2015 IL App (1st) 113583-U

FIFTH DIVISION
March 31, 2015

No. 1-11-3583

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	No. 10 CR 3427
	)	
JAMES SCHOLL,	)	Honorable
	)	Colleen Ann Hyland,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justice McBride and Justice Reyes concurred in the judgment.

ORDER

¶1 ***Held***: Defendant's convictions for home invasion and aggravated unlawful restraint were reversed and the case remanded for a new trial where the jury was not instructed that the State had to disprove defendant's affirmative defense of justifiable use of force beyond a reasonable doubt and where defendant's counsel was ineffective for failing to have the jury instructed on the affirmative defense of mistake of fact.

¶2 Defendant was arrested and charged with home invasion and aggravated unlawful restraint. Following a jury trial, defendant was found guilty of both offenses. The trial court sentenced defendant to concurrent terms of 21 years' imprisonment for home invasion and 2 years' imprisonment for aggravated unlawful restraint. On appeal, defendant contends that (1) the

State failed to prove him guilty beyond a reasonable doubt; (2) his trial counsel was ineffective for failing to submit an instruction on the affirmative defense of surrender; (3) his counsel was ineffective for failing to request that the jury be instructed on the affirmative defense of mistake of fact; and that (4) he was denied a fair trial when the trial court failed to instruct the jury that the State was required to disprove his affirmative defense of justifiable use of force beyond a reasonable doubt or, in the alternative, that his trial counsel was ineffective for failing to ensure that the jury was so instructed. For the reasons that follow, we reverse defendant's convictions and remand the case for a new trial.

¶3 The State’s first witness at defendant's trial was Tracy Laama. Laama testified that in January of 2010, she and her fiancé, Tim Majewski, lived in the first-floor apartment of a two-flat building at 605 East Chicago Avenue in Hinsdale, Illinois. Defendant and his girlfriend, Lisa Lacoco, lived in the second-floor apartment. The house had a front door, back door and a side door. The back door was accessed through a screen porch, and led to a small indoor common area from which one could take the stairs to the second-floor apartment or to the basement, or enter Laama's apartment though the back door leading directly into her kitchen. The kitchen door of Laama's apartment had a dead bolt lock on it. There was no access to the second-floor apartment from inside Laama's apartment.

¶4 Laama testified that on January 29, 2010, she came home from work between 8 and 8:30 p.m. Laama took her dog out to play for a few minutes and when she reentered the building through the rear door, she found defendant standing in the common area. They made "small talk" and Laama asked defendant if his girlfriend, Lacoco, was upset with Laama for smoking in the house. Defendant replied that Lacoco was not upset and that he "knew how to calm her down. According to Laama, defendant clapped his hands three times "very loudly" and then "started

rubbing very hard on my face." Laama backed away from defendant. Defendant then asked Laama if she wanted to go outside for a cigarette. Laama agreed, although she had never previously gone outside to smoke a cigarette with defendant.

¶5 Laama further testified that after she smoked with defendant, she went back into her apartment and started to make dinner. She then heard a knock at her back door. She unlocked and opened the door and saw defendant. They spoke briefly and Laama noticed that defendant "was drunk." Laama closed the door. Approximately ten to 15 minutes later, defendant again knocked on Laama's kitchen door. Defendant asked Laama if she would like to go outside and have another cigarette. Laama agreed and went outside with defendant. At some point while smoking, defendant told Laama that he was "going to come down the stairs naked." Laama told defendant "nobody wants to see that and you shouldn't do that." Laama stayed outside for approximately five to seven minutes and then went back into her home. Approximately 10 to 15 minutes later there was another knock at Laama's door and defendant was again outside. Laama testified that defendant seemed "very inebriated" and that he mentioned "something about the moon." Laama told defendant that she was going to sleep and then closed and locked her door.

¶6 Laama testified that approximately 10 to 15 minutes later, defendant again knocked on Laama's door and asked her to come upstairs and help him fix his computer. Laama told defendant that she was not "computer savvy" and that her fiancé could help in the morning. Defendant "made a scowling sort of face" after she refused to go upstairs with him. Laama then locked the door and called her fiancé. He did not answer so Laama called her friend Frank Blazek and asked him to come over because she "was beginning to be very fearful." Blazek arrived at Laama's apartment approximately 10 minutes later and Laama let Blazek in through the front door. They sat on the couch and Laama explained the situation. Approximately five

minutes later there was "a very hard bang" on the kitchen door. Blazek told Laama to go into her bedroom and close the door, and that he "would tell Jim to go away." Laama went into her bedroom and closed the door. She then heard "get back, get down, get back, get down," and she recognized it as defendant's voice. It then became quiet and Laama left her bedroom to "see what was going on." She saw defendant holding a firearm and pointing it at Blazek. Defendant and Laama made eye contact and she said "Oh, God, Jim, no." Laama grabbed her phone, ran back into the bedroom, and called 911.

¶7 Laama testified that she explained to the 911 dispatcher that there "was a man in my house with a gun," and that "he had my friend." A short time later Laama heard someone close to the bedroom door say "don't move." Laama "got very scared at that point," and ran into her bathroom. Laama tried to open her bathroom window but it was painted shut, so she kicked a small hole in the window and jumped out head first. She sustained cuts to her arms, face, and upper body as a result of jumping out of the window. She ran to Blazek's car and got inside. The police then surrounded the house and Laama got out of the vehicle saying "please, please help my friend. He is in there." A police officer put Laama in the back of his car and paramedics subsequently treated her injuries. Laama went to the police station later that night. Laama testified that defendant has never been given permission to enter her house.

¶8 The State next called Frank Blazek as a witness. Blazek testified that he received a phone call from a "frantic" Laama at approximately 10:00 p.m. on January 29th, 2010. Blazek then drove to Laama's apartment and told him what had happened. Within five minutes of his arrival at Laama's home, Blazek heard "a very loud aggressive knock banging at the back door." Blazek told Laama to go into her room and lock the door. He then went to the back door and opened it. Defendant was standing at the door pointing a handgun directly at Blazek. Defendant asked

Blazek who he was and Blazek responded, "Frank." Blazek asked defendant who he was, and defendant respond "Jim." Defendant walked into the apartment and told Blazek to sit on the kitchen floor. Defendant had the gun pointed at Blazek during this time. Defendant again asked Blazek who he was and Blazek replied, "I'm Frank." Blazek told defendant that he was there because Laama had called him and he wanted to make sure that everything was okay. Defendant asked Blazek where Laama was, and Blazek said that he did not know. Blazek explained that he gave this answer because he feared for Laama's safety. Defendant asked Blazek why he was at Laama's apartment and Blazek repeated that he was there because Laama had called him to come over. Defendant said that he had a "big f****** problem" and cocked the hammer of the gun while pointing it directly at Blazek. The gun was approximately four feet from Blazek's face. Defendant again asked where Laama was and Blazek replied that he was not sure. Defendant released the hammer on the gun and started beating the gun on the kitchen counter. Afterwards, defendant asked Blazek if he "smoked crack" and Blazek replied "hell no." Blazek then saw the bedroom door open and heard Laama say "Oh, God, Jim, no."

