

No. 1-14-3415

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	Nos. 14 CR 9268 &
)	14 CR 9257
MICHAEL RICH,)	
)	The Honorable
Defendant-Appellant.)	Erica L. Reddick,
)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Lavin concurred in the judgment.

ORDER

¶ 1 Held: Plain error found where the issues instruction provided the jury did not include the essential element of defendant's *mens rea*. In addition, the jury was provided conflicting instructions, such that it was not given proper guidance and could not, therefore, perform its duty. Reversed and remanded for a new trial.

¶ 2 After a jury trial, defendant Michael Rich was found guilty of two counts of felony domestic battery in two separate cases that were consolidated and involved a single complainant. Defendant was sentenced to concurrent terms of four years' incarceration on each count. On

appeal, defendant contends: (1) the trial court erred in failing to instruct the jury on an essential element of felony domestic battery; (2) the trial court erred in improperly admitting certain evidence, including paper copies of the victim's mostly recanted statement against defendant at trial; and (3) he was prejudiced when the State elicited evidence of other crimes, failed to disclose particular evidence prior to trial, and made improper comments in closing arguments. For the following reasons, we reverse and remand for a new trial.

¶ 3

I. BACKGROUND

¶ 4

Defendant was charged with multiple counts of aggravated domestic battery, domestic battery, aggravated battery, and theft stemming from two incidents on March 6, 2014, and March 25, 2014. The matters were joined and the State proceeded to trial on two counts of aggravated domestic battery and two counts of felony domestic battery.

¶ 5

This cause was tried in August 2014. At trial, the State offered the testimony of three witnesses: victim Tina Porter, Assistant State's Attorney [ASA] Leslie Gool, and Chicago Police Detective Charity Musial, the detective who took Porter's written statements about the two alleged incidents. The defense presented a single witness, Chicago Police Officer Horan, who responded to Porter's 911 call on March 25, 2014.

¶ 6

Porter testified that she had known defendant for three years, and that he was the father of two of her children. Porter described her relationship with defendant as "off and on," said she loved him, and explained they were "currently working on an engagement." When asked about March 6, 2014, Porter recalled that she was home with her nine children that day. She remembered that defendant was also at her home, but she did not recall whether defendant choked her with his hands, and denied that he slapped her in the face or punched her in the eye. She explained that they were "exchanging money" that morning. The State asked Porter if

defendant had asked her for money because he wanted to purchase drugs, defense counsel objected, and the court held a side-bar after which it sustained the objection.

¶ 7 The State identified an exhibit for the jury as a prior typed statement Porter gave to ASA Gool and Detective Charity Musial on April 28, 2014. The statement was signed by Porter at the bottom of each page and was captioned "Statement of Tina Porter." Porter recalled providing the statement, but could not recall what was in the statement because she did not "remember back that far." Porter acknowledged that the statement concerned the aggravated domestic battery which occurred on March 6, 2014, and acknowledged that there were photographs attached to the statement. The State then confronted Porter with the prior statement:

"[ASSISTANT STATE'S ATTORNEY:] Q. "[D]id you tell the Assistant State's Attorney and detective that the defendant, Michael, squeezed your neck so hard that it was hard for you to breathe?"

[WITNESS PORTER:] A. Sir, I am telling you I gave them a statement. I don't remember what's all in the statement. So I can't give you an answer on that. I do not remember.

Q. Did you tell the Assistant State's Attorney and the detective that while you were being choked you were hitting the doorframe with your hand trying to get relief?

A. That's similar to the question you just asked me and I'm telling you once again I do not remember.

Q. And did you tell the Assistant State's Attorney and the detective that you were trying to tell the defendant to let you go?

A. No.

Q. Did you tell the Assistant State's Attorney and detective that [defendant] choked you for about 35 second [sic] before releasing your neck then dragged you by your hair to your bed?

A. I can't recall saying that, sir.

Q. Did you tell the Assistant State's Attorney and the detective that six of your children were at home and your son *** who was 11 years old saw the defendant hit you?

* * *

A. All of my children were at home.

Q. And did you tell the Assistant State's Attorney and the detective that your 11 year old saw the defendant [] hit you?

A. No, I told them that my 11 year old saw me and [defendant] argue."

¶ 8 The State continued to walk through the statement line by line. Porter remembered instructing her son to go get her neighbor, not the police. She did not remember saying that her son was really scared and "didn't move" when she told him to call the police. She denied telling the ASA or detective that she walked into her daughter's room and took out her phone to call the police, explaining that her daughter does not own a telephone. Porter also denied telling the ASA or the detective that defendant slapped the phone out of her hands and punched her in the eye with his fist.

