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CH. 32 JURY

§32-1

Right to Jury Trial

(NOTE: Under Illinois law (Ill.Const. art. I, §§8 & 13 and 725 ILCS 5/103-6), an accused in a criminal prosecution has the right to a trial by jury. The prosecution does not have the right to a jury trial — the defendant’s right to a jury trial includes the right to waive a jury over the objection of the State. **People ex rel. Daley v. Joyce**, 126 Ill.2d 209, 533 N.E.2d 873 (1988).

United States Supreme Court

Blanton v. North Las Vegas, 489 U.S. 538, 109 S. Ct. 1289, 103 L.Ed.2d 550 (1989) A DUI prosecution which carried a maximum sentence of six months imprisonment did not require a jury trial even though additional, non-imprisonment penalties could be imposed (i.e. community service, a fine, loss of driver’s license and mandatory attendance at alcohol abuse courses).

Codispoti v. Pennsylvania, 418 U.S. 506, 94 S.Ct. 2687, 41 L.Ed.2d 912 (1974) A defendant has a right to trial by jury for all “serious” offenses. Crimes carrying a sentence of more than six months are deemed to be “serious” and those carrying a sentence of six months or less are “petty.” See also, **Lewis v. U.S.**, 518 U.S. 322, 116 S.Ct. 2163, 135 L.Ed.2d 590 (1996) (defendant charged with multiple petty offenses is not entitled to jury trial even though aggregate maximum sentence exceeds six months.)

McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971) A jury trial is not required in juvenile proceedings.

U.S. v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) Statute which allows death penalty only on defendants who assert their right to a jury trial is unconstitutional.

Shillitani v. U.S., 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966) here is no right to a jury trial for civil contempt based on refusing to testify before a grand jury. See also, **Frank v. U.S.**, 395 U.S. 147, 89 S.Ct. 1503, 23 L.Ed.2d 162 (1969).

Illinois Supreme Court

In re Jonathan C.B., 2011 IL 107750 705 ILCS 405/5-101(3) authorizes jury trials in delinquency proceedings only if the minor is tried under the extended juvenile jurisdiction provision, as a habitual juvenile offender, or as a violent juvenile offender. Here, a minor charged with delinquency for a sex offense argued that he was constitutionally entitled to a jury trial.

Although amendments to the Juvenile Court Act have made delinquency proceedings equivalent to criminal prosecutions, a minor is not entitled to a jury trial under the Illinois constitution. Rehabilitation remains a more important consideration in juvenile proceedings than in the criminal justice system.

The court also observed that although minors found delinquent based on sex offenses face some of the same collateral consequences as adult offenders, such as the requirement to

submit DNA samples and the absence of confidentiality of court records, such collateral consequences do not equate a juvenile delinquency determination with an adult criminal conviction.

Similarly, due process and equal protection do not give minors accused of sex offenses the right to a jury trial even though they are subject to more serious sanctions than other delinquent minors. Delinquency adjudications for felony sex offense carry only indeterminate juvenile sentences and not more serious adult sentences. And, sex offender registration is a public safety measure rather than a punishment mandating the right to a jury trial, and in any event juvenile offender registration is less onerous than adult registration because the information is available to a smaller group of persons and juveniles may petition to terminate the registration requirement.

Also, minors adjudicated delinquent of sex offenses are not similarly situated to persons who have the right to a jury trial under extended juvenile jurisdiction or to adult offenders, so the absence of the right to a jury trial in sex offense delinquency proceedings does not violate equal protection. Minors found delinquent under extended juvenile jurisdiction and adult sex offenders both face severe deprivations of liberty, including mandatory incarceration and adult sentences. By contrast, a minor adjudicated delinquent for a sex offense does not face the possibility of an adult criminal sentence, and instead receives a sentence that automatically terminates at age 21.

The court also found that equal protection principles are not triggered because juvenile sex offenders may face a future loss of liberty under the Sexually Violent Persons Act; commitment under the Act requires a separate, successful action by the State and proof of additional elements that are not common to all sex offenses.

People ex rel. Birkett v. Dockery, 235 Ill.2d 73, 919 N.E.2d 311 (2009) 725 ILCS 5/115-4(b) provides that where a defendant elects a trial by jury, the jury “shall consist of 12 members.” Because a defendant can waive the entire right to trial by jury, however, he or she can also waive the constitutional right to a jury panel composed of 12 members. Thus, while a defendant does not have an absolute right to a jury of less than 12, he or she may request that the trial court, in its discretion, order such a jury in a particular case.

Because the trial court has discretion to decide whether to use a six-person jury, *mandamus* does not lie to preclude use of a jury of less than 12.

The court rejected the State’s argument that a jury of less than 12 is authorized only where the State and defendant agree to the procedure. Instead, the court accepted defendant’s argument that “[n]either the statute nor case law supports the State’s position that it wields absolute veto power over a defendant’s request to proceed with fewer than 12 jurors.”

In the course of its opinion, the court noted that the Illinois constitutional right to a jury trial is broader than the equivalent right under the Federal Constitution. Thus, while the federal constitution allows a defendant’s jury waiver to be subject to the approval of the prosecution, the Illinois constitution affords the right to a jury trial solely to the defendant, and not to the prosecution.

People v. Nelson, 235 Ill.2d 386, 922 N.E.2d 1056 (2009) Where the State grants a defendant the right to have a jury determine punishment, the defendant acquires a due process interest in having the jury determine his sentence. The trial court does have discretion to discharge a juror after deliberations have begun, however, where such action is appropriate.

Here, the trial judge erred by dismissing a juror during deliberations at the death

penalty stage of the proceedings.

People ex rel. O'Malley v. 6323 North LaCrosse Avenue, 158 Ill.2d 453, 634 N.E.2d 753 (1994) The right to a jury trial exists at forfeiture hearings under the Illinois Controlled Substances and Cannabis Control Act. [Article I, §13 of the Illinois Constitution](#) states that the “right of trial by jury as heretofore enjoyed shall remain inviolate,” and the right to trial by jury for *in rem* proceedings existed and was recognized when the Constitution was adopted.

People v. Hudson, 157 Ill.2d 401, 626 N.E.2d 161 (1993) A jury consists of all its members, including alternates. Therefore, no abuse of discretion occurred by excusing a juror who was going to be absent and replacing him with an alternate, despite the statutory requirement that the death penalty hearing occur before the same “jury” that determined defendant’s guilt.

People v. Ruiz, 94 Ill.2d 245, 447 N.E.2d 148 (1982) Defendant and a co-defendant were granted a severance because certain statements made by the co-defendant implicated the defendant. The trial was conducted by a single judge, but with two juries. Evidence admissible against both defendants was heard by both juries, but one jury was excused when evidence admissible against only the other defendant was presented. The Court held that simultaneous trials before two juries was not error. Although this procedure presents the “possibility for prejudicial error resulting from confusion at trial,” no such confusion occurred in this case.

Danville v. Hartshorn, 53 Ill.2d 399, 292 N.E.2d 382 (1973) The trial court erred by rejecting defendant’s demand for jury trial in a prosecution for violating a municipal ordinance.

Illinois Appellate Court

People v. Johnson, 2019 IL App (3d) 150352-B The trial judge erred by not allowing jurors to take notes during trial. [725 ILCS 5/115-4\(n\)](#), which provides that jurors “shall be entitled to take notes during the trial,” protects a defendant’s right to a fair trial. The statute is mandatory; the trial court has no discretion to ignore it. The error in forbidding note-taking was not harmless beyond a reasonable doubt where the jury sent out four requests to review evidence during deliberations, including one note which described the jury as “deadlocked” if they could not review certain evidence.

People v. Hayes, 319 Ill.App.3d 810, 745 N.E.2d 31 (5th Dist. 2001) Supreme Court Rule 434(e) and [725 ILCS 5/115-4\(g\)](#) provide that an alternate juror may be placed on the jury if “before the final submission of a cause a member of the jury dies or is discharged.” Although it was “irregular” to replace a juror with an alternate where during deliberations it became clear that the juror had trouble understanding English, defendant was not prejudiced where the alternate had been subjected to the same selection procedures as the other jurors, took the same oath, heard the evidence, was instructed on the law, was discharged for only a short period of time, and stated that he had not discussed the case or formed any opinions. In addition, the jury was admonished to begin deliberations “all over again.” The court stressed, however, that the same procedure would not necessarily be proper in other situations. “Ideally, the trial court should ask the defendant whether he would waive his right to a jury

of 12 so that deliberations can proceed with 11 jurors.” In other circumstances, a mistrial might be required.

People v. Matthews, 304 Ill.App.3d 415, 710 N.E.2d 524 (5th Dist. 1999) Although a six-person jury meets constitutional requirements, the right to a 12-person jury is an “essential feature” of the constitutional right to a jury trial. Because nothing in the record indicated that defendant agreed to a jury of less than 12 members or acquiesced in a six-person jury, it could not be assumed that he was fully informed of his right to a 12-person jury and voluntarily waived that right.

§32-2

Number of Jurors - Unanimous Verdicts

United States Supreme Court

Edwards v. Vannoy, 593 U.S. ____ (No. 19-5807, 5/14/21) Defendant, who was convicted of multiple offenses in Louisiana by non-unanimous verdicts, filed a habeas petition seeking retroactive application of **Ramos v. Louisiana**, 590 U. S. ____ (2020). In **Ramos**, the Court held that the Fourteenth Amendment incorporates the Sixth Amendment right to a unanimous jury against the States. Previously, **Apodaca v. Oregon**, 406 U. S. 404 (1972), had been interpreted to allow non-unanimous verdicts in state criminal trials.

The Supreme Court concluded that **Ramos** announced a new rule. The state-court jury-unanimity rule was not dictated by existing precedent given that **Apodaca** had been interpreted by several courts to allow non-unanimous verdicts in state criminal proceedings.

New rules of criminal procedure ordinarily do not apply retroactively on federal collateral review. In **Teague v. Lane**, 488 U.S. 288 (1989), the Court identified an exception to that general rule against retroactivity for situations where the new rule constitutes a “watershed” rule of criminal procedure. That standard has not been met in any case, before or since. Thus, the Court concluded that **Teague** set out a “theoretical exception that never actually applies in practice and offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts.” The Court went on to repudiate the “watershed” exception set out in **Teague**. “New procedural rules do not apply retroactively on federal collateral review.”

The dissent would have maintained the **Teague** retroactivity exception and would have found that **Ramos** fit within it. The dissent was critical of the majority’s deviation from principles of *stare decisis* where the majority discarded precedent without any party having requested it do so and without providing adequate justification.

Ramos v. Louisiana, 590 U.S. __ (2020) The Sixth Amendment jury right contains a unanimity requirement, which applies to the states via the Fourteenth Amendment.

The two states that had been allowing guilty convictions with less than unanimity did so under the aegis of **Apodaca v. Oregon**, 406 U. S. 404 (1972). The majority overruled **Apodaca**, finding the factors traditionally considered by the court when determining whether to preserve precedent on *stare decisis* grounds do not favor upholding **Apodaca**. First, its quality of reasoning was suspect. The approval of nonunanimous guilty verdicts in that case arose from a four-justice plurality plus Justice Powell, who actually agreed with the dissent that unanimous verdicts were required under the Sixth Amendment, but that the Fourteenth Amendment did not impose the protection onto the states. The instant court noted that at the time of **Apodaca**, the court had already held in binding precedent that the

entirety of the Sixth Amendment did apply to the states, as Powell himself admitted. And the majority's conclusion that unanimity was not required was belied by history and precedent.

Additionally, there were insufficient reliance interests to justify upholding the precedent. Neither of the two states could invoke economic, regulatory, or social disruption litigants seeking to preserve precedent usually invoke. The fact that they may need to retry defendants convicted of felonies by nonunanimous verdicts whose cases are still pending on direct appeal will impose a cost, but new rules of criminal procedure usually do, and prior convictions in only two States are potentially affected here.

Ballew v. Georgia, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978) A six-person jury does not violate the right to a jury trial under the Sixth and Fourteenth Amendments. However, the purpose and functioning of a jury in a criminal trial is seriously impaired, to a constitutional degree, when the size of a jury is reduced to less than six members. See also, **Burch v. Louisiana**, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979) where the defendant was deprived of his right to a trial by jury where he was convicted of a non-petty offense by a non-unanimous, six-member jury.

Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) The federal constitution does not require that the jury verdict in a criminal case be unanimous.

Illinois Supreme Court

People v. Manning, 2018 IL 122081 When the jury is instructed on second degree murder, its inability to unanimously agree on the existence of mitigating factors results in a first degree murder conviction. The second degree murder statute replaced the voluntary manslaughter statute. Under the old statute, the State bore the burden of proving the absence of a mitigating factor. Under the current statute, the defendant bears the burden of persuading "the jury" to find the existence of a mitigating factor. Here, the jury's note informing the court that it could not agree on the presence of mitigating factors means that the defendant failed to meet his burden to convince "the jury" that a mitigating factor exists. The jurors unanimously agreed that the State proved the elements of first degree murder before even considering the existence of mitigating factors, and that is the only finding on which the jury was unanimous. The legislature would not have intended the "absurd result" of nullifying this unanimous finding based on a disagreement as to mitigating factors.

People ex rel. Birkett v. Dockery, 235 Ill.2d 73, 919 N.E.2d 311 (2009) 725 ILCS 5/115-4(b) provides that where a defendant elects a trial by jury, the jury "shall consist of 12 members." Because a defendant can waive the entire right to trial by jury, however, he or she can also waive the constitutional right to a jury panel composed of 12 members. Thus, while a defendant does not have an absolute right to a jury of less than 12, he or she may request that the trial court, in its discretion, order such a jury in a particular case.

Because the trial court has discretion to decide whether to use a six-person jury, *mandamus* does not lie to preclude use of a jury of less than 12.

The court rejected the State's argument that a jury of less than 12 is authorized only where the State and defendant agree to the procedure. Instead, the court accepted defendant's argument that "[n]either the statute nor case law supports the State's position that it wields absolute veto power over a defendant's request to proceed with fewer than 12 jurors."

In the course of its opinion, the court noted that the Illinois constitutional right to a jury trial is broader than the equivalent right under the Federal Constitution. Thus, while the federal constitution allows a defendant's jury waiver to be subject to the approval of the prosecution, the Illinois constitution affords the right to a jury trial solely to the defendant, and not to the prosecution.

Illinois Appellate Court

People v. Manning, 2020 IL App (2d) 180042 The court rejected defendant's claim that his waiver of a 12-person jury in favor of a 6-person jury was inadequate. Defendant was present in court when his attorney requested a 6-person jury, and agreed when asked personally if this was his desire. While defendant argued on appeal that he was never informed of his right to a 12-person jury, this admonishment is not necessary when defendant himself acquiesces to and agrees with his attorney's request for a smaller jury.

People v. Bochenek, 2020 IL App (2d) 170545 Defendant waived a 12-person jury and was tried by a jury of six. On appeal, he challenged the waiver. Although defendant did not raise the jury-waiver issue below, the State did not argue forfeiture on appeal. The Appellate Court concluded, therefore, that the State had forfeited any argument as to forfeiture.

On the merits, however, the Appellate Court concluded that defendant's waiver was valid. While defense counsel did not specifically state that he had discussed the choice in terms of a six-person or 12-person jury, counsel did state that he had spoken to defendant and was asking for a jury of six. And, at the outset of jury selection, the court told the venire that the trial would be by a six-person jury instead of 12. Defendant did not object at either point. The Appellate Court found the record adequate to conclude that defendant made a knowing waiver of his right to a 12-person jury.

People v. Deredt, 2013 IL App (2d) 120323 Under 725 ILCS 5/115-4(b), a jury consists of 12 members. Illinois law does not necessarily require a 12-person jury, however, because the right to waive a jury trial entirely necessarily includes the right to waive a jury composed of 12 members. Thus, Illinois courts have consistently held that a criminal defendant may waive a 12-member jury and proceed with a jury of fewer members.

Generally, defense counsel's oral waiver of the right to a jury trial is valid where the defendant is present and fails to object. The court rejected the argument that a personal waiver by the defendant was required in order to proceed with a six-person jury, finding that the waiver of a 12-person jury was valid where defense counsel stated in defendant's presence that she had spoken with defendant about whether he wanted a jury of six members or 12 members and that defendant wanted a jury of six.

People v. Dixon, 409 Ill.App.3d 915, 948 N.E.2d 786 (1st Dist. 2011) Under **People v. Babbington**, 286 Ill.App.3d 724, 676 N.E.2d 1326 (1st Dist. 1997), participation by an alternate juror in jury deliberations constitutes plain error which causes substantial prejudice to the defendant. In **Babbington**, the alternate juror deliberated with the jury, stayed overnight in the same hotel as the sequestered jurors, signed the verdict forms, and responded when the jury was polled.

Defendant's post-conviction petition failed to assert the gist of a meritorious issue under **Babbington** because it was not apparent that the alternate juror participated in deliberations. Instead, the record rebutted defendant's claim because the four verdict forms bore only the signatures of the 12 jurors, the alternate jurors had been instructed to remain

in the courtroom when the jury retired to deliberate, and the only reason to believe that an alternate juror deliberated was the clerk's erroneous polling of an alternate. The court noted that the clerk apparently realized the mistake and did not complete the polling question, but the alternate juror answered "yes" when asked whether "this [was] your verdict." In view of the verdict forms with 12 signatures, the court concluded that the alternate's answer likely reflected only that he agreed with the verdict reached by the jury and not that he had participated in deliberations.

Furthermore, the post-conviction petition did not present the gist of a meritorious issue that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness for failing to peremptorily challenge to excuse a prospective juror who eventually became the jury's foreperson. The trial court had refused to excuse the juror for cause after he failed to mention two 20-year-old arrests when asked about his prior arrest record.

The defendant could not show prejudice because, in light of the overwhelming evidence of guilt, there was no reasonable probability that the defendant would have been acquitted had the foreman not been part of the jury. Because defendant could not show that trial counsel was ineffective, appellate counsel's failure to raise the issue on direct appeal was not error.

Also, the juror's failure to mention two 20-year-old arrests did not indicate any bias where the juror stated during *voir dire* that he could be objective although one of his sons was incarcerated at the time of the trial.

People v. Babbington, 286 Ill.App.3d 724, 676 N.E.2d 1326 (1st Dist. 1997) Defendant was denied his right to a fair trial by an alternate juror's participation in the deliberations, either as a replacement for one of the regular jurors or as a 13th juror. It was clear that the alternate participated in the deliberations, since she signed the verdict forms and responded to the judge's polling.

People v. Burries, 144 Ill.App.3d 138, 494 N.E.2d 750 (4th Dist. 1986) During the State's case, a juror informed the judge that she could not be fair. The judge allowed defense counsel's motion to have the juror withdrawn. Defense counsel then requested a mistrial, stating that he was unwilling to proceed with 11 jurors. The judge asked the defendant, who said that he wanted to proceed with 11 jurors. The Court held that the right to waive a full complement of jurors lies with the defendant himself, not with defense counsel stating that, "if a defendant has the authority to waive a jury trial altogether against advice of counsel, logic requires that he have the authority to waive the existence of a full twelve-person jury under similar circumstances."

People v. Patton, 105 Ill.App.3d 892, 435 N.E.2d 171 (1st Dist. 1982) The court may accept a verdict on one count though the jury cannot reach a unanimous decision on remaining counts.

§32-3

Waiver of Jury

§32-3(a)

Generally

Illinois Supreme Court

People v. Hutt, 2023 IL 128170 Defendant was not denied his fundamental right to a jury trial on a DUI charge. Defendant executed a written jury waiver and was admonished with regard to his right to a jury trial in open court, but the written waiver did not reference the DUI case number. Instead, it listed only two pending felony case numbers. But, on the date of the waiver, defendant's DUI case was set for trial along with those felony cases. Further, the pretrial conference order issued by the court listed all of defendant's case numbers, including the DUI, and indicated that defendant had waived a jury trial. And, at subsequent proceedings where the bench trial setting was discussed, defendant did not challenge the waiver with regard to his DUI case. Accordingly, the court found that defendant had knowingly and understandingly waived his right to a jury trial on the DUI charge.

People v. Bannister 232 Ill.2d 52, 902 N.E.2d 571 (2008) The trial court has the duty to ensure that a defendant who wishes to waive a jury trial does so knowingly and voluntarily. No specific admonitions are required for an effective jury waiver, however. Unless there is some indication in a particular case that sentencing information would have had a bearing on the defendant's decision, accurate admonishments concerning the maximum and minimum authorized sentences are not required for a valid jury waiver. Because the minimum and maximum sentences are the same whether a judge or jury is the trier of fact, sentencing information generally has no effect on the decision to waive a jury. To make an adequate waiver of the right to a jury trial, the defendant must understand that the facts of the case will be determined by a judge, not by a jury. Because the record showed that the defendant knew the difference between a bench trial and a jury trial, and voluntarily choose a bench trial, the jury waiver was valid.

People v. Bracey, 213 Ill.2d 265, 821 N.E.2d 253 (2004) Although a written jury waiver is one means by which the defendant's intent may be established, the presence or absence of a written waiver is not dispositive. In this case the record was insufficient to establish a knowing and voluntary jury waiver. Defendant was convicted in a bench trial but that conviction was vacated by the trial judge because defendant had not been allowed to testify. The cause was set for a new trial before a different judge but defendant was never advised that he had the right to request a jury at the second trial. Instead, the judge who presided over the second trial presumed that the jury waiver from the first trial carried over. The second judge made no effort to determine whether defendant intended to waive a jury, and merely set the cause for a bench trial and defense counsel made no statements in defendant's presence indicating an intention to surrender the right to a jury trial. Under these circumstances, defendant's silence at the second bench trial was insufficient to show a knowing and voluntary waiver.

People v. Lindsey, 201 Ill.2d 45, 772 N.E.2d 1268 (2002) Neither the constitutional right to be present at all critical proceedings nor Illinois statutory law were violated where defendant was not personally present during his arraignment or jury waiver, but was represented by counsel and participated by closed circuit television.

In re R.A.B., 197 Ill. 2d 358, 757 N.E.2d 887 (2001) Under 705 ILCS 405/5-36(d), a minor charged with being a violent juvenile offender has the right to a trial by jury. The Supreme Court reversed the minor's adjudication because the record failed to show a knowing and voluntary jury waiver. Unlike the Criminal Code, the Juvenile Court Act has no provision requiring that a jury waiver be in writing. However, a jury waiver is valid only where it is made "knowingly" and "understandingly." No specific admonition or advice is required for an

effective jury waiver - whether a waiver is valid depends on the facts and circumstances of each case. Because the minor was never informed in open court that he had the right to a jury trial, and the question of waiving the jury was never discussed in his presence, the purported jury waiver was not knowing and voluntary. Neither “vague references” to the nature of a stipulated bench trial nor an admonishment of the rights to a hearing and confrontation specifically informed the minor that he could demand a jury trial. The minor’s failure to object when his attorney referred to a stipulated bench trial did not establish a valid waiver - the record contained no indication that the respondent was aware of his right to a jury trial, and there was no discussion in open court concerning a jury waiver. In addition, the minor’s experience with juvenile proceedings that did not carry the right to a jury determination did not establish that he knew of his right to a jury trial on a violent juvenile offender petition. See also, **People v. Williamson**, 311 Ill.App.3d 54, 724 N.E.2d 167 (1st Dist. 1999).

People v. Scott, 186 Ill.2d 283, 710 N.E.2d 833 (1999) Under 725 ILCS 5/103-6, a bench trial may be held if the right to a jury trial is “understandably waived by defendant in open court.” Under 725 ILCS 5/115-1, a waiver of a jury trial should be in writing. Under **People v. Tooles**, 177 Ill.2d 462, 687 N.E.2d 48 (1997), the absence of a written jury waiver does not require reversal “so long as the defendant’s waiver was made understandingly.” Here a jury waiver form that defendant executed in his attorney’s office was insufficient where it was filed in the defendant’s absence and never discussed while he was in court. Defense counsel’s references to a bench trial on the day of trial did not constitute defendant’s acknowledgment of the waiver in open court - defendant was not in court when a jury waiver was discussed, the written jury waiver indicated that defendant could withdraw the waiver and defense counsel’s remarks were not “an affirmative waiver” but merely indicated that the defense was prepared to go to trial.

