2017 IL App (2d) 150186-U
No. 2-15-0186
Order filed June 13, 2017

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of Du Page County. |
| Plaintiff-Appellee, | ) | |
| v. | ) | No. 12-DT-1663 |
| RICHARD J. THOMAS, | ) | Honorable Paul Marchese, |
| Defendant-Appellant. | ) | Judge, Presiding. |

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JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Hudson specially concurred.
Justice Zenoff dissented.

## ORDER

¶ 1 *Held*: The trial court erred in failing to instruct the jury on the issue of the voluntariness of defendant's actions where evidence was presented that defendant was in a state of automatism when he drove his car and collided with another vehicle; as there is no double jeopardy impediment to retrial, the trial court is reversed and the cause is remanded for a new trial.

¶ 2 Following a jury trial, defendant, Richard J. Thomas, was found guilty of one count of driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2010)) and failure to reduce speed to avoid an accident (625 ILCS 5/11-601(a) (West 2010)) and was sentenced to 60 days in jail and 24 months of probation. Defendant now appeals from his convictions,

contending that: (1) the trial court erred in refusing to instruct the jury regarding "voluntary act" where evidence was presented that defendant was in a state of automatism when he drove his car; (2) the trial court erred in admitting into evidence purported hospital blood test records; (3) the trial court erred in instructing the jury regarding the hospital blood test and the ratio for converting serum blood alcohol content (BAC) to whole blood BAC; (4) his due process rights were violated where the arresting officer's trial testimony regarding field sobriety tests conflicted significantly with the officer's testimony given at a prior hearing; and (5) he was not proved guilty beyond a reasonable doubt. We reverse and remand for a new trial.

¶ 3 I. BACKGROUND

¶ 4 Defendant was involved in a collision with a parked car on May 15, 2012 and was taken to Hinsdale Hospital by ambulance. He was subsequently charged with DUI (impairment) and failure to reduce speed to avoid an accident.[1]

¶ 5 Defendant filed a motion to quash arrest and suppress evidence. At the hearing Deputy Northrup testified that, at the scene of the collision, he noticed that defendant had a strong odor of alcohol on his breath, glassy and bloodshot eyes, thick-tongued speech, and a lack of knowledge of his whereabouts. Defendant was taken to Hinsdale Hospital, where Northrup later placed him under arrest. Northrup also testified that he performed a horizontal gaze nystagmus (HGN) test on defendant as defendant remained seated in his car after the collision, describing in detail how he performed the test and the results. Errors and contradictions in Northrup's testimony regarding

[1] The State later attempted, on the eve of trial, to add a charge of DUI (BAC of 0.08 or more) pursuant to section 11–501(a)(1) (625 ILCS 5/11-501 (a)(1) (West 2010)). The trial court granted defendant's motion to dismiss on speedy trial grounds, and this court affirmed the dismissal. See *People v. Thomas*, 2014 IL App (2d) 130660.

details such as the time he received the call regarding the collision, when he arrived, when he noticed defendant's lack of sobriety, and when he placed defendant under arrest were of such magnitude that the trial court noted that "the State's going to have significant issues at trial with this matter" and that the court was "very concerned with the cavalier attitude of the arresting officer in his memorializing the dates and times, as well as other material facts—and it is extremely disappointing." However, the trial court denied defendant's motion.

¶ 6 At trial, Northrup testified that, when he first approached defendant at the scene of the collision, he noticed that defendant had a strong odor of alcohol on his breath, bloodshot and glassy eyes, and slurred speech. When Northrup asked him how much alcohol he had consumed that night, defendant said that he had had none. Defendant also seemed confused as to what street he was on and had difficulty in removing his driver's license from his wallet. Defendant answered "no" when asked if he was taking any medications or had any medical conditions and denied taking any illegal drugs. After defendant was taken to Hinsdale Hospital, he voluntarily told Northrup that he "takes Ambien."[2] Defendant did not know if he was prohibited from consuming alcohol while taking Ambien. Northrup never asked hospital staff to take a blood test from defendant. Northrup did not offer any field sobriety tests, including HGN, to defendant, and defendant refused to take any chemical tests.

¶ 7 On cross-examination, Northrup was questioned extensively regarding the contradictions contained in his testimony at the prior hearing on the motion to quash arrest and suppress evidence, his reports, and his trial testimony as to time of the accident and time of arrest. He was also

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[2] Defendant was never charged with DUI (drugs) (625 ILCS 5/11-501 (a)(4) (West 2012)) or DUI (combination of alcohol and drugs) (625 ILCS 5/11-501 (a)(5) (West 2012)).

impeached with his prior testimony at that hearing that he had performed the HGN test on defendant at the scene of the collision.

¶ 8 Michelle Gilland testified that she was the regional manager of laboratory quality, testing, and safety for Adventist Hinsdale Hospital and had been so for 3.5 years. She was familiar with medical records kept by Hinsdale. Gilland was shown what was marked as People's Exhibit 2 for identification, and she recognized it "to be part of a medical chart," including a lab result made as a record of the collection and testing of an individual's blood. She stated that it was made in the regular course of business at Hinsdale Hospital and that an onsite lab at the hospital analyzed blood tests. When asked whether she knew whether the blood that was tested in this case had been tested at the Hinsdale Hospital Lab, she responded, "That's what the report says."

¶ 9 Defendant objected to publishing the exhibit and was allowed to cross-examine Gilland outside the presence of the jury regarding the foundation for admitting the exhibit. When asked, "Where does it say that this test here was actually performed inside the hospital's laboratory?" she replied "It does not state that." She first saw People's Exhibit 2 the day before trial, at the State's Attorney's office. The following colloquy then took place:

> "Q. So have you ever authenticated that this is—this paper, in fact, can be found at the records of the Adventist Hinsdale Hospital?
>
> A. No.
>
> Q. So you're accepting that this is a record of that hospital because they gave it to you and told you that?
>
> A. Because it has our name on it.
>
> Q. Right. So you've never authenticated it?
>
> A. No.

Q. It was printed on October 24th of 2012 underneath here it says?

A. Yes.

Q. Do you know who printed it?

A. No.

Q. Do you know if the State's Attorney printed it?

A. No.

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Q. Can you authenticate this as a true and genuine copy of the business records of Adventist Hinsdale Hospital?

A. No.”

¶ 10 In questioning by the State, Gilland testified that the exhibit did not appear to be altered and that it indicated at the top that it was from Hinsdale Hospital. The court took judicial notice of the subpoena duces tecum requesting the emergency and treatment records of defendant from the keeper of records at Hinsdale Hospital. Under questioning from defense counsel, Gilland admitted that she did not know if the exhibit had been altered and could not say that it was authentic because she had never seen it before the day before trial. She identified the exhibit as a test result for defendant because his name was on the bottom related to a saline lock insertion; there was no patient’s name at the top, where the alcohol test result was. Gilland testified as to how information was entered into a hospital chart: the physician would place an order, the blood sample would be drawn, the sample would be tested in the hospital’s lab, and the result would be “automatically transmitted from the testing instrument into the medical record.

¶ 11 After some additional foundation questions, the court admitted the exhibit into evidence and allowed the State to publish the record pursuant to section 11-501.4 of the Illinois Vehicle

Code (625 ILCS 5/11-501.4 (West 2010)) and the business records exception to the hearsay rule. Gilland testified that the exhibit contained two "blood serum or blood plasma results": the result for May 15, 2012 at 2150 hours was 159.0 milligrams, or 0.159 grams, per deciliter. The court then, at the State's request, took judicial notice of Illinois Administrative Code Chapter 20, Section 1286.40 and instructed the jury:

> "THE COURT: Okay. Ladies and gentlemen of the jury, the State is—I will take judicial notice of the—of that section of the Illinois judicial—excuse me the Illinois Administrative Code.
>
> Folks, what you're about to hear is a form of proof. It's called judicial notice, which I'm taking judicial notice of. Judicial notice of a piece of evidence is just another form of evidence just like testimony or just like an item that's a piece of evidence. And as to judicial notice, you may, but are not required to accept as conclusive any fact judicially noticed."

The State read aloud section 1284.40 that "The blood serum or blood plasma alcohol concentration result will be divided by 1.18 to obtain a whole blood equivalent." The court also took judicial notice "that .159 divided by 1.18 is equal to .134."

¶ 12 On cross-examination, Gilland testified that People's exhibit 2 showed page 26 out of 43 pages, but she did not know where the other pages were. She had not compared the exhibit to any actual records from the hospital and could not authenticate this record. Gilland testified that the exhibit did not state the method by which the test result was obtained, whether it was whole blood, serum, or plasma.

¶ 13 Defendant called Doctor James Thomas O'Donnell, who was tendered to the jury as an expert witness in the field of pharmacology. O'Donnell testified that, based on his conversation

with defendant and his examination of the police reports, hospital records, and defendant's pharmacy records (none of which were entered into evidence), he was aware that defendant had taken Ambien before the collision. One of the side effects of Ambien is sleep driving, which he also described as a type of automatism. In May 2013 (about a year after defendant was arrested), the U.S. Food and Drug Administration (FDA) issued a warning recommending a lowering of recommended dosages from 10 milligrams (which was defendant's prescribed dosage) to 5 milligrams and warning of the concept of sleep driving, which warning was now included in packages of Ambien. Sleep driving was not a voluntary act, as the person doing it "is not thinking about doing it. They're not aware it's happening and they have no recollection or memory of any events while they're under the influence of that drug." In his expert opinion, defendant was, at the time of the collision, "experiencing the effects of Ambien-induced sleep driving, automatism, and that it was—his driving was not a voluntary act." In addition to first-responder reports that noted defendant's confusion, lack of memory, and disorientation at the scene, O'Donnell considered defendant's statement to him that he took Ambien after dinner and went to bed at about 8:00 p.m., with no intention of going anywhere or driving, then woke up in the hospital.