¶ 9 Additionally, Porter denied having made a battery report via 311 and instead stated she called 911. Porter said she did not remember telling the ASA or the detective about getting a black eye with broken blood vessels in her left eye after defendant punched her, nor a sore neck from being choked. Porter testified that she was intoxicated on March 6, 2014, and does not remember things very well.

¶ 10 On cross-examination, Porter explained that she does not remember details from March 6, 2014, because she was on medication. She explained that her relationship with defendant was turbulent because he was seeing another woman at the same time. She agreed that she did not go to the hospital on March 6, 2014. She did not recall whether she told any friends or family members that defendant had hurt her. She remembered telling a police officer later that she did not want to pursue charges stemming from the March 6 incident.

¶ 11 The State then asked Porter about a separate statement she made on April 18, 2014, and walked her through the statement line by line. Porter identified her name and signature on the statement and acknowledged that the statement said: "involves a domestic battery which occurred at [address] on March 25, 2014." Porter testified that she signed each page of the statement and identified the photographs that were attached to the statement as one photograph of defendant and two photographs of herself. According to Porter, her aunt took one of the pictures of her, but she could not recall when the photograph was taken.

¶ 12 Regarding the March 25 incident, Porter testified that she and defendant were living together at the time. Porter was "kind of intoxicated" that day. They got into an argument and she called the police. She did not recall whether defendant hit, choked, dragged, or pushed her. When the police arrived, she informed them she had previously filled out a police report for the March 6 incident. She remembered the police arrested defendant.

¶ 13 She recalled meeting with the ASA and a detective on April 28, 2014, and recalled them asking her questions about the March 25, 2014 incident. She thought she must have answered the questions since the State was reading her statement in court, but she did not recall what was in the statement because it had happened so long ago. She denied telling the ASA or the detective that she did not act like she was scared when she encountered defendant in her house because

"I'm not afraid of [defendant]" and because defendant lived in the house with her. Porter told the ASA: "I don't remember what I told the State's Attorney. I'm not going to sit on the stand and lie to you or anything. It's been five months ago. I don't remember that."

¶ 14 Porter could not recall if she told the ASA and detective that she looked into defendant's eyes while defendant's hands were around her neck and that "defendant squeezed his hands around [her] neck, that [she] felt pressure around her neck but [was] still able to breathe." Porter did remember telling the ASA and detective that after defendant struck her, he stated "if you play with my freedom I will have someone come and hurt you. I don't care about your kids being here."

¶ 15 Porter also denied telling the ASA and the detective that the injury she sustained was a black eye, pictured in a photograph of her that was attached to the statement. She stated, "I don't remember that because I didn't give them the picture that you are holding in your hand." She said her aunt took the picture and she does not remember when it was taken.

¶ 16 On cross-examination, Porter testified she did not recall whether she informed the police on scene that defendant had attempted to strangle her. She did not seek medical treatment. She testified that she made her statements to the ASA and detective "out of anger" towards defendant.

¶ 17 ASA Gool testified that she was assigned to the Felony Review Unit of the Cook County State's Attorney's Office on April 28, 2014, when she received a telephone call from Detective Musial and proceeded to the Area North Detective Division. Once at the station, she met with Detective Musial and reviewed the reports pertaining to defendant's case. Then, she and Detective Musial met with the victim, Tina Porter, in a detective's office.

¶ 18 According to ASA Gool, Porter told her about the March 6, 2014 and March 25, 2014 incidents, and then agreed to make a handwritten statement. ASA Gool typed up a summary of each of Porter's statements. Porter indicated to ASA Gool that she was treated well by the police, had not been threatened or promised anything, and was not intoxicated. ASA Gool gave Porter the opportunity to review the statement and make any necessary corrections. ASA Gool, Detective Musial, and Porter then signed each page of both statements.

¶ 19 ASA Gool then testified that Porter told her: On the morning of March 6, 2014, defendant choked, slapped, and punched Porter. Defendant squeezed Porter's neck so hard that it was hard to breathe. After defendant choked Porter, he dragged her by the hair. At one point, Porter tried to grab a telephone, but defendant slapped the phone out of Porter's hands and punched her in the eye. As a result of this, Porter sustained a black eye, a broken blood vessel in her eye, and a sore neck from being choked.