People v. Tooles, 177 Ill.2d 462, 687 N.E.2d 48 (1997) Although 725 ILCS 5/115-1 requires that a jury waiver be in writing, the failure to obtain a written waiver is harmless where the record shows that the defendant knowingly and voluntarily waived a jury. See also, **People v. Eyen**, 291 Ill.App.3d 38, 683 N.E.2d 193 (2d Dist. 1997) (record did not show voluntary waiver where defendant was not present when counsel requested a bench trial, the question of a jury trial had never been discussed in defendant’s presence before trial, and defendant refused to sign a jury waiver after trial).

People v. Brown, 169 Ill.2d 132, 661 N.E.2d 287 (1996) A death penalty defendant has a statutory right to a jury sentencing even where he was convicted at a bench trial, and a judge may not require defendant to waive the jury for sentencing in order to obtain a bench trial. The trial court erred by insisting that defendant’s waiver of a jury was for both phases of the trial.

People ex rel. Daley v. Joyce, 126 Ill.2d 209, 533 N.E.2d 873 (1988) Under the Illinois Constitution, a defendant has the right to waive a jury trial even over the State’s objection.

People v. Frey, 103 Ill.2d 327, 469 N.E.2d 195 (1984) Although there was no signed or express jury waiver, the record showed that defendant did waive a trial by jury. A jury waiver does not rest on “any precise formula,” but “turns on the facts and circumstances of each particular case.” The Court noted that jury waivers can be made by counsel in the defendant’s presence. Furthermore, the record need not “affirmatively” establish that the trial court

advised defendant of his right to a jury trial and elicited his waiver of that right, or that the court or counsel advised defendant of the consequences of waiving a jury. Here, the “defendant was aware of his right to a jury trial and was present prior to trial when the jury waiver was discussed,” and defendant was not “unsophisticated, uneducated or simple-minded.”

Illinois Appellate Court

People v. Brown, 2023 IL App (4th) 220399 Defendant faced misdemeanor aggravated assault charges when he waived his right to a jury trial. These charges were later amended. The alleged facts remained the same, but the statutory citation was corrected and the charges became felonies. Defendant argued the trial court committed plain error when it did not obtain a new jury waiver. He cited **People v. Hernandez**, 409 Ill. App. 3d 294 (2011), which held that new charges filed after a jury waiver necessitate a new waiver.

The appellate court declined to apply **Hernandez**. Even though he was admonished that the charges were misdemeanors, the facts of the charges never changed, and these facts always constituted a crime that is classified as a felony. In any event, defendant received a misdemeanor sentence, because the parties believed the offense still stated a misdemeanor.

People v. Foster, 2022 IL App (2d) 200098 Defendant knowingly and voluntarily waived his right to a jury trial. At arraignment, defendant was informed of his right to choose either a bench or jury trial. And, defendant was present in court with counsel at the final pretrial hearing when counsel told the court defendant wanted to waive jury and proceed to a bench trial, along with presenting a signed jury waiver. Defendant’s silence while his attorney made that representation was evidence of a valid waiver. Further, defendant confirmed that he signed the waiver, engaged in a short exchange with the court regarding the waiver, and agreed that he was waiving a jury trial of his own free will. And, defendant had prior experience with the criminal justice system, which is additional support for the conclusion that he understood his right to a jury trial and the consequences of waiving it.

People v. Winters, 2020 IL App (2d) 180784 Defendant’s jury waiver, executed in exchange for the State’s agreement to cap its sentencing recommendation at 20 years where the statutory maximum was 30, was not unknowing or involuntary. While a defendant may not be penalized for exercising his right to a jury trial, the prospect of leniency for waiving that right is not the equivalent of a penalty for exercising it. Defendant was admonished and questioned by the court at the time of the waiver, and the record clearly established that defendant made an informed decision to waive his jury right in exchange for the State’s sentencing concession.

People v. Manning, 2020 IL App (2d) 180042 The court rejected defendant’s claim that his waiver of a 12-person jury in favor of a 6-person jury was inadequate. Defendant was present in court when his attorney requested a 6-person jury, and agreed when asked personally if this was his desire. While defendant argued on appeal that he was never informed of his right to a 12-person jury, this admonishment is not necessary when defendant himself acquiesces to and agrees with his attorney’s request for a smaller jury.

People v. Townsend, 2020 IL App (1st) 171024 Trial court erred in summarily dismissing defendant’s petition which stated the gist of a claim of ineffective assistance of counsel for overriding defendant’s desire to proceed to a bench trial rather than a jury trial. The trial record contained no objection by defendant to his counsel’s statement that defendant would

proceed to a jury trial. In an affidavit attached to his post-conviction petition, defendant alleged that he told trial counsel he wanted a bench trial, but counsel refused that request. The trial court concluded that the defendant's claim was meritless because the evidence was overwhelming and he would have been convicted at a bench trial, as well.

The Appellate Court held that defendant is not required to show the probability of a different trial outcome to establish prejudice under **Strickland**. The right to waive a jury trial belongs exclusively to defendant, and prejudice is presumed "if there is a reasonable probability that the defendant would have waived a jury trial." Defendant's failure to object to counsel's statement regarding a jury trial did not affirmatively rebut his claim, consistent with **People v. Barkes**, 399 Ill. App. 3d 980 (2010).

And, while defendant alleged in his petition that he told his public defender about his desire for a bench trial, but did not assert that he renewed that request with subsequently-retained private counsel, that deficiency was not fatal. A defendant need only presented a limited amount of detail to support his claim. The petition still set forth an arguable claim of ineffective assistance.

Finally, the Appellate Court declined defendant's request for a different judge on remand. While the court erred in basing its ruling on whether a bench trial would have resulted in a different outcome, that was simply a misapplication of the law and did not indicate that the judge was biased against defendant.

In re M.P., 2020 IL App (4th) 190814 The Habitual Juvenile Offender (HJO) statute [705 ILCS 405/5-815] mandates commitment of a juvenile offender to the Department of Juvenile Justice (DOJJ) until his or her 21st birthday if certain elements are proved. Because adjudication as an HJO involves "serious deprivation of liberty," the statute provides the right to a jury trial for minors subject to prosecution as an HJO.

A minor can waive the HJO jury trial right. In evaluating the validity of a minor's jury waiver, courts should look to settled precedent from adult criminal proceedings holding that a jury waiver must be knowingly and understandingly made. An HJO jury waiver does not require any special admonishments about the mandatory DOJJ penalty. Here, where defendant was twice admonished about his right to a jury trial, was told he was being prosecuted as an HJO, had the opportunity to consult with counsel and his mother about whether to proceed to a jury trial or bench trial, and expressed an understanding of the differences between the two types of trials, his jury waiver was valid.

People v. Bochenek, 2020 IL App (2d) 170545 Defendant waived a 12-person jury and was tried by a jury of six. On appeal, he challenged the waiver. Although defendant did not raise the jury-waiver issue below, the State did not argue forfeiture on appeal. The Appellate Court concluded, therefore, that the State had forfeited any argument as to forfeiture.

On the merits, however, the Appellate Court concluded that defendant's waiver was valid. While defense counsel did not specifically state that he had discussed the choice in terms of a six-person or 12-person jury, counsel did state that he had spoken to defendant and was asking for a jury of six. And, at the outset of jury selection, the court told the venire that the trial would be by a six-person jury instead of 12. Defendant did not object at either point. The Appellate Court found the record adequate to conclude that defendant made a knowing waiver of his right to a 12-person jury.

People v. Gatlin, 2017 IL App (1st) 143644 Defendant was charged with separate but related criminal cases. The State elected to proceed on one of the cases (14 CR 4616), while

the second (14 CR 4615) was continued for several status dates. On the day 14 CR 4616 was set for trial, defendant entered a jury waiver. The written waiver form referred only to 14 CR 4616.

After the jury waiver was entered, the State moved to join the cases on the ground that both the cases arose from one incident. Over defense counsel's objection, the cases were joined. Defense counsel declined the trial judge's offer of more time to prepare, and a bench trial was held immediately concerning both cases.

The jury waiver was insufficient as to 14 CR 4615. The written jury waiver and the trial court's admonishments referred only to 14 CR 4616, which was the only case set for trial when the waiver was entered. Once the cases were joined, the trial judge did not admonish defendant concerning his right to a jury trial in 14 CR 4615. In fact, the only admonishment concerning a jury trial in that case occurred several months earlier at the arraignment. Under these circumstances, it was clear that the waiver in 14 CR 4616 did not encompass 14 CR 4615.

The court rejected the argument that defendant knowingly and understandably waived his right to a jury trial in 14 CR 4615 because he did not object when defense counsel declined an offer of more time to prepare and a bench trial began. First, it cannot be assumed that defendant knew that he had a right to a jury trial in 14 CR 4615 after he waived that right in 14 CR 4616. Second, defense counsel made no statements in defendant's presence indicating that he was waiving his right to a jury trial in 14 CR 4615. Finally, the trial court did not clarify that defendant had a right to a jury trial in 14 CR 4615.

Because the right to a jury trial is a fundamental right afforded to criminal defendants by both the federal and state constitutions, the court concluded that the failure to obtain a knowing and voluntary jury waiver in 14 CR 4615 qualifies as plain error under the second prong of the plain error doctrine.

People v. Hollahan, 2015 IL App (3rd) 130525 Generally, when a judgment is vacated or reversed either on appeal or in the trial court and a new trial is ordered, the defendant's right to a jury trial is restored for the new trial. As a matter of first impression, the Appellate Court held that the general rule does not apply where the defendant enters a jury waiver that is not part of a plea agreement, subsequently pleads guilty, and is then granted leave to withdraw the plea. Thus, defendant was properly tried in a bench trial where he waived a jury about a month before he entered a guilty plea and was subsequently granted leave to withdraw the plea.

People v. Campbell, 2015 IL App (3d) 130614 A stipulated bench trial is tantamount to a guilty plea when the State's whole case is presented by stipulation and the defendant does not present or preserve a defense, or when the stipulation states that the evidence is sufficient to convict. When a stipulated bench trial is tantamount to a guilty plea, the trial court must admonish the defendant pursuant to [Illinois Supreme Court Rule 402\(a\)](#). And if relevant, the court must admonish the defendant that by stipulating that the evidence is sufficient to convict, he waives his right to a jury trial.

Prior to trial and after receiving proper admonitions, defendant waived his right to a jury. On the next court date, defendant agreed to plead guilty in exchange for a sentencing cap. The court properly admonished defendant pursuant to [Rule 402\(a\)](#), including re-admonishing him about his right to a jury trial, and then accepted his plea.

Following sentencing, defendant successfully moved to withdraw his guilty plea. The parties then reached an agreement that in exchange for a 15-year sentence defendant would proceed with a stipulated bench trial. The trial court again admonished defendant pursuant

to [Rule 402\(a\)](#), but did not admonish him about his right to a jury trial. The State presented a stipulated factual basis including a provision that the evidence was sufficient to prove defendant guilty beyond a reasonable doubt. The trial court found defendant guilty.

The Appellate Court held that the stipulated bench trial was tantamount to a guilty plea and thus the trial court had an obligation to fully admonish defendant pursuant to [Rule 402\(a\)](#), including his right to a jury trial, and that by proceeding with a stipulated bench trial defendant would be waiving his right to a jury trial. Although the trial court had previously admonished defendant about his right to a jury trial, because defendant had previously waived his right to a jury trial, it was critical that the court inform him that the right was reinstated when he withdrew his guilty plea and his prior waiver had no effect.

The Appellate Court held that the failure to properly admonish defendant about his right to a jury trial affected his fundamental right to a jury and thus was reviewable under the second prong of plain error. Defendant's conviction was reversed and remanded for further proceedings after proper admonitions.

People v. Warnock, 2013 IL App (2d) 120057 A waiver of the right to a jury trial is valid only if it is knowing. Although one means of showing the defendant's state of mind is to use a written waiver under [725 ILCS 5/103-6](#), the mere fact that a written waiver is filed does not necessarily establish that the waiver is valid. Generally, an oral waiver is valid if made by defense counsel in defendant's presence in open court and without objection by the defendant.

There was no valid jury waiver where the case was set for a jury trial, on the day of trial the prosecutor asked for a short continuance to obtain witnesses because "he understood this to be a jury trial," defense counsel objected to the continuance but made no reference to a bench trial, and the court proceeded to conduct a bench trial. Although what purported to be a jury waiver signed by defendant was in the record, it lacked a case number and was blank in two places where defendant's name should have been listed. Although the prosecutor's statement implied that the matter was going to be a bench trial, the court found that a tentative, negative inference from a prosecutor's statement cannot constitute a valid waiver even if the defendant fails to object.

Defendant's conviction was reversed and the cause remanded for a new trial.

People v. Deraedt, 2013 IL App (2d) 120323 Under [725 ILCS 5/115-4\(b\)](#), a jury consists of 12 members. Illinois law does not necessarily require a 12-person jury, however, because the right to waive a jury trial entirely necessarily includes the right to waive a jury composed of 12 members. Thus, Illinois courts have consistently held that a criminal defendant may waive a 12-member jury and proceed with a jury of fewer members.

Generally, defense counsel's oral waiver of the right to a jury trial is valid where the defendant is present and fails to object. The court rejected the argument that a personal waiver by the defendant was required in order to proceed with a six-person jury, finding that the waiver of a 12-person jury was valid where defense counsel stated in defendant's presence that she had spoken with defendant about whether he wanted a jury of six members or 12 members and that defendant wanted a jury of six.

People v. Liekis, 2012 IL App (2d) 100774 A bench trial may be held if the right to trial by jury is understandingly waived by the defendant in open court. While a written jury waiver is required by statute, [725 ILCS 5/115-1](#), the failure to file a written waiver does not require reversal if the waiver was understandingly made. Whether a jury waiver was understandingly made turns on the facts and circumstances of each particular case. An accused typically speaks and acts through his attorney, and a jury waiver is valid when made

by defense counsel in the defendant's presence when the defendant gives no indication of any objection to the trial court hearing the case.

Where defendant claims that she did not waive the right to trial by jury in open court, she must present a record that sufficiently covers all proceedings that could have involved the waiver. Without an adequate record, the reviewing court must assume that the record indications of a jury waiver are indeed based on a valid waiver.

Defendant presented an incomplete record on the issue of a jury waiver. The half sheet indicated that on the day that a stipulated bench trial was conducted, "jury trial [was] waived." The agreed statement of facts indicated that defense counsel moved for a stipulated bench trial and that a stipulated bench trial was conducted immediately following the court's denial of defendant's motion to reconsider. No report of proceedings for that date was included in the record. In the absence of a report of proceedings or acceptable substitute, the court assumed that the record indication of a jury waiver were based on a valid waiver. Furthermore, the record indicates that defendant was present when her attorney told the court that she waived her right to a jury.

People v. Hernandez, 409 Ill.App.3d 294, 949 N.E.2d 1139 (2d Dist. 2011) As with any waiver of a constitutional right, a waiver of the right to trial by jury not only must be voluntary, but must be a knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences. A defendant must be at least generally aware of the charges he faces before he can knowingly and intelligently decide whether guilt for those charges should be determined by a judge or a jury.

The jury waiver executed by defendant when he was charged with domestic battery did not apply to charges of obstructing a peace officer added by the State after the jury waiver. At the time of the waiver, defendant was not aware of, nor does the record indicate that he intended his waiver to cover, any later-filed charges. Defendant had no duty to withdraw his previous jury waiver for it to have no effect as to the obstruction charges. No reasonable rule can require a defendant to withdraw a waiver he never made. The very concept of a waiver – the voluntary relinquishment of a known right – implies that a defendant cannot waive jury on a yet-unknown charge.

Whether defendant validly waived jury turns on the facts and circumstances of each particular case. There are limited circumstances in which a defendant may sufficiently express his intent to waive the right to jury trial by acquiescence to a bench trial, such as where statements are made in the defendant's presence indicating that he was electing to forgo his right to a jury trial, and the defendant is a person of intelligence, experience, and considerable education. **People v. Frey**, 103 Ill.2d 327, 469 N.E.2d 195 (1984). A jury waiver is never valid where the defendant was not present in open court when a jury waiver was at least discussed. **People v. Bracey**, 213 Ill.2d 265, 821 N.E.2d 253 (2004).

Defendant did not waive a jury trial on the obstruction charges by not objecting to the bench trial. The case immediately proceeded to a bench trial upon the court's ruling that the State could add the obstruction charge. The record does not indicate that the defendant is a person of "established sophistication." The new charges did not clearly call for the same strategy as the old charge. In these circumstances, defendant's silence did not amount to a waiver by acquiescence of his right to a jury trial.

People v. Johnson, 2019 IL App (1st) 162517 The record failed to show that defendant understandingly waived his right to a jury trial. Although the record contained defendant's signed jury waiver, defendant was not informed he was entitled to choose between a jury or bench trial. He never waived his right to a jury trial on the record. Even though defense

counsel mentioned a bench trial several times in defendant's presence, counsel did so only in the context of scheduling and at no point waived the right to a jury trial on defendant's behalf.

People v. Thomas, 2019 IL App (2d) 160767 Despite defendant's refusal to sign a jury waiver form, he knowingly waived his right to a jury trial. The trial court discussed the waiver, ascertained his reasons for not signing the form (he did not trust giving his signature to the State) and thoroughly informed him of the nature of the right. Defendant unequivocally stated he wanted a bench trial, and did not need to be re-admonished two weeks later at the start of the trial.

People v. McCarter, 385 Ill.App.3d 919, 897 N.E.2d 265 (1st Dist. 2008) It is the prerogative of the defendant, rather than counsel, to decide whether to waive a jury trial. Where the trial court made no effort to ask defendant to provide further details concerning his claim that his attorney overrode his desire for a bench trial, and the trial court gave no basis for denying defendant's claim other than to state that the error was harmless because in a bench trial its finding would have been no different than that of the jury, error occurred. The court noted that the denial of the right to a bench trial is structural error which cannot be harmless. The cause was remanded for the trial court to determine whether there was any proper basis to deny defendant's claim that he was improperly denied a bench trial, and to provide relief if appropriate.

People v. Elders, 349 Ill.App.3d 573, 812 N.E.2d 649 (1st Dist. 2004) An oral jury waiver may be sufficient where, in the defendant's presence and without objection, defense counsel expressly advises the court that the defendant wants a bench trial. Counsel must make some affirmative statement that defendant wishes to forego his right to a jury trial, however, and a defendant will not be deemed to have acquiesced in a jury waiver made by his attorney outside the defendant's presence. Here, after defendant was convicted in a bench trial, the trial court noted that there was no written jury waiver in the file. Defense counsel stated that defendant said he wanted a bench trial, and defendant signed a waiver in open court. Defense counsel had said at several pretrial hearings that he wanted a bench trial, but defendant was not present at those hearings. The only reference to a bench trial that occurred in defendant's presence was some 2½ weeks before the case was tried, when counsel stated that the case was set for a bench trial. The court stated that in order for a jury waiver to be valid, "at the very least, the record must disclose some evidence of some discussion in defendant's presence, prior to being found guilty, with respect to a jury waiver." The court concluded that the single reference to a bench trial made 2½ weeks before trial was insufficient to establish a waiver; "[t]his did not constitute a discussion of a jury waiver or demonstrate that defendant was aware he could choose between a jury and bench trial."

People v. Owens, 336 Ill.App.3d 807, 784 N.E.2d 339 (1st Dist. 2002) When defendant's case was called for trial the court stated: "Mr. Owens, did I previously admonish you of a jury." Defendant responded, "Yes." The court then proceeded to a bench trial. No other indication of a jury waiver was contained in the record, except for the notation "J.W." on the half sheet. The Appellate Court held that the record was insufficient to show a valid jury waiver. The failure to file a written jury waiver does not necessarily require reversal, so long as the waiver was made understandingly and in open court. However, because the record did not contain a signed document indicating a waiver, and defense counsel made no representation concerning the jury waiver while defendant was present, there was no basis on which it could be found that defendant knowingly and understandingly waived his right

to be tried by a jury. See also, **People v. Ruiz**, 367 Ill.App.3d 236, 854 N.E.2d 701 (1st Dist. 2006); **People v. Spracklen**, 335 Ill.App.3d 768, 781 N.E.2d 1184 (3d Dist. 2002).

People v. Lach, 302 Ill.App.3d 587, 707 N.E.2d 144 (1st Dist. 1998) Where the defendant did not speak English and was not personally advised by the court or his attorney of his right to a jury trial, and there was nothing to indicate that a knowing waiver occurred, the record was insufficient to establish a valid waiver. Where a defendant is unable to speak English, there is an “even more compelling” need for the trial court to “personally [address] defendant on the record regarding his understanding of the jury waiver” before proceeding to a bench trial.

People v. Scott, 293 Ill.App.3d 241, 687 N.E.2d 1151 (5th Dist. 1997) A written jury waiver that was signed in defense counsel’s office and never confirmed in open court was insufficient to waive a jury. In addition, defendant did not acquiesce in his attorney’s request for a bench trial where the record failed to show defendant was ever advised of his right to a jury.

People v. Phuong, 287 Ill.App.3d 988, 679 N.E.2d 425 (1st Dist. 1997) A Chinese-speaking defendant’s jury waiver was not adequate where the waiver form was merely translated into Chinese, without any explanation of its meaning. A jury waiver must be made “with an understanding of the nature of the rights waived” and “may not be done in a superficial manner.” Although defendant signed a jury waiver that had been translated, in the absence of any explanation of the nature of a jury trial it was unclear whether she actually possessed a sufficient level of understanding. The Court “[was] not convinced that the mere translation of the language of the waiver form adequately conveyed its meaning to defendant,” especially where the defendant had no prior experience with the judicial system.

People v. McGee, 268 Ill.App.3d 582, 645 N.E.2d 329 (1st Dist. 1994) On the morning defendant's trial was scheduled, the trial court released the jury because it erroneously believed that defense counsel was ill. Counsel then appeared and sought to hold the trial. Defense counsel tendered a jury waiver form to the court, and defendant said that he wanted to have the trial that day. In addition, defense counsel answered affirmatively when, just before the bench trial started, he was asked whether a jury waiver had been executed. Although the waiver form in the record was blank other than defendant's signature, the Appellate Court held that defendant "understandingly" waived his right to a jury trial, because the record showed that he knew the difference between a bench trial and a jury trial and deliberately chose a bench trial.

People v. Mixon, 271 Ill.App.3d 999, 649 N.E.2d 441 (3d Dist. 1994) A jury waiver entered for one trial does not "carry over" to a second trial on the same matter and a defendant is not bound to his jury waiver when a new trial was ordered due to the State's discovery violations.

People v. Watson, 246 Ill.App.3d 548, 616 N.E.2d 649 (3d Dist. 1993) Defendant demanded a jury trial, but during a pretrial hearing, defense counsel said that the case should be set for a bench trial. Counsel and the trial judge both noted that the defendant, who was not in court, would have to execute a jury waiver at a later hearing. Defendant was present during subsequent hearings when references were made to the fact that a bench trial was scheduled. However, no jury waiver was ever secured. The Court held that the record failed to establish a knowing and understanding waiver of the right to a jury trial. An attorney's request for a bench trial cannot bind a defendant who was not present when the request was made. See

also, **People v. Eyan**, 291 Ill.App.3d 38, 683 N.E.2d 193 (2d Dist. 1997) (defendant acquiesces in request for bench trial only if he is present when request was made; failure to object when case is called for bench trial is not acquiescence).

