

NOTICE

This Order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

2026 IL App (4th) 250466-U

NO. 4-25-0466

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

September 16, 2026
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
BRIAN K. BURNETT,	)	No. 23CF363
Defendant-Appellant.	)	
	)	Honorable
	)	J. Jason Chambers,
	)	Judge Presiding.

JUSTICE DOHERTY delivered the judgment of the court
Justices Grischow and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not err in refusing to tender defendant’s non-pattern jury instruction and (2) defendant could not establish ineffective assistance of counsel.

¶ 2 Following a jury trial, defendant Brian K. Burnett was convicted of two counts of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2022)) and one count of aggravated battery with a firearm (*id.* § 12-3.05(e)(1)) on a theory of accountability. He was sentenced to 18 years’ imprisonment.

¶ 3 In this direct appeal, defendant argues that he was denied a fair trial when the trial court refused to issue a non-pattern jury instruction. In the alternative, he argues that defense counsel was ineffective for failing to tender a version of the Illinois Pattern Jury Instruction (IPI) accountability instruction that included permissive language on the “mere presence” issue. For the reasons that follow, we affirm.

¶ 4 I. BACKGROUND

¶ 5 This case stems from a drug deal turned shootout. Defendant was charged with two counts of aggravated discharge of a firearm (*id.* § 24-1.2(a)(2)) and one count of aggravated battery with a firearm (*id.* § 12-3.05(e)(1)) on a theory of accountability, as well as unlawful use of a firearm by a felon (*id.* § 24-1.1(a)). The relevant evidence from defendant’s five-day jury trial is summarized as follows.

¶ 6 A. Testimony of Apartment Complex Residents

¶ 7 Kyle Clark lived on the third floor of an apartment complex with his girlfriend Savannah Weishaar in Bloomington, Illinois. On March 11, 2022, he heard loud bangs coming from outside and looked out his apartment window to the parking lot below. He saw a red Ford SUV about to leave the parking lot when it crashed into parked cars. He recognized the Ford SUV as belonging to his neighbor, later identified as Damatez Banks. A blue Jeep and a red Kia were near the Ford SUV after the accident, with the three vehicles forming a triangle. Banks exited the Ford SUV with a handgun and opened fire in the direction of the Jeep and Kia, at which point the latter two vehicles sped off. Based on the sound of the shots, Clark assumed the previous loud bangs he heard were also gunshots. After the other vehicles sped off, Banks appeared to be carrying something in his hooded sweatshirt as he went to his apartment. Banks then went back to the parking lot and collapsed on the ground without the item he had previously been carrying. Clark’s view of these events was unobstructed. Although he was on the third floor, the events took place no more than 10 feet away from his window.

¶ 8 Weishaar testified that she made a 911 call concerning the incident on March 11, and her conversation with dispatch was admitted into evidence. What initially led to the phone call was the sound of gunshots and a car crash. When she looked out the window, she saw the same vehicles described by Clark and the Ford SUV—which she recognized as her neighbor’s—crashed

into parked cars. The Jeep and Kia stopped behind the Ford, and that is when Banks exited the vehicle and began shooting a handgun. She assumed he was returning fire and that someone from the blue Jeep had previously fired gunshots because Banks was yelling that he had been shot in the head. Weishaar never saw anyone in the Kia fire any shots.

¶ 9 Tamara Perez lived in the basement of the apartment complex but saw the events from her window. Following the crash, she saw Banks exit the Ford SUV. Banks did not have a gun or fire any shots, but the passengers of the Ford both got out of the vehicle and opened fire on the Jeep and Kia as those vehicles left the scene. Banks stayed near the Ford and collapsed shortly after the crash. He never went into the apartment complex.