¶ 20 ASA Gool also relayed that Porter told her: on March 25, 2014, defendant gained access to her apartment by taking her keys. Porter did not know defendant was in the apartment. After scaring Porter, defendant grabbed Porter by her neck and squeezed. When Porter started walking to the door, defendant grabbed her by the shirt and dragged her into the kitchen. Porter's injuries consisted of a black eye and a sore neck.

¶ 21 ASA Gool identified the photographs attached to the statements as being of defendant and Porter. She said Porter told her the black eye depicted in the third photograph of Porter was sustained from defendant hitting her.

¶ 22 Detective Musial testified that she was working as a detective on April 28, 2014, and in her investigation of a case against defendant, interviewed Porter at the Area North police department. After Detective Musial's initial investigation, she contacted the felony review unit

and ASA Gool came to the station. Detective Musial testified she was present when ASA Gool took Porter's statement and she also signed each page of both statements.

¶ 23 The State rested and defendant moved for a directed finding, which the court denied. Defendant then moved for a mistrial, which the court also denied.¹

¶ 24 Defendant presented the testimony of Chicago Police Officer Horan, who testified he responded to a 911 call on March 25, 2014, at Porter's home. While there, he met defendant and Porter. After determining that there was a previous police report on defendant for the March 6 incident, Officer Horan arrested defendant. Officer Horan did not observe any injuries on Porter, and Porter did not indicate that defendant choked her or strangled her. Officer Horan testified that Porter seemed "agitated" and may have been drinking. On cross-examination, Officer Horan testified he did not look for any injuries on Porter's body.

¶ 25 The defense rested.

¶ 26 The two written statements, with any reference to alleged other crimes redacted, plus their attendant photographs and a photograph of Porter's home, were entered into evidence and allowed to go back to the jury room.

¶ 27 At the jury instructions conference, the State proposed a "modified" version of IPI 11.12, the domestic battery instruction, without objection. In the written instructions provided the jury, the felony domestic battery instruction at issue reads:

"To sustain the charge of felony domestic battery, the State must prove the following propositions:

First: That the defendant made physical contact or [*sic*] an insulting or provoking nature with Tina Porter; and

¹ The motion for a mistrial was based on comments from ASA Gool and Detective Musial regarding their personal observations of Porter's injuries. Due to our holding in this cause, we need not describe this argument in detail.

Second: That Tina Porter was a family or household member.

If you find from your consideration of all 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 the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty."

¶ 28 During deliberations, the jury sent a handwritten note to the court regarding the above modified version of IPI 11.12, which requested clarification on a typographical error, and asked whether "or" should instead read "of" in the instruction. The trial court responded, "Yes."

¶ 29 The jury found defendant not guilty of both counts of aggravated domestic battery, and guilty of both counts of felony domestic battery, representing a guilty conviction of felony domestic battery for March 6, 2014, and another for March 25, 2014.

¶ 30 Defendant made a motion for a new trial, which the court denied.

¶ 31 After a sentencing hearing, the court sentenced defendant to an extended term of four years' incarceration on each count, to run concurrently.

¶ 32 Defendant appeals.

¶ 33 **II. ANALYSIS**

¶ 34 The issue in this appeal is whether the trial court erred in failing to instruct the jury on an essential element of the crime. Defendant contends the trial court failed to instruct the jury on the requisite mental state of felony domestic battery, thereby removing a fact question from the jury and depriving him of his right to a fair trial. Defendant also maintains that the conflicting instructions were prejudicial to him. The State replies that, because defendant did not object to

the instruction in question, he forfeited this issue. The State acknowledges that language was omitted from the instruction at issue, stating:

"Because defendant was charged with felony domestic battery, the People modified the instruction and included the word 'felony.' In making this modification, some of the language from IPI No. 11.12 appears to have been omitted from the submitted instruction. The submitted issue instruction was:

"To sustain the charge of felony domestic battery, the State must prove the following proposition:

First: That the defendant made physical contact or [*sic*] an insulting or provoking nature with Tina Porter; and

Second: That Tina Porter was a family member or household member.' "

While acknowledging this defect, however, the State also argues that no error occurred because, when the instructions are viewed as a whole, they "tracked the language of the statute for domestic battery." The State further replies that defendant has failed to carry his burden to establish either plain error or ineffective assistance of counsel. We disagree.

