2018 IL App (2d) 160709-U
No. 2-16-0709
Order filed September 4, 2018

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Boone County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 16-CF-162
	)	
MANUEL J. YANEZ,	)	Honorable
	)	C. Robert Tobin III,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: Under the facts of this case, defendant failed to show that the absence of pattern jury instruction language regarding self-defense within an issues instruction for unlawful restraint constituted plain error or ineffective assistance of counsel. Therefore, we affirmed.

¶ 2 Following a jury trial, defendant, Manuel J. Yanez, was found guilty of unlawful restraint (720 ILCS 5/12-3.3(a-5) (West 2016)) and two counts of domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2016)). On appeal, defendant argues that he was deprived of a fair trial because the issues instruction for the unlawful restraint charge did not contain necessary language regarding self-defense. Specifically, defendant argues that: (1) the trial court committed plain

error by failing to *sua sponte* include the proper language; (2) his trial counsel was ineffective for failing to submit the appropriate instruction; and (3) the State deprived him of a fair trial by failing to tender the proper instruction. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was initially charged by complaint on June 20, 2016. On July 7, 2016, he was charged by an eight-count amended information with aggravated battery (720 ILCS 5/12-3.3(a-5) (West 2016)); unlawful restraint (720 ILCS 5/10-3(a) (West 2016)); and six counts of domestic battery (720 ILCS 5/12-3.2(a)(1), 3.2(a)(2) (West 2016)). The charges stemmed from contact he had with Brenda Smith, alleged to be a family or household member, on June 19, 2016. Count I alleged that defendant committed aggravated domestic battery in that he intentionally strangled Smith. Count II alleged that defendant committed unlawful restraint in that he, knowingly and without legal authority, detained Smith inside a residence by getting on top of her. Count III alleged domestic battery in that defendant knowingly made contact of an insulting or provoking nature with Smith by placing his hands on her neck. Count IV alleged domestic battery in that defendant knowingly caused bodily harm to Smith by hitting her. Count V alleged domestic battery in that defendant knowingly made contact of an insulting or provoking nature with Smith by hitting her. Count VI alleged domestic battery in that defendant knowingly caused bodily harm to Smith by knocking her down. Count VII alleged domestic battery in that defendant knowingly made contact of an insulting or provoking nature with Smith by knocking her down. Count VIII alleged domestic battery in that defendant knowingly made contact of an insulting or provoking nature by getting on top of her.

¶ 5 Witness testimony took place on July 8, 2016. Smith testified as follows. She was 45 years old and weighed 160 pounds. She lived in an apartment with Valarie Tindle. On June 19,

2016, she had been dating defendant for a few months, and they "were staying together off and on." At about 5:30 p.m. that day, she was in her apartment with defendant and Tindle. She went into her bedroom to get earphones, and defendant came in behind her. They were not arguing. He hit her "[n]ot that hard" on the left side of her head, and she fell onto her mattress. Smith thought that she landed on her back, but she was not sure. Defendant got on top of her and choked her, with his hands around her neck. Smith yelled for help. She lost consciousness and then saw Tindle getting defendant off of her. Defendant got up, and Smith went into the living room. Defendant remained in the apartment for another 15 minutes before leaving. Smith looked in the mirror and saw redness on her neck. She did not call 911 because "[i]t was done, it was over." Defendant had borrowed her cell phone at various times throughout that day. He had also brought up the subject of Billy Pullio and other men.

¶ 6 Tindle provided the following testimony. She was 50 years old and had been convicted in 2014 of unlawful delivery of a controlled substance. Tindle had been friends with defendant for about five years. Defendant did not live in the apartment but occasionally stayed over. On the evening in question, Smith and defendant went into Smith's bedroom. About 10 minutes later, Tindle heard Smith whimpering. She went into the bedroom and saw defendant on top of Smith with his hands around her throat. Tindle told him to get off of Smith and asked what his problem was. Defendant got up, looking angry. Tindle observed that Smith's neck was red. Defendant went into the living room and said that he was not to be messed with, and that if he wanted Smith dead, she would be dead. He threatened to kill Smith and Pullio. He left after about 10 minutes. Tindle texted her neighbor Rebecca Killeen, who came over about one hour later. Tindle did not call the police because Smith was afraid and did not want her to. Defendant came back to the apartment at about 11 or 11:30 p.m. and knocked on the door. Tindle did not

let him in.