People v. Williams, 125 Ill.App.3d 284, 465 N.E.2d 1044 (4th Dist. 1984) The record showed that a “jury waiver” document, apparently signed by the defendant, was filed with the circuit clerk. However, a bystander’s report executed by the trial judge stated that the above “waiver” was filed with the judge’s secretary by defense counsel, and that defendant was not present at the time. Based upon the statement of the trial judge, the alleged jury waiver was not executed or confirmed in open court. This constituted “plain error.” The right to a jury trial “is basic and fundamental,” and no “admonishment of any kind appears in the instant record.”

People v. French, 84 Ill.App.3d 60, 404 N.E.2d 1136 (3d Dist. 1980) Defendant’s case had been twice placed on the jury calendar before being called for a bench trial. Prior to the bench trial, the trial judge stated “defendant is present with [his] attorney and the case comes on for bench trial, right?” Defense counsel responded “That is correct, Your Honor.” No additional references were made to the defendant’s right to a jury trial. The lack of a formal jury waiver required reversal of defendant’s conviction.

People v. Keagbine, 77 Ill.App.3d 1039, 396 N.E.2d 1341 (5th Dist. 1979) Jury waiver was not invalid where the State promised not to seek the death penalty if defendant took a bench trial.

People v. Coleman, 59 Ill.App.3d 1050, 376 N.E.2d 277 (1st Dist. 1978) Conviction reversed and remanded because the record failed to show that defendant waived trial by jury or that his counsel made such a waiver in his presence. The single line in the common law record (“plea of not guilty — jury waived”) was insufficient to show a valid waiver.

People v. Simpson, 24 Ill.App.3d 835, 321 N.E.2d 464 (4th Dist. 1974) Waiver of jury trial was invalid where defendants were put in the position of having a jury trial without being able to contact State witnesses (due to State’s late response to discovery motion) or having a bench trial with time to contact the witnesses.

§32-3(b)

Withdrawal of Jury Waiver; Timely Waiver

Illinois Supreme Court

People v. Catalano, 29 Ill.2d 197, 193 N.E.2d 797 (1963) The withdrawal of a jury waiver is within the discretion of the trial court. See also, **People v. Rand**, 291 Ill.App.3d 431, 683 N.E.2d 1243 (1st Dist. 1997).

Illinois Appellate Court

People v. McIntyre, 2022 IL App (2d) 200535 Before defendant signed a jury waiver, the trial court advised him, “[O]nce you waive your right to a jury trial, you can’t change your mind and take it back.” In reality, while a defendant is not entitled to withdraw a jury waiver as a matter of right, a trial court does have discretion to permit the defendant to withdraw the waiver. Thus, the admonition was misleading. But it did not invalidate an otherwise

knowing and voluntary waiver. The fact that defendant chose to make what he believed to be an irrevocable waiver suggests he would have made the same waiver if he was informed it was potentially revocable. Thus, he could not show prejudice.

The Appellate Court conceded that the faulty admonition could possibly have impacted defendant's post-waiver decision-making, in that it would prevent him from asserting that he changed his mind about the waiver. Defendant alleged this fact warranted reversal as second-prong plain error. The Appellate Court disagreed, finding the error was not in the same category of seriousness as other structural errors.

People v. Jordan, 2019 IL App (1st) 161848 Trial court committed second-prong plain error by refusing defendant's jury waiver because it was tendered after jury selection but prior to the swearing-in of the jury. The point at which the jury is sworn is when defendant loses what is otherwise an absolute right to waive a jury trial and proceed to a bench trial.

People v. Hollahan, 2015 IL App (3rd) 130525 Generally, when a judgment is vacated or reversed either on appeal or in the trial court and a new trial is ordered, the defendant's right to a jury trial is restored for the new trial. As a matter of first impression, the Appellate Court held that the general rule does not apply where the defendant enters a jury waiver that is not part of a plea agreement, subsequently pleads guilty, and is then granted leave to withdraw the plea. Thus, defendant was properly tried in a bench trial where he waived a jury about a month before he entered a guilty plea and was subsequently granted leave to withdraw the plea.

People v. Hernandez, 409 Ill.App.3d 294, 949 N.E.2d 1139 (2d Dist. 2011) As with any waiver of a constitutional right, a waiver of the right to trial by jury not only must be voluntary, but must be a knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences. A defendant must be at least generally aware of the charges he faces before he can knowingly and intelligently decide whether guilt for those charges should be determined by a judge or a jury.

The jury waiver executed by defendant when he was charged with domestic battery did not apply to charges of obstructing a peace officer added by the State after the jury waiver. At the time of the waiver, defendant was not aware of, nor does the record indicate that he intended his waiver to cover, any later-filed charges. Defendant had no duty to withdraw his previous jury waiver for it to have no effect as to the obstruction charges. No reasonable rule can require a defendant to withdraw a waiver he never made. The very concept of a waiver – the voluntary relinquishment of a known right – implies that a defendant cannot waive jury on a yet-unknown charge.

Whether defendant validly waived jury turns on the facts and circumstances of each particular case. There are limited circumstances in which a defendant may sufficiently express his intent to waive the right to jury trial by acquiescence to a bench trial, such as where statements are made in the defendant's presence indicating that he was electing to forgo his right to a jury trial, and the defendant is a person of intelligence, experience, and considerable education. **People v. Frey**, 103 Ill.2d 327, 469 N.E.2d 195 (1984). A jury waiver is never valid where the defendant was not present in open court when a jury waiver was at least discussed. **People v. Bracey**, 213 Ill.2d 265, 821 N.E.2d 253 (2004).

Defendant did not waive a jury trial on the obstruction charges by not objecting to the bench trial. The case immediately proceeded to a bench trial upon the court's ruling that the State could add the obstruction charge. The record does not indicate that the defendant is a person of "established sophistication." The new charges did not clearly call for the same

strategy as the old charge. In these circumstances, defendant's silence did not amount to a waiver by acquiescence of his right to a jury trial.

People v. Williams, 277 Ill.App.3d 571, 660 N.E.2d 1320 (3d Dist. 1996) Defendant made an oral pretrial waiver of his right to a jury trial. At the hearing on the post-trial motion, the trial court asked defendant to acknowledge his oral waiver by executing a written jury waiver form. Defendant signed the form without objection. On appeal, the Court held that a waiver signed after trial is valid where the pretrial waiver was knowing and voluntary.

People v. Spencer, 160 Ill.App.3d 509, 513 N.E.2d 514 (4th Dist. 1987) Defendant is not entitled to withdraw his jury waiver merely because the information is amended.

People v. Frazier, 127 Ill.App.3d 151, 469 N.E.2d 594 (1st Dist. 1984) Before any jurors were selected defendant sought to waive the jury. The trial judge denied this request as untimely, and defendant was convicted by a jury. "Plainly, the trial court erred in denying defendant's request for a bench trial since the request was made before the commencement of trial."

People v. Pruitte, 125 Ill.App.3d 580, 466 N.E.2d 341 (3d Dist. 1984) Defendant filed a petition to elect treatment as an addict under the Dangerous Drug Abuse Act . Defendant testified that after meeting with a court liaison for TASC, he believed he was qualified for treatment. The trial court admonished defendant that by filing a petition to elect such treatment he would have to waive his right to a jury trial. It was subsequently determined defendant was not eligible for treatment under the Act. However, defendant's motion to withdraw the petition and his request for a jury trial were denied. The Court held that the Dangerous Drug Abuse Act only requires a person to waive his right to a jury trial *after* his acceptance into a treatment program. The Court did not interpret the statute as requiring a jury waiver where a defendant merely elects to submit to treatment and asserts that he is an addict.

People v. Johnson, 122 Ill.App.3d 636, 461 N.E.2d 540 (3d Dist. 1984) Defendant was represented by the public defender until two days before trial. The trial court then appointed different counsel. In the course of discussing whether the latter counsel would have time to prepare for trial, the public defender mentioned that defendant wanted a bench trial. The judge questioned defendant, who stated that he wanted a bench trial. Two weeks later, appointed counsel was granted a continuance and filed a motion to withdraw the jury waiver, which was denied. The Appellate Court held that the trial judge should not have allowed a jury waiver immediately after granting the public defender's motion to withdraw, because the newly appointed counsel was not available to advise the defendant. "We believe that the defendant had a right to be represented by counsel and that such representation was essential in order for the defendant to knowingly and intelligently waive his right to jury trial."

People v. Zemblidge, 104 Ill.App.3d 654, 432 N.E.2d 1138 (1st Dist. 1982) Defendant sought to waive a jury at the start of closing arguments. The trial judge denied the request. The Appellate Court held that once an election for jury trial is made and testimony begins, the defendant has no absolute right to waive the jury. The decision to allow a jury waiver after the start of trial is within the discretion of the trial judge.

People v. Norris, 62 Ill.App.3d 228, 379 N.E.2d 80 (1st Dist. 1978) Defendant waived a jury in the belief that the State’s case was entirely circumstantial. After opening statements, the State amended its list of witnesses to call two eyewitnesses. The defense sought a mistrial based upon the fact that defendant waived his right to a jury because he had believed that the case was circumstantial. The Appellate Court held that defendant’s waiver of jury trial was not knowing and intelligent because he was not aware of the most damaging evidence against him.

§32-4

Jury Selection

§32-4(a)

Voir Dire Generally

United States Supreme Court

Rivera v. Illinois, 556 U.S. 148, 129 S.Ct. 1446, 173 L.Ed.2d 320 (2009) Because the Federal Constitution does not mandate peremptory challenges in jury selection, no federal issue exists where a defendant is improperly denied a peremptory challenge under State law, so long as the jury which heard the case was qualified and composed of individuals who were not subject to challenge for cause. Under such circumstances, the remedy for the improper denial of a peremptory challenge is left to State law. Where Illinois law authorized the Illinois Supreme Court to hold that the improper denial of a peremptory challenge was harmless error, no federal issue existed.

Uttecht v. Brown, 501 U.S. 1, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007) **Witherspoon v. Illinois**, 391 U.S. 510 (1968) and its progeny establish four principles concerning the selection of jurors in a capital case. First, a criminal defendant has the right to an impartial jury drawn from a venire that is not “tilted” in favor of capital punishment by the prosecution’s selective use of challenges for cause. Second, the State has a strong interest in having jurors who are capable of applying capital punishment within the framework prescribed by State law. Third, to balance these interests, a juror who is substantially impaired in his ability to impose a death sentence is subject to being excused for cause. Fourth, in determining whether the removal of a potential juror violates the right to an impartial jury, the trial court’s judgment is based in part on the demeanor of the juror. The trial court’s determination is owed deference, however, the need to defer to the trial court’s ability to perceive jurors’ demeanor does not “foreclose the possibility that a reviewing court may reverse the trial court’s decision where the record discloses no basis for a finding of substantial impairment.” The record here showed that the juror was confused and ambiguous about whether he would be able to apply the relevant death penalty law, despite several attempts by the judge and the attorneys to correct his misunderstandings and confusion and all of the interested parties in the courtroom believed that it was appropriate to excuse the veniremember for cause.

U.S. v. Martinez-Salazar, 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000) Federal prosecutions are subject to **Ross v. Oklahoma**, 47 U.S. 81 (1988), which held that due process is not violated by the trial court’s erroneous denial of a motion to remove a juror for cause where the defendant exercised a peremptory challenge and the jury which subsequently decided the case was impartial. However, the court rejected the prosecution’s

argument that to preserve a claim that the error violated the right to a fair trial, a federal defendant must use any available peremptory to strike the juror who should have been removed for cause. Once the trial judge erroneously denies a motion to excuse for cause, the defendant may choose to either use a peremptory challenge to remove the objectionable juror or, “upon conviction, pursu[e] a Sixth Amendment challenge on appeal.”

Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 942 (1992) Due process requires that a death penalty jury not be composed of individuals who have already decided how they will vote on the ultimate issue. Thus, a capital defendant is entitled to excuse for cause any juror who is unwilling to consider a non-death sentence and he also has the right to conduct a *voir dire* that will provide adequate information to determine whether a particular juror is subject to challenge. Refusing to allow defendant to question prospective jurors about their willingness to consider sentences other than death prevents the intelligent exercise of challenges for cause and renders meaningless the right to be tried by an impartial jury. General questioning on the jurors’ ability to follow the law and remain impartial is not sufficient to determine if any veniremen would refuse to consider a non-death sentences. See also, **People v. Johnson**, 159 Ill.2d 97, 636 N.E.2d 485 (1994) (trial court should have asked whether any veniremembers believed that a death sentence must be imposed if requested by the State).

Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986) The trial court must question veniremembers regarding racial prejudice where there are “special circumstances” suggesting a constitutionally significant likelihood that such prejudice might affect the trial. See also, **Ristaino v. Ross**, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976).

Illinois Supreme Court

People v. Brown, 2023 IL 126852 At defendant’s trial, jury selection consisted of the court questioning the venire in panels of four and then calling the attorneys up for an off-the-record sidebar conference to exercise challenges. Defendant was not present during those sidebar conferences. Neither defendant nor his counsel objected to this procedure.

Defendant argued on appeal that the jury selection process deprived him of his constitutional right to be present at a critical stage of the proceedings and that his trial counsel was ineffective for failing to object to it. The appellate court affirmed on the basis that defendant had not shown prejudice because he failed to establish that he was not tried by an impartial jury. The supreme court affirmed. Five justices participated in the supreme court’s decision. All five agreed as to the outcome, but were divided as to the reasoning behind that outcome.

Both the federal and Illinois constitutions afford criminal defendants the right to be present at all critical stages of the proceedings against them, from arraignment through sentencing. According to **People v. Bean**, 137 Ill. 2d 65 (1990), jury selection is a critical stage at which a defendant has the right to be present.

The lead opinion, authored by Chief Justice Theis and joined by Justice Overstreet, noted the existence of a split in the appellate court regarding whether there is a denial of the right to be present where, as here, the defendant is not excluded from the jury *voir dire* but instead is only excluded from the exercise of challenges. **People v. Spears**, 169 Ill. App. 3d 470 (1988), **People v. Beacham**, 189 Ill. App. 3d 483, and **People v. Gentry**, 351 Ill. App. 3d 872 (2004), all held that the defendants were not denied their right to be present under such circumstances. In conflict with those cases, however, is **People v. Oliver**, 2012 IL App

(1st) 102531. In **Oliver**, the court conducted *voir dire* in open court with the defendant present, but then the attorneys and the judge retired to chambers for challenges. The **Oliver** defendant lost his collateral challenge to that procedure because he had not alleged prejudice. But, the **Oliver** court's opinion also stated that "a defendant who has not waived or forfeited his right to be present [from a juror challenge conference] shows that the court has conducted a critical stage of the trial in the defendant's absence, [thus] the defendant has shown a violation of his constitutional rights."

The lead opinion declined to hold that a defendant's constitutional right to be present during *voir dire* extends to the process of challenging potential jurors. It is enough that defendant be present during the questioning of prospective jurors because that is where he may hear their answers, view their demeanor, and offer input to his counsel. To the extent that **Oliver** is inconsistent with that holding, the lead opinion stated that it is overruled.

The lead opinion also concluded that there was no evidence that counsel performed deficiently where defendant was present during jury questioning and there was no indication that counsel did not adequately represent defendant's interest during the sidebar conferences.

Justice Neville specially concurred and specifically disagreed with the conclusion that a defendant does not have a constitutional right to be present during the "challenges" portion of jury selection. He would have held that juror challenges are a critical stage and exclusion of a defendant from those proceedings violates the constitutional right to appear and defend in person. Justice Neville would have overruled **Spears, Gentry, and Beachem** to the extent they hold otherwise. But, he also concluded that exclusion from the exercise of jury challenges is not a structural error, and thus a defendant who fails to preserve the error must demonstrate prejudice from it. Defendant could not meet that burden here.

Additionally, Justice O'Brien authored a special concurrence, joined by Justice Holder White, disagreeing with the lead opinion's holding that a defendant does not have a right to be present during juror challenges. Justice O'Brien would have found deficient performance where defendant's counsel agreed to a procedure which deprived defendant of his right to be present, but she would have affirmed on the basis that defendant was unable to establish prejudice.

Justices Cunningham and Rochford took no part in the decision.

People v. Adkins, 239 Ill.2d 1, 940 N.E.2d 11 (2010) The purpose of *voir dire* is to assure the selection of an impartial panel of jurors free from either bias or prejudice. The decision of the trial court to excuse a juror due to an untruthful response is a matter lying solely within the discretion of the trial court. An abuse of discretion will be found only if the conduct of the court thwarted the selection of an impartial jury.

The trial court excused a juror for cause on motion of the State because she denied that she had been an accused in a criminal case when in fact she had been charged with misdemeanor battery 16 years earlier. The trial court did not abuse its discretion, even though no inquiry was made to determine if the juror merely forgot about the previous charge, because excusing the juror did not impede the selection of an impartial jury.

People v. Encalado, 2018 IL 122059 The manner, scope, and extent of *voir dire* rest within the sound discretion of the trial judge. An abuse of discretion occurs when the trial judge thwarts the purpose of *voir dire*, which is to allow removal of potential jurors whose minds are "so closed by bias and prejudice that they cannot apply the law as instructed." Here, defendant asked the trial court to *voir dire* prospective jurors as to whether evidence that he

had engaged the services of a prostitute would influence their judgment. His defense at trial was that the complainant was a prostitute who claimed sexual assault only after he engaged her services but then refused to pay.

The Supreme Court found no abuse of discretion, distinguishing **People v. Strain**, 194 Ill. 2d 467 (2000). The **Strain** Court required the trial court to ask about the prospective jurors' feelings toward gangs, citing a body of caselaw establishing strong public skepticism of gang members. While prostitution can evoke strong feelings, there is no evidence that people tend to treat those who patronize prostitutes as less credible. Likewise, there is not such a public bias against those who frequent prostitutes that their testimony cannot be considered fairly. And unlike **Strain**, where testimony from admitted gang members permeated the trial, the complainants' status as prostitutes in this case was neither undisputed nor of major significance in light of the alleged acts of sexual assault. Thus, specific *voir dire* about prostitution was not required. Indeed, allowing defendant's proposed *voir dire* question would have improperly permitted defendant to preargue his defense.

People v. Rinehart, 2012 IL 111719 The trial court is primarily responsible for initiating and conducting *voir dire*, though it must permit the parties to supplement its examination "by such direct inquiry as the court deems proper." Supreme Court Rule 431(a). Because there is no precise test for determining which questions will filter out partial jurors, the manner and scope of the examination rests within the discretion of the trial court and will be reviewed only for an abuse of discretion. An abuse of discretion occurs when the conduct of the trial court thwarts the purpose of the *voir dire* examination—namely, the selection of a jury free from bias or prejudice.

Voir dire questions must not be a means of indoctrinating a jury or impaneling a jury with a particular predisposition. Rather than a bright-line rule, this is a continuum. Broad questions are generally permissible. Specific questions tailored to the facts of the case and intended to serve as "preliminary final argument" are not.

Asking prospective jurors in a sexual assault prosecution whether they could think of reasons why a sexual assault victim might not immediately report an incident were within permissible boundaries. The questions were not fact-driven but focused on the jurors' preconceptions about sexual assault cases in an effort to uncover any bias regarding delayed reporting. An answer indicating a juror was less likely to believe a victim who did not immediately report would have given the State grounds to intelligently exercise its peremptory challenges. The questions were brief, and the State did not elaborate on the subject. They were posed to only five potential jurors, one-fifth of the venire. Therefore, there was no abuse of discretion by the court.

People v. Garstecki, 234 Ill.2d 430, 917 N.E.2d 465 (2009) Supreme Court Rule 431, which provides that the trial court "shall permit the parties to supplement" *voir dire* examination by direct inquiry "as the court deems proper for a reasonable period of time depending on the length of examination by the court, the complexity of the case, and the nature of the charges," requires the trial court to consider the factors specified by the rule when counsel asks to participate directly in *voir dire*. A trial court may not simply dispense with attorney questioning whenever it wants, and should exercise its discretion in favor of permitting direct inquiry.

The trial court complied with Rule 431 when, before ruling on defense counsel's request to participate in *voir dire*, the court asked what questions the defense attorney would pose, explained that the court intended to cover the same areas in its questioning, inquired

concerning the complexity of the legal issues involved in the case, and after its own *voir dire* allowed defense counsel to directly question prospective jurors based on their answers to the trial court's questioning. "[T]he court did exactly what the rule mandates: it considered the appropriate factors and allowed whatever supplemental questioning it deemed appropriate for the case." Rule 431 does not require that attorneys be allowed to directly question the entire venire in every case.

People v. Houston, 226 Ill.2d 135, 874 N.E.2d 23 (2007) Supreme Court Rule 608(a)(9) provides that in non-death cases, a court reporter "shall take the record of proceedings regarding the selection of the jury." However, the proceedings "need not be transcribed unless a party designates that such proceedings be included in the record on appeal." The Court found that defense counsel acted improperly by waiving the presence of a court reporter for *voir dire*. The plain meaning of Rule 608(a)(9) is that in non-death cases, the court reporter is to take notes of the *voir dire*. However, those notes need be transcribed only if one of the parties asks that they be included in the record on appeal. Defense counsel is not necessarily ineffective for waiving the presence of a court reporter for *voir dire*, because prejudice cannot be presumed from the mere failure to insure that *voir dire* is recorded. The situation changes, however, when a jury selection issue is raised on appeal. Because the absence of a *voir dire* record makes it "virtually impossible" for defendant to pursue such a claim, clearly violates Rule 608(a)(9), and results in "no possible strategic advantage" to the defense, the decision to waive the presence of the reporter is objectively unreasonable.

People v. Brown, 204 Ill.2d 422, 792 N.E.2d 788 (2002) Under **Morgan v. Illinois**, 504 U.S. 719 (1992), at the request of a capital defendant, the trial court must ask all potential jurors whether they would automatically vote to impose a death penalty should defendant be convicted of murder. The trial judge failed to comply with **Morgan** where he first asked whether any jurors had strong feelings for or against the death penalty, and then asked only the jurors who admitted to strong feelings whether they would automatically impose a death sentence. Whether a prospective juror has strong feelings or beliefs about the death penalty cannot be equated with whether he or she would automatically impose a death sentence - "[t]he question left open the possibility that a juror would vote to impose a death penalty automatically upon a finding of guilt, yet characterize his feelings and beliefs about the death penalty as other than 'strong.'"

People v. Metcalfe, 202 Ill.2d 544, 782 N.E.2d 263 (2002) In the absence of a motion by defense counsel, the trial judge has no duty to strike a potentially biased juror *sua sponte*. To impose a duty upon a trial court to *sua sponte* excuse a juror for cause in the absence of a defendant's challenge for cause or exercise of a peremptory challenge would allow a defendant "two bites of the apple." A defendant could allow a juror . . . whose experience with the criminal justice system was not satisfactory, to sit on his jury and gamble that the juror's bias was directed against the State and thus would work in his favor. Then, if convicted, defendant could claim that the trial court erred in failing to strike the juror *sua sponte*. In addition, if the trial court strikes a juror *sua sponte* and the defendant is convicted, the defendant could later challenge his conviction on the ground that the trial court erred in striking the juror.

People v. Strain, 194 Ill.2d 467, 742 N.E.2d 315 (2000) The purpose of *voir dire* is to obtain sufficient information to permit challenge of veniremembers who are so prejudiced that they cannot apply the law in accordance with their oaths. Although the trial court has the primary

responsibility for conducting *voir dire*, it must exercise its discretion concerning the extent and scope of the questioning in accordance with the purpose of disclosing any disqualifying bias on the part of jurors. Because street gangs “are regarded with considerable disfavor by other segments of our society” and especially strong prejudice against gangs may exist in metropolitan areas, where evidence related to gang membership and activity “is to be an integral part of the defendant’s trial,” the defense must be “afforded an opportunity to question the prospective jurors, either directly or through questions submitted to the trial court, concerning gang bias.” especially where many of the witnesses were either gang members or police officers assigned to gang units and the State repeatedly stressed to the jury the importance of gang-related testimony. See also, **People v. Gardner**, 331 Ill.App.3d 358, 771 N.E.2d 26 (1st Dist. 2002); **People v. Morales**, 329 Ill.App.3d 97, 768 N.E.2d 84 (1st Dist. 2002) (**Strain** does not mandate questioning about bias against drug dealers).

