

NOTICE  
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2016 IL App (5th) 130079-U

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).

NO. 5-13-0079

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Williamson County.
	)	
v.	)	No. 12-CF-29
	)	
JACK R. COBB,	)	Honorable
	)	John Speroni,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.  
Justice Stewart concurred and Justice Moore specially concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court erred in allowing the State to improperly comment on the defendant's failure to call a non-alibi witness to testify. Therefore, the defendant's convictions are reversed, and the cause is remanded for a new trial.

¶ 2 Following a jury trial, the defendant, Jack R. Cobb, was convicted of aggravated driving while under the influence of alcohol (DUI) (625 ILCS 5/11-501(d)(2)(C) (West 2012)) and aggravated driving while license revoked (DWLR) (625 ILCS 5/11-501(d)(1)(G) (West 2012)). He was sentenced to a term of seven years in prison on the aggravated DUI count and a consecutive term of three years in prison on the aggravated DWLR count. On appeal, the defendant contends that the trial court committed

reversible error by (1) denying his motion to suppress inculpatory statements made prior to arrest; (2) denying his motion *in limine* seeking to bar evidence of his post-arrest statements threatening a police officer; (3) allowing the State to offer a definition of the meaning of reasonable doubt during *voir dire*; (4) failing to give Illinois Pattern Jury Instructions, Criminal No. 2.03; (5) allowing the State to comment during rebuttal argument on his failure to present the testimony of a non-alibi witness, and to speculate that the witness's testimony would be unfavorable; and (6) denying him his right to a fair trial as a result of the combined impact of all of the errors. The defendant claims that he was unfairly prejudiced and denied a fair trial as a result of each individual error and the cumulative effect of the errors. For the following reasons, we reverse the defendant's convictions and remand the cause for a new trial.

¶ 3 The defendant was arrested on January 23, 2012, and later charged by information with aggravated DUI and aggravated DWLR. The defendant was also charged with threatening the arresting officer, but that charge was filed in a separate case and is not part of this appeal. The DUI and DWLR charges were tried before a jury in Williamson County. After considering the testimony of an occurrence witness and the arresting officer, the jury found that the defendant was guilty of both charges. A summary of the evidence follows.

¶ 4 Stephanie Parks was called as the State's first witness. Parks testified that sometime between 5 p.m. and 6 p.m., on January 23, 2012, she was at her home on Willow Pond Lane when she heard a knock at the door. When Parks opened the door, she observed a man, whom she did not know, standing outside. The man, whom Parks

identified in court as the defendant, stated that he was looking for "Jackie." Parks recalled that the defendant smelled of alcohol, that he was drinking out of a bottle wrapped in a brown paper bag, and that his speech was slurred. Parks also recalled that it was not yet dark outside. Parks informed the defendant that no one named Jackie lived at the residence. She ended the conversation and watched the defendant leave. Parks observed the defendant get into the driver's seat of a red Chevy or GMC truck and drive away.

¶ 5 Parks testified that after a brief period of time, she heard a noise. When she went over to the window and looked out, she observed the same red truck "barreling up and down the road" at an excessive rate of speed. Upon seeing the truck "flying up and down the road," Parks called 9-1-1 to report what she thought was a drunk driver. After reporting the suspected drunk driver, Parks observed the truck doing "doughnuts." As she continued to look on, she saw the truck almost hit another vehicle. This prompted her to call 9-1-1 once more. Moments later, Parks witnessed the defendant park the truck in her driveway, exit the vehicle, and walk around her front yard, yelling. Parks then saw the defendant return to the truck and reposition it in her driveway. He then exited the vehicle. At that point, Parks watched the defendant take his shirt off and walk around the yard. She noted that a police officer arrived shortly thereafter.

¶ 6 Deputy Robert Applehans was the State's next and final witness. He testified that at approximately 5:30 p.m., on January 23, 2012, he was dispatched to Willow Pond Lane to investigate a 9-1-1 call about an erratic driver. Deputy Applehans recalled that when he arrived at Willow Pond Lane, the sun was setting. He testified that "[i]t was

darker. The sun was going down, but you could still see fairly well." Applehans stated that as he arrived at Willow Pond Lane, he observed a red pickup truck being backed into Ms. Parks' driveway. Moments after the truck stopped moving, Applehans pulled his squad car onto the west side of Ms. Parks' driveway. Applehans further stated that he observed an individual exit the truck from the driver's side. The individual then approached Applehans' squad car. Applehans identified the defendant as the driver of the red truck.