¶ 7 Dr. William Blum was accepted as an expert in the field of forensic pathology and testified as follows. Only five pounds of pressure per square inch was needed to impede the arteries and veins in the neck. When the sides of the neck were compressed, a person could lose consciousness in about 8 to 10 seconds. If the pressure was maintained for only a short time and then removed, consciousness usually returned in a matter of seconds. There were not always visible marks on the outside of the neck when someone was strangled to the point of unconsciousness. Blum had read the police report and associated statements, and he opined that the strangulation described was consistent with blood flow being cut off in Smith's neck. Blum agreed that he did not examine Smith's neck or look at any pictures.

¶ 8 Killeen testified that she was 28 years old and lived next door to Smith and Tindle. She had known Tindle for about one year; had known Smith three or four months; and had known defendant for about six months. She received some text messages from Tindle on June 19, 2016, and after she returned home, she went to Tindle's apartment to see if everything was ok. She noticed that Smith's neck was red. Later that night, at about 11:45 p.m., Killeen was outside the apartment building talking to her husband and neighbors. She heard someone banging on Tindle's door, and she walked inside the building and saw defendant. Defendant was yelling, " 'Let me in the apartment.' " Killeen told him that he was not allowed in and needed to leave. Defendant said that if she did not let him in, he would "beat [her] ass as well." He stepped back, put his right hand on the wall, and lifted his leg like he was going to kick in the apartment's door. Killeen called the police, and defendant left the building.

¶ 9 Defendant testified as follows. He was 53 years old and 270 pounds. He had been convicted of forgery in 2007. On June 19, 2016, he borrowed Smith's phone several times

because his phone was not active. He saw that she had been speaking to her ex-boyfriend, Pullio, and communicating with other men as well. Defendant had started a sexual relationship with Smith in April 2016, about two or three weeks before Pullio went back to prison. Defendant and Smith were "friends with benefits," but defendant thought that their relationship was becoming exclusive, and he wondered why Smith was speaking romantically to other men. In the late afternoon of June 19, 2016, defendant asked Smith why she was keeping secrets from him and whether she wanted him to have a confrontation with Pullio when Pullio was released from prison. They were arguing and screaming in each other's faces. Smith pushed defendant, and he told her to please stop because he did not want to fight her. She then "bashed" him on his forehead, which was scarred and sensitive because defendant had previously been hit there with an aluminum baseball bat. She asked, "This is want you want?" Defendant again told her to please stop and tried to grab her hands to prevent her from hitting him. They were wrestling and struggling and fell on the bedroom mattress. Defendant may have accidentally hit Smith's head in the process. Defendant was "defending [himself]." Smith was screaming, and he pushed down on her chest to calm her down. He had his hands near her collarbone, and he did not think that they were near her neck. Defendant was not trying to cut off her blood or oxygen supply. He thought that they may begin to have makeup sex, because it had happened several times before. Smith stopped screaming, and Tindle came in and told defendant to get off of Smith. Defendant got up, took some of his things, and left.

¶ 10 After leaving the building, defendant ran into some police officers, who asked where he was coming from. He did not say that he was at Smith's apartment or that she had battered him. Defendant explained at trial that the police did not ask about the incident, and that he did not want to get Smith into trouble.

¶ 11 Defendant had consumed a few beers on the day in question because he was celebrating Father's Day. Later that night, he drank more and became intoxicated. He was upset that his relationship with Smith was not exclusive, as he had thought. Defendant went back to the apartment at 11 or 11:30 p.m. because he had a bag of clothes there. As he was knocking, Killeen came by with her husband and daughter. Killeen told defendant that he was not welcome there and that if he did not leave, she would call the police. Defendant asked that she get his bag for him, and she refused. She started dialing her cell phone, and he left.

¶ 12 Detective Thomas Delavan of the Belvidere Police Department testified in rebuttal as follows. At about 5:45 p.m. on June 19, 2016, he and another officer were dispatched to investigate a call of public urination. They saw defendant in the area and talked to him for about 15 minutes. He said that he was going to a friend's house, and he pointed south. He did not mention Smith attacking him. Another officer arrived in a marked squad car, and defendant turned around and placed his hands behind his back. Detective Delavan had previously seen individuals do that when they were about to be arrested. At the time, no one told defendant that he was under arrest. Detective Delavan believed that defendant was intoxicated because he had glassy, bloodshot eyes; a strong odor of alcohol on his breath; a slight delay in answering questions; and a little bit of slurred speech.