¶ 35 Whether the jury was properly instructed presents a question of law subject to *de novo* review. *People v. Parker*, 223 Ill. 2d 494, 501 (2006). The purpose of jury instructions is to convey to the jury the correct principles of law applicable to the evidence presented in the case before them so that they can reach a correct verdict. *People v. Hopp*, 209 Ill. 2d 1, 8 (2004). Generally, where an appropriate Illinois Pattern Jury Instruction (IPI) exists on a subject upon which the trial court has determined the jury should be instructed, the IPI must be used. *People v. Pollock*, 202 Ill. 2d 189, 212 (2002). Illinois pattern jury instructions were "painstakingly drafted with the use of simple, brief, and unslanted language so as to clearly and concisely state the law,"

and, for that reason, "the use of additional instructions on a subject already covered by IPI would defeat the goal that all instructions be simple, brief, impartial and free from argument" *People v. Haywood*, 82 Ill. 2d 540, 545 (1980). Therefore, while nonpattern instructions may be given, the instructions as a whole must not be misleading or confusing. *People v. Bush*, 157 Ill. 2d 248, 254-55 (1993). In addition, if conflicting instructions are given, one being a correct statement of law and the other an incorrect statement of law, the error cannot be deemed harmless. *Bush*, 157 Ill. 2d at 254; *Haywood*, 82 Ill. 2d at 545. This is because a jury instructed with contradictory instructions is not given proper guidance and, therefore, cannot perform its constitutional function. *Pollock*, 202 Ill. 2d at 212 (citing *People v. Jenkins*, 69 Ill. 2d 61, 67 (1977)).

¶ 36 We begin by noting that defendant forfeited review of this issue by failing to object to it at trial or raise it in a timely filed posttrial motion. *People v. Thompson*, 238 Ill. 2d 598, 611-12 (2010) (failure to properly preserve an alleged error by both an objection at trial and a written posttrial motion constitutes a procedural default of that error on review (citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988))). Defendant admits that he failed to properly preserve this issue for appeal, but urges us to review the error under both Supreme Court Rule 451(c) and both the first prong of the plain error exception because the evidence was closely balanced, as well as the second prong of the plain error exception because the error itself was so serious that he was denied a substantial right and thus a fair trial, requiring reversal. Ill. S.Ct. R. 615 (eff. Jan. 1, 1967); *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005) (plain error rule permits consideration of errors even though technically waived for review where the evidence is closely balanced or where the claimed error is of such magnitude that there is a substantial risk that the defendant was denied a fair and impartial trial).

¶ 37 A criminal defendant forfeits any claim of error as to a jury instruction unless he (1) objects to the instruction; (2) offers an alternative instruction; and (3) raises the issue in a posttrial motion. *People v. Sargent*, 239 Ill. 2d 166, 188-89 (2010); *Thompson*, 238 Ill. 2d at 611-12. However, where instructional errors are so grave that they affect the requirements of a fair and impartial trial, the plain error doctrine set forth in Supreme Court Rule 451(c) provides an exception to the forfeiture rule. Pursuant Rule 451(c) (eff. April 8, 2013), a defendant may raise a forfeited jury-instruction error under the plain error doctrine, alleging "substantial defects *** if the interests of justice require." See also *Sargent*, 239 Ill. 2d at 189. This rule is meant to correct grave or serious errors in cases so factually close that fundamental fairness requires that the jury be properly instructed. *Sargent*, 239 Ill. 2d at 189.

¶ 38 The rule is coextensive with the plain error clause of Supreme Court Rule 615(a), which states: " 'Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.' " *Sargent*, 239 Ill. 2d at 189 (quoting Ill. S.Ct. R. 615(a)); see also *Herron*, 215 Ill. 2d at 175 (quoting *People v. Armstrong*, 183 Ill. 2d 130, 151 n. 3 (1998)) ("Rule 451(c) is coextensive with the 'plain error' clause of Supreme Court Rule 615(a), and we construe these rules 'identically.' "). Accordingly, we consider defendant's argument pursuant to the plain error doctrine.