¶ 14 O'Donnell also testified regarding alcohol absorption rates, the differences between whole blood and serum (serum has an "artificial 18 percent elevation" in the amount of alcohol contained versus whole blood), and the fact that conversion rates from serum to whole blood range from 1.09 to 1.5; 1.18 was merely an average rate. Defendant had an abnormal (below average) hemocrit ratio such that the 1.18 conversion rate would have been inapplicable. Further, defendant's symptoms of confusion and lack of memory regarding the collision were inconsistent with a blood alcohol content of 0.134.

¶ 15 On cross-examination, O'Donnell testified that defendant told him that he had consumed a bottle of wine on the night of the collision, but did not specify the time that he consumed it. Defendant took 10 milligrams of Ambien, his prescribed dosage, at 7:00 or 7:30 p.m. O'Donnell was aware that defendant told police that he had not had anything to drink that night. Although defendant told him that he did not remember anything until he woke up in the hospital, O'Donnell was aware that, according to Deputy Northrup, defendant asked where his car was upon waking up at the hospital.

¶ 16 Defendant offered four jury instructions that included language regarding the requirement of a voluntary act, all of which were rejected by the trial court. A modified version of IPI No. 23.13 stated "A person commits the offense of driving under the influence of alcohol when he drives a vehicle while under the influence of alcohol, and his act of driving was a voluntary act." A modified version of IPI No. 23.14, Issues in Driving Under the Influence of Alcohol, included a third proposition "[t]hat the defendant's act of driving was a voluntary act." A non-IPI instruction, based on *People v. Grant*, 71 Ill. 2d 551 (1978) stated:

> "A person is not criminally responsible for an involuntary act. Certain involuntary acts, i.e., those committed during a state of automatism, occur as bodily movements which are not controlled by the conscious mind. A person in a state of automatism lacks the volition to control or prevent the involuntary acts. Such involuntary acts may include those committed during convulsions, sleep, unconsciousness, hypnosis or seizures."

Finally, defendant submitted a non-IPI instruction based on *People v. Martino*, 2012 Il App (2d) 101244 ¶ 13, which stated: "Every offense must include a voluntary act. A defendant is not criminally liable for an involuntary act. Involuntary acts are those that occur as bodily movements which are not controlled by the conscious mind."

¶ 17 The State argued that "there is no voluntary act that is required. The cases that Mr. Ramsell cites all deal with offenses that are not strict liability offenses. They are completely distinguishable." The State further argued that, "even if your Honor is to assume that this voluntariness act is required in a DUI, the State would argue that the voluntariness is being intoxicated." The State later further refined its argument:

> "Taking [*People v.] Martino* [2012 IL App (2d) 101244] that there is a voluntary act that is required of every criminal offense, it states that a voluntary act is required, not that a voluntary act is required of every element that is alleged.
>
> A voluntary act. The State's position is that the driving element is not necessary to be voluntary. The intoxication, impairment, that is necessary to be—that is the voluntary act. So, again, that the defendant voluntarily consumed these substances, this alcohol that caused the intoxication and him being the under the influence."

¶ 18 In rejecting defendant's proffered instructions, the trial court reasoned:

> "If somebody***voluntarily takes Ambien and voluntarily takes alcohol, and then drives, I guess it is a public policy issue.
>
> ***
>
> But here, the defendant voluntarily took the drug. Ambien I am talking about. And here, the defendant voluntarily, along with the Ambien, also consumed alcohol. And it is the fact that the defendant voluntarily took Ambien and voluntarily took alcohol and it's his, as I said, sort of a voluntary intoxication that he is now trying to use to attack the voluntariness of his act.
>
> The fact that he chose to do that on a strict—excuse me an absolute liability offense like driving under the influence of alcohol and the safety concerns that that offense

presents, that leads me to believe that I can't give this instruction, that this isn't a permissible defense under the very specific facts of this case.

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In other words, because there is no mental requirement of a driving under the influence of alcohol, that the voluntariness of the act is being challenged when the defendant voluntarily drank alcohol and took the Ambien as he did here. And I think that that is something that is against public policy as laid out in [*People v.*] *Teschner*. That is why it is an absolute liability offense in the State of Illinois."

The trial court therefore refused to instruct the jury on voluntariness.

¶ 19 The trial court also overruled defendant's objection to an instruction regarding judicial notice:

"You may, but are not required to accept as conclusive any fact that the court has judicially noticed. In this case, the court has taken judicial notice of 20 IL Administrative Code Section 1286.40 which states: 'The blood serum or blood plasma alcohol concentration result will be divided by 1.18 to obtain a whole blood equivalent.' "

Defendant objected because the State failed to establish that the result was a serum test.

¶ 20 The jury returned guilty verdicts on both charges, and the trial court sentenced defendant to 60 days in jail and 24 months of probation. The trial court denied defendant's post-trial and post-sentencing motions, and this appeal followed.

¶ 21 II. ANALYSIS

¶ 22 We first address what the State has styled a motion to clarify, which the State filed on the day after oral arguments were held and which we have ordered taken with the case. In this motion, the State alleges that, in rebuttal oral argument, defense counsel "made two

representations of fact that are untrue and the People were unable to correct these misrepresentations because they were only said in rebuttal." These alleged untrue representations involved the year in which warning labels regarding sleep driving were included on bottles of Ambien (the State in its motion argues 2008) and defense counsel's assertion that the State "drew out literally all the facts about the defendant taking the Ambien" in its cross-examination at trial. The State also attached two exhibits to its motion; these exhibits included newspaper articles regarding Ambien and sleep driving, a computer printout purported to be a news release from the Food and Drug Administration (FDA), and purported FDA-approved labeling for Ambien.

¶ 23 We first note that the State brought up the issue of when the Ambien warning labels appeared at 27:20 of its oral argument before this court:

> "[MR. PSENICKA:] Which has been around since 2007. That exact notice has been around since 2007. [*State v.*] *Arce* tells us that. *** Those warnings have been around since 2007. That, that, uh, Ambien causes sleep driving. That exact warning."

¶ 24 Looking at the evidence in this case, we find that Dr. O'Donnell testified at trial in October 2014 that "the FDA actually issued a strong warning last year to doctors and pharmacists and to patients about the risk of Ambien and sleep driving and other complex behaviors." He was questioned specifically about "the May 14th of 2013 FDA warning from the U.S. Food and Drug Administration requiring a lowering of the recommended doses of Zolpidem and warning of the concept of sleep driving." He stated, "The FDA recommended that the dose be lowered from 10 milligrams to 5 milligrams to limit the driving impairments, the sleepwalking, and also the residual effects that some patients had the day after. And it followed—and that came out in 2013." This testimony was again referenced in defendant's brief on appeal, which was filed in October 2015.

¶ 25 Further, on July 8, before oral argument in this case, the State filed a motion to cite as additional authority *State v. Arce*, Docket No. A-2791-l4T3 (New Jersey Superior Court Appellate Division, July 1, 2016), a non-precedential opinion out of New Jersey. *Arce*, which involved a 2013 DWI, specifically mentioned that the defendant there testified that "the Ambien pill bottle label contained warnings about sleep-walking and sleep-driving." *Arce*, p. 5. However, the defendant's expert in *Arce* testified that "in 2007, the Federal Drug Administration (FDA) directed manufacturers to provide pharmacists and doctors with warnings that a side effect of Ambien is sleep-driving. According to [expert] Lage, the FDA directive did not require distribution of the warnings to patients." *Id* at 6. Inexplicably, this is no different from the evidence of record in the case before us.

¶ 26 Defendant has represented that the FDA warnings did not come out until 2013 for almost two years and has made this point in the trial court, in his appellate brief, and in his appellate arguments. There is no contrary evidence, either in the trial court record or in *Arce*. The State has had all this time to find and present evidence to the contrary; it presented none in the trial court and only attempts to bring it up now, after oral argument, even though it moved to cite *Arce* before oral argument and argued this very point before us. The State does not get another opportunity to argue after oral arguments are finished. We must consider the evidence and arguments to be closed, and we will not consider the exhibits attached to the State's motion to clarify.

¶ 27 The State also alleged that defense counsel misrepresented to this court "that all of the facts regarding Ambien were brought out by the prosecutor in cross examination." The recording of the oral arguments at 41:46 relates:

> "[ATTORNEY RAMSELL:] It was the cross examination, by the prosecutor, that drew out literally all of the facts about the defendant taking the Ambien. Frankly, having

tried the case, if you look at pages 872 [*sic*] to 910 [*sic*], which is the State's cross examination, that's where it comes out that the defendant had a prescription, that it was filled three days before, that he had told the paramedics about it, that it was in the hospital records. They brought that out."

¶ 28 The State then proceeds to list examples of statements regarding Ambien that were brought out in the direct examination of O'Donnell and raise arguments regarding the admissibility of these statements that it had already raised in its appellate brief. No clarification of the testimony is needed, as we have reviewed the reports of proceedings in the preparation of this disposition, and the arguments were already raised. Therefore, we deny the State's motion to clarify.

¶ 29 Defendant first contends that the trial court erred in refusing to instruct the jury with his theory of the case that there was no voluntary act of driving. A defendant is entitled to a jury instruction on his theory of the case if there is some foundation for the instruction in the evidence; if there is such evidence, it is an abuse of discretion for the trial court to refuse to so instruct the jury. *People v. Jones*, 175 Ill. 2d 126, 131-32 (1997). A trial court is justified in giving an instruction based on very slight evidence in support. *Id*. "Furthermore, fundamental fairness includes, among other things, seeing to it that certain basic instructions, essential to a fair determination of the case by the jury, are given." *People v. Hari*, 218 Ill. 2d 275, 296 (2006).