People v. Kirchner, 194 Ill.2d 502, 743 N.E.2d 94 (2000) The trial judge did not err by denying defendant’s request for individual *voir dire* or by failing to ask the jurors precisely what they had read in pretrial publicity. The trial court need not question veniremembers about the content of pretrial publicity in order to protect the defendant’s right to an impartial jury. Instead, the appropriate question is whether jurors are credible when claiming not to have formed an opinion that would disqualify them from hearing the case.

People v. Terrell, 185 Ill.2d 467, 708 N.E.2d 309 (1998) The trial court did not commit reversible error at a death hearing by refusing to ask potential jurors whether the age of the victim (15 months) would affect their ability to be fair. The trial court is constitutionally required to ask potential jurors about certain biases (i.e., toward gang members or concerning a minority defendant accused of committing an interracial crime), because failing to do so renders the proceedings fundamentally unfair. Where the trial court informed the venire that the decedent was a child, stated that the purpose of *voir dire* was to select a fair and impartial jury to decide the matter based solely on the evidence and law, and asked each veniremember individually whether he or she would automatically vote to impose a death sentence without regard to any mitigating evidence, the proceedings were not fundamentally unfair despite the trial court’s failure to ask about possible bias based on the decedent’s age.

People v. Hope, 184 Ill.2d 39, 702 N.E.2d 1282 (1998) The trial judge must question veniremembers regarding racial prejudice if there are “special circumstances” which suggest “a significant likelihood that racial prejudice might infect a defendant’s trial.” Such “special circumstances” exist where racial issues are “inextricably bound up with the conduct of the trial.” Although the fact that the defendant and victim are of different races does not necessarily require questions concerning racial prejudice, a capital defendant accused of an interracial crime is entitled, upon request, to have the prospective jurors informed of the victim’s race and asked about any possible racial bias. Here, the questions asked and admonishments given during *voir dire* were not sufficient to reveal any possible interracial crime bias. The trial court’s admonishments concerning racial bias were given to only two of the four venires from which the jury was selected - indeed, seven of the 12 jurors who sentenced defendant were not admonished that race was to play no role in their deliberations. Furthermore, although several jurors responded to the trial court’s questioning by disclosing that they were racially prejudiced against the defendant, the trial court failed to inform the venire that the decedent was caucasian. General questioning about racial prejudice is

insufficient to determine whether veniremembers are biased due to the interracial nature of the crime.

People v. Macri, 185 Ill.2d 1, 705 N.E.2d 772 (1998) A death penalty defendant was not entitled to *voir dire* prospective jurors concerning whether they would: (1) be able to “hold out” against a death sentence if the remaining jurors were all in favor of death, or (2) respect the opinion of any juror who was opposed to a death sentence. **Morgan** questioning focuses only on whether a prospective juror has predetermined that a death sentence should be imposed, a subject which has no correlation to a juror’s ability to “stand alone.” In addition, the questions defendant sought to ask concerned matters related to jury deliberations, which are to be covered by the instructions the jury receives before it deliberates rather than by *voir dire* questioning, and did not involve the presumption of innocence, defendant’s right not to testify, or the State’s burden of proof.

People v. Lear, 175 Ill.2d 262, 677 N.E.2d 895 (1997) A trial judge is required to question venirepersons regarding racial prejudice if there are “special circumstances” creating a likelihood that such prejudice might affect the trial. Such “special circumstances” exist where racial issues are “inextricably bound up with the conduct of the trial.” Although the mere fact that the defendant and victim are of different races does not ordinarily create a “special circumstance,” a capital defendant on trial for an interracial crime is entitled, upon his request, to have the sentencing jury informed of the race of the victim and questioned about racial bias.

People v. Daniels, 172 Ill.2d 154, 665 N.E.2d 1221 (1996) A defendant charged with murder asserted his right to a jury trial but waived a jury for sentencing. The trial court held that because there was to be a bench sentencing, the cause was no longer a “capital” case. Thus, the judge allowed defendant only seven peremptories rather than the 14 authorized for “capital” cases. The Court concluded that whether a cause should be characterized as a “capital case” depends not on whether the defendant waives a jury for sentencing, but whether he is “potentially subject to the death penalty upon conviction.” Thus, any case “in which a defendant may be eligible for the death penalty upon conviction . . . is properly viewed as a capital case irrespective of whether defendant waives his right to a jury for the death eligibility or the aggravation and mitigation phase of sentencing.” The defendant’s rights were clearly “impaired” here, where the defense used all the peremptory challenges allowed, named two jurors it would have excluded with additional peremptories and was forced to use one peremptory to excuse a juror who arguably should have been excused for cause.

People v. Mahaffey, 165 Ill.2d 445, 651 N.E.2d 174 (1995) Defendant claimed that due process was violated because Illinois law provides that in a joint trial, the prosecution is to receive the same number of peremptory challenges as all the defendants combined. (Defendant was tried with a co-defendant, and each received 12 challenges while the State received 24.) The Court held that peremptory challenges are not of “constitutional magnitude,” and each State is free to determine the number and use of such challenges in its courts. Because defendant received the number of peremptory challenges afforded him by State law, no due process violation occurred.

People v. Towns, 157 Ill.2d 90, 623 N.E.2d 269 (1993) The Court rejected the argument that the panel should have been sworn before *voir dire*. The statute which states that prior knowledge of a case “shall not disqualify [a prospective juror] if he shall upon oath state that

he believes he can fairly and impartially render a verdict" does not require that prospective jurors be sworn before *voir dire*. Instead, the statute requires only that an oath of impartiality may be required where a venireman appears to have prior knowledge of the case.

People v. Scott, 148 Ill.2d 479, 594 N.E.2d 217 (1992) The trial court refused to ask whether any veniremen had any “feelings or viewpoint” concerning the insanity defense. Defendant argued that the refusal was an abuse of discretion under **People v. Stack**, 112 Ill.2d 301, 493 N.E.2d 339 (1986), which held that an identical question should have been asked. The Court affirmed, holding that other questions about insanity (whether veniremen would be able to vote an insanity verdict, agreed with the concept of an insanity defense and believed that an insane person could commit a crime) were adequate to disclose any bias against the insanity defense.

People v. Seuffer, 144 Ill.2d 482, 582 N.E.2d 71 (1991) A prospective juror who initially expressed disapproval of the insanity defense because it has “been abused,” but who later repeatedly stated that he would be impartial was not subject to disqualification on the ground that he was opposed to the insanity defense.

People v. Howard, 147 Ill.2d 103, 588 N.E.2d 1044 (1991) The trial court did not err by refusing to *voir dire* prospective jurors without having other veniremembers in the room. There was no reason to believe that the jurors failed to fully and frankly answer questions, or that their responses influenced any other juror or that the jurors selected were not impartial. Also the trial court did not abuse its discretion by refusing to inquire about the jurors’ views of handguns. Use of a handgun “was not a central issue at trial.”

People v. Stack, 112 Ill.2d 301, 493 N.E.2d 339 (1986) The trial judge erred by refusing to ask prospective jurors the following question tendered by defense counsel: “Do you have any feelings or viewpoints concerning the defense of insanity in a criminal case? If so, what?” The foregoing question “seeks to determine only whether the prospective juror would be biased against an insanity defense” and does not contain argumentative and misleading statements of law. The Court concluded that inquiry into the feeling or viewpoint of prospective jurors regarding an “extraordinarily controversial legal requirement against which many members of the community may have been prejudiced” is consistent with a “bona fide examination conducted so that the parties can intelligently exercise their prerogatives to challenge.”

People v. Porter, 111 Ill.2d 386, 489 N.E.2d 1329 (1986) Defendant contended that the trial judge erred by failing to ask prospective jurors whether they were acquainted with any of the parties, attorneys, witnesses, victims or their families and whether they were familiar with the facts of the case. The Supreme Court pointed out that defense counsel did not request that the above questions be asked, and held that the scope of the *voir dire* was sufficient.

People v. Bowel, 111 Ill.2d 58, 488 N.E.2d 995 (1986) The trial court did not abuse its discretion by refusing to ask prospective jurors the following questions during *voir dire*: (1) “Have you ever greeted a stranger as an acquaintance?” and (2) “[H]as a stranger ever greeted you because of a mistaken identity? Please explain?” The purpose of *voir dire* is “to assure the selection of an impartial jury,” and not to “indoctrinat[e] a jury” or impanel a jury “with a particular predisposition.” The above questions would not serve the purpose of discovering bias or prejudice on the part of prospective jurors; the Court found that the questions “were

for the purpose of educating jurors as to the defendant's theory of defense prior to trial, and as a means of selecting a jury that was receptive to that defense."

People v. Moss, 108 Ill.2d 270, 483 N.E.2d 1252 (1985) The Supreme Court held that the trial judge did not abuse his discretion by prohibiting defense counsel from using a peremptory challenge to "back-strike" a juror. The Court noted that under the "traditional approach" to jury selection, a party who tenders a panel may use a peremptory challenge against a prospective juror originally tendered if the opposing party excuses a juror, accepts another and retenders the panel. However, Supreme Court Rule 434(a) merely permits use of the traditional method unless the trial judge directs that a different procedure be used. However, a trial judge can alter the usual procedure for exercising peremptory challenges if both parties have adequate notice of the system to be used and the method chosen does not unduly restrict the use of challenges. See also, **People v. Page**, 196 Ill.App.3d 285, 553 N.E.2d 753 (3d Dist. 1990) (judge did not abuse discretion in refusing to allow back-striking).

People v. Neal, 111 Ill.2d 180, 489 N.E.2d 845 (1985) The trial court may, at its discretion, conduct individual *voir dire* out of the presence of other jurors but is not required to do so.

People v. Zehr, 103 Ill.2d 472, 469 N.E.2d 1062 (1984) It was reversible error for the trial judge to refuse to ask prospective jurors the following questions tendered by the defense: (1) If at the close of all the evidence and after you have heard arguments of counsel you believe that the State has failed to sustain the burden of proof and has failed to prove the defendant guilty beyond a reasonable doubt, would you have any hesitation whatsoever in returning a verdict of not guilty? (2) If the defendant decides not to testify in his own behalf, would you hold it against him? (3) Do you understand that the defendant is presumed innocent and does not have to offer any evidence in his own behalf, but must be proved guilty beyond a reasonable doubt by the State?"

People v. Davis, 95 Ill.2d 1, 447 N.E.2d 353 (1983) The prosecutor did not err by questioning prospective jurors about their willingness to follow the law of accountability. The prosecutor did not instruct the jury as to the law, but merely inquired whether the jurors could follow the law.

Illinois Appellate Court

People v. Resor, 2024 IL App (4th) 230208 There was no plain error in the trial court's allowing a juror who was currently serving a felony probation sentence to serve on defendant's jury. The appellate court found it "far from clear" whether Illinois law bars convicted felons from jury service. The Jury Act requires that jurors be "free from all legal exception" [705 ILCS 305/2(a)(3)], but no court has construed that language to prohibit felons from jury service. Without a clear error, there can be no finding of plain error. Further, the court noted that defense counsel's decision not to object to the juror's service may have been a matter of strategy, in the hopes that the juror might favor the defense where counsel for defendant here was also counsel for the juror in his criminal case.

People v. Prince, 2024 IL App (2d) 230027 The trial court abused its discretion because its jury empanelment procedure resulted in the seating of a juror who had expressed clear bias during *voir dire*.

Defendant was charged with domestic violence and requested a jury trial. During *voir dire*, the trial court's only guidance with respect to jury selection was that defendant, who

was acting *pro se*, would be allowed seven peremptory challenges. Twice, he was tendered a panel, used a challenge, and declined to ask the replacement veniremember any questions. Those replacements were then questioned by the State. The replacements revealed potentially prejudicial views regarding domestic violence. Defendant sought to strike these replacements, but was told on both occasions that he was too late because, by declining to question the replacements, he had accepted and tendered the panel. One of the replacements ultimately served on the jury.

The appellate court found reversible error. The trial court should have informed the defendant that the failure to question a replacement panel member would be tantamount to his acceptance of the panel. Under Rule 434(a), the default method of jury selection is the “traditional procedure,” which includes the power of back-striking. While the court had discretion to modify this method, it could do so only after providing adequate notice to the parties. Because the trial court failed to provide any guidance as to the method and manner of jury selection, it denied defendant a fair chance to exercise his peremptory challenges, including against the replacement who explicitly stated that her experience with domestic violence might cause her to be biased. The error was compounded by the trial court’s failure to follow up on the juror’s ambivalence.

The denial or impairment of the right to peremptory challenges is reversible error without a showing of prejudice. The court therefore presumed prejudice and remanded for a new trial.

People v. Polk, 2024 IL App (1st) 181933 The trial court did not err in denying a defense request to *voir dire* potential jurors as to their feelings about drugs. While a defendant must be given an opportunity to question the venire about gang bias in cases where gang membership or gang activity is integral to the trial, that standard has not been extended to other potential biases. In cases involving an affirmative defense relating to the defendant’s own drug use, *voir dire* about drug bias has been permitted. Here, the defendants’ personal drug use was not an issue at trial, and thus the denial of *voir dire* on the subject was not error.

Similarly, the gang bias questions included on the jury questionnaire were sufficient to protect the defendants’ right to an impartial jury. Defendant complained that only three gang-specific questions were asked, specifically whether the potential jurors had family or close friends involved in gangs, whether they had experiences with the Black Souls gang in Chicago, and whether they could put aside any feelings of gang bias and decide the case fairly based on the law and evidence provided. Defendant argued that the court also should have asked whether potential jurors harbored bias against street gangs, citing **People v. Strain, 194 Ill. 2d 467 (2000)**. But **Strain** only requires that jurors be questioned about gang bias, and the questions that were asked adequately probed into issues of gang bias and whether the potential jurors could decide the case based on the evidence rather than on their personal feelings about gangs.

People v. Spears, 2024 IL App (1st) 181491 The trial court did not err in denying a defense request to *voir dire* potential jurors as to their feelings about drugs. While a defendant must be given an opportunity to question the venire about gang bias in cases where gang membership or gang activity is integral to the trial, that standard has not been extended to other potential biases. In cases involving an affirmative defense relating to the defendant’s own drug use, *voir dire* about drug bias has been permitted. Here, the defendants’ personal drug use was not an issue at trial, and thus the denial of *voir dire* on the subject was not error.

Similarly, the gang bias questions included on the jury questionnaire were sufficient to protect the defendants' right to an impartial jury. Defendants complained that only three gang-specific questions were asked, specifically whether the potential jurors had family or close friends involved in gangs, whether they had experiences with the Black Souls gang in Chicago, and whether they could put aside any feelings of gang bias and decide the case fairly based on the law and evidence provided. These questions adequately probed into issues of gang bias and whether the potential jurors could decide the case based on the evidence rather than on their personal feelings about gangs.

People v. Smollett, 2023 IL App (1st) 220322 Defendant argued that the trial court violated Rule 431 by conducting *voir dire* itself and not allowing defense counsel to ask questions directly to the venire. Under Rule 431, the trial court must permit the parties to supplement its examination "by such direct inquiry as the court deems proper." In determining a proper scope of direct inquiry, the trial court must consider the factors listed in Rule 431(a)—the length of the court's examination of potential jurors, the complexity of the case, and the type of charges the defendant is facing—"and then determine, based on those factors, whatever direct questioning by the attorneys would be appropriate."

Here, the trial court openly invited input from the parties throughout *voir dire*. The case was not complex, and the trial court conducted a lengthy and comprehensive *voir dire* which incorporated many of defendant's proposed questions. Because the trial court's *voir dire* demonstrated a steadfast effort to ferret out jurors biased against defendant, including asking about views on the police, civil rights, LGBTQ rights, and the television show on which defendant worked, the court did not abuse its discretion by performing all of the questioning during *voir dire*.

The appellate court also rejected defendant's **Batson** arguments. Defendant filed a **Batson** motion after the State used four peremptory challenges against African-American members of the venire, leaving only one African-American to serve on the jury. Defendant also alleged that the State's challenge of a gay veniremember was discriminatory.

Defendant's **Batson** motion was inadequate because it made no arguments beyond the identities of the challenged veniremembers. A defendant cannot make a *prima facie* showing by simply pointing to the number of African-American venirepersons peremptorily challenged. **People v. Heard, 187 Ill. 2d 36, 52 (1999)**. Whether a *prima facie* case of discrimination exists depends on several factors, and the defendant has the burden of presenting sufficient evidence before the trial court. He cannot make new arguments for the first time on appeal, such as his claim that the jury contained only one African-American member. Finally, while **705 ILCS 305/2(b)** prohibits exclusion of a veniremember from the jury on the basis of sexual orientation, defendant again made no argument below beyond highlighting the challenged veniremember's sexual orientation.

People v. Williams, 2022 IL App (2d) 200455 The trial court adequately questioned prospective jurors regarding serving on a jury during the COVID-19 pandemic. The court explained various safety precautions that would be in place and told jurors to bring any concerns to the attention of the bailiffs. The court also specifically asked prospective jurors whether they had any concerns about serving on a jury during the pandemic. No juror raised any concerns either during *voir dire* or during the course of the trial. While the court did not ask the specific questions suggested by defense counsel, the questions the court did ask were sufficient to ensure defendant's right to an impartial jury. In support of this conclusion, the appellate court noted that the trial judge expressed concerns that defense counsel's questions

would have placed too great an emphasis on COVID-19, shifting the jurors attention away from the trial. The conduct of the *voir dire* here struck a reasonable balance between allowing jurors to express pandemic-related concerns while also ensuring that the pandemic did not become the focus of *voir dire*.

The appellate court also rejected defendant's argument that the use of masks during *voir dire* hindered his attorney's ability to read their facial expressions and make an informed decision as to impartiality. The court rejected the notion that it is essential to see a juror's nose and mouth to assess potential bias. The parties were able to see the top half of potential jurors' faces, including their eyes and forehead. And, they could listen to each prospective juror's tone of voice and observe their body language. While masks covered part of their faces, they did not infringe on defendant's right to an impartial jury.

Likewise, other pandemic precautions did not deprive defendant of a fair trial. The record demonstrated that jurors spoke up when they were having difficulty hearing or seeing due to social distancing. Those requests were not indicative of the jurors' failure to see or hear material testimony, but rather demonstrated that the jurors followed the court's instructions to bring such issues to the court's attention.

People v. Smart, 2022 IL App (2d) 210531 Defendant argued that COVID-19 mask mandate denied him his right to an impartial jury. The appellate court disagreed. Defendant claimed he could not properly evaluate venire members during *voir dire* because their faces were covered. But the ability to see the venire members' mouths and noses was not essential for assessing credibility, bias, or prejudice. The appellate court noted that numerous other jurisdictions have unanimously arrived at the same conclusion.

People v. Walls, 2022 IL App (1st) 200167 Supreme Court Rule 434(a) provides that when impaneling a jury in a criminal case, the State and defense are to "pass upon and accept the jury in panels of four," unless the court "directs otherwise." Here, the court employed a procedure whereby all potential jurors were questioned, and then the defense and State were required to submit all of their challenges for cause and peremptory challenges in writing, simultaneously. The court explained that if they struck the same potential juror, that peremptory strike would count against both. Defendant made several objections to this process which were overruled. Two of defendant's challenges for cause were rejected, and defendant ultimately exercised peremptory challenges against those two jurors. Defendant used all seven of his peremptory challenges, while the State used four. Their peremptory strikes overlapped as to a single juror.

On appeal, defendant challenged this jury selection process, arguing that the trial court abused its discretion by not providing notice of its method until after the venire was questioned. The Appellate Court rejected defendant's argument. The timing of the court's notice did not limit the parties' ability to assess juror bias through *voir dire* questioning. And, defendant did not identify any way in which his selection procedure would have changed had he learned of the court's jury selection process earlier. Even assuming error, the court noted that defendant had not claimed that he was deprived of an impartial jury, and thus he was not prejudiced. Thus, the court did not abuse its discretion in employing its own jury selection process.

People v. Sapp, 2022 IL App (1st) 200436 The Appellate Court refused to find counsel ineffective for failing to question any venire members during *voir dire*. An attorney's decision whether to question a potential juror on a particular subject is considered to be one of trial strategy. Although defendant argued that prejudice results when the State "builds a

relationship” with the jury by complimenting venire members in follow-up questions, the court found this argument speculative. Defendant could not point to any concrete prejudice resulting from defense counsel’s decision to refrain from questioning. Defendant also cited a Texas Appellate Court case finding that the failure to participate in *voir dire* is a sixth amendment violation under **Cronic**, but the Appellate Court noted the case had not been followed by other Texas courts, and that it was not binding on this court.

People v. Ticey, 2021 IL App (1st) 181002 The trial court erred in omitting the fourth **Zehr** principle during *voir dire* – that defendant’s failure to testify could not be held against him. The trial court also erred when it asked jurors whether they had any “disagreement” with the other principles, rather than asking whether they accepted them. The evidence in the case was closely balanced where one eyewitness testified that defendant participated in the drug transaction at issue, while the other testified that he did not. Accordingly, the court found plain error in the jury *voir dire*.

The trial court also erred in giving IPI 3.17, the accomplice witness instruction, where the “accomplice” witness actually testified for the defense that defendant was *not* involved in the drug sale at issue. Defendant was the driver of the vehicle from which the witness conducted a drug sale. The accomplice instruction was not meant to be used by the prosecution to undercut a defense witness’s testimony but rather is intended to inform the jury that a State’s witness might expect favorable treatment for his or her testimony. Giving the instruction here, where the evidence was closely balanced and the outcome depended on the credibility of the witnesses, was plain error.

People v. Holliday, 2020 IL App (5th) 160547 The trial court did not err in refusing to discharge defendant’s jury where there had been a disturbance in the courthouse on the morning of jury selection. The relatively minor disturbance involved the shooting victim and two other men and happened in the hallway, not in the courtroom, while the jury was still being selected. After the jury was impaneled, the court asked whether any of the jurors had witnessed anything that would cause them concern or difficulty, and none responded in the affirmative. On this record, there was no evidence that any selected juror actually witnessed the incident. Therefore, discharge of the jury was not required.

People v. Smith, 2020 IL App (3d) 160454 The trial court violated defendant’s right to a public trial when, during jury selection, the court ordered spectators, including defendant’s parents, out of the courtroom. The court made no record as to why the courtroom had to be closed. This error was not objected to, and the Appellate Court refused to find the failure to object excusable under **Sprinkle**. But the court did find second-prong plain error and reversed for a new trial.

People v. Clayton, 2019 IL App (3d) 170315 Trial court did not abuse its discretion in replacing juror who it believed had been sleeping during portions of the trial. While the judge should have acted on his suspicions about the juror’s inattentiveness earlier in the process, it was not error to excuse the juror after he revealed his dismissive views of the evidence that had been presented. Juror’s assessment of the evidence was attributable to his inattentiveness. Further, defense counsel’s waiver of defendant’s presence for the *in camera* questioning and replacement of the excused juror, even if error, did not result in a constitutional denial of defendant’s right to be present where defendant did not allege he was denied an impartial jury.

People v. Tondini, 2019 IL App (3d) 170370 Where a juror is challenged for cause, it is the burden of the challenging party to show that the juror is biased. Where a potential juror is related to a party to the case, bias may be presumed. Here, the court rejected defendant's challenge-for-cause to a juror whose wife was employed as a victim witness coordinator for the State's Attorney's office. As a "non-prosecutorial" employee, the juror's wife was not a party to the case because she had no ability to control the proceedings, question witnesses, or appeal the verdict. Further, defendant failed to properly preserve his challenge to the court's refusal to excuse for cause because he had not exercised all of his peremptory challenges at the time of the ruling and, when he later did exhaust his peremptory challenges, he did not seek reconsideration of the for-cause ruling, did not indicate that he was forced to accept an objectionable juror, and did not request additional peremptory challenges.