¶ 13 The trial court then held a jury instruction conference. The trial court asked if defense counsel was seeking to have a self-defense instruction. Counsel replied in the affirmative, and the State agreed that it would be "appropriate." The State submitted two jury instructions for the charge of unlawful restraint. The first instruction, State's Instruction No. 23, stated:

> "To sustain the charge of unlawful restraint, the State must prove the following proposition:

> That the defendant knowingly and *without legal authority* detained Brenda Smith.
>
> If you find from your consideration of all of the evidence that this proposition has been proved beyond a reasonable doubt, you should find the defendant guilty.
>
> If you find from your consideration of all of the evidence that this proposition has not been proved beyond a reasonable doubt, you should find the defendant not guilty." (Emphasis added.)

The second instruction, State's Instruction No. 24, stated:

> "To sustain the charge of unlawful restraint, the State must prove the following proposition:
>
> *First Proposition*: That the defendant knowingly and *without legal authority* detained Brenda Smith; and
>
> *Second Proposition*: *That the defendant was not justified in using the force which he used.*
>
> If you find from your consideration of all of the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.
>
> If you find from your consideration of all of the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty." (Some emphasis added.)

The State suggested that either instruction would be proper because they both included "without legal authority." It suggested that the jury be given the first instruction because the second proposition in the second instruction was duplicative of "without legal authority." Defense counsel agreed, saying, "Yeah. That's why I didn't add it to mine." The trial court instructed the

jury using State's Instruction No. 23.

¶ 14 After deliberations, the jury found defendant guilty of unlawful restraint and two counts of misdemeanor domestic battery (counts III and VIII), and not guilty of the remaining five counts. Defendant filed a motion to vacate the two domestic battery convictions on one-act, one-crime principles. The trial court ruled that it would enter judgment on only one of the domestic battery convictions. The trial court sentenced defendant to four years' imprisonment and one year mandatory supervised release for the unlawful restraint conviction. It imposed fines and costs for the domestic battery conviction.

¶ 15 Defendant timely appealed.

¶ 16 II. ANALYSIS

¶ 17 A. Trial Court

¶ 18 Defendant first argues that the trial court erred by failing to *sua sponte* provide the jury with an issues instruction on self-defense as it pertained to the unlawful restraint charge. Defendant recognizes that defense counsel did not object, either at the jury instruction conference or in a posttrial motion, to the trial court's failure to give the instruction, which normally results in forfeiture of the issue. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, defendant asks that we review the issue for plain error. The plain error doctrine allows a reviewing court to consider an unpreserved error where either (1) a clear error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) a clear error occurs that is so serious that it affected the trial's fairness and challenged the integrity of the judicial process. *People v. Sebby*, 2017 IL 119445, ¶ 48.

¶ 19 Defendant also invokes Illinois Supreme Court Rule 451(c) (eff. April 8, 2013). That rule states that substantial defects in jury instructions in criminal cases are not waived by failure

to make timely objections, if the interests of justice require. *Id.* Rule 451(c) is coextensive with the plain error rule, and we construe them identically. *People v. Downs*, 2015 IL 117934, ¶ 14. We further note that we review *de novo* whether a jury instruction correctly conveyed the applicable law. *People v. Messenger*, 2015 IL App (3d) 130581, ¶ 38.

¶ 20 The State argues that plain error analysis is not applicable because defense counsel affirmatively acquiesced to the issues instruction for unlawful restraint, and further submitted an issues instruction for unlawful restraint that was identical to the instruction accepted by the trial court. The State notes that the prosecutor and defense counsel agreed to that instruction after comparing it to one that had a separate self-defense proposition. The State cites *People v. McGuire*, 2017 IL App (4th) 150695, ¶ 29, where the court stated, "Plain-error analysis applies to cases involving procedural default, not affirmative acquiescence." *McGuire* further stated that in such a scenario, "a defendant's only available challenge is to claim that he received ineffective assistance of counsel." *Id.*

¶ 21 While we agree with the State that invited error generally precludes plain error review, the cases the State relies on do not pertain to alleged errors in instructions on the essential elements of the offense. To ensure a fair trial in criminal cases, the trial court must *sua sponte* instruct the jury on the elements of the offense, the presumption of innocence, and the burden of proof. See *People v. Wright*, 2017 IL 119561, ¶ 88. Once a defendant raises the affirmative defense of self-defense, the State had a burden of disproving it, and it is "an element essential in [the jury's] resolution of the defendant's guilt." *People v. Martinez*, 76 Ill. App. 3d 280, 282-83 (1979); see also *People v. Getter*, 2015 IL App (1st) 121307, ¶ 38 ("Once the defense properly raises the affirmative defense of self-defense, the State bears the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense, in addition to proving the

elements of the charged offense."). Accordingly, we believe that defendant is not precluded from advancing a plain error argument.

