

NOTICE

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2015 IL App (5th) 130111-U

NO. 5-13-0111

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,	)	Clay County.
	)	
v.	)	No. 11-CF-69
	)	
CARL R. LITAKER, JR.,	)	Honorable
	)	Michael D. McHaney,
Defendant-Appellant.	)	Judge, presiding.

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

**ORDER**

¶ 1 *Held:* Where the alleged defect in the jury instructions on the defendant's affirmative defense of necessity did not amount to a grievous error or result in prejudice to the defendant, the defendant did not establish that the trial court's use of the instruction was plain error or that he received ineffective assistance of counsel.

¶ 2 On July 30, 2011, the defendant, Carl R. Litaker, Jr., was arrested for driving while his driver's license was revoked in violation of section 6-303 of the Illinois Vehicle Code (the Code) (625 ILCS 5/6-303 (West 2010)). At his trial on January 8, 2013, the defendant invoked an affirmative defense of necessity, but he was found guilty of the offense by a Clay County jury. On February 14, 2013, the defendant was sentenced

pursuant to section 6-303(d-4) of the Code (625 ILCS 5/6-303(d-4) (West 2010) (stating that upon a tenth, eleventh, twelfth, or thirteenth violation of this section, a person is guilty of a Class 3 felony and ineligible for probation or conditional discharge)). He received five years' imprisonment followed by one year of mandatory supervised release, and was also assigned fines, fees, and costs. For the following reasons, we affirm the decision of the circuit court, as modified.

¶ 3 We set forth only the facts that are relevant to this appeal. On November 14, 2012, the defense disclosed their intent to pursue the affirmative defense of necessity. The State objected, and argued in a motion *in limine* that the defense was not applicable where the defendant's conduct "was not necessary to avoid a public or private injury greater than the injury which might have reasonably resulted from his own conduct" because the facts demonstrate that the defendant acted merely out of convenience. On January 8, 2013, the trial court heard argument on the motion. Believing that it would be error to grant the State's motion at that time, the trial court denied the motion but noted that the State was entitled, after adduction of the evidence, to argue against the provision of a jury instruction on this defense. The defendant's jury trial was held that same day.

¶ 4 The following facts were adduced from the defendant's jury trial. Deputy Jeremy Childers testified that on July 30, 2011, he was patrolling Route 45 between Louisville and Flora. Around 8 p.m., he was in between Palm Lane and Hickory Hill Lane on Route 45, just north of the race track. While traveling southbound, he spotted a black Buick traveling northbound, and recognized that the defendant was the driver of the vehicle. Believing that the defendant did not have driving privileges at that time, Childers

confirmed this notion with his computer, and subsequently turned northbound and initiated a traffic stop with the vehicle. Childers testified that the vehicle turned east onto Palm Lane, drove approximately 200 yards, and stopped in a driveway. Childers approached and asked the defendant why he was driving. The defendant responded that his passenger, Tabitha Polcyn, was ill with a stomach ache. Childers noted his concern upon hearing that statement, since he knew that the defendant was aware that he was not supposed to be driving. Childers testified that he then asked the defendant if he should call for emergency medical care, but both the defendant and Polcyn declined his offer. After running the defendant's license through dispatch and confirming that it was in fact revoked, he took the defendant into custody. Childers stated that Polcyn followed the squad car as far as Louisville in the Buick.

¶ 5 Tabitha Polcyn, the passenger in the vehicle at the time of the stop, testified that she was currently the defendant's girlfriend and had a child with him. She stated that at the time of the incident, she had recently starting seeing the defendant, and they had gone on a dinner date that evening in Flora. She testified that after dinner, she was driving them to her home in Louisville when she experienced a panic attack. She noted that these attacks occur occasionally, even when on her medication, and that the attacks make her shaky and disoriented for 10 to 30 minutes. Polcyn testified that during the attack, she "just lost it" and let go of the wheel. She stated that she was scared, because she had previously had a panic attack while driving on the interstate, but agreed that she was able to successfully navigate the car to a gravel "U-like" area off of the roadway. She testified that the defendant took over driving at that point, which was near the four-way stop

where Route 45 and Route 50 intersect. Polcyn admitted that she was aware that the defendant had a revoked license, and stated that they were headed to the defendant's mother's house when they were stopped by Childers. After Childers left with the defendant, Polcyn testified that she drove to her cousin, Theresa Beccue's, house in Louisville, and after calming down, she and Beccue went to the sheriff's department. She testified that Childers never inquired about emergency medical care at the scene of the stop, and that the conversation at the sheriff's office was the first time that she had spoken to him about why the defendant was driving at that time.