¶9 Blazek testified that he then heard the bedroom door slam shut. Defendant began to walk to the bedroom, hesitated, and then came back. While pointing a gun at Blazek, defendant said, "If you f******move, you're f****** dead." Defendant went to the bedroom door and started banging on it. While defendant banged on the bedroom door, Blazek pulled out his cell phone and dialed 911 and then put the phone between his legs while sitting on the floor. He heard, "hello, 911; hello, 911" coming from the phone but he did not respond. Defendant returned to the kitchen and again cocked the hammer on his gun. Defendant said that he "had a problem" and Blazek asked "what's your problem." Defendant responded that he had a problem with "the day-to-day over here in the past few weeks." Defendant then released the hammer of the gun and

walked very close to Blazek. Defendant asked Blazek "how do you feel right now?" and Blazek replied that he was "a littler uncertain right now" about how he felt. Defendant backed up and Blazek told defendant that he had just gotten off of work and that he came over here to see what was going on. Blazek also told defendant that he did not want any trouble.

¶10 Blazek testified that he then heard a loud crash coming from the bathroom. Defendant asked Blazek why Laama "was killing herself," and Blazek replied that he did not know. Defendant and Blazek then had a conversation in which they discussed their jobs. At some point, defendant again started banging the gun on the counter while saying that he had a problem. Defendant told Blazek "you are done" and told him to call his friends. Blazek tried to call Laama but she did not answer. Blazek then had another conversation with defendant. Approximately one or two minutes later, "out of nowhere," defendant took the bullets out of the gun and handed them to Blazek. Blazek told defendant to give him the gun and he took the gun from defendant. At this point Blazek's cell phone rang and he had a very brief conversation with a police officer. Blazek told the officer that he had the gun and that no one was hurt. The police officer told Blazek to come outside with defendant and to leave the gun inside. Blazek followed these instructions and he and defendant left the apartment. Blazek hugged defendant before leaving because he felt "relieved." Blazek subsequently went to the police station to give a statement. Blazek reiterated that defendant held him at gun point for approximately 10 to 15 minutes, pulled back the hammer of the gun approximately three times while pointing the gun at Blazek, and started banging the gun on the counter three different times.

¶11 On cross-examination, Blazek testified that he was wearing his work clothes when he went to Laama's apartment, which consisted of pants, a company polo shirt, a spring utility jacket and a hat. Blazek further testified that the back kitchen door was bolted when defendant

knocked on it and that he unbolted then door when he opened it.

¶12 Sergeant Stephen Cogger of the Hinsdale Police Department testified that on January 29th, 2010, he received a dispatch for "a man with a gun who was inside someone's house." The officer proceeded to Laama's apartment and, after arriving on the scene, heard "a crash and some screaming coming from the house." The officer observed Laama running from the house screaming hysterically with blood all over her hands. Laama explained to Sergeant Cogger that there "was a man still inside her house, that was holding her friend at gun point," and that she had escaped through the bathroom window. The sergeant called for paramedics. He then was able to reach Blazek on his cell phone and asked him if there was a firearm in the house. Blazek responded that there was a firearm in the house but that the person who had the gun had set it down on the counter. Sergeant Cogger told Blazek to exit the building with defendant and to surrender to police. Defendant was searched and police found a "black plastic speed loader" and a pocket knife in his pockets. On cross-examination, Sergeant Cogger testified that during his phone conversation with Blazek, he learned that "the offender had set the gun down and was now caught."

¶13 Defendant called Lisa Lacoco as a witness. Lacoco testified that she had been dating defendant since 2009 and that she purchased a firearm sometime in 2008. She kept the firearm in a locked safe in her night stand. Lacoco testified that there was an issue of sound travelling in the house and that she could "hear into the next apartment" as well as "into the porches and the common areas." She also testified that the landlord of the apartment building ran a landscaping business out of his basement and that the apartment building was open to "anyone that needed to come in at any time during the day and night." The common areas were open to the public and "the only things that were locked were the apartments." On cross-examination, Lacoco testified

that there was no "open door policy" between her apartment and Laama's apartment and that it was not uncommon for people "to be in and out of [the building's] common area."

¶14 Defendant testified on his own behalf. Defendant was a high school graduate and had previously been a member of the United States Marine Corps. Defendant testified that he was in his apartment on the evening of January 29th, 2010, and that he had been drinking alcohol. Defendant went outside to smoke a cigarette and saw Laama. He asked Laama if she wanted to have a cigarette with him and she agreed. Defendant returned to his apartment after the cigarette with Laama. Defendant left his apartment again sometime later and knocked on Laama's door to ask her if she wanted to have another cigarette. She agreed and the two had a conversation while smoking. Defendant then returned to his apartment. 20 minutes later defendant again left his apartment to smoke a cigarette. He knocked on Laama's door and asked if she wanted to join him but she refused.

¶15 Defendant further testified that later that night he heard a "clunking" noise throughout the building. Defendant thought that the noise was unusual and looked out of his bedroom window, which looked directly onto the back porch and the stairwell downstairs. Defendant observed "a large person" coming up the stairwell. This person went back down the stairwell and defendant heard a loud bang downstairs. One of the doors at the base of the stairwell led to Laama's apartment and defendant knew that Laama was alone that night. Defendant retrieved his girlfriend's firearm from a safe because he was scared and convinced "that this was abnormal activity" and that Laama was in trouble. Defendant loaded the firearm with a speed loader and left his apartment.

¶16 Defendant testified that he went downstairs to Laama's rear kitchen door. He knocked on the door and observed that it was "slightly ajar." After knocking, defendant opened the door and

saw Blazek, who he did not know, standing in the kitchen. Defendant pointed his firearm in Blazek's general direction, but not at his face, and told Blazek to remain still. Defendant did not see Laama in the apartment at this time. Defendant asked Blazek who he was and Blazek replied, "my name is Frank." Defendant asked Blazek what he was doing there and Blazek replied, "I'm a friend of Tracy." Defendant asked Blazek numerous questions including how long Blazek had known Laama and what their relationship was. This questioning lasted approximately five minutes. Defendant testified that he made Blazek sit on the kitchen floor because he wanted to check the apartment and "find out if Tracy was all right" and because he was holding Blazek "for the police." Defendant and Blazek spoke about topics such as their jobs while Blazek was sitting on the floor. Approximately ten minutes after he entered the apartment, defendant realized that Blazek was not "a bad person." Defendant then asked Blazek to "call his friends" so that they could "have the police come over and sort out what had happened." As Blazek was calling his friends, his cell phone rang and Blazek told defendant that the police had arrived. Defendant unloaded the weapon because he "didn't want anyone to get hurt," and because he was worried about what the police would think of the situation.

¶17 On cross-examination, defendant testified that Laama and her fiancée had never invited him into their apartment. Defendant had asked Laama if her fiancée was home that night and she told defendant that he was not. Defendant also had gone downstairs to Laama's apartment door approximately three to four times that night. Defendant acknowledged that he had heard people coming in and out of the common area before this incident but that he had never gone down to Laama's apartment with a firearm. Defendant also acknowledged that he did not call the police when he saw the person on the stairwell and instead he immediately got the firearm and went downstairs to Laama's apartment. Defendant testified that Blazek did not open the door for him

but that, instead, defendant opened the door and saw Blazek in the kitchen. Defendant acknowledged that he made Blazek remain on the floor for approximately ten minutes and that he had kept the gun pointed in Blazek's general direction during that time. Defendant tapped the muzzle of the firearm on the counter during that time but did not slam the butt of the pistol on the counter. Defendant acknowledged telling Blazek at some point that "if you move, you're dead." Defendant also acknowledged that he did not give the bullets and the gun to Blazek until after he knew that the police were outside.