¶ 7 The defendant engaged Applehans in conversation as soon as he exited his squad car. During the conversation, Applehans observed that the defendant was shirtless, stumbling, sweaty, and speaking with a thick tongue. Applehans then asked the defendant if he had been operating the truck. The defendant responded that he had not been driving, but that an individual named Justin Walters had been driving. Applehans testified that he asked the defendant the same question several more times. Each time, the defendant denied that he had been driving. Besides stating that it was Walters who had been driving, the defendant also stated that Ms. Parks had been driving the truck. At some point during the encounter, Applehans noticed that there was a passenger in the vehicle. The passenger was later identified as Justin Walters.

¶ 8 Applehans testified that he asked the defendant if he had consumed alcohol. The defendant admitted that he had been drinking and was drunk. He stated that he had consumed 50 beers. Applehans asked the defendant to submit to field sobriety tests, but the defendant refused. At that point, Applehans placed the defendant under arrest. The

State offered a document from the Secretary of State's Office showing that at the time of the arrest, the defendant's driver's license had been revoked. The State then rested.

¶ 9 The defendant did not testify or call any witnesses in his defense. The defendant did, however, enter into evidence a Sunrise Sunset Calendar for the month of January 2012, which showed that on January 23, the date of his arrest, the sun had set at 5:08 p.m.

¶ 10 During closing arguments, the defendant argued that Parks' observations were compromised because it was dark outside. The defendant also argued he was not driving, and that there was "someone else there." The defendant expounded on this argument by stating, "[t]his is the State's case to prove. This isn't Jack's case to prove." During rebuttal, the State countered by arguing that it was of no consequence that a passenger was present because both Applehans and Parks had observed the defendant driving. The State further stated, "[a]nd one more thing about this Mr. Walters, the defense has subpoena power too..." Defense counsel immediately objected and requested a sidebar. The court denied the request. The defendant then reasserted his objection on the ground that he was not required to present any evidence or prove anything. The court overruled the defendant's objection, reasoning that it was closing argument. The State then continued to claim, "[t]hey have the power to subpoena a witness. You don't think that if Mr. Walters was driving he wouldn't come in for his friend and say, 'No, it was me driving.' He didn't testify and there's a reason for it, ladies and gentleman." Again, the defense objected, and again, the objection was overruled based upon the grounds that this was closing argument.

¶ 11 Following closing arguments, the trial court instructed the jury on the law. The record shows that the tendered instructions did not include Illinois Pattern Jury Instructions, Criminal No. 2.03, the pattern jury instruction regarding the defendant's presumption of innocence and the State's burden of proof in a criminal case. No one recognized that this instruction had not been tendered, and the court did not instruct the jury regarding these matters. Following deliberations, the jury found the defendant guilty of both charges. The court sentenced the defendant to a seven-year term of imprisonment for aggravated DUI and a consecutive three-year term of imprisonment for aggravated DWLR. The defendant's amended motion for a new trial and his motion to reconsider sentence were denied. This appeal followed.

¶ 12 As noted previously, the defendant has raised six issues for review on appeal. We find that the issue concerning the State's remarks during rebuttal argument on the defendant's failure to subpoena a witness to testify to be dispositive of this appeal, and, as such, we address only this issue.

¶ 13 The defendant claims that the prosecutor's comments regarding the defendant's failure to subpoena a witness to testify during the rebuttal portion of closing arguments were improper and shifted the burden of proof to the defendant. The defendant contends that the trial court committed reversible error by allowing the prosecutor, over objection, to comment twice on the defendant's failure to call Justin Walters as a defense witness. More specifically, the defendant argues that he was unfairly prejudiced because the prosecutor was permitted to imply that the defendant had an affirmative duty to present evidence and that the defendant did not call Walters because Walters' testimony would

have been unfavorable to the defense. The State claims that the comments were proper and that they were invited by the argument of defense counsel. Further, the State asserts that even if the trial court erred in permitting these statements, the error was harmless in light of the overwhelming evidence of the defendant's guilt.