¶ 30 "A material element of every offense is a voluntary act, which includes an omission to perform a duty which the law imposes on the offender and which he is physically capable of performing." 720 ILCS 5/4-1 (West 2010). It is a fundamental principle that a person is not criminally responsible for an involuntary act. *People v. Grant*, 71 Ill. 2d 551, 558 (1978). "A cornerstone of the defense of involuntary conduct is that a person, in a state of automatism, who

lacks the volition to control or prevent his conduct, cannot be criminally responsible for such involuntary acts." *Id.* "Such involuntary acts may include those committed during convulsions, sleep, unconsciousness, hypnosis or seizures." *Id.* "Where the voluntariness of an act is an issue, the jury should be told in the issues instruction that it must find that the act was voluntary." IPI Criminal No. 4.14, Committee Note.

¶ 31 The State, relying on *People v. Teschner*, 76 Ill. App. 3d 124 (1979), argues that DUI is an absolute liability offense such that no mental state is required. See *Teschner*, 76 Ill. App. 3d at 125 ("the general rule is now well established that for motor vehicle offenses a defendant's intent, knowledge, or motive is immaterial to the question of guilt. The only intention necessary for liability for violating the automobile law is the doing of the act prohibited.").

¶ 32 However, *Teschner* did not hold that voluntariness was not at issue in DUI cases; it stated that "intent, knowledge, or motive is immaterial." *Id.* "Intent" and "Knowledge" are mental states. See 720 ILCS 5/4-3, 4-4, 4-5 (West 2010). "A person is not guilty of an offense, other than an offense which involves absolute liability, unless, with respect to each element described by the statute defining the offense, he acts while having one of the mental states described in Sections 4-4 through 4-7." 720 ILCS 5/4-3 (West 2010). *Teschner* was correct when it stated that the mental state was immaterial when considering an absolute liability offense such as DUI. However, "voluntary act" is not a mental state under the Criminal Code of 1961 (Code); it is defined separately in section 4-1 of the Code as a separate "material element of every offense." 720 ILCS 5/4-1 (West 2010). Thus, the State's reliance on *Teschner* is misplaced.

¶ 33 In rejecting defendant's proposed jury instructions, the trial court focused on defendant's "voluntary" ingestion of Ambien and alcohol as defendant's voluntary actions at issue. However, this focus is both blinkered and misdirected. We do not get to choose which elements of the

offense must be voluntary—the act (or acts) that make up the offense must all be voluntary. In this case, the elements of the offense of DUI, pursuant to IPI No. 23.14 ("Issues in Driving Under the Influence of Alcohol"), are: (1) that the defendant drove or was in actual physical control of a vehicle; and (2) that at the time the defendant drove or was in actual physical control, the defendant was under the influence of alcohol. IPI Crim. No 23.14. Both of these propositions must be the result of voluntary actions by the defendant; neither can be involuntary. A party guest who drinks until he passes out and then is placed by the host into his car with his keys in the ignition is in actual physical control of his vehicle and under the influence of alcohol; yet he did not voluntarily obtain physical control, because he did not voluntarily get into the car.[3] Similarly, a driver who was served spiked beverages before he drove away voluntarily drove but was not voluntarily under the influence of alcohol. Contrary to the State's arguments in the trial court (only the element of intoxication need be voluntary), both elements must be voluntary.

¶ 34 The affirmative defense of involuntary intoxication would seem to protect the driver who was slipped a "mickey":

> "A person who is in an intoxicated or drugged condition is criminally responsible for conduct *unless such condition is involuntarily produced* and deprives him of substantial

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[3] "A person need not drive to be in actual physical control of a vehicle, nor is the person's intent to put the car in motion relevant to the determination of actual physical control." *City of Naperville v. Watson*, 175 Ill. 2d 399, 402, (1997). Factors to be considered in finding actual physical control include (but are not limited to): (1) possession of the ignition key; (2) the physical capability to operate the vehicle; (3) the defendant's location in the driver's seat; and (4) the defendant's lone occupancy of the car with the doors locked. *People v. Morris*, 2014 IL App (1st) 130512, ¶ 17.

> capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." (Emphasis added.) 720 ILCS 5/6–3 (West 2012).

Indeed, our supreme court has extended that protection such that "an *unexpected* adverse side effect of a prescription drug that was *unwarned* by the prescribing doctor, the PDR or the package insert *** is 'involuntarily produced' within the plain meaning of the involuntary intoxication affirmative defense statute." (Emphases added.) *Hari*, 218 Ill. 2d at 292. However, in this case, defendant emphatically stated that he was not raising that defense. Instead, defendant here argues, not that he was involuntarily intoxicated (defendant's witness, O'Donnell, testified that defendant told him that he drank a bottle of wine before he went to bed), but that he did not voluntarily drive a vehicle. Section 4-1 of the Code provides that "[a] material *element of every offense* is a voluntary act." (Emphasis added.) 720 ILCS 5/4-1 (West 2010). See *People v. Nelson*, 2013 IL App (3d) 120191 ¶ 26 ("In addition to proving that the defendant performed the *actus reus* with the requisite *mens rea*, the State must also prove beyond a reasonable doubt that the defendant engaged in a voluntary act, for it is a 'fundamental principle that a person is not criminally responsible for an involuntary act.' *People v. Grant*, 71 Ill. 2d 551, 558 (1978)."). We are not to focus on the voluntariness of some precursor act; we are to look to the acts that are the elements of the charged offense. Here, defendant was charged with driving or being in actual physical control of a motor vehicle while under the influence of alcohol. The acts that must be found to be voluntary are driving (or being in actual physical control of) a motor vehicle *and* being under the influence of alcohol. Drinking a bottle of wine before going to bed is not a criminal offense, nor is being under the influence of alcohol by itself a criminal offense. However, driving or being in actual physical control of a vehicle while under the influence of alcohol is an offense. The *actus reus* is driving or being in actual physical control of the vehicle while under the

influence of alcohol. Both the driving (or control) and the intoxication must be voluntarily done. In this case, defendant did not claim that he was involuntarily under the influence of alcohol; his claim of involuntariness applies to his driving, not to his earlier consumption of alcohol.

¶ 35 The State argues that, according to *People v. Wirth*, 77 Ill. App. 3d 253 (1979), and *People v. Dunigan*, 96 Ill. App. 3d 799 (1981), "a defendant can only get an automatism defense instruction when the defendant has some sort of evidence of an organic impairment which leads to an alleged involuntary act." We here review the line of cases that culminates in *Dunigan*.

¶ 36 In *Grant*, 71 Ill. 2d 551, the defendant was convicted of aggravated battery after a fight in a tavern during which he struck a police officer. The defendant was diagnosed with acute alcoholism and epilepsy after the incident. At trial, the diagnosing physician opined that the defendant "was experiencing a psychomotor seizure at the time he struck the police officer, and that defendant lacked the substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." *Id* at 555. Both the defendant and the State tendered jury instructions regarding insanity; the trial court chose the State's version (IPI Criminal No. 24.01 (1968)), which read:

> "A person is insane and not criminally responsible for his conduct if at the time of the conduct, as a result of mental disease or mental defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.
>
> Abnormality manifested only by repeated criminal, or otherwise anti-social conduct, is not mental disease or mental defect."

The defendant did not tender an instruction on any theory other than insanity.

¶ 37 On appeal, the appellate court held that the failure of the trial court to *sua sponte* instruct the jury on the defense of involuntary conduct was a substantial defect requiring the reversal of defendant's conviction. This, in spite of the supreme court's later observation that "the defendant did not try the case on an involuntary conduct defense, did not cite in his post-trial motion the failure to instruct the jury on such a defense, and did not argue in the appellate court that such instruction should have been given." *Grant*, 71 Ill. 2d at 557.

¶ 38 In the supreme court, the defendant argued for the first time "that the jury could not have properly determined that the defendant possessed the requisite volition for criminal responsibility without having been informed of the defense of involuntary conduct through the IPI instruction that 'A material element of every crime is a voluntary act ***.' (IPI Criminal No. 4.14 (1968).)" *Id* at 559. The supreme court found that the defendant had not preserved his right to object to the failure to give an instruction on the defense of involuntary conduct; "[t]herefore, unless the omission of an instruction on involuntary conduct constituted such a substantial defect that the failure of the trial court to *sua sponte* give it resulted in an unfair trial, such omission shall be disregarded on appeal." *Id* at 558. The court further found:

> "The insanity instruction, as tendered, informed the jury that a person is not criminally responsible for his conduct if, at the time of the conduct, as a result of a mental disease or defect, he lacked either the requisite volition or the requisite cognition. Whether the defendant's epileptic seizure could be characterized as a mental disease or defect for the purposes of the insanity defense was never at issue. The only issue was whether the defendant was in fact in the throes of an epileptic seizure which substantially impaired his volitional capacity at the time of the conduct. The record clearly reflects that the insanity instruction and the summations drew the jury's attention fully to the evidence regarding the

> defendant's volition to control or prevent his conduct. Instructing the jury that 'a material element of every crime is a voluntary act' would not have framed the evidence more plainly." *Id* at 559.

Thus, the court found that the failure to *sua sponte* instruct the jury on the defense of involuntary conduct did not deprive the defendant of full and fair consideration on the issue and held that the omission of the instruction was "not so substantial under the circumstances as to require a reversal of the conviction." *Id*.

¶ 39 In *Wirth*, 77 Ill. App. 3d 253, the defendant was convicted of burglary where there was conflicting evidence as to his intoxication. The trial court rejected defendant's non-IPI jury instruction regarding automatism:

> "A person shows automatism or involuntary behavior and is not criminally responsible for his conduct if at the time of the conduct he lacks substantial capacity to either appreciate the criminality of the conduct or to conform his conduct to the requirements of the law." *Id* at 257.

However, the trial court instructed the jury on the defense of voluntary intoxication and also gave IPI Criminal No. 4.14 defining a voluntary act as follows:

> "A material element of every crime is a voluntary act, which includes an omission to perform a duty which the law imposes on the offender and which he is physically capable of performing." *Id* at 258.