¶ 10 B. Damatez Banks

¶ 11 Banks had known defendant since he was young and had communications with him prior to March 11 to set up a sale of three pounds of cannabis for \$6,000 cash. He intended to complete the transaction with defendant in the parking lot of the apartment complex on the morning of March 11, and he drove his red 2017 Ford Escape SUV to that location. There were two other passengers in the vehicle with him, but he claimed that he and one of the other passengers were not armed; he could not recall if the third person had a weapon. Defendant was outside of the vehicle by the driver's side front window with brothers Jaylin and Kenyon Bones when the transaction began. Banks described what followed as a "30 second flare," during which he saw three ski masks and someone reaching into the car to take the cannabis. A scuffle ensued. He heard gunshots and drove away, but he was shot and crashed the vehicle. When he crashed, everyone "scrambled," and he ran to his upstairs apartment to hide the cannabis. He never saw his passengers return fire. Defendant and the Bones brothers ran to two awaiting vehicles and left the parking lot.

¶ 12 C. Hunter Scheuermann

¶ 13 Hunter Scheuermann was a delivery driver for United Parcel Service and was delivering packages in the area of the shootout the day it occurred. As he entered the apartment complex, he saw a red vehicle with a Black male in the driver's seat and another Black male standing at the driver's side window. Based on their body language, it appeared the two were arguing and exchanging "a bag of something." He saw the person outside the vehicle hand a bag to the driver. He was only able to view the two for "10 to 15 seconds" as he drove past.

¶ 14 D. Stephanie Brown

¶ 15 Stephanie Brown testified that on the day of the incident, a car had driven through the fence at her home in Bloomington, Illinois, and struck a tree. The crash knocked items off the wall of her house and disconnected the electricity. When she went outside, she saw a woman exiting the driver side of the vehicle and a male exiting the passenger side. A recording of the 911 call she made as a part of this incident was admitted into evidence and played for the jury. During the call, Brown explained that the male and female were both Black and badly injured from the crash. She believed the male had broken his leg and he was limping. They were both picked up from the scene "very quickly" after the crash. The male got into a blue SUV, while the female got into a cream-colored sedan. The crashed vehicle was later identified as defendant's red Kia SUV.

¶ 16 E. Law Enforcement

¶ 17 Numerous members of law enforcement testified to their investigations in this matter. Surveillance video from a nearby truck repair shop showed traffic moving along a road when two SUVs, one red and the other blue, can be seen traveling at a high rate of speed, much faster than the rest of the vehicles shown. Testimony established that this was video of the blue Jeep and red Kia fleeing the scene of the shootout. Surveillance footage retrieved from Unity Point Health Methodist Hospital (UnityPoint) in Peoria, Illinois, showed a blue Jeep Compass dropping

Kenyon Bones at the emergency room entrance.

¶ 18 The Peoria Police Department contacted officers in Bloomington, stating that Bones had been admitted to UnityPoint with a gunshot wound to his right shoulder. While on the way to Peoria to interview Bones, members of law enforcement encountered what they believed to be the same blue Jeep Compass traveling toward Bloomington from Peoria. They radioed ahead to have the vehicle stopped. Dashcam video of the traffic stop admitted into evidence showed officers removing defendant from the rear passenger side of the Jeep. The officer who assisted with the traffic stop testified that once defendant was outside of the vehicle, it was apparent that he was seriously injured and that he was limping because of an injury to his leg.

¶ 19 Body camera footage from an interview with defendant after he was taken to the hospital was also admitted into evidence. Defendant stated he lived at the apartment complex where the shootout occurred and was home at the time it occurred, but he denied witnessing any shootout in the area around the apartment building or hearing any gunshots. He claimed he was “busy” arguing with his girlfriend. He also claimed that he injured himself falling down stairs and that someone had stolen his red Kia that morning. He further claimed that when officers stopped the Jeep, he was on the way to the hospital. Officers seized \$6,000 in cash from defendant at the hospital.

¶ 20 Three pounds of cannabis were retrieved from Banks’s Ford SUV. Extraction of data from the cell phones of various persons involved showed that several people had accused Banks of stealing 21 pounds of cannabis from a person in Streator, Illinois. Banks had received several death threats. Messages from the phones showed that a cash for cannabis exchange had been arranged between defendant and Banks.

