2015 IL App (1st) 123572-U

SIXTH DIVISION
February 20, 2015

No. 1-12-3572

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 20841
	)	
EDGAR CASTILLO,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held*: We affirmed defendant's conviction for aggravated driving under the influence of alcohol where any argument as to the omission of a jury instruction defining "under the influence of alcohol" was forfeited, the error did not amount to plain error under either prong, and there was no ineffectiveness of counsel.

¶ 2 Following a jury trial, defendant, Edgar Castillo, was found guilty of aggravated driving under the influence of alcohol while not possessing a valid driver's license or permit, and was sentenced to 15 months' imprisonment. The jury did not receive Illinois Pattern Jury Instruction, Criminal (IPI), number 23.29, which defines "under the influence of alcohol." Illinois Pattern Jury Instructions, Criminal, No. 23.29 (4th ed. 2000). On appeal, defendant acknowledges his

forfeiture of any claim of error as to this instruction's omission, but urges us to review the issue under the plain-error doctrine or, in the alternative, that his trial counsel was ineffective. We find there was no plain error under either prong of the plain-error doctrine, nor ineffectiveness of counsel, and affirm.

¶ 3 At trial, Ana Soto, defendant's former girlfriend, testified that on November 19, 2011, at about 11:15 p.m., she went to Junior's, a bar located at Cermak Road and Hoyne Avenue in Chicago to have drinks with friends. The bar was approximately five blocks from her home and 2 ½ blocks from the Chicago Transit Authority (CTA) Pink Line. About an hour later, she saw defendant enter the bar and order a Corona beer. Defendant offered to drive Ms. Soto home in his white and burgundy Chevy Astro van and, at sometime before 3 a.m. (the bar's closing time) on November 20, 2011, Ms. Soto and defendant left the bar. The only thing Ms. Soto could recall after she got into defendant's van was that, later that day, she awoke in Mt. Sinai hospital with an injury to the right side of her head.

¶ 4 A few weeks after the incident while at defendant's home, Ms. Soto asked defendant what had happened that night. Defendant told her that when he was driving her home, he received a text message and they began to argue. Ms. Soto attempted to exit the van while it was moving. When defendant reached over to prevent her from leaving, he drove into a cement pole.

¶ 5 Chicago police officer Jorge Flores testified that he was on patrol with Officer Segovia around 2:45 a.m. on November 20, 2011, when they received a call of a battery in progress at 2043 West Cullerton Street in Chicago. Both officers testified at trial. Officer Flores had 6 years and Officer Segovia had 14 years of service with the Chicago police department. The

officers had each received training relating to assessing whether a person is under the influence of alcohol.

¶ 6 A few moments after receiving the call, the officers arrived at an alley beside a CTA Pink Line station. The alley was well-lit, the weather was clear with no precipitation. The officers observed a white and burgundy van rocking back and forth. Believing that a battery was in progress, the officers exited their vehicle with their guns drawn and approached the van. Officer Flores saw that the passenger side sliding door was open and a male, identified as defendant, was on top of a female, identified as Ms. Soto. Officer Flores ordered defendant out of the van. When he exited the van, defendant had blood on his hands, and was swaying from side to side and holding on to the van "to stand."

¶ 7 Officer Segovia ordered defendant to the rear of the van. Defendant complied, but was swaying back and forth and leaning on the van for support as he walked. Officer Segovia asked defendant what happened and defendant stated that he had swerved and hit a cement pole. Defendant also stated that he had consumed 40 ounces of Corona beer that evening. Officer Segovia observed that defendant's speech was slurred, his eyes were bloodshot, and there was a strong odor of alcohol on his breath. Defendant did not produce a driver's license, nor proof of insurance.

¶ 8 When Officer Flores went inside the van to attend to Ms. Soto, he saw that she had a laceration on the right side of her head, and that there was blood dripping on the inside of the front passenger side window. Officer Flores heard defendant say to Officer Segovia that he struck the pole as he entered the alley and that he was sorry, and that he should not have consumed 40 ounces of Corona. Officer Flores testified that defendant's speech was slurred.

¶ 9 The exterior of the van had damage on the passenger side, with yellow paint marks running along the front fender to the rear panel. The yellow paint marks on the van matched the color of cement poles at the entrance of the alley. One of the cement poles was marked with white and red paint marks which matched the paint on the van.

