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SCHALLER, J. dissenting. The majority concludes that the trial court committed plain error by not instructing the jury on the affirmative defense of inoperability relative to the charge of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4) and did not instruct the jury on the lesser included offense of robbery in the second degree in violation of General Statutes § 53a-135 (a) (2). The majority bases both of those conclusions on the specific fact that the evidence was uncontroverted that the weapon in question was inoperable. I do not agree, and respectfully dissent.

In the present case, I conclude that the court's failure to instruct on the affirmative defense was not improper for two reasons. First, the defendant did not request that the court instruct the jury on the affirmative defense. Our case law establishes that it is the defendant's burden, and his alone, to request a jury charge on an affirmative defense. In *State* v. *Preyer*, 198 Conn. 190, 502 A.2d 858 (1985), the defendant failed to request a charge on an applicable affirmative defense that was supported by the evidence. On appeal, the defendant argued that ''a trial court always has an independent obligation, as a matter of law, to charge on any theory of defense for which there is a foundation in the evidence.'' Id., 196. The *Preyer* court did not agree and concluded that ''[t]here is no basis, in the law of this state, for the defendant's broad claim that a trial court has an independent obligation to instruct the jury on the affirmative defense . . . if the evidence at trial would suffice to support such a charge.'' Id.

The majority, however, is in direct conflict with *Preyer* and imposes a duty on the trial court to instruct on an affirmative defense absent any request for a specific instruction from the defendant. By way of its decision, the majority effectively has created law that *if the defendant* does not request an instruction on a viable affirmative defense, *the court* must provide the instruction on the affirmative defense to avoid committing plain error. I believe that is inappropriate in light of *Preyer* and stands in direct conflict with the governing law on the issue.

Furthermore, I am not persuaded by the majority's attempt to distinguish *Preyer*. The majority first states that *Preyer* has only a ''facial similarity'' because the *Preyer* court reviewed the defendant's claim under the constitutional *Golding*[1] standard as opposed to the plain error analysis invoked in the present case. While those two doctrines admittedly apply different standards, the *Preyer* court's choice of method with which to review the unpreserved claim does not diminish its *legal conclusion* that a trial court does not have an independent

obligation to instruct the jury on an affirmative defense if the evidence would suffice to support such a charge. Additionally, the fact that the *Preyer* court *did not* apply a plain error analysis in that case, in which there was evidence that was sufficient to present the defense to the jury, indicates that the *Preyer* court concluded that the trial court's failure to instruct did not constitute plain error.

The majority also attempts to distinguish *Preyer* by focusing on the phrases ''always has an independent obligation'' and ''any theory of defense'' that are used in *Preyer*'s statement of the claim. Id. The majority notes that the present case is distinguishable from that broad language because the present case is confined to the situation at hand in which there was uncontroverted evidence that the weapon in question was inoperable. Those phrases, however, are of no consequence because they are used only in the majority's recast of the defendant's claim. In that capacity, they do not have any bearing on the *Preyer* court's *conclusion of law* that ''[t]here is no basis, *in the law of this state*, for the defendant's broad claim that a trial court has an independent obligation to instruct the jury on the affirmative defense . . . if the evidence at trial would suffice to support such a charge.'' (Emphasis added.) Id. In the absence of a useful distinction from the legal conclusion set forth in *Preyer*, I must conclude that *Preyer* controls the issue presently before us and that the majority is in conflict with authority from our Supreme Court.

Second, I do not agree with the majority's reasoning that it was plain error for the court not to instruct the jury on the affirmative defense in this particular case specifically because the evidence was uncontroverted that the weapon was inoperable. Although the majority relies on that fact and distinguishes the present case from others in which the evidence of operability was contested, I do not believe that the clarity and sufficiency of the evidence of operability is the determinative factor when deciding whether a court should instruct on an affirmative defense. The conclusiveness of operability, or the potential effectiveness of an affirmative defense generally, in no way diminishes a defendant's burden of requesting an instruction on the affirmative defense or taking exception to a court's instruction that did not discuss the affirmative defense. The potency of a defense does not vitiate the procedural hurdle of requesting it or taking exception to the court's failure to include it in its jury instruction. Moreover, I cannot fathom a way, notwithstanding the majority opinion, in which the magnitude or clarity of the proof shifts the burden from the defendant to the court to ensure that an applicable affirmative defense is included in the instruction. Rather, I believe that regardless of the nature or conclusiveness of the evidence, a court is obligated to consider instructing on an affirma-

tive defense only when the defendant has requested such a charge or when the defendant takes exception to a charge that does not address an affirmative defense.