¶ 22 Defendant points out the following, which is not disputed. His testimony asserted that he was acting in self-defense, a theme also reflected in defense counsel's opening and closing remarks. The State agreed that self-defense instructions were appropriate in the case, and one of its proffered issues instructions for unlawful restraint included distinct language regarding self-defense. A trial court is required to instruct a jury in a criminal case using criminal pattern instructions unless there is no applicable pattern instruction or the court determines that a particular instruction does not accurately state the law. Ill. S. Ct. R. 451(a) (eff. Apr. 8, 2013); *People v. Cavazos*, 2015 IL App (2d) 120171, ¶ 72. The pattern issues instruction for unlawful restraint is set out in Illinois Pattern Jury Instructions, Criminal, No. 8.07 (approved October 17, 2014) (hereinafter, IPI Criminal No. 8.07), which is almost identical to State's Instruction No. 24 here (see *supra* ¶ 13). Illinois Pattern Jury Instructions, Criminal, No. 24-25.06 (4th ed. 2000) provides a general definition of self-defense, and the Committee Note states that Illinois Pattern Jury Instructions, Criminal, No. 24-25.06A (4th ed. 2000) (hereinafter, IPI Criminal No. 24-25.06A) should be given when instructing on self-defense. IPI Criminal No. 24-25.06A states: "_____ *Proposition*: That the defendant was not justified in using the force which he used." (Emphasis in original.) *Id.*

¶ 23 Defendant argues that State's Instruction No. 24 (see *supra* ¶ 13) properly incorporated IPI Criminal Nos. 8.07 and 24-25.06A, but that it was withdrawn by the trial court upon the request of the State and defense counsel. He argues that, in contrast, State's Instruction No. 23, which was submitted to the jury, did not contain the language set forth in IPI Criminal No. 24-25.06A. Defendant maintains that the parties mistakenly thought that the self-defense element

was subsumed within the basic instruction for unlawful restraint—whether "the defendant knowingly and without legal authority detained Brenda Smith." Defendant argues that, however, self-defense and a lack of legal authority are distinct concepts and therefore independent elements of unlawful restraint as applied to his case. Defendant highlights that the Committee Note to IPI Criminal No. 8.07 states that if legal authority is a question of fact, an instruction defining legal authority shall be given, such as an instruction regarding arrest by a private person or a merchant's defense. Defendant argues that the facts at trial raised no question of whether he had lawful authority to detain Smith. Defendant contends that neither the parties nor the trial court claimed that the pattern instructions did not accurately state the applicable law, and therefore the trial court erred by not following the pattern instructions.

¶ 24 Defendant continues that the omission of the self-defense component in the issues instruction for unlawful restraint unfairly prejudiced him. Defendant notes that the jury was instructed on self-defense in the issues instructions for the charges other than unlawful restraint, those being aggravated domestic battery and domestic battery, but that the language from IPI Criminal No. 24-25.06A was absent in the issues instruction for unlawful restraint.

¶ 25 Defendant relies heavily on *Getter*. There, the court stated as follows. In addition to giving a general definition of self-defense and a general instruction on the State's burden of proof, the trial court should give an issues instruction for each offense stating that the State bore the burden of proving, beyond a reasonable doubt, that the defendant was not justified in using the force that he used. *Getter*, 2015 IL App (1st) 121307, ¶ 40. Because three of the four charged offenses included a self-defense instruction, but the remaining offense did not, a rational jury would find that omission meaningful. *Id.* ¶ 41. This was especially true because self-defense was the central disputed issue at trial. *Id.* Defendant argues that, as in *Getter*, self-

defense was the only disputed issue at trial, and the lack of a self-defense issues instruction in the unlawful restraint charge would indicate to a rational juror that he or she need not find the absence of self-defense in order to find him guilty.

¶ 26 Defendant argues that the error satisfies the first prong of the plain-error test because the evidence was closely balanced, in that it turned on a credibility dispute between him and Smith. See *id.* ¶ 65 (evidence at trial was closely balanced because the trial was a credibility contest between the defendant and the State's witnesses). Defendant argues that he testified that he restrained Smith because she hit him, including on an area of his head where he had a previous injury. Defendant argues that the error also satisfies the second prong of the plain-error test because the lack of the necessary self-defense language in the unlawful restraint issues instruction created a serious risk that the jury convicted him of that charge because it did not understand that the State was required to prove the absence of self-defense beyond a reasonable doubt. See *id.* ¶ 64. Defendant argues that additional justification for second prong plain error is provided by the jury's apparent confusion during deliberations. The record reflects that when the jury initially returned and the foreperson handed the trial court the signed verdict forms, the trial court noticed that the jury had not reached a verdict on the unlawful restraint charge, and it directed the jurors to continue deliberating. The jury subsequently found defendant guilty of that charge. Defendant maintains that the jury's initial failure to reach a verdict on the unlawful restraint charge probably stemmed from the lack of a self-defense issue instruction for unlawful restraint while receiving such an instruction for the other charges.