¶ 39 The plain error doctrine "allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of

the closeness of the evidence." *Sargent*, 239 Ill. 2d 166, 189 (2010); see also *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *Herron*, 215 Ill. 2d at 186-87)); see also Ill. S.Ct. R. 615(a) ("[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court").

¶ 40 The plain error exceptions for jury instruction errors are " 'strict tests' " that are "applicable only to serious errors which severely threaten the fundamental fairness of the defendant's trial." *Hopp*, 209 Ill. 2d at 8 (quoting *People v. Roberts*, 75 Ill. 2d 1, 15 (1979)). A jury instruction error "rises to the level of plain error only when the omission creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial." *Hopp*, 209 Ill. 2d at 8. "We must determine whether the instructions, taken as a whole, fairly, fully, and comprehensively apprised the jury of the relevant legal principles." *Parker*, 223 Ill. 2d at 501. Fundamental fairness requires the trial court to give proper instructions on the elements of the offense in order to insure a fair determination of the case, and the failure to do so constitutes plain error. *People v. Williams*, 181 Ill. 2d 297, 317-18 (1998). Whether the jury instructions accurately conveyed the applicable law is an issue we review *de novo*. *Parker*, 223 Ill. 2d at 501.

¶ 41 "[T]he giving of contradictory instructions on an essential element in the case is prejudicial error, and is not cured by the fact that another instruction is correct." *Jenkins*, 69 Ill. 2d at 66; *Haywood*, 82 Ill. 2d at 545 (Where conflicting instructions are given, one of which is a correct statement of the law and the other is an incorrect statement of the law, the error is not harmless and constitutes grave error). "This is particularly true where the instruction defines the issues in the case or is mandatory in character." *Jenkins*, 69 Ill. 2d at 66. "Where the instructions

are contradictory the jury is put in the position of having to select the proper instruction—a function exclusively that of the court." *Jenkins*, 69 Ill. 2d at 67.

¶ 42 Additionally, the issuance of a correct written jury instruction does not render the issuance of an erroneous instruction harmless. See *Haywood*, 82 Ill. 2d at 545. The issuance of contrary instructions prevents the jury from performing its constitutionally appointed function because it has not been properly informed of the law to be applied in the case. *Haywood*, 82 Ill. 2d at 545, *Bush*, 157 Ill. 2d at 254 (1993) (If conflicting instructions are given, one being a correct statement of law and the other an incorrect statement of law, the error cannot be deemed harmless).

¶ 43 "The first step of plain-error review is to determine whether any error occurred." *People v. Lewis*, 234 Ill. 2d 32, 43 (2009); see also *People v. Wilson*, 404 Ill. App. 3d 244, 247 (2010) ("There can be no plain error if there was no error at all."). This requires "a substantive look" at the issue raised. *People v. Johnson*, 208 Ill. 2d 53, 64 (2003). Will therefore first review defendant's claim to determine if there was any error before considering it under plain error.

¶ 44 Illinois Pattern Jury Instructions, Criminal, No. 11.12 (4th ed. 2000), instructs:

"11.12 Issues in Domestic Battery

To sustain the charge of domestic battery, the State must prove the following propositions:

First Proposition: That the defendant [(intentionally) (knowingly)] [(caused bodily harm to) (made physical contact of an insulting or provoking nature with)] _____; and

Second Proposition: That _____ was then a family or household member to the defendant.

If you find from your consideration of all 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 the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty." IPI Criminal, No. 11.12 (4th ed. 2000).

¶ 45 The State explains that, because defendant was charged with felony domestic battery and there is no IPI for felony domestic battery, the People modified the instruction and included the word 'felony.' The State acknowledges, with no further explanation, that when it made the modification, "some of the language from IPI No. 11.12 appears to have been omitted from the submitted instruction." It argues, though, that there is no error because the instructions when viewed as a whole "tracked the language of the statute for domestic battery." We disagree.

¶ 46 The jury received a modified version of IPI Criminal No. 11.12. As provided the jury in this case, the modified IPI Criminal No. 11.12 stated as follows:

"To sustain the charge of felony domestic battery, the State must prove the following propositions:

First: That the defendant made physical contact or [*sic*] an insulting or provoking nature with Tina Porter; and

Second: That Tina Porter was a family or household member.

If you find from your consideration of all 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 the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty." IPI Criminal, No. 11.12 (Modified) (4th ed. 2000).