¶18 The jury found defendant guilty of home invasion and aggravated unlawful restraint. The trial court sentenced him to concurrent terms of 21 years' imprisonment for home invasion and 2 years' imprisonment for aggravated unlawful restraint. This appeal followed.

¶19 Defendant first contends that he was denied a fair trial because the jury was not instructed that in order to find him guilty of home invasion and aggravated unlawful restraint, it must find that the State proved beyond a reasonable doubt that his use of force was not justified. Defendant claims that without this instruction, it was not clear to the jury that the State had the burden of disproving defendant's affirmative defense of justifiable use of force beyond a reasonable doubt.

¶20 The State responds, and defendant concedes, that he has forfeited this argument because he did not tender the instruction to the trial court or object to its absence. Illinois Supreme Court Rule 366(b)(2)(i) (eff. Feb. 1, 1994) provides that "[n]o party may raise on appeal the failure to give an instruction unless the party shall have tendered it." Defendant, however, asks this Court to review this issue under Illinois Supreme Court Rule 451(c) (eff. July 1, 2006). Rule 451(c) provides that "substantial defects" in criminal jury instructions "are not waived by failure to make timely objections thereto if the interests of justice require." *Id.* "The purpose of Rule 451(c) is to permit correction of grave errors and errors in cases so factually close that fundamental

fairness requires that the jury be properly instructed. The rule is coextensive with the plain-error clause of Supreme Court Rule 615(a)." *People v. Sargent*, 239 Ill. 2d 166, 189 (2010).

¶21 Supreme Court Rule 615(a) provides that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff.Jan.1, 1967). The plain-error doctrine "permits a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Sargent*, 239 Ill. 2d at 189. Before determining whether an alleged error rises to the level of a "substantial defect" or "plain error," we must first decide whether any error occurred at all. *Id*. We review the question of whether the jury instructions accurately stated the applicable law to the jury *de novo*. *Id*.

¶22 Defendant was charged with home invasion and aggravated unlawful restraint. At the conclusion of trial, the jury was therefore instructed that "a person commits the offense of home invasion when he, not being a police officer acting in the line of duty, without authority, knowingly enters the dwelling place of another and remains in such dwelling place until he knows or has reason to know that one or more persons is present, and while armed with a firearm he uses force or threatens the imminent of use of force upon any person within the dwelling place, whether or not injury occurs." See Illinois Pattern Jury Instructions, Criminal, No. 11.53 (4th ed. 2000) (hereinafter IPI Criminal 4th No. 11.53); see also 720 ILCS 5/12-11 (West 2010) (setting forth the crime of home invasion). The jury was also instructed that "a person commits

the offense of aggravated unlawful restraint when he knowingly and without legal authority detains another person while using a deadly weapon." See IPI Criminal 4th No. 80.6A; see also 720 ILCS 5/10-3.1 (West 2010).

¶23 The jury was also given issue instructions for each offense. The instruction for aggravated unlawful restraint told the jury:

> "To sustain the charge of aggravated unlawful restraint, the State must prove the following propositions:
>
> *First Proposition*: That the defendant knowingly and without legal authority detained Frank Blazek; and
>
> *Second Proposition*: That the defendant did so while armed with a deadly weapon.
>
> 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 any one of these propositions has not been proven beyond a reasonable doubt, you should find the defendant not guilty." (Emphasis in original.)

The home invasion instruction told the jury:

> "To sustain the charge of home invasion, the State must prove the following propositions:
>
> *First Proposition*: That the defendant was not a police officer acting in the line of duty; and
>
> *Second Proposition*: That the defendant knowingly and without authority entered

the dwelling of another; and

Third Proposition: That the defendant remained in the dwelling place until he knew or had reason to know that one or more persons was present; and

Fourth Proposition: That the defendant was armed with a firearm; and

Fifth Proposition: That while armed with a firearm the defendant used force or threatened the imminent use of force upon Frank Blazek, a person within the dwelling place.

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 any one of these propositions has not been proven beyond a reasonable doubt, you should find the defendant not guilty." (Emphasis in original.)

¶24 Defendant's theory at trial was that he was justified in entering Laama's home and threatening the use of force against Blazek because he reasonably believed that this threat was necessary to prevent Blazek's unlawful entry into Laama's home and to defend her against the imminent use of unlawful force. Accordingly, defendant relied upon the affirmative defenses of justifiable use of force in defense of a person and in defense of a dwelling. The State does not dispute that defendant presented sufficient evidence at trial to raise the above-mentioned affirmative defenses. A defendant need only present some evidence of an affirmative defense in order to raise the defense and justify an instruction. *People v. Pegram*, 124 Ill. 2d 166, 173 (1988). Moreover, Illinois Supreme Court Rule 451(a) requires that in a criminal case, if the court determines the jury should be instructed on a subject, and the Illinois Pattern Jury

Instruction (IPI), Criminal, contains an applicable instruction, then the IPI instruction "shall" be given unless the court determines it does not accurately state the law. See Ill. S. Ct. R. 451(a) (eff. July 1, 2006). The trial court in this case granted defendant's request and gave the jury the IPI instructions for use of force in defense of a person (IPI Criminal 4th No. 24-25.06) and use of force in defense of a dwelling (IPI Criminal 4th No. 24-25.07).

¶25 IPI Criminal 4th No. 24-25.06 states:

> "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 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." IPI Criminal 4th No. 24-25.06.

IPI Criminal 4th No. 24-25.07 states:

> "A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to prevent another's unlawful entry into a dwelling.
>
> 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 the commission of a felony in the dwelling." IPI Criminal 4th No. 24-25.07.

¶26 After a defendant raises a defense, the burden shifts to the State to prove beyond a reasonable doubt that defendant's conduct was not justified by the offense, in addition to proving

the elements of the charged offense. *People v. Lee*, 164 Ill. 2d 104, 127 (1995). Thus, the Committee Note to IPI Criminal 4th Nos. 24-25.06 and 24-25.07 also direct the trial court to "[g]ive Instruction 24-25.06A." That instruction states, "____ Proposition: That the defendant was not justified in using the force which he used." IPI Criminal 4th No. 24-25.06A. The Committee Note to IPI Criminal 4th No. 24-25.06A states that the instruction is to be given "as the final proposition in the issues instruction for the offense charged." Thus, in addition to giving the jury the definitional instructions on use of force in defense of a person and use of force in defense of a dwelling, the trial court should modify the issue instruction for each offense to which the defense applies by including a proposition that the State has the burden of proving that the defendant was not justified in using the force he used. See *People v. Bigham*, 226 Ill. App. 3d 1041, 1046 (1992).

¶27 If a committee note to an IPI instruction provides that another instruction is to be given, that direction is mandatory. *People v. Hopp*, 209 Ill. 2d 1, 7 (2004); see also IPI Criminal 4th, User's Guide, at VIII ("If a Committee Note indicates to give another instruction, that is a mandatory requirement"). The trial court in this case, however, did not add IPI Criminal 4th No. 24-25.06A as the final proposition in the issues instruction for either home invasion or aggravated unlawful restraint and we agree with defendant that it was error for the trial court not to do so.