¶ 6 Outside the presence of the jury, the State objected to further evidence on the nature of Polcyn's panic attacks because the necessity defense did not apply to this case, rendering the additional information unnecessary and irrelevant. The court denied the motion, noting that "[r]egardless of how the court views the merits of this affirmative defense, [it is] not the trier of fact." Upon the jury's return, the defense presented evidence from witnesses attesting to the severity of Polcyn's panic attacks. Beccue was called as one of these witnesses. She confirmed that Polcyn was still very agitated when she arrived at her house after the defendant's arrest, and that she rode with Polcyn to the sheriff's office after Polcyn had calmed down.

¶ 7 The defendant admitted that he was driving at the time, despite knowing that his license was revoked. He testified that he had never seen a panic attack before and was not sure what to do, and that he drove because he was worried about his safety. He stated that his intention was to drive to his mother's house so that his mother could take Polcyn to the hospital. He testified that Polcyn did not pull over in a turn in lane, but rather "[i]t

was just a little corner by a bridge." He agreed that the shoulder of the roadway is "just barely enough—if you get off the road too far, you're in a ditch." He noted that there was a lot of traffic that evening due to an event at the race track, and that he decided to drive the vehicle despite the prohibition because it was "not off the road all the way and it just looked dangerous to me." Though he admittedly intended to drive all the way to his mother's home, when the defendant saw Childers' lights, he pulled over on Palm Lane. The defendant testified that after being stopped, he told Childers that Polcyn needed to get to a doctor because she was having a panic attack, and that he was driving "to get this car off the road and to try to get [Polcyn and himself] into a safer position." He testified that Childers did not inquire about Polcyn's condition, and that Childers never completely approached the car because the defendant exited the vehicle and met Childers halfway. The defendant stated that he did not call 9-1-1 on his cell phone or pull over as soon as possible because he also felt panicked during the incident, and noted that he believed that he had done "the best of [his] ability" in the situation.

¶ 8 At the conclusion of the evidence and outside the presence of the jury, the State again requested that the jury not be instructed on the necessity defense. The court stated that the defendant's credibility was "directly in issue" and that there was "a definite blatant credibility question for the jury to decide" regarding whether or not Childers inquired after Polcyn's medical condition at the scene, "and what [Childers] asked her or did not ask the defendant." The State agreed that it had no objections to the form of the instructions, and the court allowed the defense's proffered instructions on the necessity defense.

¶ 9 In closing arguments, the State noted that the defendant was driving and that his driver's license was revoked; "[t]hose two facts alone indicate that the defendant in any situation is not to consider driving at all safe [*sic*] some legally recognizable defense." The State agreed that necessity is a "legitimate and necessary" defense, but argued that it did not apply in this scenario. Asserting that the defendant was acting merely out of convenience, the State called attention to the discrepancies in the proffered testimony, such as between Poclyn's description of the location of the driver exchange versus that of the defendant, and between Childers' description of the verbal exchange during the traffic stop versus that of Polcyn and the defendant. The State also pointed out that the defendant's actions did not reflect the level of concern he asserted, as his stated intention was to go to his mother's house, not a hospital, to seek initial help for Polcyn, and also that he chose to continue driving instead of simply moving the vehicle from the road's shoulder to the nearest less-trafficked safe location. The State also asked the jury to consider the credibility and motivation of the witnesses who testified.