People v. Ryder, 2019 IL App (5th) 160027 An investigating officer's brother sat on the defendant's jury. The officer in question had participated in the defendant's custodial interrogation, and the veniremember admitted during *voir dire* to being the officer's brother, though he said he could be impartial. Defense counsel used all of his peremptories and therefore was unable to challenge the brother.

The Appellate Court found no duty on the part of the trial court to *sua sponte* remove the brother from the venire. The "implied bias" doctrine which some federal courts have fashioned in cases where jurors are considered too biased to participate in a fair trial, was waived below when defense counsel failed to challenge the juror. As for counsel's ineffectiveness, even assuming it would be unreasonable to allow the officer's brother onto the jury, the strength of the State's case - a confession to predatory criminal sexual abuse corroborated by credible testimony from the accuser - precludes defendant from showing prejudice.

People v. Jackson, 2019 IL App (1st) 161745 The trial court committed clear error during *voir dire* by asking the venire whether they had a "problem" with any of the 431(b) principles, rather than asking if they understood and accepted the principles. But the error was forfeited and could not be reviewed as plain error because the evidence was not closely balanced where the State's witnesses were consistent and unrefuted as to the presence of heroin in, and defendant's connection to, the apartment.

People v. Olla, 2018 IL App (2d) 160118 The trial court violated Rule 431(b) when it asked only whether the prospective jurors "had a problem with, or took issue with" the four principles. However, the Appellate Court refused plain error review. It found that the evidence was not closely balanced. The evidence primarily consisted of the testimony and prior statements of the 13-year-old complainant alleging various incidents of predatory criminal sexual assault. The Appellate Court found that the case did not present a "credibility contest" like **People v. Seby, 2017 IL 119445**, despite the fact that the defendant testified and denied the complainant's allegations, and the fact that the complainant's account included several discrepancies. The Appellate Court's analysis made no mention of the note from the jury indicating it was hung before its split verdict, which acquitted defendant of several counts. It instead relied on its "commonsense" appraisal of the testimony and the lack of evidence suggesting complainant had a motive to lie.

People v. Stevens, 2018 IL App (4th) 160138 The trial court violated Rule 431(b) because it did not ask the venire whether they understood the four principles. It further erred when it failed to give **IPI Criminal No. 11.66**, which is required to inform the jury how to assess the

weight and credibility of a statement admitted under [725 ILCS 5/115-10](#) (prior outcry statements in cases involving sexual acts perpetrated against a child under 13 years old).

The State improperly bolstered the credibility of the complainant in a sexual assault case by asking an outcry witness whether the complainant had ever not told her the truth. A witness may express an opinion about another witness's character for truthfulness only after that character has been attacked by reputation or opinion evidence.

The State erred when it asked defendant why his daughter would falsely accuse him of sexual assault. It is improper for a prosecutor to ask a defendant his opinion on the veracity of other witnesses, as such questions intrude on the jury's function to determine witness credibility and also demean and ridicule the witness.

The State also committed misconduct when it bolstered the complainant's testimony during closing argument. When rebutting the defense theory that it would have defied common sense for defendant to repeatedly sexually assault his daughter without anyone knowing, the State argued that "[w]e see that everyday in the news." This reference to matters not supported by trial evidence was improper. The State also improperly argued that an acquittal would send a discouraging message to other victims.

These errors tipped the scale against defendant in a closely balanced case, and therefore amounted to first-prong plain error. The case boiled down to a credibility contest between defendant and his daughter. Although the State presented other witnesses, these witness merely repeated the same version of events that the daughter testified to at trial. The State offered no physical evidence and no expert testimony on the observed effects on child sexual abuse victims in school or around other people. Without any corroboration either way, the evidence was closely balanced.

[People v. Cook, 2018 IL App \(1st\) 142134](#) *Voir dire* is conducted at the trial court's discretion, and the court did not abuse that discretion by questioning a potential juror to ascertain whether her strong feelings about her experiences would interfere with her ability to be fair to the parties. The trial court should ensure that venire members are sufficiently questioned to filter out those who cannot be impartial. The Appellate Court rejected defendant's assertion that the judge in this case "badgered" or "pestered" the potential juror into saying she could be fair. Rather, the trial court properly questioned here to elicit an honest answer about her ability to be fair. The juror showed only minor equivocations in her first two answers and renounced those answers after the court asked her to keep her strong feelings from her experiences with crime separate from this case, even though that might not be easy, and give the defendants a fair trial.

Furthermore, the Appellate Court refused to second guess defense counsel's strategic decision to not exercise a peremptory challenge on this juror despite her initial statement that a shooting that took place while her son and grandchildren were present might impact her ability to be fair. The juror ultimately agreed to be fair, she was a retired social worker, and the State's witnesses had criminal histories as well.

[People v. Encalado, 2017 IL App \(1st\) 142548](#) Although a trial court has discretion in the conduct of *voir dire*, it is reversible error for a court to preclude questions that would enable a defendant to remove jurors who are biased and prejudiced. Courts have held that defendants have the right to question jurors about gang membership, drug use, and the insanity defense.

At trial, defendant testified (as a defense against the charges of aggravated criminal sexual assault) that the victim agreed to have sex with him in exchange for money and drugs, but after the sexual acts he refused to pay her causing her to falsely accuse him of sexual

assault. During jury selection, the trial court denied defendant's request to question the jurors about whether hearing about prostitution would prevent them from "being fair to either side."

The Appellate Court, with one justice dissenting, held that the trial court abused its discretion by refusing to question the jurors about prostitution. The court noted that courts from other jurisdictions had found juror bias against people who engage in prostitution, pornography and other forms of "sexually immoral conduct." The court found that jurors may have a similar bias against customers of prostitution. The court cited research indicating that men feared publicity about their use of prostitution more than arrest and punishment. The court deduced from this that many people "feel strong disgust and antipathy towards the patrons of prostitutes." Defendant was thus entitled to question the jurors about whether they could decide the case "without a predisposition to find him guilty...because he patronized prostitutes."

People v. Evans, 2016 IL App (1st) 142190 The Sixth Amendment right to a public trial extends to *voir dire* of prospective jurors. A violation of the right to a public trial is a structural error which requires automatic reversal without any showing of prejudice. An error may be designated as structural only if it renders the trial fundamentally unfair or unreliable as a means of determining guilt or innocence.

To justify closing a proceeding to the public, there must be an overriding interest that is likely to be prejudiced if the hearing is open, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closure, and the court must make adequate findings to support the closure.

Here, defendant's step-grandmother was removed from the courtroom during *voir dire*. The judge stated that because there were 45 prospective jurors there was a shortage of seats in the courtroom, and that it was impossible to separate the grandmother from the prospective jurors.

The Appellate Court assumed that avoiding juror contamination is an overriding interest, but found that excluding the grandmother from the proceedings was not necessary to protect that interest. There was no evidence that the grandmother had attempted or would attempt to communicate with prospective jurors, and defense counsel stated that he had instructed the grandmother not to communicate with the jury pool. Under these circumstances there was no specific threat of jury contamination sufficient to justify closing the proceeding.

The Appellate Court also found that the second reason for barring the grandmother - that there were a limited number of seats available in the courtroom - carried even less weight. Having 45 potential jurors sit in the courtroom at one time is solely a matter of logistics and convenience, and does not affect the fairness of the trial. Many courtrooms are undersized, but "even in a cramped physical space" trial courts can deal with space limitations in ways that do not burden the right to a public trial. For example, potential jurors can be called into the room in smaller groups, the grandmother or a potential juror could have been asked to stand until a seat became available, and the jurors and the grandmother could have been instructed not to interact.

In addition, the trial court failed to make adequate findings to support the closure where it referred only to the small size of the courtroom and made no finding that the grandmother was likely to contaminate the venire. Although a trivial temporary closure might not violate the Sixth Amendment, the exclusion of the grandmother from the entire jury selection could not be deemed to be trivial.

Defendant's conviction for murder was reversed and the cause remanded for a new trial.

People v. Gashi, 2015 IL App (3d) 130064 Trial courts should not attempt to define reasonable doubt for the jury. The concept of reasonable doubt is self-explanatory and needs no further explanation. Providing a definition of reasonable doubt is more likely to confuse a jury than clarify its meaning.

Noting a split among the Illinois Appellate Courts on this issue, the Appellate Court held here that it was structural error under the second prong of plain error for the trial court to tell the jury during *voir dire* that there is no definition of reasonable doubt, so "that is for you [the jury] to decide." Such a statement implies a broad range of meanings for the concept of reasonable doubt, and it is reasonably likely that the jury would overestimate the latitude it had in defining reasonable doubt.

People v. Short, 2014 IL App (1st) 121262 At defendant's trial for attempt first degree murder, unlawful possession of a firearm by a gang member, aggravated unlawful use of a weapon, and aggravated battery with a firearm, the trial court admonished the venire that evidence of gang membership might be presented and asked whether the veniremembers would be able to afford defendant a fair trial in light of such testimony. After the jury was selected, defendant pleaded guilty to unlawful possession of a firearm by a gang member - the only charge to which the gang membership evidence was relevant - and aggravated unlawful use of a weapon. The trial court denied defense counsel's request to have the venire dismissed and a new jury selected, but informed the jury that contrary to the earlier statements no gang evidence would be presented.

The trial court did not err during *voir dire* by informing the jury that gang membership evidence might be introduced. At that point, defendant had not expressed a willingness to plead guilty to unlawful possession of a firearm by a gang member, and had merely unsuccessfully sought to have a bench trial on that charge. Thus, the trial court admonished the venire in accordance with its reasonable expectation that gang-related evidence would be presented. Once defendant pleaded guilty to the only charge on which such evidence could have been admitted, the judge properly instructed the jury that despite the earlier statements, no gang evidence would be presented.

Even if the trial court erred, defendant was not prejudiced. A defendant facing charges that require evidence of gang membership is entitled to have the jury questioned during *voir dire* to determine if he will be prejudiced by admission of such evidence. **People v. Thompson, 2013 IL App (1st) 113105**. Here defense counsel was satisfied after *voir dire* that the jurors would not hold evidence of gang membership against defendant. There is no basis to argue that the jury could no longer be fair and impartial after it was told that gang evidence would not be presented.

Although defendant speculated that the jury would likely assume that he was guilty of the charges that were dropped, the court found that it is "[e]qually possible that the jury assumed the State dropped the charges because it would not be able to prove them." The court also noted that the jury acquitted defendant of attempt first degree murder and convicted only on a lesser charge, further establishing that it was likely not affected by the trial court's reference to gang evidence.

People v. Jones, 2014 IL App (1st) 120927 The Sixth Amendment guarantee to a public trial is designed for the protection of the accused, and is intended to: (1) ensure a fair trial;

(2) encourage the prosecution and trial court to carry out their duties responsibly; (3) encourage witnesses to come forward; and (4) discourage perjury. The right to a public trial includes the right to a public *voir dire*.

The right to a public trial is not absolute, however, and can be infringed when necessary. In addition, a temporary closure may be so trivial that it does not violate the Sixth Amendment. This “triviality standard” is not a harmless error analysis, however. Instead, it examines the trial court’s actions and the effects of the closure to determine whether Sixth Amendment protection was denied.

Plain error did not occur where *voir dire* of three veniremembers occurred in chambers, outside the presence of the public and the defendant. First, Supreme Court Rules 431 and 234 grant the trial court discretion to conduct *voir dire* outside the presence of other jury members. Second, because access to *voir dire* was not requested by defendant, the news media, or the public, the procedure merely prevented other members of the *voir dire* panel from hearing the responses. The right to a public trial does not require that all veniremembers hear other veniremembers’ answers.

One of the prospective jurors requested an *in camera* discussion, and there was nothing in the record to indicate that the trial was in any way unfair due to the brief *in camera* questioning, especially since all three of the prospective jurors questioned *in camera* were excused from the jury. Because any closure was trivial, no Sixth Amendment violation occurred.

People v. Bowens, 2013 IL App (4th) 120860 At defendant’s trial for attempt first degree murder, aggravated domestic battery, and aggravated battery, the trial judge denied a motion to excuse the judge’s husband from the jury for cause. The Appellate Court affirmed on direct appeal, noting that defense counsel’s failure to exercise a peremptory challenge against the judge’s husband amounted to acquiescence to the husband’s jury service, and therefore waived the issue for appeal.

Defendant then filed a *pro se* post-conviction petition alleging that defense counsel was ineffective for failing to use an available peremptory challenge to remove the trial judge’s husband from the jury. The judge who had presided over the jury trial also heard the post-conviction petition, and summarily dismissed the petition as frivolous and patently without merit.

Defendant raised the gist of a constitutional claim, finding that where the defense had peremptory challenges available, it was objectively unreasonable for counsel to allow the trial judge’s husband to be seated as a juror. The court noted that other jurisdictions have found that regardless whether peremptory challenges are available, the constitutional right to a fair trial is violated where the spouse or close relative of the trial judge serves as a juror. In addition, the Illinois Supreme Court has held that the conviction must be reversed and a new trial awarded where the wrongful denial of a challenge for cause denies a defendant the right to a trial before a fair and impartial jury.

People v. Brown, 2013 IL App (2d) 111228 Peremptory challenges are tools for jury selection. Generally, neither party has the right to exercise a peremptory once a juror has been accepted and sworn. At least until the trial begins, however, the trial court has discretion to allow parties to exercise peremptory challenges to sworn jurors.

Neither [Illinois Supreme Court Rule 434](#) nor [725 ILCS 5/115-4](#) authorizes a party to use a peremptory challenge against a sworn juror once the trial begins.

Adopting the reasoning of [U.S. v. Harbin, 250 F.3d 532 \(7th Cir. 2001\)](#), the Appellate Court concluded that allowing the State to exercise a peremptory challenge to excuse a juror after witnesses have testified constitutes structural error which requires automatic reversal without conducting harmless error analysis. Here, a juror realized from the testimony that defendant's parents were the pastors of a church where the juror's cousin had died after being shot by police. That death was not related to the charges against defendant, although defendant had been a witness to the shooting.

Illinois law does not expressly authorize the use of peremptory challenges during trial, and §115-4 authorizes at most two alternate jurors, making it practically impossible to allow mid-trial peremptory challenges. By allowing the State to exercise a peremptory challenge during trial, after the defendant had exercised all of her peremptories before trial, the trial court "changed the rules when only the State could play."

Defendant's convictions were reversed and the cause remanded for a new trial.

[People v. Dixon, 409 Ill.App.3d 915, 948 N.E.2d 786 \(1st Dist. 2011\)](#) Under [People v. Babbington, 286 Ill.App.3d 724, 676 N.E.2d 1326 \(1st Dist. 1997\)](#), participation by an alternate juror in jury deliberations constitutes plain error which causes substantial prejudice to the defendant. In [Babbington](#), the alternate juror deliberated with the jury, stayed overnight in the same hotel as the sequestered jurors, signed the verdict forms, and responded when the jury was polled.

Here, defendant's post-conviction petition failed to assert the gist of a meritorious issue under [Babbington](#) because it was not apparent that the alternate juror participated in deliberations. Instead, the record rebutted defendant's claim because the four verdict forms bore only the signatures of the 12 jurors, the alternate jurors had been instructed to remain in the courtroom when the jury retired to deliberate, and the only reason to believe that an alternate juror deliberated was the clerk's erroneous polling of an alternate. The court noted that the clerk apparently realized the mistake and did not complete the polling question, but the alternate juror answered "yes" when asked whether "this [was] your verdict." In view of the verdict forms with 12 signatures, the court concluded that the alternate's answer likely reflected only that he agreed with the verdict reached by the jury and not that he had participated in deliberations.

Furthermore, the post-conviction petition did not present the gist of a meritorious issue that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness for failing to peremptorily challenge to excuse a prospective juror who eventually became the jury's foreperson. The trial court had refused to excuse the juror for cause after he failed to mention two 20-year-old arrests when asked about his prior arrest record.

The defendant could not show prejudice because, in light of the overwhelming evidence of guilt, there was no reasonable probability that the defendant would have been acquitted had the foreman not been part of the jury. Because defendant could not show that trial counsel was ineffective, appellate counsel's failure to raise the issue on direct appeal was not error.

The juror's failure to mention two 20-year-old arrests did not indicate any bias where the juror stated during *voir dire* that he could be objective although one of his sons was incarcerated at the time of the trial.

[People v. Gonzalez, 2011 IL App \(2d\) 100380](#) Supreme Court Rule 431(a) provides that the trial court shall conduct *voir dire* examination of prospective jurors, but "may permit the parties to submit additional questions to it for further inquiry . . . and shall permit the parties

to supplement the examination by such direct inquiry as the court deems proper . . . depending on the length of examination by the court, the complexity of the case, and nature of the charges.” Whether the trial court erroneously denied direct questioning by the parties is reviewed under the abuse of discretion standard.

In determining whether to allow direct questioning by the parties, Rule 431(a) mandates that the trial court consider the length of its own examination of veniremembers, the complexity of the case, and the nature of the charges. Trial courts may not simply dispense with attorney questioning, but after considering the relevant factors may conclude that under the circumstances direct questioning is unnecessary.

Here, the trial court erred by disallowing any direct questioning of the venire. There was no indication in the record that the trial court exercised its discretion. Similarly, there was no mention of the complexity of the case, nature of the charges, or length of the court’s examination. Furthermore, the case was not “exceedingly simple.” The Appellate Court concluded that the trial judge simply decided before *voir dire* to dispense with any direct questioning, informing the parties at one point that “[t]his is the new regime.”

Because the evidence was closely balanced, the failure to comply with Rule 431(a) was plain error. The court noted that a directed verdict in favor of the defense was granted on one charge at the close of the State’s case, the credibility of witnesses was critical in resolving the charges, and notes sent by the jury indicated that it had difficulty deciding the case. Under these circumstances, the refusal to allow direct questioning may have hindered the parties’ ability to probe the venire for evidence of bias.

People v. Bowens, 407 Ill.App.3d 1094, 943 N.E.2d 1249 (4th Dist. 2011) Defendant waived the argument that the trial court erred by failing to excuse her spouse for cause. The Appellate Court concluded that the issue was waived because, after the motion to excuse for cause was denied, counsel failed to exercise one of his two remaining peremptories.

Although counsel was only permitted to exercise peremptories within each panel of four veniremembers, and stated that he had allocated the two remaining challenges for use against two prospective jurors whom he knew would be in the final panel, the Appellate Court found that he should have used a peremptory against the judge’s husband and then asked the judge for an additional challenge. By accepting the panel with the objectionable juror while he had peremptories remaining, counsel affirmatively acquiesced to the juror’s service and waived the issue for appeal.

The court rejected the argument that the trial court’s failure to excuse her spouse for cause could be reached as plain error. Plain error analysis can apply only to procedural default – the failure to make a timely assertion of a known right – and not where the defense affirmatively acquiesces to an error. In the latter situation, defendant’s only recourse is to challenge counsel’s acquiescence as ineffective assistance.

The court declined to address whether jury service by the trial judge’s spouse might be *per se* reversible error if the defendant does not acquiesce. However, “[w]e note . . . that the record contains no suggestion of some compelling need for why the trial court thought it necessary for her spouse to serve as a juror in a case over which she presided, a circumstance which strikes this court as rather unusual.”

In dissent, Justice Pope found that “where the trial judge goes home each night of three-day trial . . . to the same home where she resides with her husband-juror,” the appearance of impropriety calls into question the fundamental fairness of the trial. Justice Pope also criticized the majority’s failure to discuss the ramifications of having a judge’s family member serve on the jury, including that: (1) the spouse might look unkindly on a defense attorney who engages in heated discussion with the judge, (2) the trial court might

be called to inquire into allegations of juror misconduct against the spouse, and (3) other jurors might be unduly influenced by the spouse's view of the case. Justice Pope also noted that "it seems extremely unlikely defendant would have been successful in obtaining an extra peremptory challenge" after the judge denied a motion to excuse her spouse for cause.

People v. Johnson, 408 Ill.App.3d 157, 945 N.E.2d 610 (1st Dist. 2010) At defendant's trial for home invasion and armed robbery, the trial court denied a defense request for supplemental *voir dire* concerning the racial attitudes of the venire. The Appellate Court held that no error occurred.

Generally, there is no constitutional right to *voir dire* on matters which might "conceivably prejudice" veniremembers. However, there is a constitutional right to question prospective jurors about their racial views where "special circumstances" create a "constitutionally significant likelihood" that racial prejudice will affect the proceedings. Such "special circumstances" exist where issues of race are "inextricably bound up with the conduct of the trial."

The failure to allow questioning about racial attitudes is constitutional error only if the trial is rendered fundamentally unfair. That the defendant is black and the complainant white is not a "special circumstance" justifying *voir dire* about racial attitudes.

The defense argued that racial issues were inherent in this case because defendant was a black man who was married to a white woman and accused of offenses against the boyfriend of his mother-in-law. The court noted that the few references to race in the record were raised by the defense in argument and lacked any evidentiary support. Furthermore, the offenses had no racial component and were motivated by coincidence and opportunity. Under these circumstances, the proposed questioning concerned irrelevant matters and would have injected race into a case which had no other racial content.

The court added that even had the defendant's interracial relationships played an important role in the jurors' ability to be impartial, the proposed supplemental questioning would have been improper because it did not even remotely address such relationships.

People v. Sanders, 393 Ill.App.3d 152, 911 N.E.2d 1096 (1st Dist. 2009) **People v. Strain**, 194 Ill.2d 467, 742 N.E.2d 315 (2000), which provides that a trial judge must inquire about the potential gang bias of veniremembers where gang related evidence is integral at trial, constituted a "new" rule of law which could not be applied retroactively on collateral review. Furthermore, a post-conviction petition filed the year after **Strain** was decided, but eight years after defendant was convicted, was untimely.

The Appellate Court acknowledged that its rulings conflicted with **People v. Gardner**, 331 Ill.App.3d 358, 771 N.E.2d 26 (1st Dist. 2002), which held that a defendant could obtain retroactive relief on a post-conviction petition based on **Strain** although the ordinary statutory period for filing such a petition had expired. The Appellate Court stated "that as much as we respect the opinions of the **Gardner** court we cannot align ourselves with its analysis on these matters."

People v. Reed, 376 Ill.App.3d 121, 875 N.E.2d 167 (3d Dist. 2007) Supreme Court Rule 608(a)(9) provides that in non-death cases, a court reporter shall take notes of the jury selection. However, those notes need not be transcribed unless a party designates jury selection proceedings to be included in the record on appeal. In **People v. Houston**, 226 Ill.2d 135, 874 N.E.2d 23 (2007), the Illinois Supreme Court found that defense counsel improperly waived a court reporter for *voir dire*, and remanded the cause with directions to

reconstruct the *voir dire* record so the reviewing court could consider the defendant's claim of error in jury selection. In **Houston**, the Supreme Court explicitly stated that the mere failure to insure the presence of a court reporter during *voir dire* is not necessarily ineffective assistance of counsel. Here, because defendant raised no allegation of error concerning jury selection, counsel was not ineffective.

People v. Allen, 313 Ill.App.3d 842, 730 N.E.2d 1216 (2d Dist. 2000) Under amendments to Supreme Court Rule 431 that took effect May 1, 1997, the trial court "shall permit the parties to supplement [*voir dire*] examination by such direct inquiry as the court deems proper for a reasonable period of time depending on the length of examination by the court, the complexity of the case, and the nature of the charges." Rule 431(b) was also amended to provide that upon defendant's request, the trial court is required to ask veniremembers whether they understand and will accept the presumption of innocence, the reasonable doubt standard, that the defendant is not required to offer any evidence, and that defendant's failure to testify cannot be held against him. Although the word "shall" in Rule 431(a) is "directory" rather than "mandatory," the Supreme Court's elimination of the discretionary language of the prior version of Rule 431 indicates that it intended for trial courts to exercise discretion in favor of allowing direct questioning of prospective jurors.