¶ 40 The only evidence presented at trial regarding voluntariness was from a psychiatrist who "had never known or examined the defendant and testified he knew nothing about the conduct of the defendant;" the "expert testified in response to a hypothetical question propounded by counsel for defendant." *Id*. The expert stated that his "impression" was that the hypothetical man:

> " 'probably did have an acute organic brain syndrome' and could 'conceivably' have been suffering from hypoglycemia at that time; might have been suffering 'from acute emotional disturbance' and was markedly intoxicated. On cross-examination the doctor testified it was possible the defendant was not suffering from hypoglycemia at the time. Webster's Seventh New Collegiate Dictionary 410 (1967), defines 'hypoglycemia' as an abnormal decrease of sugar in the blood.' " *Id.*

¶ 41 On appeal, the defendant cited to *Grant*. The appellate court found the situation in *Grant* to be "different":

> "In *Grant*, the defendant was suffering from a physical disease. In the instant case, the defendant had no disease and his only problem was one of voluntary intoxication. In the instant case, there is no actual evidence of any organic impairment of defendant at any time. The defendant's evidence consists simply of hypothetical speculation by a psychiatrist, clearly different from specific and positive testimony. There is no evidence in this record that hypoglycemia might or could cause involuntary criminal behavior. We accordingly reject defendant's contention." *Id.*

¶ 42 The *Wirth* court's distinction of *Grant* makes no sense. The defendant in *Grant* had a disease (epilepsy), yet that was not held to be the basis for requiring an instruction on voluntariness; the issue of the defendant's mental disease *viz a viz* his ability to control his conduct was adequately covered by the insanity instruction. The defendant did not tender an instruction on voluntariness, "did not try the case on an involuntary conduct defense, did not cite in his post-trial motion the failure to instruct the jury on such a defense, and did not argue in the appellate court that such instruction should have been given." *Grant*, 71 Ill. 2d at 557. Further, the

supreme court concluded that the trial court in *Grant* did not err in failing to *sua sponte* give such an instruction.

¶ 43 Unfortunately, the court in *People v. Dunigan*, 96 Ill. App. 3d 799 (1981) further muddied the waters. In *Dunigan*, the defendant offered the following jury instructions that were rejected by the trial court:

> "A person is not guilty of an offense unless with respect to each element described by the instruction defining the offense he acted while having one of the mental states described below:
>
> (A) That the person acted intentionally.
>
> (B) That the person knows or acted knowingly.
>
> (C) That the person is reckless or acted recklessly."

And:

> "A person intends or acts intentionally, or with intent or with intent to accomplish a result or engage in conduct described by the instruction defining the offense when his conscious objective or purpose is to accomplish that result or engage in that conduct."
>
> "A person is not guilty of an offense unless he has one of the mental states of either intent, knowledge or recklessness."

However, the trial court did tender to the jury, at defendant's request, the instruction that "A material element of every crime is a voluntary act." *Dunigan*, 96 Ill. App. 3d at 824.

¶ 44 On appeal, the *Dunigan* court stated:

> "The supreme court in *Grant* apparently recognized that I.P.I. Criminal 4.14 is a proper instruction if the evidence supports the automatism defense. *Wirth expanded upon Grant by*

*finding that an automatism instruction need only be given when defendant offers evidence of his organic impairment which leads to involuntary criminal behavior.*

In the instant case, the court tendered to the jury the instruction implicitly found by the court in *Grant* to properly describe the automatism defense *even though defendant here, as in Wirth, offered no psychiatric testimony of organic impairment rendering his conduct on the day in question involuntary.* Therefore, we find that the trial court did not err in rejecting the non-I.P.I. instructions offered by defendant on his theory of the case." (Emphases added.) *Id* at 825-26.

¶45 All this shows that *Wirth* and *Dunigan* have misread, misinterpreted, and misapplied *Grant*. No fair reading of *Grant* can lead to the conclusions stated in those cases, and the State's argument based on that line of cases must be rejected. There is no basis in *Grant* for *Wirth*'s holding that a defendant can only get an automatism defense instruction when the defendant has some sort of evidence of an organic impairment which leads to an alleged involuntary act. Certainly, our supreme court in *Hari*, decided more than 30 years after *Wirth* and *Dunigan*, neither recognized nor imposed any such restriction on acts that are produced by an unexpected adverse side effect of a prescription drug that was unwarned by the prescribing doctor, the PDR or the package insert.[4]

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[4] The supreme court has also recently declared that, in a prosecution for aggravated driving under the influence, a defendant should have been allowed to present evidence that an unforeseen medical condition (low blood pressure), rather than presumed drug impairment, led her to lose consciousness and was the sole proximate cause of the resulting collision with the victim's vehicle; nothing in the DUI statute (625 ILCS 5/11-501(a)(6), (d)(1)(C) (West 2010)) prevented a defendant from raising an affirmative defense. *People v. Way*, 2017 IL 120023 ¶¶ 31-32. The

¶ 46 The special concurrence states that *Wirth* and *Dunigan* "broadly support" its proposition that defendant's automatism must not be the product of a voluntary act in order instruct the jury on the defense. See *infra* ¶ 84. This is an odd statement to make, as both *Wirth* and *Dunigan* required evidence of an "organic impairment" and would have denied the very relief to this defendant that the special concurrence agrees should be granted.

¶ 47 No statutory or case law suggests that, where voluntariness is at issue, the jury should not be instructed on the issue. On the contrary, "[w]here the voluntariness of an act is an issue, the jury *should be told* in the issues instruction that it must find that the act was voluntary." (Emphasis added.) IPI Criminal No. 4.14, Committee Note.

¶ 48 The State argues that defendant "did not offer any competent evidence to support his proposed instructions," listing a load of facts about defendant's alleged Ambien usage that "could not come in through his expert[,] as such statements were hearsay and only admissible to explain the basis for the expert's opinion." "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Ill. R. Evid. 703 (eff. Jan 1, 2011). Further, "[t]estimony in the form of an opinion or inference

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court opined that a defendant may raise a sudden, unforeseeable medical condition that does not address presumed impairment, but rather proximate cause, as a defense to a charge of aggravated DUI. *Id*. Unlike in *Way*, defendant here is claiming that the State failed to prove that his driving was a voluntary act due to his medical condition (automatism) brought on by the Ambien. He is not arguing against presumed impairment, he is arguing the State's failure to prove an element of the charge.

otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Ill. R. Evid. 704 (eff. Jan 1, 2011). Ordinarily, a limiting instruction is the proper remedy when evidence is admitted for only a limited purpose. *People v. Scott*, 148 Ill. 2d 479, 527-28 (1992). The State would have been entitled to such an instruction had it requested one; however, not only did the State not request such an instruction, it even substantively argued to the jury hearsay evidence brought out on cross-examination of O'Donnell, such as :

> "Then the expert gets up there and says, defendant told me he had a bottle of wine that evening.
>
> Now, a crash like this happens not from Ambien, but from a person who drinks a bottle of wine, gets behind a wheel of a car. That's how this happens."

The State's failure to seek a limiting instruction and its own use of hearsay statements belie its argument.

¶ 49 Further, on direct examination by the State, Deputy Northrup testified that defendant told him that he took Ambien. Dr. O'Donnell then testified that, in his professional opinion, based on the police and medical reports and his conversations with defendant, defendant was, at the time of the collision, "experiencing the effects of Ambien-induced sleep driving, automatism, and that it was—his driving was not a voluntary act." Thus, there was competent evidence regarding defendant's use of Ambien and expert testimony that the Ambien led to automatism such that defendant's "driving was not a voluntary act." The State's argument amounts to an argument about weight of evidence, not lack of evidence, and it fails.

¶ 50 The dissent similarly complains about the weight of the evidence submitted by defendant. The dissent complains that defendant submitted no evidence regarding the warnings (or lack of

same) included on his bottle of Ambien or given to him by his physician, and failed to submit into evidence his pharmacy records. *Infra* ¶ 98. The dissent further states:

> "a lack of evidence that defendant *was* specifically warned about the possible side effect of automatism does not amount to evidence that he was *not* warned. Any inference that could be drawn from the absence of evidence of a specific warning was too remote to constitute the very slight evidence necessary to require the instruction." (Internal quotation marks omitted.) *Infra* ¶ 98.

We first note that defendant is not required by law to present any evidence, let alone evidence that might not support his defense. That job is generally reserved for the State. In this case, the State did attempt to bring in evidence regarding Ambien labeling, albeit almost two years after the close of trial (see *supra* ¶¶ 22-26), and even cited *Arce* as additional authority even though it tended to support, not impair, O'Donnell's testimony regarding the labeling. See *supra* ¶ 25. The only proper inference that can be drawn from the evidence (and lack of same) presented in this case is that defendant was *not* warned of the possible side effects of Ambien.

¶ 51 The dissent's complaint also demonstrates a misunderstanding of defendant's automatism defense. The defense is not that defendant was not warned by the FDA that Ambien might cause sleep driving; the defense is that defendant took Ambien and did sleep drive such that he did not voluntarily drive the car. The failure to warn is not the *sine qua non* of the defense; there may be other factors that allow the defense to be presented to the jury, such as what reactions to a prescription are reasonably expected and issues of constructive notice. This misunderstanding leads to the dissent's incorrect claim that "any inference that could be drawn from the absence of evidence of a specific warning was too remote to constitute the very slight evidence necessary to require the instruction." (Internal quotation marks omitted.) *Infra* ¶ 98.

The dissent ignores all of O'Donnell's testimony about Ambien, sleep driving, and automatism and claims that there was not even slight evidence regarding the automatism defense. Defendant used evidence (or lack of same) regarding warnings to bolster his defense, but it was not his defense.