¶ 10 The defense closed by reiterating the circumstances surrounding Polcyn's panic attack, and in that dangerous situation "the first thing [the defendant] thought \*\*\* was [that his] mom is up the road. [He can] get off the road at that point." The defense stated that they were not asking the jury to decide that the defendant did not drive that day or that his license was not revoked, but that he drove "out of necessity from a situation he did not create himself."

¶ 11 The jury received the defendant's instruction number one, marked as "IPI-Criminal

No. 24-25.22," over the State's objection. That same day, the jury returned a guilty verdict.

¶ 12 On appeal, the defendant alleges that he was denied a fair trial and the effective assistance of counsel where the jury was not properly instructed on his necessity defense. Specifically, the defendant contends that the trial court erred in giving a jury instruction that materially deviated from the pattern instruction—and that in the same vein, his counsel was ineffective for facilitating the improper instruction and failing to clarify the law to the jury—because the necessity instructions that were given left out crucial "choice-of-evils" language that impeded the jury's understanding of a critical element of the case.

¶ 13 The instruction given to the jury in the instant case stated that "[c]onduct which would otherwise be an offense is justifiable by reason of necessity if the defendant was without blame in occasioning or developing the situation and reasonably believed that such conduct was necessary to avoid a public or private injury which might reasonably result from his own conduct."

¶ 14 In contrast, the Illinois pattern jury instruction for necessity states that "[c]onduct which would otherwise be an offense is justifiable by reason of necessity if the defendant was without blame in occasioning or developing the situation and reasonably believed that such conduct was necessary to avoid a public or private injury *greater than the injury* which might reasonably result from his own conduct." (Emphasis added.) Illinois Pattern Jury Instructions, Criminal, No. 24-25.22 (4th ed. 2000).

¶ 15 The defendant argues that the omission of "greater than the injury" language meant that "the jury was never told that the State had to prove beyond a reasonable doubt

that [he] did not reasonably expect driving a few miles to get help [for Polcyn's alleged anxiety attack] would avoid a greater injury than waiting by the side of the road." The defendant asserts that due to the misleading nature of the instruction, our court "should place no confidence in the jury verdict" and that the alleged error warrants reversal of his conviction and remand for a new trial.

¶ 16 The defendant admits that he forfeited this issue by failing to make a timely objection to the instruction in the trial court; however, he urges this court to review his contention pursuant to the doctrine of plain error. We note initially this court strives to apply the waiver rules narrowly and consistently, and "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction where no objection has been made in the trial court." (Internal quotation marks omitted.) *People v. Berry*, 99 Ill. 2d 499, 506 (1984). The plain error doctrine allows a reviewing court to consider unpreserved errors where (1) regardless of the closeness of the evidence, the alleged error is so serious that it affected the fairness of the defendant's trial or challenged the integrity of the judicial process, or where (2) the evidence is closely balanced, regardless of the seriousness of the error. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). The burden of persuasion remains with the defendant. *Id.* at 186.

¶ 17 The defendant's arguments regarding ineffective assistance of counsel and the "closely balanced evidence" prong of plain error may both be addressed by considering whether or not he can demonstrate that he has been prejudiced. *People v. White*, 2011 IL 109689, ¶ 134. Thus, we will first consider the "serious error" prong of plain error in



regards to the defendant's assertion, followed by a discussion of any prejudice he may have suffered as a result of the alleged error.

¶ 18 Due to the importance of the right involved, prejudice is presumed under the "serious error" prong of the plain error doctrine. *Herron*, 215 Ill. 2d at 187. An incorrect instruction is not necessarily reversible error; it 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. *People v. Sargent*, 239 Ill. 2d 166, 191 (2010).

¶ 19 The defendant cites *People v. Berry*, 99 Ill. 2d 499 (1984), in support of his contention that this failure constitutes grave error. In *Berry*, the jury was not instructed that the State was required to prove that the defendant did not meet his affirmative defense. *Berry*, 99 Ill. 2d at 505. Further, in closing arguments, defense counsel only made a general reference to that burden of proof, noting only that it was the State's burden to prove the defendant guilty of each and every allegation beyond a reasonable doubt; likewise, the prosecutor's closing argument did not fill in the instructional gap. *Id.* at 505-06. In finding that the omission constituted reversible error, the court contrasted the case with the analysis in *People v. Huckstead*, 91 Ill. 2d 536 (1982), where that court found that though the issue instruction had not been offered, the closing arguments (in conjunction with the remaining instructions) had sufficiently informed the jury of the applicable law because both parties' arguments reiterated that the affirmative defense was the State's burden. *Id.* at 505-06 (citing *Huckstead*, 91 Ill. 2d at 545). The *Berry* court

therefore found that grave error resulted where the jury was never sufficiently apprised of the applicable law.