People v. James, 304 Ill.App.3d 52, 710 N.E.2d 484 (2d Dist. 1999) The Court held that a prospective juror's Fifth Amendment right against self-incrimination extends to jury selection procedures. Thus, the prosecutor acted improperly by questioning veniremembers about whether they had ever used illegal drugs. While the court acknowledged that a potential juror's views about illegal drug use is a proper subject for *voir dire*, such information "may be elicited without trampling the constitutional rights of potential jurors."

People v. Bennett, 282 Ill.App.3d 975, 669 N.E.2d 717 (3d Dist. 1996) A defendant's constitutional rights to an impartial jury and to be present were violated where 16 of the 29 veniremembers were questioned outside defendant's presence; defendant could have helped counsel decide whether peremptory challenges should be exercised against any of five members of the petit jury who were questioned in defendant's absence, and the trial court's asserted reason for excluding defendant (security) was not sustained by the record.

People v. Green, 282 Ill.App.3d 510, 668 N.E.2d 158 (1st Dist. 1996) Where during or just after *voir dire* it "comes to the attention of the trial court that there are facts that contradict answers given on *voir dire*," and only a minor delay would result from allowing a limited inquiry to resolve the contradictions, the trial court should grant a request to reopen *voir dire*.

People v. Oliver, 265 Ill.App.3d 543, 637 N.E.2d 1173 (1st Dist. 1994) The trial court agreed to ask several questions tendered by the defense, including whether the veniremember or a relative or close friend had ever been the victim of a crime. However, the trial court asked only that veniremembers stand if they or members of their family had ever been victims of armed robbery, rape or sexual assault or if a close friend or relative had been the victim of a homicide. When 15 to 20 veniremembers stood, the judge asked whether there was anything about their experiences that would prevent them from being fair and impartial. Only one veniremember said that he could not be fair. The Appellate Court held that the trial judge abused his discretion by failing to give defense counsel an adequate opportunity to determine possible bias. Not only did the trial court fail to individually question jurors who had been

victims of prior offenses, but the question that was asked was "compound, confusing, unduly restrictive, and made it impossible to determine whether defendant received a fair and impartial jury."

People v. Lanter, 230 Ill.App.3d 72, 595 N.E.2d 210 (4th Dist. 1992) The trial court refused to ask veniremen whether they had "any feelings concerning the use of alcohol or drugs" which could affect their ability to be jurors. The trial court stated that because every person has some feelings about alcohol and drugs, the question had not been asked in proper form. Although not every affirmative defense is so controversial as to require specific questioning during *voir dire*, the court should allow questions which seek to discover whether venire members are prejudiced against the intoxication defense, especially where no other questions relating to alcohol or drugs are asked. The trial court's failure to elicit the pertinent information, or to allow defense counsel to do so, violated the right to a fair and impartial jury.

People v. Delgado, 231 Ill.App.3d 117, 596 N.E.2d 149 (1st Dist. 1992) A trial court has inherent authority to grant a party an additional peremptory challenge. But see, **People v. Holey**, 159 Ill.2d 272, 637 N.E.2d 992 (1994) (Supreme Court declined to decide whether the trial court may allow additional peremptories).

People v. Thomas, 89 Ill.App.3d 592, 411 N.E.2d 1076 (1st Dist. 1980) One prospective juror stated that her father, a police officer, died when she was young. The trial court denied defense counsel's request to inquire whether he died of natural causes or during the course of his duties. Defense counsel was also prevented from asking another juror, who mentioned that her house had been burglarized, whether anyone was arrested. Finally, the court refused to ask several prospective jurors whether they would follow the law regardless whether they agreed with it. The Court held that each of these questions was probative and relevant in determining whether the jurors would be fair and impartial. Reversed and remanded.

§32-4(b)

Exclusion of Jurors Based on Race or Sex

United States Supreme Court

Flowers v. Mississippi, ___ U.S. ___ (No. 17-9572) In evaluating a **Batson** claim, a prosecutor's disparate questioning of black and white prospective jurors can be probative of discriminatory intent. Here, the prosecutor struck five of six black prospective jurors. During *voir dire*, the prosecutor asked a total of 145 questions of the five stricken black prospective jurors but only 12 questions of the 11 white seated jurors. Coupled with the State's history of discriminatory jury selection during defendant's prior trials in this matter (over the course of six trials, the State struck 41 of 42 black potential jurors), the drastic difference in questioning strongly suggested discriminatory intent.

Likewise, comparing prospective jurors who were struck with those who were not can provide compelling evidence in a **Batson** analysis. Here, the State said it struck a black juror because she knew several defense witnesses and worked at Wal-Mart where defendant's father also worked, but the State did not strike three white jurors who also knew many of the individuals involved in the case and had relationships with defendant's family. The State

also gave factually inaccurate explanations for some of its strikes of black jurors, another factor demonstrating discriminatory intent.

Considering all of these facts and circumstances together, the Court concluded that the trial court erred in denying defendant's **Batson** challenge. The Court reversed defendant's conviction and remanded for further proceedings.

Miller-El v. Dretke, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) The petitioner, who had been convicted of capital murder, was entitled to *habeas* relief on **Batson** grounds. The 108-person venire for defendant's trial contained 20 African-American veniremembers, only one of whom served on the jury. Nine of the African-Americans were struck for cause or by agreement, while 10 were excused by the prosecution's use of peremptories. In finding that the petitioner had established that the prosecution's use of peremptories was racially motivated, the court utilized a "side-by-comparison" of African-Americans who were struck and white veniremembers who served. The court concluded that a discriminatory intent was shown because in several instances, the prosecutor's reasons for striking black panelists applied equally to non-blacks who were permitted to serve. The court also noted that the prosecutor's failure to ask followup questions of black jurors concerning its claimed concerns made its assertions of race-neutral reasons less credible. In addition, the State asked different *voir dire* questions to black and non-black veniremembers, giving the former a description of the death penalty which was apparently intended to elicit an unfavorable reaction to the possibility of a death sentence, and asking a question "which might fairly be called trickery" and which appeared to have been intended to elicit a justification for use of a peremptory. Finally, for decades before defendant's trial, prosecutors in the county had systematically excluded blacks from juries. The prosecutor's office had adopted a manual which recommended excluding minorities from juries, and the prosecutors in this case marked the race of each prospective juror on his or her juror card. When the evidence "is viewed cumulatively its direction is too powerful to conclude anything but discrimination".

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) The Court extended **Batson** to prohibit exercising peremptories on the basis of gender. The practice of discriminating by gender does not further the State's legitimate interest in achieving a fair and impartial trial, and therefore does not satisfy the "heightened scrutiny" standard applied to gender-based classifications. Gender is an inaccurate basis on which to predict a juror's likely attitude and such arguments "condone the same stereotypes" previously used to justify the "wholesale exclusion of women from juries and the ballot box."

Georgia v. McCollum, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992) A defendant's exercise of peremptory challenges in a racially discriminatory manner is "State action" for purposes of the Equal Protection Clause - peremptory challenges are creations of state law and the peremptory challenge and jury systems could not exist without governmental participation. A defendant's exercise of peremptory challenges in a racially discriminatory manner violates equal protection for the same reasons as does the prosecution's racial exercise of such challenges.

Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) A criminal defendant has standing to raise a **Batson** objection even if he is not of the same race as the excluded jurors. See also, **People v. Holman**, 169 Ill.2d 356, 647 N.E.2d 960 (1995).

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) Racial discrimination in the jury selection process violates equal protection.

Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979) State statute that automatically exempted women from jury duty upon their request violated the fair cross-section requirement of the Sixth Amendment.

Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975) A state statute which excluded women from jury service, unless they had previously filed a written declaration of their desire to serve, violated the fair cross-section requirement of the Sixth Amendment. However, there is no requirement that the petit jury actually chosen must mirror the community and reflect various distinctive groups in the population. Thus, a defendant is not entitled to a jury of a particular composition. See also, **Teague v. Lane**, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); **People v. Saunders**, 187 Ill.App.3d 734, 543 N.E.2d 1078 (2d Dist. 1989).

Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973) State trial judge, upon timely request by defendant, was required to *voir dire* jurors on subject of racial prejudice. See also, **Turner v. Murray**, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986) (trial court must allow questioning concerning racial prejudice where there are “special factors” suggesting that racial prejudice may affect the trial).

Illinois Supreme Court

People v. Birge, 2021 IL 125644 The trial court did not violate Rule 431(b) when it read all four principles to the venire, then asked by a show of hands whether the group understood and accepted them. The six-justice majority held that “the rule plainly states that the court can ask the questions to the potential jurors as a group, and the rule does not require that their response be conveyed orally rather than by a show of hands.”

The dissenting justice would have found the judge violated Rule 431(b) by reading the four principles as a compound question to a group of venire members and not requiring a verbal response. He believed the majority’s interpretation of the rule renders it unconstitutional because it confuses rather than elucidates the principles, thereby undermining defendant’s right to a fair trial by an impartial jury. The dissent would have found plain error under both prongs, and advocated for a pre-trial questionnaire to be filled out by potential jurors to inform them of the law and root out biased jurors.

People v. Rivera, 227 Ill.2d 1, 879 N.E.2d 876 (2007) A trial court may raise a **Batson** claim *sua sponte* only if a *prima facie* case of discrimination is abundantly clear. When a court acts *sua sponte*, it must make an adequate record of all the relevant facts, and must articulate a basis for its belief that a *prima facie* case of discrimination has been shown. Where the trial court raises a **Batson** violation *sua sponte*, a bifurcated standard of review applies. The trial court’s findings of fact, including any observations made on the record concerning demeanor and credibility, are accepted unless they are contrary to the manifest weight of the evidence. However, the ultimate legal determination based on such findings is reviewed *de novo*.

Here, the trial court stated that it believed that defendant had improperly exercised peremptories based on gender. The following factors are pertinent to a claim of gender discrimination in jury selection: (1) gender identity between the party exercising the peremptory and the excluded venirepersons; (2) the pattern of peremptory strikes; (3) a disproportionate use of peremptory challenges against female venirepersons; (4) the level of

female representation in the venire as compared to the jury; (5) the questions and statements of the challenging party; (6) whether the excluded venirepersons were a heterogeneous group sharing gender as their only common characteristic; and (7) the gender of the defendant, victim and witnesses. In this case no *prima facie* case of discrimination was shown by either the number of peremptories exercised against female veniremembers or the “nature of the questions” which defense counsel asked. The court also noted that the judge did not make any on-the-record observations concerning counsel’s demeanor or conduct which caused the judge to believe that peremptories were being exercised improperly. Because there was no basis in the record to support a *prima facie* case of racial discrimination, defendant was improperly denied the use of a peremptory challenge. However, the improper denial of a peremptory challenge is harmless if the evidence, as it was in this prosecution, is so overwhelming that no rational jury could have acquitted.

People v. Johnson, 114 Ill.2d 170, 499 N.E.2d 1355 (1986) Prior to his trial in Will County, the defendant moved for a change of place of trial due to extensive publicity. The trial judge moved the trial to Iroquois County. Defendant then objected to trial in Iroquois County based on a lack of racial diversity. Iroquois County has a white population of 95.5%, whereas Will County’s white population is about 90%. The Court rejected the defendant’s claim holding that a requirement that the venire of the transferee county proportionately mirror any distinctive groups found in the originating county would saddle the judiciary with an onerous, if not impossible, task and effectively grant defendants a heretofore unrecognized right to choose their place of trial.

People v. Free, 112 Ill.2d 154, 492 N.E.2d 1269 (1986) Defendant alleged that he had been denied a fair jury because of discriminatory housing practices in his county. In an unrelated case, a federal court had held that the county engaged in discriminatory zoning practices that barred minorities and lower-income groups from establishing residences in the county. The Supreme Court stated that “while courts can in no way condone discriminatory housing practices, such practices are not constitutional cause for reversing convictions of all defendants tried by juries during the existence of the housing practices. In a criminal proceeding an accused has the constitutional right only to a venire drawn from a fair cross-section of the community.”

Illinois Appellate Court

People v. Wright, 2024 IL App (1st) 161404-B During *voir dire*, the defense raised a **Batson** challenge after the State struck 5 of the 10 black veniremembers. The trial court found no purposeful discrimination, and defendant was convicted of attempt murder of a police officer.

In a prior opinion, the appellate court remanded, finding the trial court conducted an improper **Batson** hearing. On remand for second and third-stage **Batson** proceedings, the State attempted to justify its use of the peremptory challenges, including a challenge used on a 20-year-old black male veniremember, Hickman. During *voir dire*, Hickman stated that he lived with his parents, attended one year of college for construction engineering, and worked for his father’s construction company. In explaining its strike, the prosecutor claimed Hickman was “very tight-lipped and uninterested in the proceedings,” and he appeared “confrontational or aggravated or agitated.” The prosecutor further claimed “there was some push back and pull between him and the judge, somewhat disrespectful, probably more on the uninterested side, but didn’t like to have the questions repeated to him.” Finally, the prosecutor stated that Hickman “was a young African American who might identify with the

Defendant who was around the same age at the time that this offense.” The trial court again found no discrimination.

On appeal, defendant argued that the prosecutor’s reference to defendant’s race was a non-race-neutral reason indicative of discrimination and a **Batson** violation. The appellate court disagreed that the mention of Hickman’s race alone violated **Batson**, but it held that the pretextual nature of the prosecutor’s reasons created an inference of purposeful discrimination. The transcript of Hickman’s *voir dire* belied the prosecutor’s description of Hickman as confrontational or aggravated. Instead, it showed he answered all of the questions appropriately. To the extent that the trial court agreed with the State that Hickman was disrespectful or disinterested, the appellate court found it clearly erroneous. Finally, while the prosecutor tried to draw a distinction between Hickman’s terse answers and those of other non-black veniremembers, the appellate court found that many of the non-black jurors whom the prosecution kept on the jury provided similar yes-or-no answers. Invoking the supreme court’s warning to closely scrutinize explanations pertaining to demeanor, which are subjective and prone to be used as pretext, see **People v. Harris**, 129 Ill. 2d 123, 176 (1989), the appellate court remanded for a new trial.

People v. Grant, 2019 IL App (3d) 170185 Defendant’s rights to due process and equal protection were not violated by the trial court’s mid-trial removal of the lone African-American juror. Early in the trial, the court noted that that juror and another appeared drowsy. After the complaining witness testified, the State moved to remove the African-American juror because a victim’s advocate said he had fallen asleep during the testimony. While the court did not personally observe the juror sleeping, it was not error to remove him based on the advocate’s representation. Although the other drowsy juror was not removed, the disparate treatment was proper because that other juror’s level of “nodding off” was not as severe.

People v. Hollins, 366 Ill.App.3d 533, 852 N.E.2d 414 (3d Dist. 2006) The defendant was denied due process and equal protection when the jury commissioner manipulated the jury pool so that 16 of the first 18 veniremembers examined during jury selection were members of minority groups, but only two minority veniremembers were included in the remainder of the jury pool. The court concluded that because the jury coordinator removed 14 Caucasians who had been randomly assigned to defendant’s jury pool, and because representation of Caucasians on defendant’s jury panel was 20% less than the county’s Caucasian population, an equal protection violation was shown. The court also found that due process is violated by *any* intentional manipulation of the jury pool on the basis of race. “Regardless of whether it was one individual from traditionally under represented groups that was arbitrarily excluded or in the alternative, the entire group we simply can not allow such prejudicial conduct to invade the courtrooms, where due process guarantees all persons the right to a fair trial in a fair tribunal.”

§32-4(c)

“Batson” Hearings

§32-4(c)(1)

Generally

United States Supreme Court

Snyder v. Louisiana, 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) The prosecution claimed that it exercised a peremptory against an African-American veniremember who was a student teacher because it feared that he might accept a verdict to a lesser charge to avoid missing school for death penalty deliberations. The prosecutor also stated this veniremember appeared to be “very nervous.” The trial court upheld the peremptory but the Supreme Court reversed. Although deference to the trial judge’s ruling is especially appropriate where that ruling is based upon the veniremember’s demeanor, the record did not show that the trial court made a demeanor-based determination. The prosecutor’s second reason for the peremptory - the veniremember’s student teaching obligation - “fails even under the highly deferential standard of review applicable here.” Although the veniremember initially expressed concern about missing his student teaching obligations, he expressed no further concern after the clerk contacted the Dean of the College and learned that any time missed could be made up. The prosecutor’s belief that the veniremember would accept a lesser verdict to shorten the proceedings was “highly speculative.” The court noted that if most of the jury favored a death sentence, a juror who wanted to shorten deliberations would do the same. Finally , the prosecutor accepted two Caucasian jurors who had conflicting obligations at least as serious as being a student teacher.

Johnson v. California, 545 U.S.162, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005) A three-step process is used to resolve claims under **Batson**. First, the defendant must make a *prima facie* case by showing that the relevant facts give rise to an inference that the prosecutor exercised peremptories with a discriminatory purpose. Once the defendant has made a *prima facie* case, the burden shifts to the prosecution to explain its peremptories with permissible, race-neutral justifications. If the prosecution tenders race-neutral explanations, the trial court must decide whether the defendant has proven intentional racial discrimination. Although states have flexibility in formulating procedures to comply with **Batson**, the court concluded that California improperly required that at the first stage, the defendant was required to show that racial motivation was “more likely than not.” It is not until the third stage, at which point the trial judge has the benefit of both the defendant’s allegations and the prosecutor’s explanations, that the judge must determine whether an improper motivation was “more likely than not.”

Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) A criminal defendant has standing to raise a **Batson** objection even if he is not of the same race as the excluded jurors. See also, **People v. Coleman**, 155 Ill.2d 507, 617 N.E.2d 1200 (1993).

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) The Court rejected the rule that to establish an equal protection violation based upon the State’s exclusion of prospective black jurors by peremptory challenge, the defendant must prove repeated striking of blacks in a number of cases. Instead, a defendant may make a *prima facie* showing of purposeful racial discrimination in selection of the jury by relying solely on the facts in his own case. To establish a *prima facie* case of purposeful discrimination, the defendant must show that “he is a member of a cognizable racial group” and that the prosecutor used “peremptory challenges to remove from the venire members of the defendant’s race.” The defendant “is entitled to rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate.” Finally, the defendant must show that “these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude

the veniremen from the petit jury on account of their race.” Once the defendant makes a *prima facie* showing, the State must “come forward with a neutral explanation for challenging black jurors.” The prosecutor’s explanation “need not rise to the level justifying exercise of a challenge for cause,” but it is not sufficient rebuttal for the prosecutor to state that the prospective jurors were challenged “on the assumption - or his intuitive judgment - that they would be partial to the defendant because of their shared race.” See also, [People v. McDonald](#), 125 Ill.2d 182, 530 N.E.2d 1351 (1988).

Illinois Supreme Court

[People v. Houston](#), 229 Ill.2d 1, 890 N.E.2d 424 (2008) Although defense counsel acted improperly by waiving the presence of a court reporter during *voir dire*, counsel was not ineffective where the defendant could not establish that the result of the trial would have been different had a court reporter been present. The court remanded the cause for reconstruction of the *voir dire*, and concluded that the bystander’s report failed to show a *prima facie* case of discrimination under **Batson**. In addition, even if a *prima facie* case had been shown, the State would have been able to articulate race neutral reasons for excusing the only African-American veniremember against whom it exercised a peremptory.

[People v. Blackwell](#), 177 Ill.2d 338, 665 N.E.2d 782 (1996) The State exercised 15 of its 17 peremptory challenges to exclude women from the venire. Four of the excluded venirewomen were black, and defendant raised a **Batson** objection. The prosecutor responded to the objection by saying he had excluded potential jurors on the basis of gender, because he was concerned about potential sympathy for defendant’s mother. While the direct appeal was pending, the Supreme Court issued **J.E.B. v. Alabama ex rel. T.B.**, which held that peremptory challenges may not be exercised on the basis of gender. The Illinois Supreme Court found that the defendant had established a *prima facie* case of gender discrimination, and remanded the cause for a hearing at which the State could present gender neutral reasons for its peremptory challenges. On remand the prosecutor claimed that the State had selected the jury under the theory that veniremembers fall into two categories: “proactive” and “reactive.” The prosecution believed that “proactive” jurors are leaders, good communicators and more aggressive, and it did not want too many of them on the jury. The trial court found that no constitutional violation had occurred but the Supreme Court disagreed. The Court held that the State’s professed “proactive” strategy, had it been applied consistently, would have been a gender-neutral strategy. However, the record showed that the State applied the “proactive” theory only to the selection of women, and that “proactive” men were permitted to remain on the jury.

[People v. Munson](#), 171 Ill.2d 158, 662 N.E.2d 1265 (1996) Defendant claimed that the State violated **Batson** by excluding two black veniremembers. Under **Batson** the objecting party must make a *prima facie* showing that the prosecutor exercised peremptory challenges based on race. If that burden is satisfied, the opposing party has the burden of articulating a race-neutral explanation for the peremptory. A race-neutral explanation is one based upon something other than race, and is to be judged based on its *facial* validity. Thus, the explanation given at this stage need not be persuasive or even plausible; it need only be race-neutral. The trial court must make a factual finding as to whether a party used a peremptory challenge to discriminate. Because such a finding is based in large part on credibility, the trial court’s finding is afforded great deference. Here, the trial court found a *prima facie* case of racial discrimination as to the exclusion of two jurors but then held that neither exclusion

was racially motivated. The Supreme Court upheld the exclusions. First, the prosecutor could properly excuse a venireperson in the belief that she knew him from some other case. Second, one of the veniremembers could legitimately have been excused because he hesitated when asked whether he could sign a guilty verdict. The Court has frequently approved peremptory challenges based on courtroom conduct or demeanor. Finally, the trial judge's finding that the *prima facie* case had been rebutted was supported where the key witnesses were black, two black jurors sat on the jury and the State had no motive to exclude black jurors.

People v. Hope, 168 Ill.2d 1, 658 N.E.2d 391 (1995) The Court stressed that **Batson** involves a three-step procedure. First, the objecting party must make a *prima facie* showing of racial exclusion. Second, the opposing party has the burden to articulate a race-neutral explanation for the strikes. Third, the trial court must determine whether, in view of the explanation and the other circumstances, the objecting party has established purposeful discrimination. At the second step of the procedure, a sufficiently race-neutral explanation is given where the striking party gives an explanation based on something other than race. The only question at the second stage is whether the explanation is valid *on its face*, and not whether it is "persuasive" or "plausible." (See, **Purkett v. Elem**, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995)). The "plausibility" or "persuasiveness" of the explanation is at issue at the third stage and the burden of proof is on the *objecting* party.

Here, the State offered a sufficiently race-neutral reason to require the court to proceed to the third stage. The prosecutor claimed that the juror in question had been excluded because her "background" (including her occupation as a freelance writer, her residence in Hyde Park, and her membership in the Buddhist faith) made her the kind of juror the State did not want. None of the State's reasons for exclusion were inherently discriminatory, and the trial judge is in the best position to assess the answers given by potential jurors and the credibility of the prosecutor. In addition, whether the juror could be excluded based upon her Buddhist faith was a moot question because at least two of the reasons given by the State (her occupation and area of residence) were race-neutral.

People v. Fair, 159 Ill.2d 51, 636 N.E.2d 455 (1994) The Court found that defense counsel waived any **Batson** challenge by not objecting until the jury had been sworn, both parties had given opening statements, and three State witnesses had testified. Acceptance of an impaneled jury implicitly shows satisfaction with the jurors, and a defendant "cannot wait until the trial is well under way before objecting to the jury composition." See also **People v. Andrews**, 132 Ill.2d 451, 548 N.E.2d 1025 (1989).

People v. Pecor, 153 Ill.2d 109, 606 N.E.2d 1127 (1992) Defendant raised a **Batson** objection to the State's use of peremptories to excuse one white and four black veniremen. Following then-current Illinois law, the trial court ruled that a white defendant could not challenge the exclusion of black jurors. While the case was on appeal, the United States Supreme Court held that a defendant of one racial background has standing to challenge the State's use of peremptories to excuse veniremen of a different race (**Powers v. Ohio**). In the Supreme Court, the State contended that although at the time of trial defendant had no standing to raise a **Batson** challenge, he should have made a record in the hope that the law might eventually change. The Supreme Court found that valuable time and judicial resources would be wasted if parties were required to make full records despite their lack of standing to raise an issue, and a defendant who lacks standing cannot be required to anticipate that the law might change.