¶ 27 The State responds that we should reject defendant's plain error argument. Like defendant, it points out that the Committee Note to IPI Criminal No. 8.06 states that if legal authority is a question of fact, an instruction defining legal authority should be given. The

Committee Note references, among other things, "Article 7 of Chapter 20." IPI Criminal No. 8.06. That section includes section 7-1 of the Criminal Code of 2012 (720 ILCS 5/7-1 (West 2016)), which defines self defense. Therefore, the State argues that the Committee Note clearly indicates that a defendant acts with "legal authority" if his or her conduct falls under section 7-1. See also *People v. Tamayo*, 2012 IL App (3d) 100361, ¶ 23 (where conduct precluded self-defense claim, individuals acted without lawful authority).

¶ 28 The State argues that a comparison of the pattern instructions for assault establish that the phrase "without lawful authority" is analogous to the absence of an affirmative defense such as self-defense. The Committee Note to the definition instruction for assault states to "[u]se the phrase 'without lawful authority' whenever an instruction is to be given on an affirmative defense contained in Article 7[.]" Illinois Pattern Jury Instructions, Criminal, No. 11.01 (approved April 29, 2016). In contrast, the Committee Note to the issues instruction for assault states that the phrase "without lawful authority" is not present because inclusion of language of the affirmative defense (which would encompass the self-defense language in IPI Criminal No. 24-25.06A) will already "require the jury to find that the defendant acted without lawful authority." Illinois Pattern Jury Instructions, Criminal, No. 11.02 (approved April 29, 2016) (hereinafter, IPI Criminal No. 11.02). Therefore, according to the State, because the jury found that defendant acted "without legal authority," it necessarily rejected his claim that he was justified in his use of force.

¶ 29 The State argues that the Supreme Court implicitly reached the same result in *People v. Thurman*, 104 Ill. 2d 326 (1984). There, the issues instruction for murder and voluntary manslaughter instructed the jury that the State had to prove that the defendant acted without lawful justification, but the issues instruction for involuntary manslaughter did not include such

language. *Id.* at 328-29. The jury found the defendant not guilty of the former crimes but guilty of the latter crime, and also guilty of armed violence predicated on involuntary manslaughter. *Id.* at 329. The State argued that the jury was adequately informed that the defendant could be found not guilty of involuntary manslaughter based on self-defense because the instruction defining involuntary manslaughter contained the "without lawful justification language." *Id.* at 330. The supreme court disagreed, stating that "unless similar language [to without lawful justification] appears in the issues instruction for that offense[,] a prudent juror could easily conclude that the absence of self-defense need not be found before returning a guilty verdict." *Id.* at 331. The State argues that here, unlike *Thurman*, the "without legal authority" language did appear in the contested issues instruction.

¶ 30 The State additionally argues that the jury was adequately instructed because in closing argument, defense counsel stated that the State had to prove, for each charge, that defendant was not acting in self-defense. The State cites *People v. Huckstead*, 91 Ill. 2d 536, 543 (1982), where the issues instruction did not state that, in addition to the elements of the crime, the State had to prove beyond a reasonable doubt that the defendant was not justified in using the force that he used. The supreme court held that because the jury was given a stand-alone self-defense instruction and was instructed on the burden of proof and that the defendant did not have to prove his innocence, and because closing arguments specifically and repeatedly emphasized that the State had a burden of proving that the defendant was not justified in the force that he used, the failure of the trial court to instruct the jury on self-defense in the issues instruction did not constitute plain error. *Id.* at 544-45. The State argues that, as in *Huckstead*, the combination of the instructions and arguments made it clear to the jury that the State had the burden to disprove self-defense as it related to the unlawful restraint charge. See also *People v. McDowell*, 138 Ill.

App. 3d 622, 629 (1985) (any error made by the trial court in refusing to give IPI Criminal No. 24-25.06A was harmless because the issues instruction contained the phrase "without legal justification," which was sufficient to adequately instruct the jury).

¶ 31 The State maintains that defendant's argument, that the jury initially failed to return a verdict on the unlawful restraint charge due to confusion from the failure to include the self-defense proposition within the issues instruction, solely amounts to speculation. The State cites *People v. Hopp*, 209 Ill. 2d 1, 17 (2004), where our supreme court stated that speculation about what the jury may have thought was insufficient to show that the omission of a jury instruction was plain error. The State highlights that the jury returned the guilty verdict six minutes after being sent back to complete deliberations on the unlawful restraint charge.