¶ 10 Defendant had no obvious injuries and declined medical assistance. Defendant was placed under arrest for driving without a driver's license and for not having automobile insurance. Because Ms. Soto needed medical attention and the alley pavement was not even, Officer Segovia delayed the performance of field sobriety tests. After an ambulance transported Ms. Soto to the hospital, defendant was taken to the police station and arrived at 3:10 a.m.

¶ 11 At the police station, the police observed that defendant's breath smelled strongly of alcohol and his eyes were bloodshot. Defendant was asked to perform field sobriety tests. Defendant refused, saying: "I am not taking nothing. I'm good." Officer Segovia, after giving defendant his *Miranda* warnings, asked defendant what he had been drinking that evening and defendant again stated that he drank forty ounces of Corona beer. Officer Segovia asked defendant if he had ever possessed a driver's license and defendant stated that he had not. After reading defendant the "Warnings to Motorist," Officer Segovia asked defendant if he would take a Breathalyzer exam; defendant declined the request. Defendant fell asleep on a bench while being processed and while being questioned in an interview room.

¶ 12 Officer Segovia testified that, in his opinion, defendant had been driving while under the influence of alcohol. His opinion was based on his training and experience, as well as defendant's poor driving which resulted in a collision, admission to drinking, and refusal to take a Breathalyzer test and field sobriety tests. The officer's opinion also was based on the officer

having observed defendant's slurred speech, inability to maintain his balance, bloodshot eyes, strong odor of alcohol on his breath, and sleeping at the police station.

¶ 13 The parties stipulated that defendant did not have a valid driver's license at the time of the incident. The State rested its case. Defendant made a motion for a directed verdict, which the trial court denied. The defense rested its case without presenting evidence. After closing arguments, the trial court instructed the jury.

¶ 14 The jury was instructed *inter alia* that defendant was charged with the offense of aggravated driving under the influence of alcohol, had pled not-guilty and was presumed innocent, and the State had the burden of proving him guilty of the charge beyond a reasonable doubt. The jury received IPI number 23.13, which states that "[a] person commits the offense of driving under the influence of alcohol when he drives or is in actual physical control of a vehicle while under the influence of alcohol." Illinois Pattern Jury Instructions, Criminal No. 23.13. (4th ed. 2000). The trial court also gave the jury IPI number 23.14, the issue instruction for aggravated driving under the influence of alcohol, which informed the jury that the State was required to prove each of the elements of driving under the influence of alcohol as charged here, including "[t]hat at the time the defendant drove or was in actual physical control of a vehicle, the defendant was under the influence of alcohol." Illinois Pattern Jury Instructions, Criminal No. 23.14. (4th ed. 2000).

¶ 15 At the jury instruction conference, neither party had requested the inclusion of IPI number 23.29, which defines "under the influence of alcohol." Illinois Pattern Jury Instructions, Criminal No. 23.29. (4th ed. 2000). IPI number 23.29 was not included in the jury's instructions.

¶ 16 At 4:10 p.m., the jury sent out a note to the trial judge which stated:

"DUI?

"1. What % of alcohol constitutes being drunk?

2. What does DUI legal-*definitely*?

3. Why could have been done since the test[s] were refused, breathalyzer, blood drawn?"

(Emphasis in original.)

The note also stated: "Legal recourse to perform test since under arrest." The parties, the trial judge, and defendant agreed that the proper response to these questions was: "You have received the evidence and the instructions. Please continue to deliberate."

¶ 17 At 4:56 p.m., the jury sent out a second note which stated: "We need the legal standard for concluding an individual is driving under the influence of alcohol, this is the only the problem at issue." Again, the parties, the trial judge, and defendant agreed that the proper response to these questions was: "You have received the evidence and the instructions. Please continue to deliberate."

¶ 18 At 5:43 p.m., the jury sent out a third note which stated:

"Under Illinois State law, are there (at least) two separate laws:

DUI (only under influence) and

DWI (for which the '.08% standard exists to prove')."