¶ 52 The trial court looked to cases from several foreign jurisdictions to support its decision to decline to give defendant's instructions regarding voluntariness, including *State v. Clowers*, 217 N.C. App. 520 (2011), *State v. Newman*, 353 Or. 632 (2013), and *Polston v. State*, 685 P.2d 1 (Wy. 1984). First, we note that, as foreign jurisdiction decisions, these cases are not precedential or binding on this court. See *In re A.C.*, 2016 IL App (1st) 153047 ¶ 47. Comparable cases from foreign jurisdictions may be considered for their persuasive value. *Id*. However, none of these cases involved the use of Ambien, and all involved voluntary intoxication or the combination of alcohol and a prescription drug not at issue here. Further, while the State chain cited these cases in its brief, it provided no analysis of the cases in its argument (and only a one-sentence abstract of each case in its summary of the trial court's ruling), and it did not raise the cases at oral argument. Thus, the State's "argument" based on these cases is forfeited.

¶ 53 The special concurrence finds *Clowers* to be "more factually on point" with the case before us than were *Wirth* and *Dunigan* (which were not at all on point) and relies on it for support. *Infra* ¶ 84. In *Clowers*, the defendant took Alprazolam to treat panic attacks. He went to a party, where he " 'had a few drinks.' " *Clowers*, 217 N.C. App. at 523. He was later involved in a collision while driving, but he testified that he "blacked out" (*Id* at 528) and "that he did not remember anything after having a few drinks until 'regaining consciousness' the next day while lying on a bench in a jail cell." *Id* at 523. However, there was no evidence, let alone expert testimony, regarding any potential side effects of Alprazolam, whether taken alone or in

combination with alcohol, and specifically, no evidence that the use of Alprazolam was in any way linked to automatism. Further, the court in *Clowers* (and the trial court in the case before us) implied that the defendant was warned of the "possible side effect" (never identified in *Clowers*) and nonetheless voluntarily ingested the drug (see *id* at 528); this clearly was not the evidence in this case. Finally, the defendant in *Clowers* never claimed that he did not voluntary drive; he claimed merely "that he blacked out and has no memory of what happened on the night in question." *Id* at 528. There is nothing in *Clowers* to indicate whether he blacked out before or after he commenced driving. Thus, there is no evidence in *Clowers* of a probable instance of automatism. The fact that the court of appeals of North Carolina concluded that the defendant was not entitled to an instruction on automatism is not instructive here, as there was no evidence of automatism in that case. *Clowers* is not comparable and provides counterfactual misguidance.

¶ 54 The special concurrence also fails to notice that the *Clowers* court stated that, while the defense of automatism did not apply in cases " 'in which the mental state of the person in question is due to***voluntary intoxication resulting from the use of drugs or intoxicating liquor' " (not at issue in our case), it *does* apply in cases " 'of the unconsciousness of persons of sound mind as, for example, somnambulists*** in which there is no functioning of the conscious mind and the person's acts are controlled solely by the subconscious mind.' " *Id* at 528-29 (quoting *State v. Williams*, 252 S.E.2d 749, 743 (1979). A somnambulist is "one who is subject to somnambulism," which is defined as "the action of walking or *the performance of other motor acts while asleep* and specif. when the actions are not recalled after waking." (Emphasis added.) Merriam-Webster's Third New International Dictionary 2172 (1993). Thus, in *dicta*, *Clowers* actually *supports* the giving of an automatism defense here.

¶ 55 Neither the special concurrence nor the dissent ever explains how someone can voluntarily induce a state of automatism. The lack of an explanation arises from a basic defect in the reasoning of both the special concurrence and the dissent—the inability to comprehend the difference between a state of intoxication and a state of automatism. Voluntary intoxication and automatism are mutually exclusive. Intoxication has two possible states: one is a state of diminished consciousness where the person's inhibitions are lowered and he allegedly cannot judge right from wrong; the second is an immobile unconsciousness, *i.e.*,passed out. Automatism involves *mobile* unconsciousness---the performance of actions "without the doers intention or awareness." Merriam--Webster's Medical Dictionary (2010), available at http://www.merriam-webster.com/medlineplus/automatism (last visited April 25, 2017); see also *Clowers*, 217 N.C. App. At 436 ("the unconsciousness of persons of sound mind as, for example, somnambulists *** in which there is no functioning of the conscious mind and the person's acts are controlled solely by the subconsciousness mind." (Internal quotation marks omitted.)) Automatism cannot, by definition, be equated with voluntary intoxication. The inebriated party guest who micturates on the rug and passes out on the couch is not an automaton. The special concurrence conflates an intoxicated or drugged condition of consciousness, based on the ingestion of intoxicants and unprescribed drugs, with unconscious automatism. See *infra* ¶ 86. Not only is this improper and illogical, it leads to a conclusion far beyond what is necessary to dispose of this case.

¶ 56 One can voluntarily become inebriated, which will lead to diminished consciousness or unconsciousness, but how can one voluntarily induce automatism? There was nothing in the record that informed defendant that he could induce, let alone guarantee, a state of automatism by voluntarily taking the drug; *ergo*, the alleged prohibition is not specifically, let alone impliedly,

contained in the record. We are not aware of any treatise or scientific paper, or anything else, that defines, let alone describes, voluntary automatism. This alleged preclusion is not supported in scientific theory or in the record, nor is it supported by law. Ambien is not "Zombie Pill, guaranteed to make you an automaton or your money back!" While automatism might be a side effect of Ambien, how often does it occur? It is one thing to say that automatism is voluntarily induced if you know that automatism *must* result from its ingestion; however, it is a quantum leap to say that it is voluntarily induced if there is a *possibility* that automatism *may* result from taking your prescribed dosage of Ambien. Must any drug that comes with an FDA warning regarding somnambulism as a possible side effect of the prescribed dosage also include the warning that "any criminal actions committed while in such a state will be prosecuted to the fullest extent of the law"?

¶ 57 The dissent demonstrates this indiscriminate view when it states that defendant's argument is nothing more than attempt to "give new life" to the prohibited defense of voluntary intoxication and summarizes defendant's argument as "he was too impaired to control his actions such that he did not 'voluntarily' drive his car." *Infra* ¶ 96. This is an invalid summarization. Defendant never claimed that he was impaired and could not control his actions; he claimed that he was *unconscious* and that he *performed a motor act (driving) while asleep*. Further, the dissent does not inform us what faculty of defendant was supposedly impaired. Impair is defined as "to make worse: diminish in quantity, value, excellence, or strength." Merriam-Webster's Third New International Dictionary 1131 (1993). What does the dissent mean—that defendant's consciousness was diminished in value or excellence? The dissent misrepresents the defense as diminished consciousness; the defense is a lack of consciousness.

¶ 58 The state of medical science and the state of the law criminalizing involuntary acts have created a conundrum in how to deal with drug-induced automatism that arises while the defendant is under the supervision of a doctor. Neither the legislature nor our supreme court has resolved the tension between the good-faith ingestion of prescribed drugs and the possible or probable side effects that result in property damage and/or personal injury. The special concurrence attempts to establish the law; however, the record in this case and the state of medical science are insufficient to set the parameters in this area. Nevertheless, based upon this record, this defendant deserves a new trial to present his defense.

¶ 59 Again, there need be only "some foundation" in the evidence for an instruction to be given; even "very slight evidence" is sufficient. *Jones*, 175 Ill. 2d at 131-32. Here, there was evidence that defendant's driving was not a voluntary act and that he was suffering from "the effects of Ambien-induced sleep driving, automatism." That was defendant's entire defense, and he was entitled to instructions on his defense.

¶ 60 Defendant offered four jury instructions, all of which the trial court rejected. Two of the instructions (Definition of Driving Under the Influence of Alcohol and Issues in Driving Under the Influence of Alcohol) were modified IPI instructions (IPI Criminal Nos. 23.13 and 23.14, respectively). The other instructions were non-IPI instructions attempting to define involuntary acts and were based on case law.

¶ 61 "The sole function of instructions is to convey to the jury the correct principles of law applicable to the evidence submitted to it in order that, having determined the final state of facts from the evidence, the jury may, by the application of proper legal principles, arrive at a correct conclusion according to the law and the evidence." (Internal quotation marks omitted.) *People v. Hudson*, 222 Ill. 2d 392, 399 (2006). The instructions given to the jury, considered as a whole,

must fully and fairly announce the law applicable to the respective theories of the People and the defense. *Id*. Pursuant to Supreme Court Rule 451(a) (eff. Apr. 8, 2013) a trial court must instruct the jury pursuant to the IPI criminal instructions unless the trial court determines that the IPI instruction does not accurately state the law; where there is no IPI jury instruction on a subject that the court determines the jury should be instructed, the court has the discretion to give a non-IPI instruction. *Id* at 399-400. We will not disturb a trial court's decision to instruct a jury using a non-IPI instruction absent an abuse of that discretion. *Id* at 400. An abuse of discretion occurs in refusing to give a non-IPI instruction when there is no IPI instruction applicable to the subject on which the jury should have been instructed, and the jury was left to deliberate without proper instructions; however, refusal to give a non-IPI instruction does not constitute an abuse of discretion if there is an applicable IPI instruction and/or the essence of the refused instruction is covered by other given instructions. *People v. Nutall*, 312 Ill. App. 3d 620, 633 (2000).

¶ 62 As we have already seen, the Committee Note. To IPI Criminal No. 4.14 requires that, "Where the voluntariness of an act is an issue, the jury should be told in the issues instruction that it must find that the act was voluntary." Defendant tendered a modified version of IPI No. 23.14, Issues in Driving Under the Influence of Alcohol, that included a third proposition "[t]hat the defendant's act of driving was a voluntary act." This instruction is in accord with the Committee Note, and the trial court erred in refusing to give this instruction to the jury.