¶28 The State does not dispute that the trial court erred by failing to give IPI Criminal 4th No. 24-25.06A. The State asserts, however, that the trial court's error is not reviewable under the second prong of the plain-error doctrine. The State claims that the Illinois Supreme Court has limited review under that prong to "structural errors" that require automatic reversal and has also limited the class of such errors to those enumerated by the United States Supreme Court.

According to the State, the trial court's error in this case does not fall within one of those limited types of structural errors and therefore is not subject to review under the second prong of the plain-error doctrine. Instead, the State argues, the trial court's error should be subject to harmless error review and was in fact harmless because the evidence of defendant's guilt was overwhelming and because the State disproved defendant's affirmative defense beyond a reasonable doubt.

¶29 The State's argument is based upon a line of cases in which our supreme court has equated the second prong of plain-error review with "structural error." For example, in *People v. Glasper*, 234 Ill. 2d 173 (2009), our supreme court considered a trial court's failure to comply with a preamended version of Supreme Court Rule 431(b), which governs *voir dire* examination. The issue in that case was whether the trial court's error required automatic reversal and the court noted that automatic reversal is required only when an error is deemed "structural." *Id*. at 197. The court observed that a structural error is "a systemic error which serves to 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.' " *Id*. at 197-98 (quoting *People v. Herron*, 215 Ill. 2d 167, 186 (2005). The court further observed that an error is typically designated as structural only when it " 'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.' " *Id*. at 196 (quoting *Rivera v. Illinois*, 556 U.S. 148, 160 (2009). The court noted that the United States Supreme Court has recognized an error as structural only in a very limited class of cases and the court stated that the trial court's failure to comply with Rule 431(b) was not "included in this class." *Glasper*, 234 Ill. 2d at 198. The court observed that the trial court's failure to comply with Rule 431(b) did not involve a fundamental right or a constitutional protection but instead involved a violation of a right created by the Illinois Supreme Court Rules. *Id*. at 193. The court

noted that a violation of the Illinois Supreme Court Rules did not require reversal in every instance and that the court had subjected violations of its rules to harmless-error review. *Id*.

¶30 Next, in *People v. Thompson*, 238 Ill. 2d 598 (2010), the issue involved a trial court's failure to comply with an amended version of Rule 431(b). Our supreme court first considered the State's contention that the error was not a structural error requiring automatic reversal. *Id*. at 608. The court noted its prior statement in *Glasper* that structural errors have been recognized by the United States Supreme Court in a very limited class of cases and observed that "[t]hose cases include a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction." *Id*. at 609 (citing *Washington v. Recuenco*, 548 U.S. 212, 218 n. 2 (2006)). The court stated that while trial before a biased jury would constitute structural error, there was no evidence that the defendant in that case was tried before a biased jury. *Id*. at 611. Noting that a violation of Rule 431(b) did "not necessarily render a trial fundamentally unfair or unreliable in determining guilt or innocence," the court concluded that the trial court's violation of the rule in that case did not "fall within the very limited category of structural errors" requiring automatic reversal." *Id*.

¶31 Our supreme court then noted that the parties had raised "*alternative* arguments applying plain-error and harmless-error review" to the case and then found that, because the defendant had forfeited his claim, the court would "consider only plain error." (Emphasis added.) *Id*. The defendant in *Thompson* argued that the error was reversible under the second-prong of the plain-error doctrine. Id. at 613. The court then observed "[i]n *Glasper*, this court equated the second prong of plain-error review with structural error, asserting that 'automatic reversal is only required where an error is deemed "structural," *i.e.*, a systemic error which serves to "erode the

integrity of the judicial process and undermine the fairness of the defendant's trial." ' " *Id*. at 613-14 (quoting *Glasper*, 234 Ill. 2d at 197–98) (quoting *Herron*, 215 Ill.2d at 186). The court then held that although "[a] finding that defendant was tried by a biased jury would certainly satisfy the second prong of plain-error review because it would affect his right to a fair trial and challenge the integrity of the judicial process," the defendant in that case had failed to present any evidence that the jury was biased against him. *Thompson*, 238 Ill. 2d at 614. Finally, the court observed that the prospective jurors in that case received some, but not all, of the required Rule 431(b) questions and that the venire had been admonished and instructed on the rule's principles. *Id*. at 615. Thus, the court found that the defendant had failed to meet his burden "of showing that the error affected the fairness of his trial and challenged the integrity of the judicial process." *Id*.

¶32 Subsequently, in *Washington*, a decision relied upon by the State in this case, our supreme court considered whether the trial court erred in refusing to instruct the jury on second degree murder where the court gave an instruction on self defense. After finding that the trial court erred, the court addressed the parties' disagreement as to whether the error was amenable to harmless-error analysis. *Id*. at ¶ 58. The court held that "the failure by a trial court to instruct the jury on second degree murder where the court has given an instruction on self-defense is not subject to automatic reversal." *Id*. at ¶ 59. In doing so, the court reiterated its holding in *Glasper* that automatic reversal is only required when an error is deemed "structural" and cited to the United States Supreme Court's decision in *Neder v. United States*, 527 U.S. 1 (1999). The court noted that in *Neder*, the United States Supreme Court found that a jury instruction that omitted an element of the offense was not structural error. *Washington*, 2012 IL 110283, ¶ 59 (citing *Neder*, 527 U.S. at 8-9 ("an instruction that omits an element of the offense does not *necessarily*

render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence"). (Emphasis in original). The court then observed that, in contrast to structural errors, "instructional 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 court reviewed the evidence presented at trial and concluded that it could not say that the result of the defendant's trial would not have been different had the jury received the second degree murder instruction and thus the court affirmed the appellate court's reversal of the defendant's conviction. *Id*. at ¶ 60, 62.

¶33 Based upon this line of cases, the State essentially argues that second prong plain-error is the functional equivalent of structural error. According to the State, because the error in this case does not fall within one of the six categories of structural error enumerated by the United States Supreme Court, the error cannot be reviewed under the second prong of the plain-error doctrine. The State argues that instead, pursuant to *Washington*, the error should be subject to harmless-error analysis.

¶34 Defendant, on the other hand, relies upon a line of cases which he claims stand for the proposition that substantial defects in jury instructions, such as the ones in this case, are not waived and can be reviewed under the second prong of the plain-error doctrine. For example, in *People v. Huckstead*, 91 Ill. 2d 536 (1982), the defendant was charged with murder and raised the affirmative defense of self-defense. The jury received the issue instruction for murder but the jury was not given IPI Criminal No. 25.05, which required the State to prove that defendant was not justified in his use of force. *Id*. at 504. Defense counsel did not tender the instruction or include the issue in his posttrial motion. The court recognized the limited use that had been given to the Rule 451(c) exception to the waiver rule and applied the "grave error" and "closely

balanced evidence" tests to the facts of the case. The court concluded that based upon the facts of the case, the failure to give IPI Criminal No. 25.05 did not constitute plain error. *Id*. at 544.