The trial judge stated:

"I am not going to respond to the .08 situation, but I will tell them you received your instructions, please continue to deliberate because you have the issues as to aggravated under the influence case. They have the three issues that's what we are supposed to be

> deliberating on. This answer was at 5:50 p.m. I am also going to put 'Please read the instructions carefully.' "

The parties, the trial judge, and defendant agreed that the proper way to answer the question was: "You have received the evidence and the instructions. Please continue to deliberate."

¶ 19 The jury found defendant guilty of aggravated driving under the influence of alcohol. The trial court denied defendant's motion for a new trial which made no mention of an error in the jury instructions, nor the failure to submit IPI number 23.29 to the jury, nor the trial court's answers to the jury's questions. The court sentenced defendant to 15 months' imprisonment. Defendant now appeals.

¶ 20 On appeal, defendant contends that the phrase "under the influence of alcohol" is a key element of his aggravated driving under the influence of alcohol conviction and, therefore, the trial court erred by failing to provide IPI number 23.29 or any other definition of the phrase.

¶ 21 Defendant acknowledges that he waived the issue by failing to request IPI number 23.29, which defines "under the influence of alcohol," and by failing to object when the trial court did not give the jury instruction and raise the issue in a posttrial motion. Defendant, however, requests this court apply a plain-error analysis. Alternatively, defendant argues that trial counsel was ineffective for failing to submit IPI number 23.29; for not objecting when IPI number 23.29 was not read to the jury; and for not objecting to the trial court's answers to the jury's questions.

¶ 22 The State responds that defendant forfeited any claim predicated on the missing jury instruction; that the issue is not subject to plain-error review because there was no error and, in any event, the evidence overwhelmingly supported defendant's conviction; and the alleged error did not constitute a substantial defect or grave error.

¶ 23 A defendant may not raise the failure to give a jury instruction on appeal unless the defendant tendered the jury instruction at trial and raised the instruction issue in a posttrial motion. Ill. S. Ct. R. 366(b)(2)(i) (eff. Feb. 1, 1994, as amended); see also *People v. Herron*, 215 Ill. 2d 167, 175 (2005).

¶ 24 "Supreme Court Rule 451(c), however, 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*. at 175; see also Ill. S. Ct. R. 451(c) (eff. Apr. 8, 2013). "Rule 451(c) crafts a limited exception to the general forfeiture rule to correct 'grave errors' and errors in cases 'so factually close that fundamental fairness requires that the jury be properly instructed.' " *Id*. (citing *People v. Hopp*, 209 Ill. 2d 1, 7 (2004) (citing *People v. Thurman*, 104 Ill.2d 326, 329-30 (1984))). "Rule 451(c) is coextensive with the 'plain error' clause of Supreme Court Rule 615(a), and we construe these rules 'identically.' " *Herron*, 215 Ill. 2d at 175.

¶ 25 The plain-error doctrine is a narrow, limited exception to the general forfeiture rule. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). Under the doctrine, a reviewing court may consider an unpreserved issue when a clear and obvious error occurred and, either the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant, or the error is so serious, that it affected the fairness of defendant's trial. *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). Under both prongs of a plain-error analysis, a defendant bears the burden of persuasion. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). Before considering defendant's claim under either prong, we must first determine whether a clear and obvious error has occurred. *Piatkowski*, 225 Ill. 2d at 565.

¶ 26 While the parties typically bear the primary burden of preparing jury instructions, in a criminal case, the trial court must "fully and properly instruct the jury on the elements of the offense, the burden of proof, and the presumption of innocence." *People v. Pierce*, 226 Ill. 2d 470, 475 (2007). We review *de novo* whether the trial court failed to fully instruct the jury under applicable law. *People v. Parker*, 223 Ill. 2d 494, 501 (2006).

¶ 27 Here, the trial court properly gave IPI number 23.13, which defines the offense of "driving under the influence of alcohol" as occurring when a person "drives or is in actual physical control of a vehicle while under the influence of alcohol." Illinois Pattern Jury Instructions, Criminal No. 23.13 (4th ed. 2000). The comment to IPI number 23.13 directs the court to also "[g]ive [i]nstruction number 23.29, defining the term 'under the influence of alcohol.' " *Id.*, Committee Note. IPI number 23.29 defines "under the influence of alcohol" as follows: "A person is under the influence of alcohol when, as a result of drinking any amount of alcohol, his mental or physical faculties are so impaired as to reduce his ability to think and act with ordinary care." Illinois Pattern Jury Instructions, Criminal No. 23.29 (4th ed. 2000).

