date, Roberson was filling the cooler when he observed the defendant, whom he recognized from the defendant's prior visits to the store, take a bottle of MD20/20, also known as Mad Dog, out of the cooler and place it in the front of his pants or in his pants pocket. Roberson identified the defendant in court. Roberson was inside the cooler filling it from behind, and he had a clear and unobstructed view of the defendant taking the Mad Dog out of the cooler. Roberson did not see anything else in the defendant's hands at the time. The Mad Dog sold for $2.99.

After the defendant removed the Mad Dog from the cooler, he walked to the end of the aisle where he was hidden from the cashier and placed the Mad Dog in his pants. The defendant and his female companion then approached the cashier and purchased some items. Roberson did not observe the defendant remove the Mad Dog from his pants, set it down anywhere, or pay for it. Roberson confirmed with the cashiers that the defendant had not paid for the Mad Dog.

Roberson continued to watch the defendant until he left the store, and then he called the police. Roberson continued to watch the defendant through the window as he walked to the bus stop across the street, where police arrested him. Roberson did not believe that the theft would have been caught on surveillance tapes because the cameras were not aimed at the areas where the defendant took the Mad Dog or put it in his pants. He admitted, however, that he had not reviewed the surveillance tapes.

Roberson did not remember seeing the defendant remove from the cooler the sodas that he actually paid for. He did see the defendant's female companion standing nearby in the store. She was pushing a baby stroller.

Michael Gabel testified that he was working as a cashier at the MotoMart at the time

in question. The defendant was a frequent store customer whom Gabel recognized. He identified the defendant in court. At the time in question, the defendant was in the store with a female companion, who was pushing a baby stroller. The woman and the defendant purchased two sodas using a LINK card, which contains a balance for food stamps, as well as a cash balance. Alcohol cannot be purchased with food stamps. The cash balance on the card used by the defendant and his companion was only 18 cents. Gabel did not sell the couple any Mad Dog. Gabel did not see the defendant or his companion with any Mad Dog. He did not observe anything in the defendant's pants. Gabel did not think the defendant was acting any differently than he usually did.

Detective Matthew Eiskant with the Belleville police department testified that he was on duty and received a dispatch regarding the alleged theft, which included a description of the suspect and a location. He responded to the scene and observed a man matching the description standing at a bus stop across the street from the MotoMart. Eiskant knew the man as the defendant and also knew his female companion as Jennifer Livingston. Eiskant identified the defendant in court. Eiskand asked the defendant where the bottle of Mad Dog was that he had just stolen. The defendant responded that he had not stolen anything, and he produced a receipt. The receipt showed a food stamp purchase, which could not include alcohol, for less than what a bottle of Mad Dog would cost. The defendant then stated that Livingston had the Mad Dog. Eiskant asked Livingston where the Mad Dog was, and she pulled it out of a diaper bag. Eiskant observed three cans of Colt 45 beer in the diaper bag. The Mad Dog and the beer were very cold, as if they had just been taken out of a cooler. Eiskant continued to question the couple in the parking lot of the MotoMart. The defendant eventually admitted that he had stolen the Mad Dog from the MotoMart, but only after Eiskant had told the defendant and Livingston that if he did not find out the truth, he would have to arrest them both and the Department of Children and Family Services would have

to be called to take custody of their baby, who was in the stroller. The defendant was arrested.

The next day Eiskant interviewed the defendant at the police station. The defendant was advised of his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)), which Eiskant believed he understood and voluntarily waived. The interview was audio- and video-recorded. The DVD recording was played for the jury. The defendant again admitted having committed the offense.

When the defendant was searched incident to his arrest, he did not have any money on him. The bottle of Mad Dog cost $3.22 with tax.

Eiskant admitted that he never saw the defendant in possession of a bottle of Mad Dog. It was in the diaper bag. Neither the defendant nor Livingston were holding the diaper bag; it was sitting on a nearby wall. When Eiskant asked the defendant where the Mad Dog was, the defendant responded that it was in the diaper bag. Livingston removed it from the diaper bag and handed it to the defendant. The defendant admitted having stolen the Mad Dog only after being told that his baby might have to be taken into protective custody.

Officer Robert Wallace with the Belleville police department testified that prior to being taken to the police station, the defendant was taken back to the MotoMart, where he was identified by the employees.

The defendant presented no evidence in his own behalf. It became clear in closing argument that the defendant's theory of defense was that his girlfriend, Jennifer Livingston, had stolen the Mad Dog. Defense counsel argued that although the defendant confessed to stealing the Mad Dog, that confession was essentially coerced by the threat that his baby would be taken into protective custody if both of the parents had to be arrested. He admitted to a crime he did not commit in order to protect his baby and its mother.