¶ 32 The State further argues that this case is distinguishable from a typical plain-error case involving a missing self-defense instruction because defendant was convicted of multiple domestic battery counts related to the unlawful restraint charge. The State points out that the jury found defendant guilty of domestic battery of an insulting or provoking nature for (1) getting on top of Smith, and (2) placing his hands on her neck. For both counts, the jury had to find that the State proved beyond a reasonable doubt that defendant "was not justified in using the force which he used." The State argues that these two counts were the most factually similar to the unlawful restraint charge. Therefore, according to the State, even if the jury accepted defendant's self-defense argument for his actions while he and Smith were standing, the jury rejected the defense as it pertained to defendant's actions once Smith was on the mattress. The State argues that, as a result, defendant has not established that the omission of IPI Criminal No. 24-25.06A created a serious risk that the jurors convicted him because they did not understand the applicable law.

¶ 33 Last, the State argues that the evidence was not closely balanced based on the weight difference between defendant and Smith and Tindle's testimony that she saw defendant on top of Smith with his hands around her throat.

¶ 34 Defendant responds that the State's comparison of the instructions for assault offers a concession to him because IPI Criminal No. 11.02 also requires the self-defense language from IPI Criminal No. 24-25.06A that was lacking here. Defendant also argues that the State's position, that the jury's finding that he acted without legal authority necessarily meant that it rejected his self-defense claim, is contrary to the letter and spirit of the IPI instructions, which were not followed. Defendant contends that the State's equating of "without lawful authority" to "not justified in the force that he used" is unsupported by caselaw and the pattern instructions. Defendant argues that "legal authority" can encompass conduct other than self-defense, so a finding of "without legal authority" does not necessarily mean that a defendant "was not justified in the force that he used."

¶ 35 Defendant furthers argues that although the State relies on *Thurman*, that case is actually favorable to him because the supreme court found that necessary language was not included in the issues instruction. *Thurman*, 104 Ill. 2d at 331. Defendant also argues that his trial counsel's closing argument did not cure the instructional error because she did not inform the jury that the State was required to prove the absence of self-defense beyond a reasonable doubt. Defendant argues that *Getter* rejected a similar argument. See *Getter*, 2015 IL App (1st) 121307, ¶ 44 (defense counsel argued in support of the defendant's justification for his use of force but did not discuss the minutia of the instructions of the elements of the charged offenses). Defendant maintains that the jury was required to follow the trial court's legal instructions, regardless of the

content of closing argument, and that the jury was instructed that closing arguments were not evidence.

¶ 36 Defendant additionally argues that *Huckstead* is distinguishable because the defendant there was not charged with multiple offenses, some of which had the self-defense issues instruction and some that did not. Defendant points out that *Getter* distinguished *Huckstead* on this basis. *Getter*, 2015 IL App (1st) 121307, ¶ 47 ("In the present case, in contrast [to *Huckstead*], the absence of a self-defense instruction on the aggravated discharge count was conspicuous because the other three charged offenses contained the instruction."). Defendant further argues that although the State highlights that he was found guilty of two domestic battery counts despite the presence of self-defense language, he was found not guilty of conduct involving hitting Smith, knocking her down, and strangling her, which are factually within the scope of the unlawful restraint count. Defendant maintains that there was therefore a serious risk that the jury convicted him of unlawful restraint due to the omission of the self-defense instruction.

¶ 37 We agree with defendant that because the pattern instructions accurately stated the law, the jury should have been instructed according to the pattern instructions (see Ill. S. Ct. R. 451(a) (eff. Apr. 8, 2013)), which would have meant including the self-defense proposition from IPI Criminal No. 24-25.06A in the issues instruction for unlawful restraint; even the State admits that this would have been "the cleaner practice." However, the question remains whether this deficiency constitutes plain error.

¶ 38 We ultimately agree with the State that the omission does not rise to the level of plain error when considering *all* of the circumstances of this case. First, the instruction given required that the jury find that the State proved that defendant acted "without legal authority." As the

State points out in its discussion of the Committee Note to IPI Criminal No. 8.06 and the pattern instructions for assault (see *supra* ¶¶ 27-28), phrases such as "legal authority" and "lawful authority" encompass the concept of self-defense. The *Thurman* court similarly found that "lawful justification" included self-defense for charges of involuntary manslaughter. *Thurman*, 104 Ill. 3d at 331; see *supra* ¶ 29. Here, the issues instruction for the unlawful restraint charge required that the jury find that the State proved that defendant acted "without legal authority," which similarly includes self-defense. Significantly, the instruction found to constitute plain error in *Getter* did not require that the jury find that the defendant acted without legal/lawful authority.