¶35 Subsequently, in *People v. Berry*, 99 Ill. 2d 499, 502-03 (1984), the defendant was alleged to have murdered the victim and raised the affirmative defense of justified use of force in defense of a person. The trial court gave the jury IPI Criminal No. 2.03, the burden-of-proof instruction, which stated that the burden is on the State throughout the case to prove the guilt of the defendant beyond a reasonable doubt, and IPI Criminal No. 7.02, the issue instruction for murder, which required the State to prove all the elements of the offense of murder beyond a reasonable doubt. The court also gave the jury IPI Criminal No. 24.06, the instruction defining when the use of force was justified in defense of a person. *Id*. at 502-03. The jury was also given the IPI instruction containing the issues for voluntary manslaughter and the IPI instructions containing the definitional instructions for murder and voluntary manslaughter. However, the jury was not given IPI Criminal No. 25.05 which, in addition to proving the elements of the crime, requires the State to prove, beyond a reasonable doubt, that the defendant was not justified in using the force which he used. *Id*. The issue in *Berry* was whether the failure to give IPI Criminal No. 25.05 constituted plain error under Rule 451(c). *Id*.

¶36 The court rejected the State's argument that under *Huckstead*, the failure to give IPI Criminal No. 25.05 could not be plain error. *Id*. at 504-05. The court noted that *Huckstead* emphasized that the plain-error exception to waiver under Rule 451(c) was to be limited to the correction of "grave errors" or to situations where the case was so factually close that fundamental fairness required the jury to be properly instructed. *Id*. at 505 (citing *Huckstead*, 91 Ill. 2d at 544). However, applying this test to the facts to the case, the court found that there was "grave error" as well as circumstances that were so close factually as to require the tendering of

proper jury instructions. *Id*. First reviewing the issue for "grave error," the court distinguished *Huckstead*:

> "In *Huckstead*, the court found that the instructions tendered (IPI Criminal Nos. 2.03, 7.02, 24.06), in conjunction with the closing arguments given by both litigants, sufficiently informed 'the jury that the State had the burden of proving that defendant was not justified in the force he used.' (*Huckstead*, 91 Ill. 2d at 545). Although issue instruction, IPI Criminal 25.05, had not been offered, defendant's counsel, in closing argument, 'repeatedly and specifically' impressed upon the jury the necessity of the State proving that the defendant was not justified in the force he used. Moreover, the State in rebuttal argument reiterated that it was its burden to show that the force used was not justified. As such, the court found that the failure to give IPI Criminal No. 25.05 did not constitute "grave error." *Id.*

¶37 The court observed that in the case before it, unlike in *Huckstead*, defense counsel did not inform the jury during closing arguments or any time during trial that the State had the burden of proving beyond a reasonable doubt that the defendant was not justified in his use of force. *Id*. at 506. Defense counsel only made a "general reference" to the State's burden of "proving defendant] guilty of each and every allegation that is charged beyond a reasonable doubt." *Id*. Moreover, "[t]he instructional gap was not filled by the prosecutor who, in rebuttal, merely acknowledged that the State has the burden of proof." *Id*. Thus, despite the fact that the court strove "to apply the waiver rule narrowly," the court found that a review of the record established "that the jury was not apprised that the State had the burden of proving, beyond a reasonable doubt, that defendant was not justified in the force he used and, therefore, grave error resulted." *Id*. The court proceeded to conduct a separate analysis and find that the facts of the case were

closely balanced on the question of whether the shooting occurred as a result of self defense. *Id.* The court concluded: "Under the circumstances of this case, we hold that the trial court's failure to give IPI Criminal No. 25.05 was a critical error which ' "severely threatened the fundamental fairness" of the defendant's trial.' " *Id.* at 507 (quoting *Huckstead*, 91 Ill.2d at 547).

¶38 Next, in *Hopp*, 209 Ill. 2d at 7, the trial court gave the jury the IPI instructions for a charge of conspiracy other than certain drug conspiracies but did not comply with the committee note accompanying one of those instructions which required to the court to also give an instruction defining the offense that is the alleged subject of the conspiracy. Our supreme court found that the trial court erred because " '[i]f a Committee Note indicates to give another instruction, that is a mandatory requirement.' " *Id.* (quoting IPI Criminal 4th, User's Guide, at VIII). The court then considered whether the error was plain error under Supreme Court Rule 451(c). The court made the following observations regarding Rule 451(c):

> "Rule 451(c)'s exception to the waiver rule for substantial defects applies when there is a grave error or when the case is so factually close that fundamental fairness requires that the jury be properly instructed. [Citations]. The tests for application of Rule 451(c)'s exception to the waiver rule are "strict tests" that "demonstrate that the exception to the waiver rule is limited and is applicable only to serious errors which severely threaten the fundamental fairness of the defendant's trial." *People v. Roberts*, 75 Ill. 2d 1, 15 (1979). The function of jury instructions is to convey to the jurors the law that applies to the facts so they can reach a correct conclusion. [Citation]. Thus, the erroneous omission of a jury instruction rises to the level of plain error only when the omission 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." *Id.*

at 7-8.

The court went on to discuss a case in which it had found that an omitted jury instruction rose to the level of plain error and a case in which it had not. As an example, the court discussed *People v. Ogunsola*, 87 Ill. 2d 216 (1981), in which it found that an omitted instruction " 'removed from the jury's consideration a disputed issue essential to the determination of defendant's guilt or innocence.' " The court then discussed how it arrived at that conclusion:

> "The defendant in *Ogunsola* was charged with deceptive practices. The jury was given an IPI instruction that it should find the defendant guilty if the State proved beyond a reasonable doubt that the defendant wrote a check with the intent to pay the victim while knowing the check would not be paid. The jury should have been instructed that it also had to find the defendant intended to defraud the victim, because intent to defraud is an element of the offense of deceptive practices. We reasoned that intent to defraud is an essential element because it is possible to possess the element of knowledge the check will not be paid, on which the jury was instructed, without possessing intent to defraud. *Ogunsola*, 87 Ill. 2d at 221. Because the principal contested issue relevant to defendant's culpability was whether he intended to defraud, we held that 'fundamental fairness required that the jury be instructed' it had to find intent to defraud. *Ogunsola*, 87 Ill .2d at 223." *Hopp*, 209 Ill. 2d at 8.

The court then observed that the determination of whether an omitted jury instruction rose to the level of plain error required the court to consider the effect the omission had on the outcome of the case. See *id*. at 10 ("we have never held any such omission [of a jury instruction] to be plain error without considering the effect that the omission had on defendant's trial"). Regarding the defendant's burden of establishing that an omitted jury instruction amounted to plain error, the

court observed that "[t]his rule does not require that defendant prove beyond doubt that her trial was unfair because the omitted instruction misled the jury to convict her. It does require that she show that the error caused a severe threat to the fairness of her trial." *Id*. at 12. Ultimately, the court found that the defendant had offered only "speculation" and had failed to show from the record that the omitted instruction severely threatened the fairness of her trial. *Id*.