¶ 14 Generally, a prosecutor has wide latitude in closing arguments to comment on the evidence and make reasonable inferences arising from the evidence. *People v. Robinson*, 391 Ill. App. 3d 822, 839 (2009). A prosecutor, however, is prohibited from commenting on a defendant's failure to call a non-alibi witness to testify when the comment implies that the witness's testimony would have been unfavorable to the defendant and the witness is equally accessible to the State. *People v. Enoch*, 189 Ill. App. 3d 535, 550 (1989). Comments on the failure of the defendant to produce a witness equally available to the State are improper because such remarks tend to shift the burden of proof to the accused. *People v. Wills*, 151 Ill. App. 3d 418, 421 (1986). The jury may, however, consider a defendant's failure to produce a witness who could testify to material facts if it is manifest that it is within the power of the accused to produce such a witness and that such witness is not accessible to the prosecution. *Wills*, 151 Ill. App. 3d at 421. Additionally, comments made by the State on the failure of a potential defense witness to testify are permitted when they are made in response to the defendant's own reference to the State's failure to call a witness to the stand. *People v. Holman*, 103 Ill. 2d 133, 151 (1984).

¶ 15 Nevertheless, closing arguments must be viewed in their entirety, and the alleged improper comments must be viewed in context. *People v. Blue*, 189 Ill. 2d 99, 128

(2000). Erroneous comments will not be found to be reversible error unless they constitute a material factor in conviction or result in substantial prejudice to the accused. *Wills*, 151 Ill. App. 3d at 423. If, however, the reviewing court finds that the prosecutor's improper remarks contributed to the defendant's conviction, then a new trial should be granted. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007).

¶ 16 The defendant suggests that there appears to be two different standards of review that have been applied in addressing claims based upon allegedly improper closing arguments. See *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007) (*de novo* review) and *People v. Blue*, 189 Ill. 2d 99, 128 (2000) (abuse of discretion). We need not resolve this issue as our conclusion is the same under either standard.

¶ 17 In this case, there is no indication that Justin Walters was not equally accessible to the State and the defense. The record shows that the State initially disclosed Justin Walters as a potential witness, and included his address in its disclosure, and that the defendant then indicated that he may call any witness identified in the State's disclosure. There is nothing in the record to indicate that Walters was inaccessible to the State.

¶ 18 We next consider whether the prosecution's comments concerning the defendant's failure to call Walters to testify implied that his testimony would have been unfavorable to the defendant. During the rebuttal portion of the State's closing argument, the prosecutor twice noted that the defendant had the power to subpoena Walters for trial. On the second occasion, the prosecutor also implied that the defendant did not call Walters because Walters' testimony would have been unfavorable to the defense. These comments made by the prosecution were akin to stating that the defendant had failed to

produce evidence to prove his innocence, which he was never required to do. See *People v. Magnafichi*, 9 Ill. 2d 169, 174 (1956) ("[N]o rule is more firmly settled than that a defendant in a criminal case is not bound to prove himself innocent, but the State must prove him guilty beyond a reasonable doubt, the defendant being presumed innocent."); see also *People v. Weinstein*, 35 Ill. 2d 467, 470 (1966) ("The burden of such proof never shifts to the accused, but remains the responsibility of the prosecution throughout the trial."). In our view, these comments impermissibly shifted the burden of proof to the defendant. Contrary to the State's contention, we do not find that the defendant elicited or invited the State's rebuttal remarks.

¶ 19 Further, the trial court's failure to instruct the jury at the close of evidence on the State's burden of proof, and the defendant's presumption of innocence as required by Illinois Pattern Jury Instructions, Criminal No. 2.03 (4th ed. Supp. 2009), magnified the error and the resulting prejudice. Instructing the jury on the defendant's presumption of innocence and the State's burden of proof "is a time-honored and effective method of protecting a defendant's right to a fair trial, which is guaranteed by the due process clause of the fourteenth amendment" (*People v. Layhew*, 139 Ill. 2d 476, 486 (1990)). In addition, the Committee Note to IPI Criminal 4th No. 2.03 states that this instruction must be given in all cases. Under these circumstances, the State's improper remarks and the failure to properly instruct the jury resulted in a violation of the defendant's right to due process, and undermines our confidence in the outcome of the trial. Accordingly, the defendant's convictions are reversed and the cause is remanded for a new trial.

¶ 20 Given our disposition, we need not address the defendant's remaining contentions of error. For the reasons stated, we reverse the defendant's convictions and we remand this cause for a new trial.

¶ 21 Reversed and remanded.