At the jury instruction conference, the State tendered the following burden-of-proof

jury instruction:

> "To sustain the charge of burglary by remaining within a building, the State must prove the following propositions:
>
> First Proposition: That the defendant knowingly entered a building; and
>
> Second Proposition: That the defendant did so with authority; and
>
> Third Proposition: That the defendant thereafter, without authority, knowingly remained within that building; and
>
> Fourth Proposition: That the defendant remained within that building with the intent to commit therein the offense of theft.
>
> If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.
>
> If you find from your consideration of all the evidence that *each one* of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty." (Emphasis added.)

The defendant made no objection and the instruction was presented to the jury, both orally and in writing, as tendered. The State then argued the instruction to the jury as tendered, telling the jury that if it found from its consideration of all the evidence that *each one* of the four propositions has not been proven beyond a reasonable doubt, it should find the defendant not guilty. The defendant did not object to this portion of the State's argument. The defendant did not raise any instructional error in his posttrial motion.

The defendant now argues on appeal that the circuit court's failure to properly instruct the jury on the burden of proof denied him a fair trial and due process of law. There is no question that the jury was improperly instructed on the State's burden of proof with regard to a verdict of not guilty. The last paragraph of the instruction in question should have read,

"If you find from your consideration of all the evidence that *any one* of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty." (Emphasis added.) Illinois Pattern Jury Instructions, Criminal, No. 14.10 (4th ed. 2000). Instead, the circuit court in the case at bar instructed the jury as follows: "If you find from your consideration of all the evidence that *each one* of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty." (Emphasis added.) The State concedes that the instruction given was erroneous and improper.

The defendant argues that although he did not object at any point to the erroneous instruction, the error is not forfeited. Generally, a defendant forfeits the review of an alleged jury instruction error if he does not object to the instruction or offer an alternative instruction at the trial and does not raise the instruction issue in a posttrial motion. *People v. Herron*, 215 Ill. 2d 167, 175 (2005). This encourages the defendant to raise issues before the circuit court, allowing the court to correct its own errors before the instructions are given and consequently not allowing the defendant to obtain a reversal through inaction. *Herron*, 215 Ill. 2d at 175.

Supreme Court Rule 451(c), however, provides that substantial defects in criminal jury instructions are not forfeited by a failure to make a timely objection thereto, " 'if the interests of justice require.' " *Herron*, 215 Ill. 2d at 175 (quoting Ill. S. Ct. R. 451(c) (eff. July 1, 1997)). Rule 451(c) crafts a limited exception to the general rule of forfeiture to correct " 'grave errors' " and errors in cases " 'so factually close that fundamental fairness requires that the jury be properly instructed.' " *Herron*, 215 Ill. 2d at 175 (quoting *People v. Hopp*, 209 Ill. 2d 1, 7 (2004)). It serves to ensure that a defendant is not deprived of his right to a fair and impartial jury trial. *Herron*, 215 Ill. 2d at 177.

Rule 451(c) is coextensive with, and construed identically to, the plain error clause of Supreme Court Rule 651(a) (eff. Dec. 1, 1984). *Herron*, 215 Ill. 2d at 175. Rule 615(a)

provides that any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded, and plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the circuit court. Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999).

The plain error doctrine 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. *Herron*, 215 Ill. 2d at 186-87. In the first instance, the defendant must show that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. *Herron*, 215 Ill. 2d at 187. In the second instance, the defendant must prove that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *Herron*, 215 Ill. 2d at 187. In both instances the burden of persuasion remains with the defendant. *Herron*, 215 Ill. 2d at 187.

The defendant argues that both of these circumstances exist in the case at bar. We agree. We conclude that the defendant has established that the evidence is so closely balanced that the error alone severely threatened to tip the scales of justice against him, and we also conclude that the defendant has established that the error here was so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. Thus, we consider the error under the plain error doctrine. Upon doing so, we further conclude that the defendant was prejudiced by the erroneous instruction and that it did deprive him of a fair trial and due process.

The defendant relies primarily on *People v. Sanders*, 129 Ill. App. 3d 552, 562 (1984). In that case, the jury was given an oral instruction that it should find the defendant guilty of attempted murder if *any one* of the two elements were proven beyond a reasonable doubt and find him not guilty if *any one* of the two elements were not proven beyond a reasonable

doubt. This oral instruction authorized the jury to convict if less than all the elements were found proved. The jury was instructed in writing that it should find the defendant not guilty if *each one* of the two elements were not proved beyond a reasonable doubt. This written instruction authorized the jury to find the defendant not guilty only if *both* of the elements were not proved beyond a reasonable doubt. Despite the defendant's failure to object, the court reviewed the error under the plain error doctrine because of its grave nature. *Sanders*, 129 Ill. App. 3d at 562-63.