¶39 Subsequently, in *People v. Sargent*, 239 Ill. 2d 166 (2010), the court considered a trial court's failure to tender to the jury an instruction regarding how it should determine the weight and credibility of certain hearsay statements. Although the failure to give the instruction was error, the issue was forfeited because defense counsel did not request the instruction or included the issue in a posttrial motion. *Id*. at 188. Reviewing the issue under both prongs of the plain-error doctrine pursuant to Rule 451(c), the court first found that the evidence was not closely balanced and therefore the error could not be considered under the first prong of the plain-error doctrine. *Id*. at 190. Reviewing the issue under the second prong of plain error, the court cited *Hopp* for the proposition that the function of jury instructions was to convey to the jurors the applicable law so they can reach a correct determination and that the "erroneous omission of a jury instruction rises to the level of plain error only when the omission 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." *Id*. at 191. The court noted that this was a "difficult" standard to meet. *Id*. The court ultimately found that the defendant had failed to persuade the court that the error threatened the fairness of the trial. The court noted that "the jury in this case was not left without direction regarding how it was to approach the victims' statements," and noted that the jury was given a general instruction on how it was to judge the believability of the witnesses and assign weight to their testimony." *Id*. at 191-92. The court

further stated that while the language in the instruction the jury was given was different than the language in the instruction the jury should have been given, the instructions conveyed similar principles regarding the jury's role in assessing witness credibility and factors to consider in making that assessment. *Id*.

¶40 Finally, defendant directs our attention to a recent decision in which the Fourth Division of this court found that the omission of IPI Criminal 4th No. 24-25.06A from the issues instruction for aggravated discharge of a firearm, while simultaneously including that instruction in the other three charged offenses, amounted to plain error under the second prong of the plain-error doctrine. See *People v. Getter*, 2015 IL App (1st) 121307. In so holding, the court rejected the State's assertion, which is the same as the one put forward by the State in this case, that second-prong plain error review is limited to the six examples of structural error identified by the United States Supreme Court. The court noted that while our supreme court has analogized second-prong plain error to structural error, "it has never limited second-prong plain error to those six types of errors, and in fact has found that errors other than those six qualified as second-prong plain error. *Id*. at ¶ 59 (citing *In re Samantha V.*, 234 Ill. 2d 359, 378-79 (2009) (second-prong plain error resulted from violation of one-act, one-crime rule)); *People v. Walker*, 232 Ill. 2d 113, 131 (2009) (failure to grant continuance to defense counsel was second-prong plain error)); *Thompson*, 238 Ill. 2d at 610-15 (analogizing structural error to second-prong plain error, but independently analyzing alleged error under each doctrine). The court further stated that it would have been unnecessary for the court in *Sargent* to state the rule that the omission of jury instructions can rise to the level of second-prong plain error if the only question was whether the error fell within one of the six previously-specified categories of structural error. *Getter*, 2015 IL App (1st) 121307, ¶ 61; see also *People v. Clark*, 2014 IL App (1st) 123494, ¶

40 ("Although [*Glasper* and *Thompson*] equated second-prong plain error to structural error, they did not restrict plain error to the six types of structural error that have been recognized by the United States Supreme Court").

¶41 The cases set forth above establish that although our supreme court has analogized the second prong of the plain-error doctrine to structural error, the court has never held that review under that prong is limited to the six types of structural error identified by the United States Supreme Court. Further, our supreme court has never held invalid the principle that the omission of a jury instruction can constitute a "grave error" under "limited circumstances" when the omission 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. The cases set forth above establish that, instead, this principle is still valid and that the determination of whether the omission of a jury instruction rises to the level of grave error is made on a case-by-case basis and depends upon the circumstances of each case.

¶42 Applying these principles to the facts of this case, we find that the failure to give the jury IPI Criminal 4th No. 24-2506A, and to specifically include that instruction as the final element for both of the offenses of which defendant was charged, amounts to a "grave error." We begin by noting that the affirmative defense of justifiable use of force was defendant's only defense to the charges against him and the principal contested issue at trial was whether defendant was justified in his use of force. However, the jury was never told that the State had the burden of disproving that defense beyond a reasonable doubt. Specifically, the trial court gave the jury the issue instructions for home invasion and aggravated unlawful restraint. These instructions listed the elements of each offense in the form of propositions and told the jury that the State had to prove each proposition and that the jury should find defendant guilty if it found that the State had

proved each proposition beyond a reasonable doubt. However, the trial court did not add IPI Criminal 4th No. 24-2506A as the final proposition to the issue instruction for each offense. Therefore, the jury was never told that the final proposition the State had to prove for each offense was that defendant was not justified in using the force that he used and that the State had to prove that proposition beyond a reasonable doubt. The jury was also not told that it should find defendant not guilty if it found that the State had failed to prove beyond a reasonable doubt that defendant was not justified in using the force that he did. Because these final propositions were omitted, the jury was essentially told to find defendant guilty of each offense if it found that the State had proved beyond a reasonable doubt all the propositions listed in the issue instructions for home and invasion and aggravated unlawful restraint, without requiring the jury to consider whether the State had proved beyond a reasonable doubt that defendant's use of force was not justified by his reasonable belief in the need to prevent an unlawful entry into a dwelling or an unlawful use of force. Had the additional proposition been added to each offense, it would have been clear to the jury that the State had the additional burden of disproving defendant's defense beyond a reasonable doubt and the jury would have had the opportunity to consider whether defendant's use of force was justified.

¶43 We recognize that the trial court gave the jury IPI Criminal 4th Nos. 24-25.06 and 24-25.07, which defined the justifiable use of force in defense of another and in defense of a dwelling. However, the jury was given these two definitions in isolation. The term "justified" did not appear in any of the other instructions given to the jury and the jury was never told how to use the justification definitions in reaching its verdict. Had the jury been properly instructed, as set forth above, this would have given context to the definitions of justifiable use of force and told the jury how to properly apply those definitions to the facts of the case in determining

whether the State had met its burden of proof. However, the jury was not properly instructed and it therefore lacked the tools to analyze the evidence fully and to reach a verdict based upon an application of all of the relevant law to the facts of the case. We also note that IPI Criminal 4th Nos. 24-25.06 and 24-25.07, the definitional instructions regarding justifiable use of force, do not inform the jury that it is the State's burden to prove that the force was not justified. [1]

¶44 Moreover, as in *Berry* and unlike in *Huckstead*, the jury was not apprised of the correct legal principles in opening or closing arguments. See *Berry*, 99 Ill. 2d at 506; *Huckstead*, 91 Ill. 2d at 545. During closing arguments, defense counsel read the definitions of justified use of force that would later be submitted to the jury but counsel never mentioned that, for each offense, the State had the burden of proving beyond a reasonable doubt that defendant was not justified in using the force that he did. Similarly, counsel never told the jury it should find defendant not guilty the jury found that the State had not proved that proposition beyond a reasonable doubt. Moreover, during its closing arguments, the State read the issue instructions for both charged offenses and explained to the jury how it had proved each proposition beyond a reasonable doubt. Yet, the State never mentioned that for each offense, the final proposition it had to prove beyond a reasonable doubt was that defendant was not justified in using the force that he used.