¶ 22 JUSTICE MOORE, specially concurring:

¶ 23 I concur in the result reached by my colleagues. However, unlike my colleagues, my review of the facts of this case leads me to conclude that the defendant did in fact elicit and invite the State's rebuttal remarks. As the recitation of facts in the majority's disposition demonstrates, the defendant's remark, in closing, that there was "someone else there" could refer only to the passenger later identified as Justin Walters, whom the defendant had told Deputy Applehans was driving the vehicle and whom defense counsel, in closing, suggested was driving. The State had the right to respond, in rebuttal to the defendant's argument, and, in my view, given the wide latitude allowed in closing argument, the State's rebuttal remarks were proper, did not constitute error, and do not require reversal. That said, the rebuttal remarks are relevant to what I see as a larger problem, one that I believe does require reversal and remand for a new trial: the failure to instruct the jury at the close of evidence on the State's burden of proof, and the defendant's presumption of innocence, as required by Illinois Pattern Jury Instructions, Criminal No. 2.03 (4th ed. Supp. 2009) (IPI instruction).

¶ 24 As a general rule, a trial judge has no obligation to issue jury instructions *sua sponte*; to the contrary, "a party who desires a specific instruction must offer it and request that the court tender it." *People v. Curry*, 296 Ill. App. 3d 559, 567 (1998) (citing *People v. Layhew*, 139 Ill. 2d 476, 485-86 (1990)). Accordingly, I do not fault the trial judge in this case, as the blame for the mistake clearly lies with the parties. Nevertheless, in a criminal case such as this one, "fundamental fairness concerns require a court to see that the jury is instructed on the elements of the crime charged, on the presumption of innocence and on the burden of proof." *Id.* (citing *Layhew*, 139 Ill. 2d at 486). The failure to do so does not always constitute reversible error. *Id.* To determine if reversal is required, a court of review must consider the totality of the circumstances, including: (1) all the instructions given to the jury; (2) arguments made by counsel; (3) whether the evidence against the defendant was overwhelming; and (4) any other relevant factors. *Id.* As the cases cited by the parties demonstrate, and as one would expect, the results of such a totality-of-the-circumstances review vary widely.

¶ 25 In the case at bar, I believe the evidence against the defendant, recited in the majority disposition, was overwhelming, which of course weighs against reversal. Other factors that weigh against reversal include the following: (1) prior to *voir dire*, the trial judge discussed the State's burden of proof, and the presumption of innocence, and properly questioned prospective jurors about their acceptance thereof; (2) the issues instructions informed the jury of the State's burden of proof (although not the presumption of innocence); and (3) defense counsel referenced the State's burden of proof (although not the presumption of innocence) during closing argument. In contrast, the

following factors weigh in favor of reversal: (1) the trial judge told the jurors that at the end of the case they would be instructed on the law they must follow, but the instructions they eventually received did not include the required IPI instruction or any other reference to the presumption of innocence; (2) the defendant did not testify, and the evidence he presented consisted only of one largely-innocuous exhibit, which meant the defendant was relying heavily on the jury understanding the presumption of his innocence and the State's burden of proof; and (3) the trial judge specifically instructed the jury not to consider remarks of counsel as evidence, which, although proper, negated any benefit the defendant may have received from his counsel's attempts to remind the jury of the State's burden of proof and the defendant's presumption of innocence.

¶ 26 I reiterate that I do not believe the State's rebuttal remarks were in error. Nevertheless, they are a relevant factor to the above analysis as well, because, as explained above, the trial judge overruled defense counsel's objection to the remarks, said objection being in the form of a statement that the defense was not required to put on any evidence, or to prove anything. In the absence of the required IPI instruction, which would have clarified for the jury that defense counsel was correct—that the defense was not required to put on any evidence, or to prove anything, and that in fact the burden of proof was on the State and the defendant was presumed to be innocent—I am concerned that the jury may have been left with the impression that defense counsel was incorrect in his assertion, which, after all, the judge had overruled. Although the judge stated the reason for overruling defense counsel was that "[i]t's closing arguments," I am not confident that the jury would not have concluded that defense counsel's statement was

wrong as a matter of law as well. Because they received no instructions or other guidance that would have disabused them of this incorrect notion, I, like my colleagues, do not have confidence in the outcome of the trial, and agree that reversal and remand for a new trial is required. Accordingly, I concur in the result reached by my colleagues.