¶ 21 F. Jury Instructions and Closing Argument

¶ 22 During the jury instruction conference, defense counsel tendered a non-IPI jury instruction. Counsel stated that the instruction was legally correct, but he was unaware of any authority that entitled defendant to have it tendered to the jury. The instruction provided as follows:

“Mere presence of the defendant at or in the vicinity of the scene of the crime does not make him legally responsible for the conduct [of] another. Even consent or knowledge by the defendant that a crime was being committed would not constitute aiding or abetting.

Mere presence at the commission of an alleged offense without any affirmative act of assisting, abetting, or encouraging the commission of the act is not sufficient to render someone accountable for the commission of the offense.”

¶ 23 The State objected, arguing that other jury instructions already directed the jury that there must be “conduct *** in furtherance of the plan and intended act” in order to convict.

¶ 24 The trial court commented that it was concerned that the proposed non-pattern instruction would raise additional questions on the definitions of “assisting, abetting, or encouraging.” The court determined that the other jury instructions adequately presented the legal principles of the case, so it declined the non-pattern instruction. The instructions accepted by the court included the standard accountability and circumstantial evidence instructions. Regarding accountability, the court approved giving the following instruction to the jury:

“A person is legally responsible for the conduct of another person when, either before or during the commission of an offense, and with the intent to promote or facilitate the commission of an offense, he knowingly solicits, aids, abets, agrees to aid, or attempts to aid the other person in the planning or commission of an offense.

The word ‘conduct’ includes any criminal act done in furtherance of the planned and intended act.”

See Illinois Pattern Jury Instructions, Criminal, No. 5.03 (approved Apr. 28, 2023) (hereinafter IPI Criminal No. 5.03).

Regarding circumstantial evidence, the court said it would instruct the jury as follows:

“Circumstantial evidence is the proof of facts or circumstances which give rise to a reasonable inference of other facts which tend to show the guilt or innocence of the defendant. Circumstantial evidence should be considered by you together with all the other evidence in the case in arriving at your verdict.”

¶ 25 During the State’s initial closing argument, the prosecutor recited the accountability instruction for the jury. Thereafter, the prosecutor stated:

“So, folks, you will probably hear not presence at the scene, the terminology mere presence. You may hear an argument related to mere presence. Mere presence at the scene of a crime does not mean you are accountable for the crime of others. So the argument being, what I am anticipating, probably wrong, [defendant], innocent bystander, going up to Damatez Banks to buy some weed, the Bones brothers show up, everything goes into the toilet, [defendant] had nothing to do with it. That’s the argument. The issue then becomes I have to show the conduct that includes any criminal act done in furtherance of the plan and the intended act.”

¶ 26 During defendant’s closing argument, his attorney agreed that the prosecutor was correct in stating “just being at the scene of the crime doesn’t make you guilty.” He explained that “the Bones brothers weren’t guilty of a drug transaction just because they were there, because they weren’t part of the drug transaction, and [defendant] was not guilty of anything that happened

during the shooting just because he's there." Counsel also repeatedly argued that there was no evidence that could tie defendant to the shots fired or a scheme to rob Banks.

¶ 27 G. Verdict, Sentencing, and Postjudgment Motion

¶ 28 Following the State's rebuttal, the trial court instructed the jury by providing, among others, the instructions on accountability and the use of circumstantial evidence. The court then directed the jury to begin deliberations. Ultimately, defendant was found guilty of three of the four counts and sentenced to 18 years' imprisonment.

¶ 29 Defendant filed a motion for a new trial, arguing that the trial court erred in refusing the non-pattern jury instruction on "mere presence." The court denied the motion, finding that the instruction on accountability was sufficient to convey that defendant's mere presence at the scene alone was not enough to support a guilty verdict.

¶ 30 This appeal followed.