¶45 The State notes that the jury was instructed on the State's burden to prove defendant's guilt beyond a reasonable doubt and that the burden remained with the State throughout the case. The jury was also instructed on the definition of justifiable use of force in defense of a person

[1] We also note that although not raised by parties, the definitional instruction for home invasion and aggravated unlawful restraint did not include the phrase "without lawful justification." The Illinois Pattern Jury Instructions Criminal 4th recommend that the phrase be inserted whenever an Article 7 affirmative defense is raised. See, *e.g.*, IPI Criminal 4th No. 7.01, Committee Note ("Use the phrase "without lawful justification" whenever an instruction is to be given on an affirmative defense contained in Article 7 of the Criminal Code of 1961 (720 ILCS 5/7-1 through 5/7-14).

and in defense of a dwelling. The jury was instructed that one of the elements of aggravated unlawful restraint that the State had to prove was that defendant "knowingly and without legal authority" seized Blazek, and was also instructed that one of the elements of home invasion the State had to prove was that defendant "knowingly and without authority" entered the dwelling place of another."

¶46 We cannot conclude that the above instructions apprised the jury that the State had the burden of proving beyond a reasonable doubt that defendant was not justified in using that the force that he used. As noted, the jury was never told that a lack of justification was an element for each charged offense that the State had to prove beyond a reasonable doubt. Moreover, the questions of whether defendant detained Blazek "without authority" and whether he entered Laama's home "without legal authority" are not the same as the question of whether defendant was justified in his actions based upon a reasonable belief, and the State offers no specific argument to the contrary. Despite the instructions given to the jury, the jury was never told that the State was required to disprove defendant's affirmative defense beyond a reasonable doubt and that doing so was the final proposition the State had to prove for each offense.

¶47 Based upon the record before us, we conclude that defendant has met his burden of establishing that a "grave error" occurred and specifically that the erroneous omission of the jury instructions created "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." See *Berry*, 99 Ill. 2d at 507; *Hopp*, 209 Ill. 2d at 7-8; *Sargent*, 239 Ill. 2d at 191. Accordingly, defendant's convictions for home invasion and aggravated unlawful restraint must be reversed.

¶48 Defendant raises an alternative argument that his trial counsel was ineffective for failing to tender IPI Criminal 4th No. 24-25.06 or to object to its omission. While it appears that counsel

certainly should have requested this instruction, we need not reach this issue as we have already found that it was error to fail to include IPI Criminal 4th No. 24-25.06 and that as a result a new trial is warranted.

¶49 Defendant next contends that his counsel was ineffective for failing to tender a jury instruction on the affirmative defense of mistake of fact for the charges of home invasion and aggravated unlawful restraint.

¶50 The affirmative defense of mistake of fact is codified as follows: "A person's ignorance or mistake as to a matter of either fact or law *** is a defense if it negatives the existence of the mental state which the statute prescribes with respect to an element of the offense." 720 ILCS 5/4-8(a) (West 2010). Consistent with this statute, IPI Criminal 4th No. 24-25.24 defines mistake of fact as follows: "A defendant's mistake of fact as to a matter of fact is a defense if the mistake shows that the defendant did not have the [(intent) (knowledge) (recklessness)] necessary for the offense charged." The Committee Note for this IPI also instructs the trial court to give IPI Criminal 4th No. 24-25.24A. That instruction states: "_____ *Proposition*: That the defendant was not mistaken as to a matter of fact that would show he did not have the [(intent) (knowledge) (recklessness)] necessary for the offense charged." Similar to IPI Criminal 4th No. 24-25.06A explained above, the trial court is to add IPI Criminal 4th No. 24-25.24A as the final proposition to the charged offense to which the affirmative defense applies.

¶51 Defendant asserts that his mistaken belief that Blazek was an intruder would have been a complete defense to the charges against him because it would have negated the requisite mental state of knowledge, that defendant "knowingly and without legal authority detained Frank Blazek" (aggravated unlawful restraint), and that he "knowingly and without authority entered the dwelling place of another" (home invasion). Defendant claims that there was sufficient

evidence presented at trial to raise the affirmative defense of mistake of fact and that counsel's failure to tender the instruction "deprived [the jury] of the opportunity to find that [defendant's] mistake as to the circumstances of [Blazek's] presence in [Laama's] apartment demonstrated that he lacked criminal intent."

¶52 The State responds that there was insufficient evidence to raise the affirmative defense of mistake of fact and that the only evidence supporting the defense came "exclusively" from defendant. The State further claims that defense counsel's decision to rely on a defense of justifiable use of force to the exclusion of a defense of mistake of fact was a matter of trial strategy that is immune from a claim of ineffective assistance of counsel. Finally, the State argues that defendant cannot show that the result of his trial would have been different had the instruction been given because there was no persuasive evidence to the support the proposition that defendant mistakenly believed an intruder had broken into Laama's apartment.

¶53 We first find that defense counsel was deficient in failing to request that the jury be instructed on mistake of fact. There was "some evidence" in the record to support the instruction. Specifically, there was evidence presented upon which the jury could have found that defendant mistakenly believed that Laama was in danger and entered her apartment with a gun and detained Blazek, a stranger, until he realized his mistake - that Blazek was not an intruder – at which point he handed over the bullets and the gun. It matters not that some of this evidence came in the form of defendant's testimony or that there was conflicting testimony and inferences that could be drawn therefrom upon which the jury could have found that the State disproved the affirmative defense beyond a reasonable doubt. Defendant's testimony was properly admitted evidence and it is the trier of fact's responsibility to determine the credibility of the witnesses, to assign weight to their testimony and to resolve any conflicts in the evidence. See *People v.*

Brooks, 187 Ill. 2d 91, 132 (1999). All that is required is "some evidence" to warrant an instruction on an affirmative defense. See *Pegram*, 124 Ill. 2d at 173.

¶54 Because there was "some evidence" in the record to support the affirmative defense of mistake of fact, the question becomes whether counsel's decision to not request that the jury be instructed on mistake of fact was objectively unreasonable. We disagree with the State that defense counsel's failure to do so was a matter of reasonable trial strategy. To the contrary, there would have been no conflict between mistake of fact and the affirmative defense that defendant did raise, justifiable use of force. The mistake of fact defense would have given the jury an alternative basis upon which to acquit defendant and the two defenses, presented in tandem, would have bolstered defendant's overall theory that his actions were the result of his reasonable, albeit mistaken, belief that Laama was in danger and that Blazek was an intruder in her home. Because there was evidence supporting the affirmative defense, and because requesting that the jury be instructed on the defense would have provided an additional basis upon which to find defendant not guilty of the charged offenses that was consistent with defendant's theory of the case, we conclude that defense counsel's performance fell below an objective standard of reasonableness when counsel failed to have the jury instructed on mistake of fact.

¶55 We also find that defendant has shown that he was prejudiced by counsel's deficient performance. Because there was evidence supporting the affirmative defense, the trial would have been required to grant defense counsel's request to have the jury instructed on mistake of fact. See P*egram*, 124 Ill. 2d at 173. Therefore, had defense counsel requested the instruction, the jury would have been specifically instructed that, for each offense, the final proposition the State had to prove beyond a reasonable doubt was that defendant was not mistaken as to a matter of fact that would show that he did not have the knowledge necessary for the offense charged. If the

jury believed that defendant was acting under the mistaken belief that Laama was in danger, instructing the jury on mistake of fact would have given the jury an alternative means by which to find defendant not guilty. However, because defense counsel did not request the instruction, the jury was deprived of the opportunity to find that, due to a mistake as to the circumstances of Blazek's presence in Laama's apartment, defendant lacked the requisite mental state for each charged offense.