¶ 63 The trial court also refused defendant's modified version of IPI Criminal No. 23.13, Definition of Driving Under the Influence of Alcohol, and his non-IPI instructions based on *Grant*, 71 Ill. 2d 551 (1978) and *People v. Martino*, 2012 IL App (2d) 101244 ¶ 13, which attempted to define involuntary acts. However, we need not determine whether any of these particular instructions must be given on retrial. The parties do not contest whether the *particular* non-IPI

instruction on automatism were proper. (Obviously, once the trial court ruled that defendant was not entitled to raise the defense, the parties had no need to contest how the jury should have been instructed on it.) They also did not address which party had the burden to prove the applicability or inapplicability of the defense that refutes the State's burden to prove the voluntary act. We do not suggest how, if at all, proper instructions should address these issues. As the parties have not explored them on appeal, we leave the parties to do so on remand. If the evidence on retrial warrants instructions on voluntariness, the trial court must exercise its discretion in adopting tendered instructions or crafting instructions on its own such that the instructions that are given to the jury, considered as a whole, "fully and fairly announce the law applicable to the respective theories of the People and the defense." *Hudson*, 222 Ill. 2d at 399.

¶ 64 The dissent argues that defendant failed to propose accurate jury instructions in the trial court and has, thus, forfeited his right to appeal the trial court's refusal to instruct the jury. *Infra* ¶ 99. Supreme Court Rule 366(b)(2)(i) prevents a party from raising on appeal "the failure to give an instruction unless the party shall have tendered it." Defendant appeals from the trial court's refusal to instruct the jury on his defense and give to the jury the instructions that he tendered to the court. However, the dissent finds forfeiture in defendant's failure to tender the instructions that the dissent thinks *should* have been tendered. But there is no Illinois statutory or case law that requires proof of involuntariness of the automatistic state in order to raise a defense of automatism; how could defendant be required to propose instructions expressing a "requirement" that exists nowhere outside of the dissent's current position that was generated more than two years after the trial?

¶ 65 Furthermore, in order to find forfeiture, we would have to find that the trial court precluded defendant from instructing the jury on the defense because the tendered instructions were

improper. That is not what the record here reflects. This case does not involve a question of failing to submit instructions. It is the dissent's contention that the wrong instructions were tendered; however, the trial court did not make that ruling. The trial court disallowed the instructions because it disallowed the defense ("this isn't a permissible defense under the very specific facts of this case."). Again, the dissent fails to cite to any authority for the proposition that, where instructions were submitted and the defense was disallowed "as against public policy," the instructions are deemed forfeited for failure to amend them to comply with the court's ruling.

¶ 66 Voluntariness was an issue for the jury to decide. When the evidence raises the basis for an instruction, a trial court's refusal results in a denial of defendant's due process and entitles a defendant to a new trial. *Hari*, 218 Ill. 2d at 296. The trial court's refusal to so instruct the jury was an abuse of discretion and error, and we must reverse defendant's convictions and remand for a new trial with proper instructions.

¶ 67 While we hold that a new trial must be held, we need not address which of O'Donnell's statements were substantive and which were admissible only to explain the basis for the expert opinion. We also need not further address when the warnings regarding Ambien and sleep-driving were promulgated and ordered attached to Ambien bottles. The only evidence in this case was O'Donnell's testimony that the warnings were not given until *after* defendant was charged. The State and defendant can provide to the jury whatever evidence on the existence (or lack thereof) of warnings they can muster on retrial. However, even then, we are not determining that the issue of the warning is dispositive. The trier of fact must determine if defendant's driving was a voluntary act in light of the totality of the evidence presented on retrial.

¶ 68 We will address defendant's other contentions, as they are likely to arise again on remand. Defendant next contends that the trial court erred in admitting People's Exhibit 2 into evidence.

Through section 11–501.4 of the Vehicle Code, "[o]ur State legislature has determined that lab reports of hospital blood tests conducted in the regular course of providing emergency medical treatment are admissible in prosecutions for DUI under the business records exception to the hearsay rule." *People v. Henderson*, 336 Ill.App.3d 915, 920–21 (2003). Section 11–501.4 sets forth the specific foundational requirements for the admission of blood alcohol test results. *People v. Olsen*, 388 Ill. App. 3d 704, 710 (2009).

¶ 69 Section 11–501.4 provides in part:

> "(a) Notwithstanding any other provision of law, the results of blood tests performed for the purpose of determining the content of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof, of an individual's blood conducted upon persons receiving medical treatment in a hospital emergency room are admissible in evidence as a business record exception to the hearsay rule only in prosecutions for any violation of Section 11–501 of this Code or a similar provision of a local ordinance, * * * when each of the following criteria are met:
>
> (1) the chemical tests performed upon an individual's blood were ordered in the regular course of providing emergency medical treatment and not at the request of law enforcement authorities;
>
> (2) the chemical tests performed upon an individual's blood were performed by the laboratory routinely used by the hospital; and
>
> (3) results of chemical tests performed upon an individual's blood are admissible into evidence regardless of the time that the records were prepared." 625 ILCS 5/11–501.4 (West 2010).

¶ 70 Deputy Northrup testified that he saw hospital personnel treating defendant and that he never asked hospital staff to take a blood test from defendant. Gilland testified that she was familiar with Hinsdale Hospital medical records and that an onsite lab at the hospital analyzed blood tests. When asked whether she knew whether the blood that was tested in this case had been tested at the Hinsdale Hospital Lab, she responded, "That's what the report says," although she had to admit on cross-examination that the exhibit did not state that the test was actually performed inside the hospital's laboratory. Thus, if there was a blood test taken it was not at the behest of the police and the only other reasonable conclusion is that it was done upon the order of a doctor. The testimony of Gilland was sufficient, if believed, to establish that the lab work was obtained in a routine manner regardless of where it might have been analyzed.

¶ 71 Defendant next contends that the trial court erred in instructing the jury that the blood alcohol test was a serum blood test; further, the court erred in instructing the jury that the proper conversion ratio to whole blood was 1.18. In addition to announcing to the jury that it was taking judicial notice of Illinois Administrative Code Chapter 20, Section 1286.40, the trial court provided the following written instruction to the jury:

> "You may, but are not required to accept as conclusive any fact that the court has judicially noticed.
>
> In this case, the court has taken judicial notice of 20 IL Administrative Code Section 1286.40, which states:
>
> > 'The blood serum or blood plasma alcohol concentration result will be divided by 1.18 to obtain a whole blood equivalent.[']"

Defendant argues that the instruction was improper because the evidence was not clear as to whether the test results were for whole blood or serum or plasma. Gilland testified that there were

two results "of blood serum or blood plasma alcohol concentration" listed on People's Exhibit 2; however, on cross-examination, she stated the exhibit did not say what type of blood alcohol test was performed.

¶ 72 Even if this were error, we find no prejudice here. The undisputed test result was 0.159. If this was whole blood, defendant's blood alcohol concentration (BAC) was 0.159. If it was serum/plasma, the conversion rate of 1.18 resulted in a BAC of 0.134. Even using Dr. O'Donnell's range of serum/plasma conversion rates (1.09 to 1.5) results in BAC readings of 0.146 to 0.106. All of these possible results are above 0.08 and would have entitled the State to the presumption that defendant was under the influence. As we find no prejudice, we find no reversible error here.

¶ 73 Defendant next contends that his due process rights were violated where Deputy Northrup's trial testimony regarding field sobriety tests conflicted significantly with his testimony from the hearing on the motion to quash and suppress such that the trial court should have dismissed the charges against defendant or granted a new trial and barred the officer's testimony. Defendant seeks either the grant of a new trial with Northrup barred from testifying or outright dismissal of the charges against him. We have already determined that defendant must receive a new trial. However, we find no basis to bar Northrup's testimony. While Northrup's testimony was thoroughly impeached, the trier of fact is in the best position to judge credibility of witnesses, resolve conflicts in the evidence, and draw conclusions based on all the evidence. See *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 21. Defendant will have the opportunity to impeach Northrup and assail his credibility before a new jury.

¶ 74 Defendant finally contends that he was not proved guilty beyond a reasonable doubt of either charge against him. Although we have already determined that defendant is due a new trial,

our reversal of defendant's conviction raises the double jeopardy issue. The double jeopardy clause of the United States Constitution prohibits the State from having another opportunity to try a case unless it has presented in the first trial sufficient evidence to prove the defendant guilty beyond a reasonable doubt. *People v. Johnson*, 2013 IL App (2d) 110535, ¶ 84. Thus, before remanding for a new trial, double jeopardy requires this court to rule upon the sufficiency of the evidence. *People v. Taylor*, 76 Ill. 2d 289, 309 (1979); *Johnson*, 2013 IL App (2d) 110535, ¶ 84. We must determine whether, after considering all of the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985).

¶ 75 Here, looking at the evidence in the light most favorable to the prosecution, we see that defendant was identified as the driver of the car that collided head-on with the parked car of Laima Sineokijiene. Northrup testified that defendant had bloodshot, glassy eyes, slurred and mumbled speech, and an odor of alcohol coming from his mouth. Hospital records showed a BAC of at least .134. Defendant's own expert testified that defendant told him that he drank an entire bottle of wine the night of the collision. A rational trier of fact could have found defendant guilty of both charges against him. Thus, we conclude that there is no double jeopardy impediment to retrial. See *People v. Olivera*, 164 Ill. 2d 382, 393 (1995) ("Although the double jeopardy clause precludes the State from retrying a defendant after a reviewing court has determined that the evidence introduced at trial was legally insufficient to convict, the double jeopardy clause does not preclude retrial of a defendant whose conviction has been set aside because of an error in the proceedings leading to the conviction.").