People v. Mack, 128 Ill.2d 231, 528 N.E.2d 1107 (1989) A defendant is not entitled to production of the prosecutor’s *voir dire* notes at a **Batson** hearing. Such notes come within the protections of the work-product doctrine (Supreme Court Rule 412(j)(i)).

People v. Young, 128 Ill.2d 1, 538 N.E.2d 453 (1989) At a **Batson** hearing, the prosecutor’s statement of reasons for exercising peremptory challenges need not be given under oath and subject to cross-examination.

Illinois Appellate Court

People v. Talley, 2023 IL App (4th) 221013 No plain error occurred when the trial court denied defendant’s **Batson** motion. A black member of the venire informed the court that he was a police officer and knew several of the State’s witnesses. The defense asked to remove the officer from the venire for cause, but the State objected and the court denied the motion based on the officer’s assertions that he could be fair and impartial.

The State later used a peremptory challenge to remove the officer. The defense objected, arguing that the removal of the only black member of the venire was a **Batson** violation. It noted the State had already objected to a for-cause challenge, and the officer said he could be fair and impartial. The State argued this was not a *prima facie* showing of discrimination, and the trial court agreed, noting a single strike does not constitute a “pattern.” But it asked the State to provide a race-neutral reason “in the interest of cleanliness.” The State responded that it feared the officer’s presence on the jury could be used as an issue by defendant on appeal. The trial court found this satisfactory and the defense made no further objection.

The appellate court first found that, contrary to defendant’s claim, the court did not impermissibly require him to show a pattern of exclusion to establish a *prima facie* case of discrimination. A pattern is one factor in the analysis, and the trial court’s comment shows it considered this factor in addition to those raised by defense counsel. The court is not required to list all of the factors, and while other cases have found error when the court directly states that no *prima facie* showing was made because of the lack of a pattern, no similar statement was made here. Finally, the court did not improperly collapse and skip steps in the **Batson** procedure, or deprive defendant of the right to rebut the race-neutral reason. The appellate court acknowledged the procedure used here was not ideal, as the trial court did not methodically advance through the **Batson** steps, but nothing about the court’s ruling constituted prejudicial error.

People v. Duffie, 2022 IL App (2d) 210281 During jury selection, the prosecution excused the sole African-American prospective juror. The trial court, *sua sponte*, asked the prosecutor for “a **Batson** reason” for the strike, and the prosecutor said he was concerned about the juror’s answer that, in his former role as a bank examiner, he would evaluate surrounding circumstances in assessing someone’s technical violation of the law. The prosecutor went on to explain that the State wanted jurors who would follow the law exactly as written. Defense counsel objected, arguing that the State’s reasoning was suspicious. The trial court allowed the State’s peremptory strike, stating that it believed the State’s reason complied with **Batson**.

The appellate court found that the trial court had committed plain error by failing to follow the three-step **Batson** process. Where defendant objects under **Batson**, he bears the burden of making a *prima facie* showing that the prosecutor has exercised peremptory

challenges on the basis of race. But, here, since the court raised the **Batson** issue on its own, the court bore the burden of making a record of why there was a *prima facie* case of discrimination in the exercise of the challenge. The court failed to do so here. Additionally, the court's declaration that it believed that the State's proffered race-neutral reason for the peremptory challenge was "a reason that would comply with **Batson**" was not clear as to whether this was a finding of no purposeful discrimination or simply a finding that the State had offered a race-neutral reason. Thus, the record was inadequate for review. Accordingly, the appellate court remanded for a proper **Batson** hearing, setting forth a specific timeline for those proceedings, and retained jurisdiction to review the circuit court's decision on remand.

People v. Trejo, 2021 IL App (2d) 190424 The trial court conducted an improper inquiry in response to defendant's **Batson** motion, and the Appellate Court remanded for the limited purpose of a new **Batson** hearing. Defendant, who is Hispanic, filed a **Batson** objection after the State peremptorily challenged an Hispanic member of the venire, after having already challenged two previous Hispanic venirepersons. The trial court responded by asking the State for a race neutral reason for the strike, which the State provided. The trial court denied the motion, accepting the State's explanation and noting that defendant failed to show a "pattern" of discrimination. It then prohibited defendant from making a **Batson** objection to the striking of the first two Hispanic venirepersons, reasoning that defendant could not "go back" and object to previous challenges.

The Appellate Court remanded for a new **Batson** hearing. First, the trial court's request for a race neutral explanation, before it made a finding of a *prima facie* case of discrimination, improperly collapsed the first and second stages of the **Batson** inquiry. While the trial court mentioned it did not find a pattern of discrimination, this is only a single factor in the analysis; nothing else in the record supported the notion that the trial court had found no *prima facie* case of discrimination. Moreover, the court did not give defendant a chance to respond to the State's race neutral reason, essentially jumping to the third stage of **Batson**. Finally, the law is clear that a defendant can "go back" and challenge dismissed veniremembers pursuant to **Batson**, as long as the objection occurs before the jury is sworn.

People v. Little, 2021 IL App (1st) 191108 Liberally construed, defendant's *pro se* post-conviction petition stated the gist of a claim of ineffective assistance of trial counsel for failing to raise a **Batson** challenge to the State's exclusion of an African American venireperson (ISBN). While defendant's petition named two other jurors but did not mention ISBN, it also stated counsel should have raised a **Batson** challenge based on the removal of "all" African American venirepersons. This was sufficient to encompass defendant's complaint regarding ISBN.

The Appellate Court went on to examine the record and determined defendant could arguably make a *prima facie* showing of discriminatory purpose in the excusing of ISBN, who was the same race as defendant and shared other characteristics with non-African-American jurors who were not removed by the State. The record also showed that of the six African American venirepersons, the State was responsible for excusing 50%, two for cause and ISBN via a peremptory challenge. And, the ultimate makeup of the jury deviated from the makeup of the original venire by 2.5%, which at least arguably permits an inference of discriminatory intent, albeit a slight one. Accordingly, defendant stated the gist of a claim of ineffective assistance of counsel for not objecting under **Batson**.

People v. Gonzalez, 2019 IL App (1st) 152760 The trial court’s denial of defendant’s **Batson** challenge was not clearly erroneous. Defendant alleged that the State exhibited gender bias when it struck three men from the venire before defendant’s trial for sexual assault. Although the trial court skipped the first stage of the **Batson** process and asked the State for gender-neutral reasons without finding a *prima facie* case, the Appellate Court affirmed. Nothing in the record suggested the State’s explanations were pretextual, and neither **Batson** nor its progeny required the court to consult the defense before evaluating the State’s explanations.

People v. Byrd, 2017 IL App (2d) 140715 Under **Batson**, the State’s use of a peremptory challenge to exclude a potential juror solely because of the race violates the defendant’s Fourteenth Amendment right to equal protection. The **Batson** court recognized two possible remedies - seating the juror who was improperly challenged, or discharging the venire and starting jury selection anew with another venire. The **Batson** court did not state a preference for either remedy, and no Illinois case conclusively discusses the appropriate remedy.

Because more than one remedy is available, the trial court necessarily has discretion concerning which remedy to apply. An abuse of discretion occurs only where the trial court’s decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it. Here, the issue is whether the trial court abused its discretion by excusing the venire and restarting jury selection with a different venire rather than seating the improperly excused juror.

The court noted that the juror against whom a peremptory was improperly applied was excused without any objection by the defense. The defense did not request that the juror be seated until the following day, at which time the juror had been excused for more than 12 hours and may have been exposed to information related to the case and may have discussed the case with other persons. Furthermore, without any objection by the parties the court had opted to excuse the entire jury pool and restart jury selection with a new venire, making it impractical to reconstitute the jury so the improperly excused juror could be seated. Under these circumstances, the trial court’s decision was not arbitrary, fanciful, or unreasonable.

People v. Shaw, 2014 IL App (4th) 121157 Under **Batson v. Kentucky, 476 U.S. 79 (1986)**, courts follow a three-step procedure to evaluate claims of discrimination in jury selection. During the first step, defendant must make a *prima facie* showing that the State used peremptory challenges on the basis of race. During the second step, the State must articulate race-neutral reasons for its challenges. If the State proffers race-neutral reasons, defendant may rebut the reasons as pretextual. During the third step, the court must determine whether defendant has shown purposeful discrimination in light of all the evidence.

In deciding whether defendant has made a *prima facie* showing, the court must consider the totality of the relevant facts and circumstances surrounding the peremptory challenge. The court should consider a number of factors, including a pattern of strikes against a racial group, a disproportionate use of strikes against a group, the racial composition of the venire as compared to the jury, and whether the excluded jurors were a heterogeneous group sharing race as their only common characteristic.

The State exercised peremptory challenges on two of the three African-American veniremembers. Defendant, who is African-American, objected to both challenges. As to the first veniremember, defendant argued that there were no facts or circumstances other than race that would explain the challenge. The trial court turned to the State for an explanation. The prosecutor responded that he did not think “this is the correct procedure,” since

defendant had not established any pattern of strikes with regard to race. Nevertheless, the prosecutor gave a race-neutral explanation for the challenge.

Defendant argued that it would be impossible to show a pattern where there was only one African-American veniremember to strike. The trial court overruled the objection concluding that defendant had not “established a pattern under **Batson**.”

Defendant objected to the State’s second challenge on the basis that the State had used peremptory challenges against both African-American veniremembers, and thus “we now have a pattern.” Without seeking input from the State, the trial court stated that it did not find a pattern with either challenge.

The Appellate Court stated that it was unclear whether the trial court had found a *prima facie* case of discrimination. Although the trial court asked for and the State provided a race-neutral explanation for the first challenge, in its ruling the court failed to discuss any of the relevant factors other than the lack of a pattern. The trial court thus failed to proceed methodically through the three-step **Batson** procedure, and incorrectly collapsed the first and second steps into a single inquiry. The record also showed that the trial court improperly denied defendant’s challenge to the first strike solely because he failed to establish a pattern of discrimination, which is only one of several factors relevant to a *prima facie* case.

As to the second challenge, the Appellate Court again held that the trial court failed to follow the clear three-step **Batson** process. It was thus impossible to conduct a meaningful review of defendant’s arguments. The Appellate Court remanded the case for the trial court to conduct a full **Batson** hearing.

People v. Washington, 272 Ill.App.3d 913, 651 N.E.2d 625 (1st Dist. 1995) Where the record does not establish the race of excluded venirepersons, a reviewing court may consider defense counsel’s uncontested statements identifying the race of such jurors. Defendant did not waive his **Batson** claim, where counsel specifically objected to the State’s use of two peremptory challenges on the ground that the jurors were the only two black women in the venire.

People v. Whaley, 184 Ill.App.3d 459, 540 N.E.2d 421 (1st Dist. 1989) The Appellate Court found that the defendant sufficiently objected to the State’s peremptory challenges against the prospective jurors, and thus made the trial judge aware of the claim. “[W]e do not believe that defense counsel is required to use any particular or *pro forma* language to bring a **Batson** claim to a trial court’s attention. The fact that the trial court is made aware of the claim, not the manner in which the claim is made, is dispositive.” (Defense counsel argued to the trial judge that he saw no reason for the prosecutor to exclude either of the black jurors). The Court also held that to preserve a **Batson** issue for appeal, it is not necessary to raise the issue in a post-trial motion. The **Batson** case itself requires only a “timely objection.”

§32-4(c)(2)

Prima Facie Showing

Illinois Supreme Court

People v. Davis, 231 Ill.2d 349, 899 N.E.2d 238 (2008) In 2008, the Supreme Court remanded the cause for a new **Batson** hearing because in conducting a **Batson** hearing *sua sponte*, the trial court failed to make a sufficient record to allow review. Here, the Supreme

Court found that the trial judge did not abuse its discretion by finding on remand that the defendant failed to establish a *prima facie* case for a **Batson** violation.

People v. Williams, 173 Ill.2d 48, 670 N.E.2d 638 (1996) The prosecution used a peremptory challenge against an African-American and the defendant raised a **Batson** objection. The prosecutor responded that defense counsel was asking the trial court to find that a *prima facie* case of racial discrimination had been shown. The prosecutor then noted that only one African-American had been challenged, and said, "You saw he was a black man with red hair. You heard the answers to his questions, that he was not satisfied [with the result in a previous case]. I don't think we have to come forward with any reasons why this was - this man was excluded. It is obvious why this person was excluded." The trial court held that defendant had not established a *prima facie* case. The Supreme Court affirmed. Here, the only factors tending to show discrimination were that both defendant and the excluded venireperson were black and the victim was Caucasian. The Court also rejected defendant's argument that discriminatory intent was shown by the prosecution's statement that the excluded venireperson was "a black man with red hair." The Court found the statement to be "merely descriptive."

People v. Simms, 168 Ill.2d 176, 659 N.E.2d 922 (1995) Defense counsel made an oral motion to challenge the jury panel because it contained no African-Americans. To make a *prima facie* showing of racial discrimination the defense must establish that: (1) the group excluded from the panel is a "distinctive" group in the community, (2) the group's representation in the venire is not "fair and reasonable" as compared with its representation in the community, and (3) the under representation is due to "the group's systematic exclusion" from the jury-selection process. The Court concluded that since African-Americans comprise only 2% of DuPage County's population, it is "fair and reasonable" to expect some venires will lack any black members. Defendant also failed to introduce evidence suggesting that the absence of African-Americans from the venire was due to systematic exclusion from the selection procedure. See also, **People v. Fomond**, 273 Ill.App.3d 1053, 652 N.E.2d 1322 (1st Dist. 1995).

People v. Harris, 164 Ill.2d 322, 647 N.E.2d 893 (1994) A *prima facie* showing of discrimination concerning one racial or ethnic group does not automatically establish a *prima facie* case with respect to other groups; although defendant established a *prima facie* case as to the exclusion of black jurors, the prosecution was not required to provide an explanation for the exclusion of Hispanic veniremembers.

People v. Andrews, 146 Ill.2d 413, 588 N.E.2d 1126 (1992) In determining that defendant had failed to establish a *prima facie* case of discrimination in the State's use of peremptories, the trial judge "relied almost exclusively on his observations regarding the prosecutors involved and the local conditions in Cook County." The judge noted that the prosecutors had been before him on numerous occasions and that he believed that they were not "racially prejudiced persons." The judge said that certain "intangibles," which he could not articulate, led to his ruling. The Supreme Court held that the trial judge's ruling was contrary to the manifest weight of the evidence and that the judge improperly overemphasized his own observations and neglected to consider other relevant factors. The State's use of all eight of its peremptory challenges against blacks strongly suggests a racial motivation, establishes a pattern of using strikes against black veniremen and "constitutes the disproportionate use of strikes against black venire persons." The excluded black jurors were a heterogeneous group

which shared race as their only common characteristic. The Court acknowledged that all eight of the excluded jurors were engaged in “nonprofessional occupations,” but noted that all 13 of the accepted jurors also engaged in such occupations. Six of the 12 jurors who were accepted had past contacts with the legal system, as did five of the excluded veniremen. The fact that three blacks were selected for the jury, while relevant, is not dispositive. The question is whether the State discriminated against the excluded jurors, not whether it failed to discriminate against the accepted jurors. **Batson** is violated if the State excludes even one black venireperson on a racial basis.

People v. Hope, 137 Ill.2d 430, 560 N.E.2d 849 (1990) The trial judge erred in finding the absence of a *prima facie* case under **Batson**. The Supreme Court noted that (1) there was a pattern of State strikes against black venire members. Only 19% of the venire members were black, yet the State used nearly 50% of its peremptory challenges against blacks, resulting in an all-white jury. Although the number of blacks excluded is not, in itself, determinative, it was “very relevant” in this case because “it represented a gross racial imbalance in jury selection.” (See also **People v. Evans**, 125 Ill.2d 50, 530 N.E.2d 1360 (1988); **People v. Hooper**, 133 Ill.2d 469, 552 N.E.2d 684 (1989); **People v. Holman**, 132 Ill.2d 128, 547 N.E.2d 124 (1989); **People v. Mahaffey**, 128 Ill.2d 388, 539 N.E.2d 1172 (1989).

People v. McDonald, 125 Ill.2d 182, 530 N.E.2d 1351 (1988) The Court found that defendant presented a *prima facie* showing of racial discrimination. The defendants were black and the prosecutor used peremptory challenges to exclude 16 black jurors, who shared race as their only common characteristic. The Court concluded that the pattern of strikes against the black veniremen, along with the fact that they shared race as their only common characteristic, “compels us to conclude that defendants established a *prima facie* case of discrimination.”

Illinois Appellate Court

People v. Smollett, 2023 IL App (1st) 220322 Defendant argued that the trial court violated Rule 431 by conducting *voir dire* itself and not allowing defense counsel to ask questions directly to the venire. Under Rule 431, the trial court must permit the parties to supplement its examination “by such direct inquiry as the court deems proper.” In determining a proper scope of direct inquiry, the trial court must consider the factors listed in Rule 431(a)—the length of the court’s examination of potential jurors, the complexity of the case, and the type of charges the defendant is facing—“and then determine, based on those factors, whatever direct questioning by the attorneys would be appropriate.”

Here, the trial court openly invited input from the parties throughout *voir dire*. The case was not complex, and the trial court conducted a lengthy and comprehensive *voir dire* which incorporated many of defendant’s proposed questions. Because the trial court’s *voir dire* demonstrated a steadfast effort to ferret out jurors biased against defendant, including asking about views on the police, civil rights, LGBTQ rights, and the television show on which defendant worked, the court did not abuse its discretion by performing all of the questioning during *voir dire*.

The appellate court also rejected defendant’s **Batson** arguments. Defendant filed a **Batson** motion after the State used four peremptory challenges against African-American members of the venire, leaving only one African-American to serve on the jury. Defendant also alleged that the State’s challenge of a gay veniremember was discriminatory.

Defendant's **Batson** motion was inadequate because it made no arguments beyond the identities of the challenged veniremembers. A defendant cannot make a *prima facie* showing by simply pointing to the number of African-American venirepersons peremptorily challenged. **People v. Heard**, 187 Ill. 2d 36, 52 (1999). Whether a *prima facie* case of discrimination exists depends on several factors, and the defendant has the burden of presenting sufficient evidence before the trial court. He cannot make new arguments for the first time on appeal, such as his claim that the jury contained only one African-American member. Finally, while 705 ILCS 305/2(b) prohibits exclusion of a veniremember from the jury on the basis of sexual orientation, defendant again made no argument below beyond highlighting the challenged veniremember's sexual orientation.

People v. Jones, 2021 IL App (1st) 181266 The trial court erred when it failed to find a *prima facie* case of discrimination after defendant challenged the State's use of peremptory strikes during jury selection.

The State used all three of its peremptory strikes against African-American veniremembers. In response to the defense **Batson** motion, the trial court noted that the State had chosen to keep three African-American jurors, and that the three who were stricken all had different characteristics – one had a criminal record, one was highly educated, and one was unemployed. The court denied the motion.

The Appellate Court first rejected the defendant's claim that the trial court improperly collapsed the first and second stages. Although the trial court mentioned some potential race-neutral reasons in the course of its ruling, it clearly found the defense had not made a *prima facie* case.

But the trial court's conclusion as to a *prima facie* case was against the manifest weight of the evidence. The Appellate Court analyzed the seven factors outlined in **People v. Williams**, 173 Ill. 2d 48, 71 (1996), including racial identity between the defendant and excluded potential jurors, a pattern of strikes against potential jurors of the alleged racial group, and a disproportionate use of peremptory strikes against members of the alleged racial group. The weight of the evidence favored a *prima facie* case of discrimination where all peremptories were used against African-American veniremembers and the defendant was African-American. And the heterogenous nature of the group actually favored a *prima facie* case, contrary to what the trial court found, particularly because several empaneled jurors shared similar characteristics with the stricken veniremembers. The court remanded for a stage two and, if necessary, stage three **Batson** inquiry.

In re A.S., 2016 IL App (1st) 161259 **Batson** established a three-step process for addressing claims of racial discrimination in jury selection. First, a defendant must make a *prima facie* showing that the State used its peremptory challenges on the basis of race. Second, the burden shifts to the State to articulate race-neutral reasons for excluding each dismissed juror; the defendant then may argue that the reasons are pretextual. Third, the trial court must undertake "a sincere and reasoned attempt to evaluate the prosecutor's explanations" and make the ultimate determination of whether defendant has made a case of purposeful discrimination.

The Appellate Court held that the trial court properly found that defendant made a *prima facie* case that the State used its peremptory challenges on the basis of race. The record showed that the State used 80% of its peremptory challenges against African-Americans, only 8.3% of the jury was African-American, and three members of the venire challenged by the State were a heterogenous group, sharing race as their only common characteristic.

But once the State came forward with reasons for its challenges, the trial court failed to conduct a proper third-stage evaluation of those reasons. The State provided race-neutral explanations for all but one of its challenges. As defendant pointed out below, however, in three of those instances the State also accepted white jurors with similar though not identical characteristics. The trial court nonetheless accepted the State's explanations without any scrutiny and thus failed to conduct a meaningful third-stage evaluation of the State's reasons. The trial court also failed to require the State to provide a race-neutral explanation for one of its peremptory challenges. And finally, the trial court improperly relied on the dissent in **Batson** as support for its decision.

The Appellate Court remanded the case for further **Batson** proceedings.

People v. Gutierrez, 402 Ill.App.3d 866, 932 N.E.2d 139 (1st Dist. 2010) Under **Batson v. Kentucky**, 476 U.S. 79 (1986), the 14th Amendment prohibits the use of peremptory challenges solely on the basis of race. **Batson** claims are resolved under a three-step process. First, the defendant must make a *prima facie* showing that the State has exercised peremptory challenges on the basis of race. Once a *prima facie* has been made, the burden shifts to the State to articulate a race-neutral reason for excusing a venireperson. Finally, the trial court must determine, based on all the evidence, whether the defendant has satisfied his burden of establishing purposeful discrimination.

A *prima facie* case is not established merely because a number of minority veniremembers have been excused through peremptories. Rather, all relevant circumstances must be considered, including: (1) the racial identity between the defendant and excluded venirepersons, (2) any pattern of strikes against minority veniremembers, (3) any disproportionate use of strikes against such members, (4) the level of minority representation in the jury compared to the venire, (5) any statements made by the prosecutor during *voir dire* and in exercising challenges, (6) whether the excluded venirepersons were a heterogeneous group sharing race as their only common characteristic, and (7) the races of the defendant, victim, and witnesses. The trial court's determination concerning a *prima facie* case will not be disturbed on appeal unless it is against the manifest weight of the evidence.

Defendant failed to make a *prima facie* case that the prosecutor used peremptories to excuse Black jurors. First, there was no racial identity between defendant and the stricken jurors; defendant was Hispanic and Caucasian, while the excluded jurors were Black. Second, the State did not use a disproportionate number of peremptory challenges to exclude Black jurors where four of its seven peremptories were exercised against Blacks. Third, there was no pattern of strikes against Black veniremembers where the State accepted two panels which included four Blacks before exercising any peremptories against Blacks. Fourth, the jury which heard the case had a higher percentage of Black members than the venire as a whole. Fifth, the prosecutor's statements during *voir dire* gave no indication of a racial motivation for the State's exercise of peremptories. Sixth, neither the decedent, the defendant, nor the attorneys were Black. Seventh, the excluded veniremembers were not a heterogeneous group sharing race as their only characteristic. Instead, the stricken jurors were similar in whether they were parents, their criminal histories, and their employment status.

The court also held that a racial motivation was not shown by the fact that the State's final four peremptories were used to excuse Black jurors. Defendant's convictions and sentences were affirmed.