¶ 47 The jury was also provided a written instruction on felony domestic battery which provided:

"A person commits the offense of felony domestic battery when he intentionally or knowingly makes contact of an insulting or provoking nature to any family or household member."

¶ 48 Here, the jury was provided with conflicting instructions, that is, one instruction for felony domestic battery reflected a mental state requirement, while the second instruction for the same crime of felony domestic battery reflected no mental state at all. The crime of felony domestic battery does, in fact, include a requisite mental state. ILCS 5/12-3/2 (West 2014). Specifically, section 12-3.2 of the Criminal Code defines the offense of domestic battery as follows:

"(a) A person commits domestic battery if he or she *knowingly* without legal justification by any means:

(1) Causes bodily harm to any family or household member;

(2) Makes physical contact of an insulting or provoking nature with any family or household member[.]. 720 ILCS 5/12-3.2(a) (West 2014) (emphasis added).

This means that, to secure a conviction under Section 12-3.2, as the State did here, the State was required to prove beyond a reasonable doubt each of four essential elements: that defendant (1) intentionally or knowingly (2) without legal justification (3) made physical contact of an insulting or provoking nature (4) with a family or household member. However, the modified

issues instruction given in this case, which clearly defined the elements of the offense, made no mention of the requirement that defendant acted intentionally or knowingly.

¶ 49 We find *People v. Jenkins*, 69 Ill. 2d 61 (1977), instructive. In *Jenkins*, our supreme court ordered a new trial for the defendant, where two of the jury instructions contradicted one another on the essential elements of the offense. *Jenkins*, 69 Ill. 2d at 65. The court held that contradictory instructions on an essential element could not be cured by another instruction that was correct because the jury would be forced to determine which instruction was correct. *Jenkins*, 69 Ill. 2d at 66.

¶ 50 The *Jenkins* court stated that the court has the duty to inform the jury as to the law, but where the instructions are contradictory, the jury cannot perform its constitutional function:

"This inability is the fault of the court, whose duty it is to give the proper guidance, not to generate confusion, as was the case here. It is well established that the giving of contradictory instructions on an essential element in the case is prejudicial error, and is not cured by the fact that another instruction is correct. While it is true that an instruction may be inaccurate, and other instructions may remove this error, such cannot be so when the instructions are in direct conflict with one another, one stating the law correctly and the other erroneously. This is particularly true where the instruction defines the issues in the case or is mandatory in character. [Citations.]

Where the instructions are contradictory[,] the jury is put in the position of having to select the proper instruction[,] a function exclusively that of the court. As far as can be known, defendant might well have been convicted on the basis of the erroneous instruction. Certainly, a person should not stand to lose his liberty because a jury has received equivocal instructions." *Jenkins*, 69 Ill. 2d at 66-67.

¶ 51 Moreover, our supreme court later held that the complete omission of part of the definition of the crime charged deprives the jury of the guidance it needs to properly decide the case. *People v. Ogunsola*, 87 Ill. 2d 216, 223 (1981) ("It is of the essence of a fair trial that 'the jury not be permitted to deliberate a defendant's guilt or innocence of the crime charged without being told the essential characteristics of that crime.' " (quoting *Lewis*, 112 Ill. App. 2d at 11)); see also *Haywood*, 82 Ill. 2d at 545.

¶ 52 Here, defendant's jury was given similar, contradictory and inconsistent instructions on felony domestic battery. The modified IPI Criminal 11.12 completely omitted the requisite mental state for the crime, but instead instructed the jury that a defendant commits the crime of felony domestic battery if he makes physical contact of an insulting or provoking nature with the victim. Instead of being held to the appropriate legal *mens rea* standard, which is an element of the crime, the jury was instead provided what was essentially a strict liability standard, instructing the jury that defendant would be guilty of felony domestic battery if he made physical contact of an insulting or provoking nature with the victim, regardless of his mental state. Like *Jenkins*, the fact that the jury received a definitional instruction that was an accurate statement of the law applicable in this case did not cure the error of giving the jury an inaccurate statement of the law. Like *Jenkins*, the jury in this case was required to choose between an accurate instruction which applied to the facts of this case and an inaccurate instruction which did not. Also as in *Jenkins*, the giving of these contradictory instructions on an essential element in the case was grave error which mandates reversal. The error was not cured.