¶ 28 Our supreme court in *Hopp* held that a committee note which indicates that another instruction be given, is a mandatory requirement as set forth in the IPI User's Guide. *Hopp*, 209 Ill. 2d at 7; Illinois Pattern Jury Instructions, Criminal User's Guide (4th ed. 2000). Thus, we find the failure to give IPI number 23.29 was a clear and obvious error.

¶ 29 Having found the omission of IPI number 23.29 was error, we must consider whether the error constitutes plain error under either prong of the doctrine. Defendant first argues that the error is reversible under the first prong of the plain-error doctrine because the evidence at trial, as to his being under the influence of alcohol, was closely balanced. We disagree.

¶ 30 In assessing first-prong plain error, we consider whether the outcome of defendant's trial would have been different had the jury been instructed on the definition of "under the influence of alcohol." See *People v. Cook*, 2014 IL App (1st) 113079, ¶ 33. An instructional error is harmless beyond a reasonable doubt where the evidence in support of the verdict is so clear and convincing that the verdict would not have been different had the jury been properly instructed. *Id*. ¶ 32 (citing *People v. Pomykala*, 203 Ill. 2d 198, 210 (2003), and *People v. Furdge*, 332 Ill. App. 3d 1019, 1032 (2002)).

¶ 31 It is a question of fact for the jury to decide whether a defendant was under the influence of alcohol. *People v. Janik*, 127 Ill. 2d 390, 401 (1989). A conviction for driving under the influence of alcohol may be sufficiently supported by "the credible testimony of an arresting officer alone." *People v. Elliot*, 337 Ill. App. 3d 275, 281 (2003). The State need not present scientific proof of intoxication. *People v. Sturgess*, 364 Ill. App. 3d 107, 115 (2006). Relevant evidence of physical and mental impairment includes the officer's testimony as to the smell of an alcoholic beverage on the defendant's breath, glassy and bloodshot eyes, slurred speech and unbalanced walking or standing. *Elliot*, 337 Ill. App. 3d at 281. Testimony that a defendant refused testing is relevant as circumstantial evidence of a consciousness of guilt. *People v. Jones*, 214 Ill. 2d 187, 201-02 (2005). To prove a defendant was under the influence of alcohol, the State must show that the defendant was " ' "less able, either mentally or physically, or both, to exercise clear judgment, and with steady hands and nerves operate an automobile with safety to himself and to the public." ' " *People v. Gordon*, 378 Ill. App. 3d 626, 632 (quoting *People v. Bostelman*, 325 Ill. App. 3d 22, 34 (2001) (quoting *People v. Seefeldt*, 112 Ill. App. 3d 106, 108 (1983))).

¶ 32 Ms. Soto testified that she went to Junior's bar at 11:15 p.m. on November 19, 2011. She saw defendant enter the bar an hour later and order a Corona. Sometime before the bar closed at 3 a.m., she left with defendant who was to drive her home. Ms. Soto did not recall what happened after entering defendant's van. Ms. Soto testified that defendant subsequently told her that during the drive, they fought, and when defendant attempted to stop her from getting out of the van, the van swerved.

¶ 33 Shortly after 2:45 a.m., Officers Flores and Segovia went to the location where defendant's van was parked. Officers Segovia and Flores, experienced and trained police officers, testified as to their observations of defendant at the scene, and later, at the station. Defendant had a strong odor of an alcoholic beverage on his breath, his eyes were bloodshot and his speech was slurred. Defendant had difficulties maintaining his balance when standing and walking and used the van for support. Defendant admitted, at the scene and at the police station, to drinking 40 ounces of Corona. Defendant told Officer Segovia that the van had swerved and struck a pole as he entered the alley. Officer Flores heard defendant apologize to Officer Segovia and state that he should not have had a 40-ounce Corona. Defendant declined medical attention at the scene and had no obvious injury.

¶ 34 Upon arriving at the police station, defendant asked to use the bathroom. He declined requests to do field performance tests and a Breathalyzer test. Defendant fell asleep on a bench while being processed and while being questioned in the interview room. Officer Segovia, based on his significant experience and training as a police officer and his observations of defendant, testified that in his opinion, defendant was under the influence of alcohol.