¶ 39 Second, defense counsel clearly communicated to the jury during closing argument that the jury instructions required the State to prove that defendant did not act in self-defense. She stated:

> "I ask that you consider carefully the jury instructions on self-defense. You will see that the State must disprove that [defendant] was justified in using force. You will receive one that says 'A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force.' You will receive one that says 'A person who has not initially provoked the use of force against himself has no duty to attempt to escape the danger before using force against the aggressor.' *You will see that in each and every one of the propositions and definition phrases, that there will be a proposition that says that he acted either without legal authority, without legal justification, or that he was unjustified in the force that he used. Therefore, the State must prove in each of those cases that he was not using self-defense*." (Emphasis added.)

Thus, defense counsel clearly and specifically equated the "without legal authority" language in the jury instructions to a lack of justification for self-defense. She also directly argued that defendant "was justified in using force to restrain" Smith, that the State had to prove that he acted intentionally and "not that he was trying to hold her down so that she would stop hitting him," and that the State "must disprove self-defense." In rebuttal, the State repeatedly argued that the evidence showed that defendant was not acting in self-defense.

¶ 40 Defendant argues that closing argument cannot cure deficient jury instructions, but in *Huckstead* the supreme court explicitly stated that the instructions given, in combination with closing argument, adequately apprised the jury that the State had the burden of proving that the defendant was not justified in the force he used. *Huckstead*, 91 Ill. 2d. at 545; see also *People v. Olaska*, 2017 IL App (2d) 150567, ¶ 127 ("The closing arguments of the parties are also instrumental in forming a jury's understanding of the law and can compensate for confusing aspects of the instructions."). The supreme court reached this result in *Huckstead* even though the issues instruction did not include the language "without legal authority" present here. It is true that *Getter* distinguished *Huckstead* on the basis that *Huckstead* did not involve multiple offenses, some of which contained a self-defense instruction and some did not. *Getter*, 2015 IL App (1st) 121307, ¶ 47. However, the instruction at issue in *Getter* also did not include the "without legal authority" language included in this case. See *id.* ¶ 25. Moreover, *Getter* also distinguished *Huckstead* on the basis that there, the parties repeatedly and specifically argued to the jury that the State had the burden to prove the lack of self-defense, whereas in *Getter* the prosecution compounded the error caused by the faulty jury instruction, and defense counsel did not address the matter in a meaningful way. *Id.* ¶ 25. Here, akin to *Huckstead* and unlike *Getter*, defense counsel clearly and specifically argued that the State had to disprove self-defense for

each charge, going as far as to link it to the "without legal authority language" present in the unlawful restraint issues instruction, and the State argued against the application of self-defense, thereby validating its burden of proof on that element.

¶ 41 Third, as the State points out, this case is unique in that there was another, similar charge which did include the self-defense language from IPI Criminal No. 24-25.06A, and for which the jury still found defendant guilty. That is, the unlawful restraint charge alleged that defendant knowingly and without legal authority detained Smith in that he "got on top of" her, and the domestic battery charge in count VII, which contained the self-defense proposition, alleged that he made contact of an insulting or provoking nature with Smith "in that he got on top of" her. As such, the jury rejected defendant's self-defense argument as it pertained to getting on top of Smith, which was also the basis of the unlawful restraint charge. We further agree with the State that defendant's argument, that the jury initially left the verdict forms for the unlawful restraint charge blank because it was confused due to the lack of a self-defense issues instruction, is pure speculation. The trial court told the jury that it "forgot one *** set," which the jury did not dispute, and the jury returned with a guilty verdict for unlawful restraint six minutes after being sent back to deliberate on that charge.

¶ 42 Turning to the application of the plain error test, we begin with the second prong. For that prong, "[t]he erroneous omission of a jury instruction only rises to the level of plain error when its omission creates a serious risk that the jury incorrectly convicted the defendant because the jurors did not understand the applicable law, so as to severely threaten the fairness of the trial." *People v. Thompson*, 2017 IL App (5th) 120079-B, ¶ 25; see also *Getter*, 2015 IL App (1st) 121307, ¶ 62. For the reasons discussed above, there is not a serious risk that the jury

incorrectly convicted defendant of unlawful restraint on the basis of a lack of understanding that the State had the burden to prove that defendant was not acting in self-defense.