¶ 20 We disagree with the defendant that an "instructional gap" existed where the words "greater than the injury" were not explicitly stated in the instructions or in the parties' closing arguments. In the instant case, the State had to prove to the jury, beyond a reasonable doubt, that the defendant did not reasonably expect that driving on his revoked license would avoid a greater injury than remaining on the side of the road with his allegedly incapacitated driver. In our courts, this defense is viewed as involving the choice between two admitted evils where other optional courses of action are unavailable, and the conduct chosen must promote some higher value than the value of literal compliance with the law. *People v. Janik*, 127 Ill. 2d 390, 399 (1989).

¶ 21 A review of the record shows that the State's main closing argument indeed focused on the defendant's credibility, *i.e.*, that Polcyn's physical state was not nearly the emergency situation that the defendant had described, and thus he was not rightfully calling his conduct "necessary" when it was really a matter of convenience. However, we find that the State also made clear to the jury that even if they were convinced by the defendant's version of the events, he could not have had a reasonable belief that his conduct was necessary because he had alternative choices in that scenario that did not require him breaking the law. Similarly, the defense's closing arguments also addressed the defendant's state of mind on that day, arguing that he had a reasonable belief that driving illegally was the better alternative to remaining parked near a heavily trafficked roadway with a panicking driver. Bearing these facts in mind, we believe that even

without explicitly referencing a "greater injury," both parties' arguments clearly ask the jury to determine whether the defendant had reasonably believed that his chosen conduct was the lesser of the remaining "choice-of-evils." We cannot find that the written omission resulted in such an "instructional gap" that the jury misunderstood the applicable law regarding necessity, and therefore did not constitute a grave error warranting reversal.

¶ 22 We also find that the defendant was not prejudiced as a result of this instruction, forestalling his claim that the instruction was reversible error or that he received ineffective assistance from his trial counsel. *White*, 2011 IL 109689, ¶ 133. Even with the nonpattern jury instruction, the jury is entitled to disbelieve the defense's version of the events. When a defendant elects to explain his actions during an offense, it is incumbent upon him to tell a reasonable story or be judged by its improbabilities. *People v. Sheridan*, 57 Ill. App. 3d 765, 774-75 (1978). The bias of the remaining defense witnesses is certainly pertinent to their credibility, as well. See *People v. Barcik*, 365 Ill. App. 3d 183, 192 (2006) (finding that the witness's fiancée relationship to the defendant gave her testimony little weight). The jury was entitled to find Childers' account more credible than that of the defense witnesses, as their testimonies were inconsistent and also held great potential for bias. We find that the defendant was not prejudiced by the omitted words because we cannot say that the nonpattern instructions affected the outcome of the case.

¶ 23 Finally, the defendant argues that he is entitled to corrections for some of the fines imposed and for monetary credit for each day of presentence custody. The State

concedes the error. Pursuant to our authority under Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994)), we modify the trial court's assignment of fines and costs to reflect that the defendant is not required to make payment to the Trauma Center Fund or the Spinal Cord Injury Paralysis Cure Research Fund, that his Violent Crimes Victims Assistance fine is amended to \$12, and that he is entitled to receive his \$5-per-day credit for each day of presentence custody.

¶ 24 The jury instruction on necessity was not reversible error, as the nonpattern instruction submitted by the defense did not fall within either of the two categories set forth under a review for plain error. We also find that the defendant did not demonstrate that he received ineffective assistance of counsel. We therefore affirm the judgment of the circuit court with corrections as to the defendant's fines and fees.

¶ 25 Affirmed as modified.