¶ 35 The evidence of defendant being under the influence of alcohol was clear and convincing. That evidence included defendant's admissions to consuming alcohol before driving and losing control of his van within blocks of the bar. His statement to Ms. Soto about their heated argument, and his conduct which resulted in the van swerving into a pole, is evidence of a lack of "clear judgment" and "steady hand." *Gordon*, 378 Ill. App. 3d at 632. A jury could reasonably find defendant's erratic driving was related to his alcohol consumption which rendered him incapable of driving safely. The officers' observations of defendant at the scene and police station, and defendant's refusal to perform field sobriety and Breathalyzer tests constitute overwhelming evidence that he was under the influence of alcohol as that term is defined by IPI number 23.29. We conclude that the result of the trial would not have been different if the jury was instructed as to the definition of "under the influence of alcohol" as set forth in IPI number 23.29.

¶ 36 Defendant argues that the jury's questions during deliberations demonstrate not only its confusion as to the under the influence of alcohol element which required court clarification, but, also, that the evidence was indeed closely balanced on this issue. We disagree. First, our review of the evidence led to our conclusion that the evidence was not closely balanced but, rather, clear and convincing, that defendant was under the influence of alcohol. The jury's questions do not impact our conclusion as to the evidence.

¶ 37 Further, any issue as to the need to provide clarification of the term "under the influence of alcohol" in response to the jury's questions was not preserved as defendant did not object at trial or in a posttrial motion. *People v. Flores*, 381 Ill. App. 3d 782, 784 (citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)). Moreover, defense counsel agreed with the trial court's responses

to the questions and, thus, defendant is estopped from raising any argument as to those responses. *Flores*, 381 Ill. App. 3d at 784 (citing *People v, Harvey*, 211 Ill. 2d 368, 385 (2004)) ("where a defendant either invites or agrees with a procedure at trial and then later challenges that procedure on appeal, the supreme court has determined that the circumstance exceeds the bounds of waiver and has considered it an issue of estoppel").

¶ 38 We are not convinced that the trial court erred in failing to instruct the jury as to the definition of "under the influence of alcohol." The clear gist of two of the three notes from the jury, the first and the last, concerned whether defendant's blood alcohol level was over the legal limit of .08. Defendant, however, was not charged with driving while his blood alcohol level was greater than the legal limit. Because defendant refused a Breathalyzer test, there was no evidence as to his blood-alcohol level. Any instruction defining the legal limits would have been irrelevant and not warranted by the evidence and the charges.

¶ 39 Furthermore, even if the trial court erred in failing to instruct the jury on the definition of "under the influence of alcohol" as set forth in IPI number 23.29, in response to the jury's questions, the error did not rise to the level of first-prong plain error. The evidence in support of defendant being under the influence of alcohol in this case was substantial, clear, and convincing.

¶ 40 Defendant also argues that the failure to provide IPI number 23.29 constitutes second-prong plain error. Our supreme court has equated the second prong of plain-error review with structural error. *People v. Thompson*, 238 Ill. 2d 598, 613-14 (2010) (citing *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2007)). Structural error is defined as a "systemic error which serves to

'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.' " *Id*. (quoting *Herron*, 215 Ill. 2d at 186)).

¶ 41 An error in the instructions to the jury, including the omission of a jury instruction, may be second-prong error where defendant has established there was a " 'serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law ***.' " *People v. Getter*, 2015 IL App (1st) 121307, ¶ 60 (quoting *People v. Sargeant*, 239 Ill. 2d 166, 190-91 (2010)). "This standard is a difficult one to meet. *Id*. at 190. For example, our supreme court has found that the omission of "the definition of a term used to instruct the jury on the essential issue in the case," (*id*. at 190), and an incorrect instruction, are "not necessarily plain error." *Id*. at 191 (citing *Hopp*, 209 Ill. 2d at 10). See, also *Cook*, 2014 IL App (1st) 113079, ¶ 30 (quoting *People v. Washington*, 2012 IL 110283, ¶ 59).