¶ 43 Regarding the first prong of the plain error test, the parties dispute whether or not the evidence was closely balanced. We agree with the State that the evidence was not closely balanced on the question of self-defense as it related to the unlawful restraint charge. The testimony was not just a credibility contest between defendant and Smith, in that Tindle testified that she heard Smith whimpering and saw defendant on top of her. Also, there was a significant weight difference between defendant and Smith.

¶ 44 Even otherwise, the first prong of the plain error test requires more than closely-balanced evidence; it requires proof of prejudice from a clear and obvious error, in that there is a resulting possibility that the jury's verdict may have resulted from the error rather than the evidence. *People v. Ely*, 2018 IL App (4th) 150906, ¶ 18. That is, the claimed error "has to be of *such a nature* that it might have tipped the scales against the defendant." (Emphasis in original.) *Id.* Given that the disputed instruction required the State to prove that defendant acted "without legal authority," which defense counsel clearly argued included self-defense, and that the jury explicitly rejected defendant's self-defense argument in another charge alleging that he got on top Smith, the error here could not have affected the case's outcome. Accordingly, defendant has failed to show plain error resulting from the trial court's failure to *sua sponte* include the self-defense language from IPI Criminal No. 24-25.06A in the issues instruction for the unlawful restraint charge.

¶ 45 B. Trial Counsel

¶ 46 Defendant next argues that his trial counsel was ineffective for failing to tender an issues jury instruction for unlawful restraint that included the self-defense language. For a claim of

ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). The defendant must first establish that, despite the strong presumption that trial counsel acted competently and that the challenged action was the product of sound trial strategy, counsel's representation fell below an objective standard of reasonableness under prevailing professional norms such that he or she was not functioning as the counsel guaranteed by the sixth amendment. *People v. Manning*, 227 Ill. 2d 403, 416 (2008). Second, the defendant must establish prejudice by showing a reasonable probability that the proceeding would have resulted differently absent counsel's errors. *People v. Valdez*, 2016 IL 119860, ¶ 14. A failure to establish either prong of the *Strickland* test precludes a finding of ineffectiveness. *People v. Peterson*, 2017 IL 120331, ¶ 79.

¶ 47 Defendant argues that his trial counsel mistakenly believed that the self-defense issues instruction was duplicative of the without lawful authority element of unlawful restraint and therefore unnecessary. Defendant argues that her performance was deficient under the first prong of *Strickland* because she failed to tender the appropriate IPI instruction, and that he was prejudiced under the second prong of *Strickland* because the jury instructions prevented the jury of acquitting him of unlawful restraint based on self-defense.

¶ 48 As we discussed above, defendant has failed to show that, given the circumstances of the case, the failure to include the self-defense language from IPI Criminal No. 24-25.06A was of such a nature "that it might have tipped the scales against" him. See *supra* ¶ 43, quoting *Ely*, 2018 IL App (4th) 150906, ¶ 18. *A fortiori*, defendant has failed to show that there is a reasonable probability that the proceeding would have resulted differently had the jury been

given the missing instruction. Accordingly, his ineffective assistance of counsel argument is without merit.

¶ 49 C. State

¶ 50 Last, defendant argues that the State wrongly deprived him of a fair trial by failing to "tender" the self-defense proposition for the issues instruction on the unlawful restraint charge. Defendant argues that the State is just as responsible for the error as the trial court and defense counsel. He cites *People v. Jackson*, 2016 IL App (1st) 133741, ¶ 76, where the court quoted *People v. Rowjee*, 308 Ill. App. 3d 179, 185 (1999) in stating, " 'The State's concession is a welcome one. In a criminal prosecution *** an assistant State's Attorney[] is the representative of all of the people, including the defendant, and it is as much his or her duty to safeguard the constitutional rights of the defendant as those of any other citizen.' "

¶ 51 We note that the State did "tender" an unlawful restraint issues instruction that included the self-defense language from IPI Criminal No. 24-25.06A, but the parties and the trial court ultimately decided that the jury should be instructed with the other instruction tendered by the State. Moreover, *Jackson* and *Rowjee* involved concessions of reversible error by the State, which are not present here. In any event, defendant did not object to the jury instructions at trial, leaving plain error as the only method of review. See *Sebby*, 2017 IL 119445, ¶ 48; *Enoch*, 122 Ill. 2d at 186. We have already conducted a detailed analysis of defendant's plain error argument and determined that it fails (see *supra* ¶¶ 38-43), so we need not address this issue further.

¶ 52 III. CONCLUSION

¶ 53 For the reasons stated, we affirm the judgment of the Boone County circuit court.

¶ 54 Affirmed.