¶ 53 Moreover, the *Jenkins* court acknowledged that, while the other instructions might cure the error caused by an inaccurate instruction, other instructions cannot cure the error where the instructions are in direct conflict. *Jenkins*, 69 Ill. 2d at 66. That is the case here, where the proper

definitional instruction provided, in pertinent part, that to be found guilty of felony domestic battery, the defendant must "intentionally or knowingly" make contact of an insulting or provoking nature to the victim. The modified instruction that was provided the jury, however, completely omitted defendant's *mens rea*, instructing the jury that, to be found guilty of felony domestic battery, the defendant must only have made physical contact of an insulting or provoking nature to the victim. The omission of the *mens rea* was error.

¶ 54 Having concluded that the trial court erred, this court must next determine whether it requires reversal. We therefore address the issue of whether the error falls into either category of plain error. *Thompson*, 238 Ill. 2d at 613 (the first prong of the plain error doctrine operates when " 'a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error; ' " the second prong operates when " 'a clear or obvious error occurred and that error is so serious that it affected the * * * integrity of the judicial process, regardless of the closeness of the evidence' " (quoting *Piatkowski*, 225 Ill. 2d at 565)). Under both prongs of the plain error doctrine, the burden of persuasion rests with the defendant. *Piatkowski*, 225 Ill. 2d at 565. If that burden is not met, defendant's conviction will stand. *Herron*, 215 Ill. 2d at 181-82.

¶ 55 Here, the victim, Tina Porter, testified to a lack of memory of the underlying facts, stated that she was either taking medication that affected her memory or was intoxicated at the times of the purported crimes, could not recall having told the ASA about any injuries she had sustained, and testified that she accused defendant "out of anger." Additionally, there were no corroborating hospital records, and the responding police officer testified he did not notice any injuries on Porter, but also testified that Porter seemed agitated and may have been drinking. We find, under the specific facts of this case where the jury was improperly instructed by a conflicting, uncured,

defective jury instruction regarding the essential elements of the charged offense, that, for purposes of the first prong of plain error analysis, the evidence was closely balanced such that " 'the error alone threatened to tip the scales of justice against the defendant' " (*Thompson*, 238 Ill. 2d at 613 (quoting *Piatkowski*, 225 Ill. 2d at 565); see also *People v. Ayers*, 331 Ill. App. 3d 742, 750 (2002) ("Where conflicting instructions are given, one of which is a correct statement of the law and the other is an incorrect statement of the law, the error is not harmless and constitutes grave error. [Citations.] Thus, we will review the merits of [the defendant's] contentions.").

¶ 56 The modified 11.12 instruction was a conflicting and inaccurate statement of the applicable law, and the error in giving it to the jury was not remedied by any of the remaining instructions provided the jury. The error resulted in serious prejudice to defendant in that it denied him the right to have the jury properly instructed as to all of the requisite elements of the charged crime. See *Jenkins*, 69 Ill. 2d at 67 ("Where the instructions are contradictory the jury is put in the position of having to select the proper instruction—a function exclusively that of the court.") The error in this case caused serious prejudice to defendant and, but for the error, the jury might have reached a different verdict. See *Hopp*, 209 Ill. 2d at 8 (A jury instruction error "rises to the level of plain error only when the omission creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial."); *Pollock*, 202 Ill. 2d at 212 (a jury instructed with contradictory instructions is not given proper guidance and, therefore, cannot perform its constitutional function). Therefore, defendant is entitled to a new trial.

¶ 57 We note that defendant also asserts that a note sent by the jury during deliberations evidenced its confusion over the conflicting instructions. During deliberations, the jury sent a

handwritten note to the court regarding the modified version of IPI 11.12, which requested clarification on what was apparently a typographical error, and asked whether "or" should instead read "of" in the instruction. The trial court responded, "Yes." Defendant points out that this note suggests the possibility that the jury relied specifically on the modified issues instruction in its deliberations. We do not speculate here, however, on the private deliberations of the jury, and this argument has not impacted our decision today.

¶ 58 Deciding this case as we do, we need not address the remaining issues raised by defendant.

¶ 59 III. CONCLUSION

¶ 60 The issues instruction provided in the case at bar, which defined the elements of the offense, did not include the essential element of defendant's *mens rea*. In addition, the jury was provided conflicting instructions, such that it was not given proper guidance and could not, therefore, perform its duty. We find plain error here and reverse this cause for a new trial.

¶ 61 Reversed and remanded.