¶ 76 In a fanciful bit of *dicta*, the special concurrence claims that, as the dissent agrees with the special concurrence "that automatism is a defense only if the condition was involuntarily

produced,***a majority of this panel has subscribed to this view of the automatism defense, and thus it is this view that the parties and the trial court must effectuate on remand." *Infra* ¶ 91. This argument harkens back to the case of *Reliable Fire Equipment Co. v. Arredondo*, 405 Ill. App. 3d 708 (2010) (reversed, 2011 IL 111871). In *Reliable Fire*, Justice Zenoff delivered the judgment of the court while (then) Justice Hudson wrote a special concurrence. Justice O'Malley, dissenting, claimed that, as he agreed with the reasoning of the special concurrence, "[t]he special concurrence and dissent, therefore, form the majority on the significant legal issue decided in this case." *Id* at 753 (O'Malley, J., dissenting). For various reasons, including the fact that "[t]he lead opinion and the special concurrence also agree that the facts of this case do not warrant reversal or remand," Justice Zenoff found that "the dissent's self-portrayal as part of the majority is unsubstantiated." *Id* at 738. It is ironic that Justice Zenoff now accedes to pressing the same gambit she so forcefully fought against in *Reliable Fire*.

¶ 77 The special concurrence here cites no authority for this attempt to cobble together a "majority" out of a special concurrence and *dicta* contained in a dissent, and does not even mention *Reliable Fire*. The dissent does not agree with the majority (including the special concurrence) that this defendant should receive a new trial; how, then, can the dissent have any voice in how the retrial that we order here today is to be conducted? A dissent is not the law of the case. *AMF, Inc. v. Victor J. Andrew High School*, 172 Ill. App. 3d 337, 342 (1988). See also *County of Du Page v. Lake Street Spa, Inc.*, 395 Ill. App. 3d 110, 123 (2009) ("Unfortunately for the County, it was the dissent that stated that proposition, not the majority, and it is not the holding in that case. Rather, *Bradley* holds that the trial court is bound by the views of law expressed in the appellate court's resolution of the case, unless the facts presented require differently.") The musings of a dissent that does not even agree that a remand is required have no impact on the new trial that

results from this judgment order. It is all *dicta*. On remand, the trial court is bound to follow the judgment order of this court.

¶ 78 III. CONCLUSION

¶ 79 For these reasons, the judgment of the circuit court of Du Page County is reversed, and the cause is remanded for a new trial consistent with this judgment order.

¶ 80 Reversed and remanded for a new trial consistent with this judgment order.

¶ 81 PRESIDING JUSTICE HUDSON, specially concurring.

¶ 82 I agree with Justice McLaren that defendant is entitled to a new trial because he was entitled to jury instructions on the defense of automatism. However, at least under these facts, I disagree with Justice McLaren's view of the parameters of that defense, and thus I disagree with his view of what proper instructions on that defense must convey.

¶ 83 In Justice McLaren's view, defendant was entitled to present the defense of automatism because he presented at least slight evidence that his driving was not the product of a voluntary act. However, in my view, the automatism defense required evidence not only that defendant's *driving* was not the product of a voluntary act, but also that defendant's *automatism* was not the product of a voluntary act.

¶ 84 *Wirth* and *Dunigan* broadly support this latter proposition,[5] but *Clowers* is more factually on point. In *Clowers*, the defendant testified that he mixed alcohol and Alprazolam and that he

[5] Justice McLaren (*supra* ¶ 46) calls this an "odd statement," insofar as *Wirth* and *Dunigan* spoke in terms of "organic impairments." See *Dunigan*, 96 Ill. App. 3d at 826 ("*Wirth* expanded upon *Grant* by finding that an automatism instruction need only be given when defendant offers evidence of his organic impairment which leads to involuntary criminal behavior."). However, the *Wirth* court used those terms only to distinguish *Grant*. See *Wirth*, 77 Ill. App. 3d at 258 ("In

was subsequently conscious of nothing until he woke up the next day in a jail cell. At his trial for DUI, he proposed a jury instruction on automatism, which the trial court refused. On appeal, the court observed that, as defendant argues here, " '[i]f a person is in fact unconscious at the time he commits an act which would otherwise be criminal, he is not responsible therefor. The absence of consciousness not only precludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability.' " *Clowers*, 720 S.E.2d at 436 (quoting *State v. Williams*, 252 S.E.2d 739, 743 (1979)). However, the court further observed that the defense was limited: it " 'does not apply to a case in which the mental state of the person in question is due to…voluntary intoxication resulting from the use of drugs or intoxicating liquor, but applies only to cases of the unconsciousness of persons of sound mind as, for example, somnambulists or persons suffering from the delirium of fever, epilepsy, a blow on the head or the involuntary taking of drugs or intoxicating liquor, and other cases in which there is no functioning of the conscious mind and the person's acts are controlled solely by the subconscious mind.' " *Id.* (quoting *Williams*, 252 S.E.2d at 743). The court held: "Here, even though defendant testified that it was not his intention to drink alcohol in excess on the night in question, there was no

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*Grant*, the defendant was suffering from a physical disease. In the instant case, the defendant had no disease and his only problem was one of voluntary intoxication. In the instant case, there is no actual evidence of any organic impairment of defendant at any time."). Thus, the crux of *Wirth* was that the automatism defense was unavailable because the defendant's alleged automatism was the product of a voluntary act. The *Dunigan* court's statement that, per *Wirth*, an automatism instruction requires evidence of an "organic" (as opposed to involuntary) impairment might be imprecise, but *Dunigan* remains consistent with the view that the defense is available only where the automatism was not the product of a voluntary act.

evidence that his consumption of alcohol was involuntary. Further, despite the possible side effect of Alprazolam, defendant testified that his ingestion of the anxiety drug was also voluntary. Therefore, the defense of automatism was not available to defendant. [Citation.] Therefore, the trial court did not err in denying defendant's requested jury instruction as to automatism or unconsciousness as the evidence, even viewed in the light most favorable to the defendant, [citation], did not support that instruction." *Id.*

¶ 85 Justice McLaren does not acknowledge this limit on the defense. In his view, if a defendant drives unconsciously, he cannot be guilty of DUI, no matter how he became unconscious. Thus, here, in his view, the question is simply whether defendant drove unconsciously; even if defendant had been on notice that his consumption of alcohol and Ambien could cause him to drive unconsciously, the fact that he drove unconsciously—if indeed he did—absolves him of liability.

¶ 86 I disagree. By statute, "[a] person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is *involuntarily produced* and deprives him of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." (Emphasis added.) 720 ILCS 5/6-3 (West 2014); see also Illinois Pattern Jury Instructions, Criminal, No. 24-25.03 (4th ed. 2000). When a person voluntarily produces an intoxicated or drugged condition, we do not reward that person with immunity for his acts, even if, due to the condition, his acts are not strictly voluntary. The same principle should apply here. Based on the facts of this case, the thrust of the defense is that because of the unexpected adverse side-effect of Ambien that was unwarned by the prescribing doctor, the PDR or the package insert, the defendant lapsed into an automatistic state and did not

voluntarily drive his vehicle. However, that defense should only be available if the condition was involuntarily produced.

¶ 87 Here, in rejecting defendant's proposed instructions, the trial court essentially applied the holding in *Clowers*; the court ruled that "the defendant voluntarily took the drug. Ambien I am talking about. And here, the defendant voluntarily, along with the Ambien, also consumed alcohol. And it is the fact that the defendant voluntarily took Ambien and voluntarily took alcohol and it's his, as I said, sort of a voluntary intoxication that he is now trying to use to attack the voluntariness of his act." However, this case is distinguishable from *Clowers* in a crucial respect. The *Clowers* court noted that the defendant there voluntarily ingested Alprazolam "despite the possible side effect," presumably automatism. *Clowers*, 720 S.E.2d at 436. In so noting, the court implied that the defendant was *warned* of that possible side effect. Here, by contrast, defendant submitted evidence not only that he drove while he was in a state of automatism, but also that he had not been warned that his use of Ambien could produce that state. That is, he submitted evidence that his alleged automatism was involuntarily produced. See *Hari*, 218 Ill. 2d at 292; see also Black's Law Dictionary 1575 (6th ed. 1990) (the term voluntary "often implies knowledge of essential facts").[6] He thus was entitled to have the jury

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[6] Justice McLaren questions how a defendant could *ever* voluntarily produce a state of automatism. *Supra* ¶ 56. The answer lies in what the defendant knows. "An unexpected and unwarned adverse effect of a drug taken on a doctor's orders falls within the ordinary and popularly understood definition of 'involuntarily.' " *Hari*, 218 Ill. 2d at 292. Thus, here, it is defendant's evidence that his alleged automatism was "unexpected and unwarned" that allows him to submit the defense. However, if the alleged automatism was, in fact, "expected or warned," then it was, indeed, voluntarily produced and the defense would not be available.

instructed on automatism. *Cf. State v. Little*, No. 05-0157, 2005 WL 3478118 (Iowa Ct. App. Dec. 21, 2005), at *3 (defendant not entitled to raise automatism where, *inter alia*, he "had ample warning of the dangers of his cocktail from the warnings included with his prescriptions").

¶ 88 Dr. O'Donnell testified that, in his professional opinion, defendant was "experiencing the effects of Ambien-induced sleep driving, automatism, and that it was—his driving was not a voluntary act." For the above reasons, I agree with the trial court that this was not enough to entitle defendant to present the defense. However, Dr. O'Donnell further testified—or at least implied—that a warning of Ambien's possible side effect of automatism would not have been included in defendant's package of Ambien. Even an implication can constitute the slight evidence that warrants a jury instruction. See Ill. R. Evid. 704 (eff. Jan 1, 2011); *People v. Wheeler*, 200 Ill. App. 3d 301, 308 (1990). Thus, defendant submitted evidence not only that his *driving* was not the product of a voluntary act, but also that his *automatism* was not the product of a voluntary act. Because defendant submitted this *additional* evidence, he was entitled to present the defense. However, it is important to note, that we are not deciding here whether defendant is relieved of culpability due to the unwarned, unexpected adverse side-effect of ingesting Ambien. Rather, we are only deciding today that defendant was entitled to present evidence that his alleged automatism was involuntarily produced and to have the jury instructed on that defense.