¶ 42 Defendant's conviction was based on the charge that on November 20, 2011, he "drove or was in actual physical control of a motor vehicle within the State of Illinois, while under the influence of alcohol," while he did not possess a license or a permit. The jury was instructed correctly as to all elements of the offense, that it was the State's burden to prove each of those elements beyond a reasonable doubt, and that defendant had pled not-guilty and was presumed innocent of the charge. The prosecutor and defense counsel presented closing arguments as to the element of "under the influence of alcohol." As we have discussed and found, the State presented overwhelming evidence as to defendant being under the influence of alcohol. We conclude that the omission of the definition of "under the influence of alcohol" did not "create[] 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." *Hopp*, 209 Ill. 2d at 12.

Therefore, we reject defendant's argument that the failure to provide IPI number 23.29 or, otherwise, defines the term "under the influence of alcohol" for the jury in response to its questions, constitute error requiring reversal under the second prong of plain error.

¶ 43 Our decision, that there is no plain error under either prong of the plain-error doctrine, is not changed by defendant's citation of *People v. Delgado*, 376 Ill. App. 3d 307 (2007). In *Delgado*, the defendant was charged with criminal sexual assault and aggravated criminal sexual abuse. The aggravated criminal sexual abuse indictment alleged that the defendant "committed an act of sexual conduct by the transmission of semen onto [the victim's] stomach." *Id*. at 316. The alleged act, transmission of semen, is included in the Criminal Code's definition of "sexual conduct" under section 12-12(e) (720 ILCS 5/12–12(e) (West 2004)), but the jury did not receive an instruction defining "sexual conduct." *Delgado*, 376 Ill. App. 3d at 316. The jury found defendant guilty of aggravated criminal sexual abuse, but not-guilty of criminal sexual assault. The defendant, on appeal, argued that the trial court erred in not instructing the jury as to the definition of "sexual conduct." *Id*. at 312. Because the issue had not been preserved, we conducted a plain-error review. *Id*. at 314. First, this court found the trial court had committed error in not giving an instruction defining "sexual conduct" as was charged in the indictment because that phrase was neither self-defining, nor widely known. *Id.* at 316-17. We then went on to find the error was reversible under the first prong of the plain-error doctrine in that the evidence on this issue was closely balanced. *Id*. at 318.

¶ 44 In contrast, the evidence in this case, as to whether defendant was under the influence of alcohol, was not closely balanced, but clear and convincing. Therefore, *Delgado* is distinguishable and does not support a finding of first-prong plain error.

¶ 45 In *Delgado*, after due consideration of the evidence and the applicable law, we also found second-prong plain error. *Id*. at 320. Because the jury had not been instructed on the meaning of "sexual conduct," the jury was prevented from properly determining whether the defendant was guilty of the offense as it was charged there. *Id*. at 316. We determined that "[t]he jury could have interpreted 'sexual conduct' to include any conduct that was sexual in nature. However, defendant was not charged with any conduct that was sexual in nature; rather, he was charged with sexual conduct by transfer of semen onto the body of [the victim]." *Id*. at 318. In this case, after due consideration of the evidence and the applicable law, we found that grave error did not occur as there was no possibility that the jury incorrectly convicted defendant based on a misunderstanding of the law. Again, *Delgado* is distinguishable.

¶ 46 Finally, defendant argues that a new trial is warranted because his trial counsel was ineffective for failing to submit IPI number 23.29 or object to the trial court's failure to submit the instruction, and for agreeing to the trial court's responses to the jury's questions. We find defendant has failed to demonstrate his trial counsel was ineffective.

¶ 47 To establish ineffectiveness of trial counsel, a defendant must show that his attorney's performance was deficient and that he suffered prejudice as well. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). We may resolve an ineffectiveness of counsel claim by first addressing the issue of prejudice without ever determining there was a deficiency in representation. *People v. Caballero*, 126 Ill. 2d 248, 260 (1989). To prove prejudice, a defendant must show there was a reasonable probability that, but for counsel's claimed deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 689. The evidence of defendant being under the influence of alcohol was clear and convincing,

there was no serious risk that the result of the proceeding would have been different if the jury had received IPI number 23.29, or been instructed as to the definition of "under the influence of alcohol" in response to its questions. Therefore, defendant was not prejudiced by the actions of his counsel and his ineffectiveness claim fails.

¶ 48 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 49 Affirmed.