I also conclude that the court's failure to instruct the jury on the lesser included offense of robbery in the second degree was not improper. At the outset, I note as a procedural matter that the defendant did not raise or brief the issue of whether the court's failure to instruct on the lesser included offense constituted plain error. The majority, however, reaches that issue because, having concluded that the court, sua sponte, should have instructed on the affirmative defense, it necessarily addresses the lesser included offense. Although I understand the majority's need to address the issue as part of its analysis of the failure to charge on the affirmative defense, because I conclude that there was no plain error regarding the instruction on the affirmative defense, the question of whether the court committed plain error with regard to not instructing the jury on the lesser included offense is a separate issue. Because that issue is separate and the defendant has failed to raise it, I would not address it.

Even if I were to address the lesser included offense issue, I would not agree with the majority's reasoning that the court acted improperly in not instructing the jury on the lesser included offense merely because there was uncontroverted evidence that the weapon was inoperable. I would conclude otherwise because the contested nature of the evidence alone is not determinative of the question. Rather, the four-pronged *Whistnant*[2] test governs the issue. Although that test clearly implicates the evidence in a case, it does not rely solely on evidentiary matters. I therefore do not agree with the majority analysis, which omits the first prong of the *Whistnant* test to focus on the evidence. Although our case law states that we *may* assume that the first factor has been satisfied, such an action is not mandatory.

In the present case, I would give due consideration to the first prong of *Whistnant* because I believe it is possible that the defendant, fully aware of the evidence regarding inoperability, purposely decided not to request the lesser instruction. Instruction on the lesser included offense may not have been requested because the defendant sought an outright acquittal as part of an *all or nothing* strategy, rather than a conviction of a lesser crime. I do not believe it is appropriate to ignore the first prong in this case because the defendant may well have deliberately failed to request the instruction on the lesser included offense. That likelihood is bolstered by the fact that the defendant did not assert the affirmative defense to the charge of robbery in the first degree. Under those circumstances, I would conclude that the defendant has failed to meet the first prong of the *Whistnant* test and that this is not an appropriate

situation for us to ignore that failure.

In addition to that, I disagree with the majority because of the ramifications its decision will have on both the parties to a trial and the presiding court. In essence, the majority requires that if a defendant does not request an instruction on an affirmative defense or take exception to a charge that does not include such instruction when there is uncontroverted evidence to support an affirmative defense, the court is obligated to instruct on the defense for the defendant and to inform the jury of the applicability of the defense. That new requirement presents several significant problems.

First, the majority potentially deprives the prosecution of a chance to argue whether the court should instruct on an affirmative defense. Without a requested instruction by the defendant or an exception by the defendant to the court's instruction, the prosecution will have no opportunity to argue whether the court should instruct on the affirmative defense because any mention of instructing on a defense will be raised for the first time by the court at the time it actually charges the jury and informs it of the affirmative defense. I do not believe that the prosecution should be *surprised* in that manner and denied an opportunity to address the affirmative defense and the evidence underlying it. Such an outcome is patently unfair.

Second, the majority's decision may have a negative effect on a defendant's trial strategy. If a defendant argues, as the defendant in this case did, that he was not present at the scene of the crime, then defense counsel may believe that as a matter of strategy, it is not in the defendant's best interest to offer the jury an alternative in the form of an affirmative defense that places the defendant at the scene. In that scenario, the court's obligation to instruct the jury on an affirmative defense that the defendant has not requested may directly undercut the defendant's strategy. I do not believe that a defendant's trial tactics should be subject to that potential undermining. Moreover, as previously stated, it is the defendant's responsibility to request an instruction on an affirmative defense or to take exception to an instruction that does not contain one. In the context of the present discussion, keeping that burden on the defendant allows him to control his trial strategy and to assert a consistent defense. The defendant's choice, either alone or through counsel, to seek out an instruction on an affirmative defense should not implicate the court's intervention in the process.

Finally, the majority's decision imposes several inappropriate burdens on the trial court. According to the majority, if a defendant does not request an affirmative defense instruction or take exception to the court's instruction when there is uncontroverted evidence to support it, the court is obligated to instruct on the defense for the defendant. As a result, the trial court

now has the burden of determining whether any affirmative defenses may apply if uncontroverted evidence exists to support them. If the court concludes that defenses do exist, it then has to determine whether uncontroverted evidence in fact exists, thereby requiring it to instruct on the defense. I note that although those determinations were not difficult to make in the present case, other cases likely will not provide such clear answers.

For the foregoing reasons, I do not believe that the trial court's instruction constituted plain error, and I would affirm the judgment.

[1] See *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).

[2] See *State* v. *Whistnant*, 179 Conn. 576, 588, 427 A.2d 414 (1980).