In reversing the defendant's conviction, the court pointed out that the burden-of-proof instruction is an essential mandatory instruction and that the circuit court's failure to properly instruct on the burden of proof serves to deprive the accused of a fair and impartial trial. *Sanders*, 129 Ill. App. 3d at 563. That error is not a mere technical defect or an error in a nonmandatory instruction, which frequently may be remedied by reading the entire series of instructions as a whole. *Sanders*, 129 Ill. App. 3d at 563. The error was further compounded because not only were the oral and written instructions individually erroneous but together they presented conflicting and contradictory grounds by which the jury was to reach a not guilty verdict. *Sanders*, 129 Ill. App. 3d at 563. The court concluded that the error in instructions was so grave that it mandated a reversal and a remand for a new trial, even though the evidence was sufficient to find the defendant guilty beyond a reasonable doubt. *Sanders*, 129 Ill. App. 3d at 564.

The State counters that the holding of *Sanders* was brought into question by the supreme court's holding in *People v. Easley*, 148 Ill. 2d 281 (1992). In *Easley*, the jury was instructed that it should find the defendant guilty if it found "these" two propositions proved beyond a reasonable doubt and that it should find the defendant not guilty if it found "these" two propositions not proved beyond a reasonable doubt. The instruction omitted the words "each of" from the guilty finding and "any of" from the not guilty option. The supreme court

concluded that an error in jury instructions which misstates the burden of proof is sufficiently "grave error" to warrant a review under the plain error doctrine, despite the defendant's failure to object to the instruction before the circuit court. *Easley*, 148 Ill. 2d at 338.

The court concluded upon review, however, that the error was harmless because the defendant had suffered no prejudice as a result. *Easley*, 148 Ill. 2d at 338.

> "Our conclusion is based on the jury's verdict of guilty. Under the instructions the jury received ***, in order to reach a verdict of guilty, the jury had to find that the State had proven both propositions beyond a reasonable doubt. The jury's verdict shows that they found that the State proved both elements of the crime. Any error present in the not-guilty instruction did not result in any prejudice to defendant, as the jury found that both propositions had been proven beyond a reasonable doubt." *Easley*, 148 Ill. 2d at 339.

See also *People v. Lucas*, 151 Ill. 2d 461, 494 (1992).

Despite the supreme court's holding in *Easley*, we cannot conclude that the defendant in the case at bar was not prejudiced by the erroneous instruction, which in no uncertain terms instructed the jury that it could not find the defendant not guilty unless the State failed to prove all four of the elements of the offense. The jury was left with two stark choices: either all the elements were proved and the defendant was guilty, or none of the elements were proved and the defendant was not guilty. The jury was given no option if it believed that only some of the elements were proved but not all of them. In that circumstance, a properly instructed jury would acquit. That option was not available to the jury in the case at bar, which might have found the defendant guilty because a majority of the elements had been proven beyond a reasonable doubt, but not all of them. In our view, this error deprived the defendant of a fair trial, especially in light of the closeness of the evidence.

As we have stated, we find the evidence to be closely balanced. Although the store

manager testified that he saw the defendant place the bottle of Mad Dog in his pants, the cashier who waited on the defendant did not see anything in the defendant's pants and did not think the defendant acted suspiciously. The bottle of Mad Dog was not found in the defendant's pants; it was found in a diaper bag, which at the time it was found neither the defendant nor his girlfriend was holding. The manager testified that he watched the defendant at all times and continuously up until the police arrived; he did not see the defendant remove the bottle from his pants and place it in the diaper bag. Although the defendant "confessed" twice, those confessions came only after the defendant was told that if the police had to arrest both the defendant and his girlfriend, their baby would have to be taken into protective custody. Under these circumstances, a reasonable jury could have concluded that the defendant's confession was not credible and not entitled to much weight.

The error in the burden-of-proof instruction is grave and fundamentally affects the defendant's right to a fair trial. The evidence is so closely balanced that the error alone severely threatened to tip the scales of justice against the defendant. In light of the closeness of the evidence, we cannot help but conclude that the erroneous instruction " 'creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial.' " *Herron*, 215 Ill. 2d at 193 (quoting *Hopp*, 209 Ill. 2d at 8).

We conclude that the defendant was deprived of a fair trial by the erroneous burden-of-proof instruction given to the jury. Accordingly, we reverse the defendant's conviction and remand this cause to the circuit court of St. Clair County for a new trial.

Reversed; cause remanded.