¶ 31 II. ANALYSIS

¶ 32 Defendant presents two arguments on appeal. First, he contends the trial court erred in refusing to give his non-pattern jury instruction. Second, he argues that counsel was ineffective in failing to tender a version of the IPI accountability instruction that addressed "mere presence." We address each point in turn.

¶ 33 A. Non-Pattern Jury Instruction

¶ 34 Defendant references the familiar principle he is entitled to the submission of appropriate jury instructions pertaining to his theory of the case if there was any evidence in the record to support them. See *People v. Gilliam*, 172 Ill. 2d 484, 519 (1996). While this principle is undeniable, it is also not quite the issue here. The jury here was given an IPI instruction on the principles pertaining to accountability, including the requirement that defendant's responsibility

must flow from his conduct. The issue here is not that the standard accountability instruction is wrong, but whether there was a *better* instruction to which defendant was entitled, *i.e.*, an instruction that amplified defendant's argument that "mere presence" in the area is insufficient to give rise to accountability. In other words, the question is whether defendant was entitled to have his non-IPI instruction given to the jury.

¶ 35 Regarding the use of pattern jury instructions, Illinois Supreme Court Rule 451(a) (eff. Apr. 8, 2013) provides as follows:

"Whenever Illinois Pattern Jury Instructions Criminal, contains an instruction applicable in a criminal case, giving due consideration to the facts and the governing law, and the court determines that the jury should be instructed on the subject, the IPI Criminal instruction shall be used, unless the court determines that it does not accurately state the law."

Here, defendant does not contend that IPI Criminal No. 5.03 is an inaccurate statement of the law, so on the terms just described, the trial court was under an obligation to give it.

¶ 36 As for a non-pattern instruction, where the "IPI Criminal does not contain an instruction on a subject on which the court determines that the jury should be instructed, the instruction given on that subject should be simple, brief, impartial, and free from argument." *Id.* "[W]here there is no IPI jury instruction regarding a subject on which the court determines the jury should be instructed, the court has discretion to give a non-IPI instruction." *People v. Fane*, 2021 IL 126715, ¶ 33. We review the denial of a non-pattern jury instruction for an abuse of discretion. *Id.*

¶ 37 Here, we find that the trial court acted within its discretion in refusing defendant's proposed non-pattern instruction. The proposed instruction was unduly focused on defendant's

particular strategy—noting that “mere presence” is not alone enough to give rise to accountability—and not enough on the broader provisions of the law concerning accountability.

¶ 38 Moreover, if defendant felt that the IPI instruction did not go far enough to make his point on the insufficiency of “mere presence,” there was an IPI-approved option available to him. The committee note to IPI Criminal No. 5.03 states that the following additional paragraph can be included in the accountability instruction when supported by the evidence:

“Actual physical presence at the commission of a crime is not a requirement for legal responsibility. However, mere presence at the scene of a crime does not make a person accountable for an offense. You may consider a person’s presence at the scene of a crime along with other circumstances when determining accountability.”

IPI Criminal No. 5.03, Committee Note (approved Apr. 28, 2023).

¶ 39 The presence of this IPI-approved language ends any consideration of the appropriateness of defendant’s non-IPI instruction. See Ill. S. Ct. R. 451(a) (eff. Apr. 8, 2013); *Gilliam*, 172 Ill. 2d at 519 (noting a court does not err in the refusal of a non-IPI instruction where an IPI instruction on the subject exists). Defendant’s citation to caselaw regarding an entitlement to an instruction on an affirmative defense is not on point where the instructions requested in those cases were pattern instructions. See *People v. Jones*, 175 Ill. 2d 126 (1997); *People v. Miller*, 2021 IL App (1st) 190060. Even in *People v. Danielly*, 274 Ill. App. 3d 358, 367-68 (1995), the reviewing court found no abuse of discretion in the failure to tender the defendant’s non-pattern instruction regarding the destruction of evidence.