¶ 89 In her dissent, Justice Zenoff asserts that defendant forfeited the defense. She first notes that she agrees with my view that the defense applies only if the automatism was involuntarily produced. She then notes that defendant's proposed jury instructions did not convey that limit on the defense; instead, consistently with Justice McLaren's view, they would have instructed the jury to acquit defendant merely if he was in a state of automatism. She notes further that,

after the trial court properly rejected those instructions, defendant did not propose any instructions that properly described the defense. She thus concludes that he forfeited it.

¶ 90 I think that Justice Zenoff applies forfeiture too strictly. Although the trial court did rely on the ground that defendant "voluntarily took Ambien and voluntarily took alcohol," it went on to hold, more broadly, that automatism "isn't a permissible defense under the very specific facts of this case," because DUI is an "absolute liability offense." In so doing, the trial court left no room for defendant to respond that, because he had not been warned of Ambien's possible side effect of automatism, his automatism was not voluntarily produced. In deeming DUI an "absolute liability offense," the trial court informed defendant that whether he drove was all that mattered; his mental state was simply irrelevant. Although I do not deny that defendant did not submit alternative instructions on automatism, "[t]he law does not require the doing of a futile act." *Ohio v. Roberts*, 448 U.S. 56, 74 (1980). As the trial court had demonstrated that it would reject *any* instructions on automatism, I cannot fault defendant for failing to offer alternative instructions.

¶ 91 I reiterate, however, that Justice Zenoff and I agree that automatism is a defense only if the condition was involuntarily produced. Thus, although Justice McLaren has delivered "the judgment of the court," which is to reverse and remand for a new trial, a majority of this panel has subscribed to this view of the automatism defense, and thus it is this view that the parties and the trial court must effectuate on remand.

¶ 92 That said, I join Justice McLaren in declining to attempt to prescribe the jury instructions that would properly define the automatism defense as it applies to these facts. Again, the jury must be informed that the defense applies only if defendant was in a state of automatism that was involuntarily produced. *Cf.* Illinois Pattern Jury Instructions, Criminal, No. 24-25.03 (4th ed.

2000). Beyond providing that general guidance, I join Justice McLaren in leaving it to the parties and the trial court to flesh out the precise wording of the proper instructions on remand.

¶ 93 JUSTICE ZENOFF, dissenting.

¶ 94 I agree with Presiding Justice Hudson's view that the automatism defense applies only if the automatism was involuntarily produced. However, because defendant did not propose jury instructions that properly defined that defense in accordance with this view, he forfeited the defense. Additionally, I submit that the evidence here did not justify automatism instructions, because defendant failed to produce even slight evidence that he was not warned of the potential side effects of Ambien. Accordingly, I would affirm defendant's conviction.

¶ 95 Justice McLaren explains that even though DUI is an absolute liability offense, a defendant's conduct must be voluntary. See *supra* ¶¶ 31-32. I agree with that premise. The question then arises as to what it means for an action to be "voluntary" in circumstances where an offense does not require any particular *mens rea*. In Justice McLaren's view, "the act (or acts) that make up the offense must all be voluntary" (*supra* ¶ 33), and "[w]e are not to focus on the voluntariness of some precursor act," *i.e.*, the ingestion of alcohol or other substances (*supra* ¶ 34). Respectfully, I believe that such view effectively reads a *mens rea* requirement of "knowledge" or "intent" into the DUI statute, which is improper.

¶ 96 Such view also blurs any distinction between the legitimate defense of automatism and the prohibited defense of voluntary intoxication. Voluntary intoxication has not been recognized in Illinois as a defense to criminal conduct since 2002, when the legislature amended section 6-3 of the Code. *People v. Jackson*, 362 Ill. App. 3d 1196, 1201 (2006). Even prior to the 2002 amendment, a defense of voluntary intoxication would not have been available to a person charged with DUI, because it is not a specific intent crime. See *People v. Rodgers*, 335

Ill. App. 3d 429, 433 (2002) ("It is well-settled that the defense of voluntary intoxication may be employed only when the offense charged requires the proof of a specific intent as one of the elements of the crime.") I see no reason why a DUI defendant should be able to give new life to this prohibited defense under the guise of an automatism defense—*i.e.*, arguing that he was too impaired to control his actions such that he did not "voluntarily" drive his car. I therefore agree with Presiding Justice Hudson that the source of the automatism cannot be ignored, and I believe that this proposition is supported by persuasive foreign authority. See *e.g.*, *City of Missoula v. Paffhausen*, 289 P.3d 141, 148-49 (Mont. 2012) (the defendant was permitted to raise an automatism defense to a charge of DUI where there was evidence that somebody had put a "date rape" drug in her drink and that she did not drive voluntarily); *Schlatter v. State of Indiana*, 891 N.E.2d 1139, 1143 (Ind. Ct. App. 2008) (due to the defendant's voluntary intoxication, he was not permitted to raise a defense of automatism to a charge of sexual misconduct with a minor).

¶ 97 As Presiding Justice Hudson indicates, the trial court properly rejected defendant's proposed instructions. Those instructions would have required the jury to acquit defendant if he merely drove in a state of automatism, regardless of whether that state was involuntarily produced. Thus, those instructions did not accurately and completely state the law. See *People v. Parker*, 223 Ill. 2d 494, 500 (2006) ("the purpose of jury instructions is to provide the jury with correct legal principles that apply to the evidence").

¶ 98 Presiding Justice Hudson goes on to state, however, that defendant was entitled to submit *accurate* instructions on the automatism defense, because he submitted evidence that his alleged automatism indeed was involuntarily produced. I agree with Presiding Justice Hudson that a defendant who finds himself in a state of automatism due to an unwarned side effect of a prescription medication should be able to argue that he did not act voluntarily in driving his car.

This is consistent with *Hari*, 218 Ill. 2d at 293, where the supreme court recognized that "the unexpected and unwarned adverse effect [of a drug taken on doctor's orders] is not a conscious effect of a defendant's will, is not resulting from a defendant's free and unrestrained choice, and is not subject to control of defendant's will." However, I disagree that defendant here submitted any such evidence. As Justice McLaren acknowledges, defendant "emphatically stated that he was not raising" the defense of involuntary intoxication, which was at issue in *Hari*. *Supra* ¶ 34. Moreover, although defendant submitted evidence of certain warnings that were included with packages of Ambien sold *after* he was arrested, he submitted *no* evidence of the warnings that were included with *his own* package of Ambien. Nor was there evidence regarding any warnings (or lack thereof) that he received from the physician who prescribed the drug to him. Furthermore, while defendant's pharmacy records were marked as Exhibit 5, defendant did not choose to introduce them, and they are not included in the record. In my view, a lack of evidence that defendant *was* specifically warned about the possible side effect of automatism does not amount to evidence that he was *not* warned. Any inference that could be drawn from the absence of evidence of a specific warning was "too remote to constitute the 'very slight' evidence necessary to require the instruction." *Wheeler*, 200 Ill. App. 3d at 308.

¶ 99 In any event, the primary reason why defendant was not entitled to submit accurate instructions on the automatism defense is that he did not *propose* accurate instructions on the automatism defense. Having failed to propose such instructions, he forfeited his entitlement to them. See Ill. S. Ct. R. 366(b)(2)(i) (eff. Feb. 1, 1994) ("No party may raise on appeal the failure to give an instruction unless the party shall have tendered it."); *People v. Hopp*, 209 Ill. 2d 1, 7 (2004) (with limited exceptions, "a party that fails to tender a jury instruction may not raise the failure to give the instruction on appeal").

¶ 100 Presiding Justice Hudson posits that, because the trial court had made clear that it would not accept *any* instructions on automatism, we should excuse defendant's failure to propose accurate instructions. I respectfully disagree, for two reasons.

¶ 101 First, I do not read the trial court's comments as so definitively preclusive. It made those comments in the context of defendant's request to instruct the jury inaccurately; that is, the court definitively precluded the defense only as defendant had inaccurately defined it. I see no reason to believe that, had defendant reacted to the trial court's comments by proposing that the jury be instructed *accurately*, the trial court would have refused to do so.

¶ 102 Second, even if the trial court's comments were as preclusive as Presiding Justice Hudson suggests, there would have been nothing "futile" about defendant's proposing accurate instructions: as noted, his doing so would have *preserved for appeal his alleged entitlement to them*. Indeed, if a party's failure to raise an issue at trial were excusable merely because the issue would have been unlikely to succeed, the forfeiture rule would have virtually no teeth at all. See *People v. Cloutier*, 178 Ill. 2d 141, 164 (1997) ("Obviously, the requirement of a contemporaneous objection promotes judicial economy and the swift and fair administration of justice. We are hesitant to undermine these objectives by allowing a criminal defendant to base his choice whether to object not on the merits of the objection but on a general appraisal of the trial court's inclinations. Hence we agree with the State that these claims of error are waived.").

¶ 103 Defendant simply misunderstood the automatism defense. He viewed it as unlimited, and he attempted to have the jury instructed accordingly. When the trial court stopped him and noted that he voluntarily took Ambien, defendant did not argue, even in the alternative, that his alleged automatism was nevertheless involuntarily produced. Even on appeal, though he does rely on the propositions that Ambien had "then-unknown hypnotic effects" and caused "an

unanticipated reaction," he does not acknowledge that his proposed instructions in no way would have prompted the jury to acquit him only if that side effect was "then-unknown" or "unanticipated." Throughout this case, he has rested on his original theory, the *wrong* theory. Nevertheless, my colleagues are rewarding him by giving him a second chance to submit *additional evidence* in support of the *right* theory. See *supra* ¶ 67 ("The State and defendant can provide to the jury whatever evidence on the existence (or lack thereof) of warnings they can muster on retrial."). I see no reason to do so. Thus, I respectfully dissent.