¶56 In reaching this conclusion, we reject the State's assertion that defendant was not prejudiced because there was no evidence supporting the instruction. As we have already found, there was "some evidence' supporting the instruction. It is true, as the State points out, that there was conflicting evidence of some points, such as whether the back door was ajar or Blazek unbolted the back door and let defendant into the apartment, and that the jury could have drawn other inferences from the evidence and concluded that defendant did not mistakenly believe that Blazek was an intruder in Laama's home or that defendant remained in the apartment threatening the use of force even after he learned that Blazek was not an intruder. However, this only illustrates how defendant was prejudiced because the jury was never given the opportunity or the instructions by which to consider the evidence and determine if the State had disproved the affirmative defense beyond a reasonable doubt. We thus find that defendant has met his burden and shown that there is a reasonable probability that, but for counsel's failure to have the jury instructed on mistake of fact, the result of defendant's trial would have been different.

¶57 Defendant's final contention is that his home invasion conviction should be reversed where his trial counsel was ineffective for failing to have the jury instructed on the affirmative defense of surrender. Defendant claims that there was sufficient evidence presented at trial to raise the defense and that he was prejudiced because there is "more than a reasonable

probability" that the jury would have acquitted defendant of home invasion had it been instructed on the affirmative defense.

¶58 As relevant to this appeal, the home invasion statute provides:

> (a) A person who is not a peace officer acting in the line of duty commits home invasion when without authority he or she knowingly enters the dwelling place of another when he or she knows or has reason to know that one or more persons is present or he or she knowingly enters the dwelling place of another and remains in the dwelling place until he or she knows or has reason to know that one or more persons is present *** and
>
> (1) While armed with a dangerous weapon, other than a firearm, uses force or threatens the imminent use of force upon any person or persons within the dwelling place whether or not injury occurs." 720 ILCS 5/19-6(a)(1) (West 2010).

Further, section b of the statute provides:

> "It is an affirmative defense to a charge of home invasion that the accused who knowingly enters the dwelling place of another and remains in the dwelling place until he or she knows or has reason to know that one or more persons is present either immediately leaves the premises or surrenders to the person or persons lawfully present therein without either attempting to cause or causing serious bodily injury to any person present therein." 720 ILCS 5/19-6(b) (West 2010).

¶59 We decline to consider this issue. We have already concluded that defendant's conviction must be reversed on two bases and the case remanded for a new trial. As to the affirmative defense of surrender, we feel it is appropriate on retrial to allow the trial court to first determine whether the facts of the case justify an instruction on the affirmative defense.

¶60 However, we do address two issues that the parties dispute in this appeal that could arise

on remand. The State argues that the surrender defense was not available to defendant because his conduct did not fall within its parameters. We disagree.

¶61 The State first asserts that the home invasion statute defines an offender as "1) a person who knowingly enters the dwelling place of another without authority knowing or having reason to know that one or more persons is present; [or] 2) a person who knowingly enters the dwelling place of another without authority and remains in the dwelling until he or she knows or has reason to know that one or more persons are present." The State claims that defendant could not have raised the surrender defense because it is only available to persons in the second category of offenders, *i.e.*, someone who "discovers that someone is present and immediately leaves or surrenders." The State asserts that defendant cannot meet this threshold requirement because he "absolutely knew that Laama was in her apartment" when he entered.

¶62 However, the State ignores that defendant was charged with and convicted of the second category of home invasion. The jury was specifically instructed that to convict defendant of home invasion they must find only that he "knowingly entered and remained until he knew that persons were present." The jury was not tendered any instructions regarding the first category of home invasion. The State did not charge defendant with the first category and it cannot change its version of the case on appeal. See *People v. Crespo*, 203 Ill. 2d 335, 355 (2001). Defendant was convicted based on the second category of home invasion and therefore the surrender defense was available to him.

¶63 The State next asserts that the surrender defense was unavailable to defendant because he did not "immediately surrender" to Blazek, as required by the statute. The relevant portion of the statute reads:

> "It is an affirmative defense to a charge of home invasion that the accused ***

> *either immediately leaves the premises or surrenders to the person or persons lawfully present therein without either attempting to cause or causing serious bodily injury to any person present therein*." (Emphasis added.) 720 ILCS 5/19-6(b) (West 2010).

The State claims that the word "immediately" modifies both "leaves" and "surrenders" such that the surrender defense is only available to a defendant who "immediately surrenders," which the State claims defendant did not do.

¶64 We disagree with the State's argument as the relevant portion of the statute uses the word "or" in between the phrases "immediately leaves the premises *or* surrenders to the person or persons lawfully present therein." 720 ILCS 5/19-6(b) (West 2010). The word "or" is a disjunctive conjunction. *People v. Central Mortgage Co. v. Kamarauli*, 2012 IL App (1st) 112353, ¶ 18. "[U]se of the disjunctive indicates alternatives and requires separate treatment of those alternatives; hence a clause *following* a disjunctive is considered inapplicable to the subject matter of the *preceding* clause." (Emphasis in original.) *In re E.B.*, 231 Ill. 2d 459, 468 (2008). It is apparent that the term "immediately" modifies only "leaves the premises" and not "surrenders to the person or persons lawfully present therein." The IPI issues instruction for the affirmative defense also demonstrates that "immediately" only modifies "leaves the premises." The issues instruction states:

> "_____ Proposition: That the defendant, when he [(knew) (had reason to know)] that one or more persons was present in the dwelling place, did not [(immediately leave such premises) (surrender to the person or persons lawfully present therein)] without [(attempting to cause) (causing)] serious bodily injury to any person present therein." IPI Criminal 4th No. 24-25.25A

Thus, the statute does not require a defendant to "immediately surrender" to invoke the surrender

affirmative defense. Unlike the first part of the statute, there is no temporal restriction in the second part of the affirmative defense. For these reasons, we find that the surrender defense was legally available to defendant.

¶65 The question is whether there was some evidence that defendant surrendered to the person or persons lawfully present in the home before he attempted to cause or caused serious bodily injury. The parties offer competing arguments on this issue. However, we believe this is a question of fact that should first be decided by the trial court and therefore we make no determination as to whether the surrender defense was factually available to defendant on this basis.

¶66 In conclusion, we find that the trial court committed plain error when it omitted IPI Criminal 4th No. 24-25.06A from the issues instruction for home invasion and aggravated unlawful restraint. We further find that defense counsel was ineffective for failing to request that the jury be instructed on the affirmative defense of mistake or fact. We note that defendant argues on appeal that he was not proved guilty beyond a reasonable doubt where the evidence established that his entry into Laama's home was justified by his reasonable belief that Laama was in danger. However, when the evidence is viewed in the light most favorable to the State (*People v. Smith*, 185 Ill.2d 532, 541 (1999)), a rational trier of fact could have found defendant guilty of home invasion and aggravated unlawful restraint. We have already noted above the conflicting evidence adduced at trial and further noted that the jury could have rationally rejected defendant's testimony. Thus, while discounting the defendant's testimony and taking the testimony of Laama together with Blazek in its most favorable light, the jury could have rationally found him guilty as charged. Therefore, double jeopardy does not bar defendant's retrial for these offenses. *People v. Ward*, 2011 IL 108690, ¶ 50.

¶67 Reversed and remanded.