¶ 40 We now consider defendant’s alternative contention that his counsel rendered ineffective assistance by failing to tender an instruction incorporating the “mere presence” discussion, as permitted by the committee notes to IPI Criminal No. 5.03.

¶ 41

B. Assistance of Counsel

¶ 42 Criminal defendants are entitled to the constitutional guarantee of effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525-26, (1984). A defendant's claim of ineffectiveness is considered under the familiar two-prong analysis laid out in *Strickland*. *People v. Lewis*, 2022 IL 126705, ¶ 44. To prevail, the defendant must establish counsel's performance was objectively unreasonable and affirmatively prove that he suffered prejudice from the errors of counsel. *Id.* ¶¶ 44, 46.

¶ 43 "Generally, counsel's choice of what jury instructions to tender to the court is a matter of trial strategy." *People v. Bruemmer*, 2021 IL App (4th) 190877, ¶ 53. " 'Accordingly, counsel's decision as to which jury instruction to tender can support a claim of ineffective assistance of counsel only if that choice is objectively unreasonable.' " *Id.* (quoting *People v. Mister*, 2016 IL App (4th) 130180-B, ¶ 97).

¶ 44 Because a defendant must satisfy both prongs of the *Strickland* test, the failure to establish either prong is fatal to the claim. *People v. Carroll*, 2026 IL 131360, ¶ 68. "As such, if a reviewing court determines that the defendant has failed to prove prejudice, the court need not address the deficient performance prong." *Id.* Accordingly, we first determine whether defendant can establish that he was prejudiced by the absence of the instruction at issue.

¶ 45 As the State points out, there is a significant amount of caselaw on the topic of whether a "mere presence" instruction is required when the State proceeds on an accountability theory to secure a conviction. See *People v. McNabb*, 2022 IL App (4th) 220070-U, ¶ 132 ("The appellate court has repeatedly held that juries need not be instructed explicitly that mere presence at the scene of the crime is insufficient to prove accountability.") (citing *People v. Nutall*, 312 Ill.

App. 3d 620, 634-35 (2000); *People v. Thomas*, 175 Ill. App. 3d 521, 530 (1988)); see also *People v. Wilson*, 257 Ill. App. 3d 670, 697-98 (1993) (“[T]he standard [IPI] accountability instruction contains the essence of the ‘mere presence’ instruction.”).

¶ 46 Defendant argues that the caselaw cited by the State was issued “before the CLEAR Commission undertook a review of the Criminal Code [of 1961 (Code)] and determined that the ‘mere presence’ defense was *not* adequately conveyed by the accountability statute.” (Emphasis in original.) The CLEAR commission was established in 2004 with the goal of streamlining the Code, and the adoption of its recommendations resulted in the reduction of the Code’s content by one third. See The CLEAR Commission, *Governor Approves Last In Series Of Bills Streamlining Illinois Criminal Code*, PR Newswire (Aug. 27, 2012) (available at <https://www.prnewswire.com/news-releases/governor-approves-last-in-series-of-bills-streamlining-illinois-criminal-code-167609195.html>) (last visited Aug. 27, 2026). The statute was subsequently amended to reflect the committee’s recommendations (see Pub. Act 96-710 (eff. Jan. 1, 2010) (amending 720 ILCS 5/5-2(c) (West 2008))), and the “Supreme Court Committee on Jury Instructions amended the official committee notes to IPI [Criminal] No. 5.03,” providing for an additional paragraph in the accountability instruction to address the concept of “mere presence.” Defendant reasons that the older cases cited by the State are, therefore, no longer persuasive. Moreover, he contends the parties’ closing arguments were over two hours long, so focusing on two brief excerpts to find a lack of prejudice because the jury was informed of the “mere presence” proposition is insufficient.

¶ 47 Despite defendant’s arguments to the contrary, we find that he was not prejudiced by the lack of the additional “mere presence” language in the accountability instruction given here. This court has repeatedly found that the essence of the “mere presence” instruction is inherent in the accountability instruction. While inclusion of the additional paragraph on “mere presence” here