People v. Jamison, 2018 IL App (1st) 160409 Defendant could not make a *prima facie* case of discriminatory jury selection despite the fact that the State used three of four peremptory challenges against African-American veniremembers. The State accepted two other African-American jurors, and trial counsel failed to develop several other facts germane to a first-stage **Batson** inquiry, including the level of African-American representation on the venire as compared to the jury, or the race of the victims or witnesses. Defendant has the burden of preserving a record, and any ambiguities must be construed against his claim.

People v. Davis, 345 Ill.App.3d 901, 803 N.E.2d 514 (1st Dist. 2004) Under **Batson** the defendant, must present sufficient facts to raise an inference that the prosecutor challenged veniremembers based on their race. The factors relevant to a *prima facie* case include: (1) racial identity between the defendant and the excluded veniremember; (2) any pattern of strikes against veniremembers of a particular group; (3) disproportionate use of peremptory challenges against minority veniremembers; (4) the level of minority representation in the venire as compared to the jury that was eventually selected, (5) the prosecutor's questions and statements during *voir dire* and while exercising peremptories; (6) whether the excluded veniremembers were a heterogeneous group sharing race as their only common characteristic; and (7) the race of the defendant, victim and witnesses. Here, the Appellate Court found that a *prima facie* case was shown by the record.

The excluded veniremember was the only African-American in the venire, and defendant was African-American. The excluded veniremember had no criminal record or prior jury service, and had no family members who had been charged with or convicted of a crime. The veniremember had been employed as a maintenance engineer for 13 years, was single with two children, had lived at his current address for five years, and did not know any of the parties, witnesses or lawyers. He knew nothing about the case, and had no family members or friends who were associated with law enforcement. In addition, although the juror had been the victim of an auto theft and had a friend who testified in a criminal case ten years earlier, he stated that neither of those experiences would prevent him from being impartial. The court stressed that other than his race, the excluded veniremember had substantially the same characteristics as white members of the venire who were accepted.

People v. Champs, 273 Ill.App.3d 502, 652 N.E.2d 1184 (1st Dist. 1995) Under the circumstances of this case, the trial judge's determination that no *prima facie* case had been established was contrary to the manifest weight of the evidence. The State used 60% of its peremptories against African-American veniremembers, who were but 19% of the venire. In addition, African-American representation on the jury was only 8.3%, compared with 19% in the venire as a whole. The Court remanded the cause for a hearing on the second stage of the **Batson** inquiry - whether the State could give race-neutral reasons for its peremptories.

People v. Holmes, 272 Ill.App.3d 1047, 651 N.E.2d 608 (1st Dist. 1995) The State exercised its first peremptory against a black venireperson, and defense counsel argued that the prosecution had no reason to exclude the juror other than her membership in the NAACP. The trial court ruled that the defense had not made a *prima facie* case because the juror was one of the few divorced venirepersons and the only one who belonged to the NAACP. The Appellate Court observed that except for her race and membership in NAACP, the excluded black veniremember had "substantially the same characteristics" as the jurors the State accepted. In addition, the prosecution accepted white jurors with memberships in Jewish, community and fraternal groups. The Court concluded that the venirewoman's race and

membership in an organization “which can be identified with race” made her exclusion race-specific, and that the judge should have held that the defense had proven a *prima facie* case.

People v. Hayes & Burton, 244 Ill.App.3d 511, 614 N.E.2d 229 (1st Dist. 1993) The State used seven of its eight peremptory challenges to excuse black veniremen. However, the trial court found that no *prima facie* case of discrimination had been shown because the jury sworn to hear the case included several blacks, one alternate was black, the defense excused one black after he had been accepted by the State and all of the principals in the trial were black. The Appellate Court found that the trial court erred by ruling that a *prima facie* case of discrimination had not been proven. The use of seven of eight peremptories against blacks established two of the factors commonly used to determine whether a *prima facie* case exists: a pattern of strikes against blacks and the disproportionate use of peremptories against black veniremen. The excluded jurors were a heterogeneous group which shared race as their only common characteristic. In addition, they shared several characteristics with white veniremen who were selected for the jury.

People v. Charles, 238 Ill.App.3d 752, 606 N.E.2d 603 (1st Dist. 1992) After the State exercised seven of its 11 peremptory challenges to excuse black jurors, the defense moved for a mistrial on **Batson** grounds. The Appellate Court found that a *prima facie* showing was made where the State used a disproportionate number of its peremptories to challenge black jurors, the excluded jurors were a heterogeneous group and the prosecutor referred to a black venireman named Zebedee Braithwaite as “Zippodee Dooda.”

People v. Johnson, 199 Ill.App.3d 798, 557 N.E.2d 565 (1st Dist. 1990) A *prima facie* showing of discrimination was made when the record showed that the defendant was black and that the prosecutor used six of seven peremptories to exclude black venirepersons. Two blacks served on the jury. The Appellate Court stated that the only common characteristic of the excluded blacks was their race (although some had been victims of crime, this was also true of non-blacks who were not challenged). The Court also stated that **Batson** does not require complete exclusion of a racial group to prove discrimination. Finally, the fact that the prosecutor was black is a relevant consideration, but is not dispositive.

People v. Mays, 176 Ill.App.3d 1027, 532 N.E.2d 843 (1st Dist. 1988) A *prima facie* case of purposeful discrimination was shown where the defendant was black and the prosecutor “excluded all the blacks from the jury by using 86% of its challenges to excuse 100% of the blacks in the 40-person venire, while it used only 3% of its challenges to exclude nonblacks.”

§32-4(c)(3)

Neutral Explanations

United States Supreme Court

Flowers v. Mississippi, U.S. (No. 17-9572) In evaluating a **Batson** claim, a prosecutor’s disparate questioning of black and white prospective jurors can be probative of discriminatory intent. Here, the prosecutor struck five of six black prospective jurors. During *voir dire*, the prosecutor asked a total of 145 questions of the five stricken black prospective jurors but only 12 questions of the 11 white seated jurors. Coupled with the State’s history of discriminatory jury selection during defendant’s prior trials in this matter (over the course

of six trials, the State struck 41 of 42 black potential jurors), the drastic difference in questioning strongly suggested discriminatory intent.

Likewise, comparing prospective jurors who were struck with those who were not can provide compelling evidence in a **Batson** analysis. Here, the State said it struck a black juror because she knew several defense witnesses and worked at Wal-Mart where defendant's father also worked, but the State did not strike three white jurors who also knew many of the individuals involved in the case and had relationships with defendant's family. The State also gave factually inaccurate explanations for some of its strikes of black jurors, another factor demonstrating discriminatory intent.

Considering all of these facts and circumstances together, the Court concluded that the trial court erred in denying defendant's **Batson** challenge. The Court reversed defendant's conviction and remanded for further proceedings.

Foster v. Chatman, 578 U. S. ___, 136 S. Ct. 1737, 195 L.E.2d 1 (2016) The constitution forbids striking even one prospective juror for racially discriminatory purposes. **Batson**, 476 U.S. 79 (1986), provides a three-step process for determining when a peremptory strike has been used improperly. First, a defendant must make a *prima facie* case of discrimination. If that case has been made, the prosecution must offer a race-neutral basis for the strike. Finally, the court must determine whether the defendant has shown purposeful discrimination. Here, only the third step was at issue.

The court held that defendant established that the prosecution used two of its peremptory challenges in a racially discriminatory manner. Although the prosecution provided numerous facially race-neutral explanations for its two challenges, the record demonstrated that the explanations were false and pretextual.

Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) A three-step procedure is required in resolving **Batson** objections: (1) whether the party bringing the challenge has established a *prima facie* case of racial discrimination, (2) whether the party exercising the peremptory offers a race-neutral reason for the exclusion, and (3) whether the objecting party has carried his burden to establish racial discrimination in the use of the peremptory. The second step of the process does not demand a "persuasive" or even a "plausible" reason. Instead, only a reason that is not inherently discriminatory need be given. Here, the Court of Appeals erred by holding that the reason offered by the State at the second stage (that the veniremen had unusually long hair and facial hair) must be not only race-neutral but at least "minimally persuasive." The credibility of the explanation is not in issue until the third stage of the inquiry, when the burden of persuasion is on the party bringing the challenge.

Hernandez v. New York, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) The prosecutor used peremptories to excuse bilingual jurors on the ground that their responses to *voir dire* made him fear that they would not limit themselves to the official interpreter's translation of Spanish testimony. The trial court found this explanation to be racially neutral, and the Supreme Court found that this ruling was not clearly erroneous. However, the Court noted that striking all veniremen who speak a certain language, without regard to their statements about whether they could be impartial, is likely to be a mere pretext for racial discrimination.

Other Federal Courts

Turner v. Marshall, 121 F.3d 1248 (9th Cir. 1997) The prosecution violated **Batson v. Kentucky** by exercising a peremptory against an African-American (who was a “classic prosecution juror”) because he was hesitant to view gruesome photographs of the crime scene. The prosecutor’s explanation for the peremptory was pretextual, particularly since a white juror who expressed greater reluctance to view the photographs was allowed to remain on the jury.

Illinois Supreme Court

People v. Wiley, 165 Ill.2d 259, 651 N.E.2d 189 (1995) The State claimed that it had selected the jury according to a "wish list" of characteristics it hoped to find, including "the ability to be fair, honest, sober, cogent, patient, attentive, detail-oriented, and analytical." The trial court accepted the prosecution's explanations. The Supreme Court rejected defendant's argument that since several jurors were accepted by the State despite lacking the traits set out in the list, the "wish list" was nothing more than a pretext for discrimination. Although not all the jurors accepted by the State possessed all of the "ideal attributes" from the list, that fact alone did not establish racial discrimination. The Court again recognized that the credibility of the State's explanations at the **Batson** hearing is to be determined by the trial court, whose ruling is to be affirmed unless it is manifestly erroneous. However, the Court stressed that the prosecution must give "more than a bald assertion of nondiscriminatory motives or good faith," that the specific bias allegedly shown by the juror must relate "to the cause being tried," and that challenges based on a veniremember's demeanor must be closely scrutinized.

People v. Harris, 164 Ill.2d 322, 647 N.E.2d 893 (1994) The Court held that it is not necessarily pretextual to dismiss a juror based upon a lack of knowledge concerning certain information, even if no follow-up questions were asked. Whether an explanation is race-neutral is primarily a question of credibility; thus, while "extra caution" may be warranted where a peremptory is based on lack of knowledge, such a challenge is not "automatically invalid." Here, the Court accepted the State's claim that it had not asked further questions because it did not want to taint the remaining members of the venire.

People v. Andrews, 155 Ill.2d 286, 614 N.E.2d 1184 (1993) The State exercised eight of its 14 peremptory challenges, all against black venirepersons. Three members of the jury which heard the case were black. The prosecutor claimed that because the case potentially involved a death sentence, the State wanted mature jurors who were willing to sit in judgment of another person. In the State's view, this meant jurors who were self-employed or who had prior jury service. In addition, the State claimed that it wanted to avoid sympathy by excluding jurors who were either the same age as the defendant or who had children of defendant's age. Finally, because defendant was expected to assert that his confession had been coerced by a police beating, the State wanted jurors with favorable opinions of police officers. The Supreme Court found the prosecutor's explanations to be race-neutral. Where the prosecution offers more than one explanation for its use of a peremptory, a finding of race-neutrality should be accepted if at least one explanation is race-neutral. Finally, the Court found that its conclusion of no purposeful discrimination was supported by the fact that three blacks were allowed to serve on the jury despite the State having unused peremptories, and because the State's peremptories were exercised in a "non-consecutive pattern."

People v. Hope, 147 Ill.2d 315, 589 N.E.2d 503 (1992) A finding of no purposeful discrimination in the prosecutors' use of peremptory challenges was contrary to the manifest weight of the evidence. The factual findings of the trial court are entitled to "great deference," but in this case there were "exceptional circumstances" which indicated that the trial court had erred. (The prosecutor used 11 peremptory challenges, including five against blacks, and the only other black venireman was excused for cause.) The explanations offered by the State were pretextual where whites exhibiting the same characteristics as those cited by the prosecutors were allowed to serve. "The prosecution's reasons are a collection of vague common characteristics and include repeated reliance upon the alleged demeanor of jurors or mistaken allegations about the jurors. Examined as a whole, they establish racial discrimination."

People v. Young, 128 Ill.2d 1, 538 N.E.2d 453 (1989) The State's explanations for its exclusion of black venirepersons were race-neutral and sufficient under **Batson**. The defendant first contended that the prosecutor should not be allowed to rely upon demeanor as a reason for excluding a juror because this may be a subterfuge for excusing a juror on the basis of race. The Court held that demeanor or outward manner or bearing "has anciently been regarded as being of significance [and] demeanor of a prospective juror has traditionally been a factor of importance in jury selection." Thus, "a juror's demeanor may constitute a legitimate and racially neutral reason for excusing him or her." The Court again stressed that a prosecutor's reasons for the use of peremptory challenges "need not rise to the level justifying the exercise of a challenge for cause."

People v. Mack, 128 Ill.2d 231, 538 N.E.2d 1107 (1989) Five black veniremen were excused on the basis of their demeanor (i.e. failed to make eye contact with the prosecutors, hesitated in responding to questions about capital punishment, responded in a casual manner to some questions, looked at the defense but not at the prosecutors, and didn't seem to understand certain questions). The Court stated that the prosecutor may properly exclude prospective jurors on the basis of demeanor. "We cannot say that the prosecutors in this case were unjustified in excusing the prospective jurors for the grounds cited. Three black veniremen were excused because of their employment and employment status (i.e., unstable job history, worked as a security guard but frequently changed jobs; employed by a "well-known criminal defense firm as, in her words, a "brief specialist"; 38 years old, divorced, unemployed and attending school). The Court stated that the "State's concern over the employment status and positions of these prospective jurors was legitimate and race neutral." One black venireman was excused because of her social relationship with a number of attorneys and a judge whose courtroom was across the hall. Finally, four black veniremen were excused based mainly on their age and status as renters rather than homeowners.

People v. McDonald, 125 Ill.2d 182, 530 N.E.2d 1351 (1988) The State's explanations for the use of peremptory challenges against black venirepersons were inadequate to rebut the *prima facie* case of discrimination. The prosecutor excluded two blacks whose spouses were teachers, because teachers and people who live with teachers "tend to use their own reasoning and [do] not rely so much on the evidence and arguments presented by counsel." However, the prosecutor accepted a white juror who is a teacher. "No explanation is offered for this patent inconsistency, and our review of the record reveals none." The prosecutor struck a 34-year-old black man because "young single males are the worst jurors for a rape case." This reason was "untenable" when the prosecutor accepted an 18-year-old white male. Some of the blacks were struck because they were mothers of large families. This claim was

“belied” by the fact that the prosecutor accepted a white juror who was the mother of a large family. The prosecutor struck a black juror who stated that she had been on jury duty four years previously, but did not state whether she actually served on a jury. The prosecutor accepted a white juror who had actually served on two previous juries. The prosecutor excused a black juror because she was a nurse, claiming that a nurse would not be an acceptable juror. The prosecutor accepted a white nurse’s assistant “without explaining why a nurse’s assistant would somehow be a more acceptable juror than a nurse.” The prosecutor struck two black jurors based on their advanced age (63 and 69 years old). This explanation was “inconsistent” with the acceptance of a white juror who was 67 years old.

Illinois Appellate Court

People v. Bradshaw, 2020 IL App (3d) 180027 The trial court erred in accepting the State’s race-neutral reason for dismissing a black juror.

The State used peremptory challenges on the only two black members of the venire. The defense raised a **Batson** challenge. Asked for race-neutral reasons, the prosecutor explained that the first venireperson was a lawyer who admitted he had represented defendant in the past. The prosecutor stated that the second veniremember in question had arrests in his background. Pressed on the nature of his criminal history, the prosecutor stated that she did not have the information in front of her but that she knew he had “criminal contacts.” Asked what those entailed, the prosecutor stated that her assistant pulled the information and gave her notes, but she didn’t have them in front of her. She added that she didn’t like the potential juror’s demeanor, stating the way he answered her questions gave her a “bad vibe” and did not make her “warm and fuzzy.” The trial court rejected this latter rationale, but found the explanations about criminal contacts to be race-neutral. It denied the **Batson** motion. Defendant was convicted of possession of a controlled substance with intent to deliver.

The Appellate Court found a **Batson** violation with respect to the second potential juror. The fact that a veniremember has “criminal contacts” does not overcome a *prima facie* case of discrimination. Criminal history, in and of itself, does not disqualify one from serving on a jury. To qualify as a race-neutral reason, the State must explain why the criminal history would impact the veniremember’s ability to be impartial. Here, not only did the prosecutor not do that, she failed to even prove the existence of the supposed criminal history.

People v. Gonzalez, 2019 IL App (1st) 152760 The trial court’s denial of defendant’s **Batson** challenge was not clearly erroneous. Defendant alleged that the State exhibited gender bias when it struck three men from the venire before defendant’s trial for sexual assault. Although the trial court skipped the first stage of the **Batson** process and asked the State for gender-neutral reasons without finding a *prima facie* case, the Appellate Court affirmed. Nothing in the record suggested the State’s explanations were pretextual, and neither **Batson** nor its progeny required the court to consult the defense before evaluating the State’s explanations.

In re A.S., 2017 IL App (1st) 161259-B The proponent of a **Batson** challenge bears the ultimate burden of persuasion and a trial court’s third-stage findings regarding purposeful discrimination will not be reversed unless they are clearly erroneous. During the third stage, a trial court is often called upon to assess the credibility of the lawyers who exercised the peremptory challenges in question. Typically, such observations and credibility findings are entitled to deference. But a State’s reason for exercising a peremptory challenge is subject to close scrutiny if it rests on subjective observations.

During jury selection, the State challenged an African-American female (“CT”) for cause because she had failed to disclose a 1977 theft conviction for which she had received supervision. The trial court initially indicated that it would excuse her for cause, but then decided to question her in chambers. Under questioning, CT remembered the conviction and said she had simply forgotten it and had not intentionally concealed it. Based on this, the court refused to excuse CT for cause. It found that she did not lie about her conviction. Instead, it was an honest mistake, especially since she had received supervision which many people associate with no conviction at all. The State used a peremptory challenge on CT.

An African-American male (“JW”) failed to disclose a 13-year-old DUI conviction. When questioned in chambers, JW said he forgot about the conviction. He didn’t even think of a DUI as criminal matter. The State said it assumed the court would not excuse JW for cause and declined to exercise a peremptory challenge on him even though it had three left.

At a third-stage **Batson** hearing to determine whether the State’s peremptory challenge of CT was based on her race, the State explained that it excused CT because it did not believe she was being truthful when she said she didn’t remember her conviction. By contrast, the State said it accepted JW because it believed he was being honest when he said he didn’t remember his conviction. The trial court accepted the State’s explanation and denied defendant’s **Batson** motion.

The Appellate Court held that the State failed to provide a non-pretextual race-neutral reason for excusing CT. The Appellate Court did not “give much credence” to the State’s “fundamentally subjective reasons” for dismissing CT. The State claimed that it did not believe CT was being honest when she said she had simply forgotten about her prior conviction. But the trial court assessed CT’s demeanor when it denied the motion for cause and characterized her failure to report the prior conviction as an “honest mistake.” If the State had actually believed that CT was lying, it should have taken issue with the trial court’s assessment.

The Appellate Court also doubted the State’s explanation for treating JW differently than CT. Although the State claimed that it believed JW genuinely overlooked his previous conviction, the State still moved to strike him for cause which contradicted its asserted belief in his honesty. The Appellate Court could find no acceptable explanation for the State’s different treatment of CT and JW.

The Appellate Court was also troubled by the trial court’s failure to reconcile its findings that CT was being honest with its acceptance of the State’s position that she was being dishonest. The trial court never probed the State’s asserted belief and thus failed to undertake a “sincere and reasoned attempt” to evaluate the State’s explanations.

The Appellate Court thus found that defendant had sustained its burden to show a **Batson** violation and granted defendant a new trial.

In re A.S., 2016 IL App (1st) 161259 The trial court properly found that defendant made a *prima facie* case that the State used its peremptory challenges on the basis of race. The record showed that the State used 80% of its peremptory challenges against African-Americans, only 8.3% of the jury was African-American, and three members of the venire challenged by the State were a heterogenous group, sharing race as their only common characteristic.

But once the State came forward with reasons for its challenges, the trial court failed to conduct a proper third-stage evaluation of those reasons. The State provided race-neutral explanations for all but one of its challenges. As defendant pointed out below, however, in three of those instances the State also accepted white jurors with similar though not identical characteristics. The trial court nonetheless accepted the State’s explanations without any scrutiny and thus failed to conduct a meaningful third-stage evaluation of the State’s reasons.

The trial court also failed to require the State to provide a race-neutral explanation for one of its peremptory challenges. And finally, the trial court improperly relied on the dissent in **Batson** as support for its decision.

The Appellate Court remanded the case for further **Batson** proceedings.

People v. Morales, 308 Ill.App.3d 162, 719 N.E.2d 261 (1st Dist. 1999) The Court found pretextual the prosecution's claim that it challenged an African-American veniremember because she was a salesperson who worked on commission and might be inattentive because she was hesitant about missing work. Although concerns about the possibility of losing income may constitute a race-neutral reason for exclusion, the explanation was pretextual because it was not applied consistently to a white juror who was accepted despite concerns that serving would interfere with his last semester of college. But see, **People v. Easley**, 192 Ill.2d 307, 736 N.E.2d 975 (2000) (because in many cases a peremptory challenge is based on a combination of traits, purposeful discrimination is not established merely because an excluded venireperson shared a characteristic with a juror who was not challenged). The State also acted improperly by excusing a Hispanic veniremember because "he had some type of heavy accent" and therefore might not understand the testimony. If the prosecutor challenged the veniremember because he had trouble understanding English, the challenge was improper because there was no evidence to support such a conclusion. If the prosecutor struck the veniremember because he had a Spanish accent, "then we can only conclude that he was improperly challenged because he was Hispanic."

People v. Roberts, 299 Ill.App.3d 926, 702 N.E.2d 249 (1st Dist. 1998) Although a veniremember's untruthfulness in completing a juror card is a race-neutral reason for exercising a peremptory, the explanation was pretextual in this case. First, the "chronology of events" was troubling. "When the trial court said the State's justification was insufficient and asked if the State had anything further, the State responded "No." However, after the State learned the trial court would grant the **Batson** motion unless it offered another reason, the State suddenly asked to see the juror's card. Only after reviewing the card did the State offer "untruthfulness" as its reason, stating that the juror's jury card answers varied from his *voir dire* answers. This chronology of events reveals the State was unaware of the juror's alleged 'untruthfulness' when it made its peremptory challenge." In addition, the record did not support the claim that the juror was untruthful in answering questions about his occupation. The jury card allowed only a "yes" or "no" answer concerning employment. On *voir dire*, the juror said that he worked "on and off." Because neither of the answers allowed by the juror card would have been entirely accurate, under the State's reasoning the juror would have been "untruthful" no matter what he answered.

People v. Davis, 287 Ill.App.3d 46, 677 N.E.2d 1340 (1st Dist. 1997) Bertha White was excused in violation of **Batson**. The prosecutor claimed he excused White because she "has a son approximately the defendant's age; we felt she would be very sympathetic towards [defendant]." This explanation was 'clearly pretextual'; White's son was 21 at the time of trial, while the defendant was 36. In addition, the prosecutor accepted Caucasian veniremembers who had children who were closer in age to the defendant, including one who had a son in his late 20's, and accepted two African-American jurors who had sons in their middle 30's.

People v. Randall, 283 Ill.App.3d 1019, 671 N.E.2d 60 (1st Dist. 1996) The Appellate Court lamented "the charade that has become the **Batson** process. The State may provide the

trial court with a series of pat race-neutral reasons for its exercise of peremptory challenges. Since reviewing courts examine only the record, we wonder if the reasons can be given without a smile. Surely, new prosecutors are given a manual, probably entitled, 'Handy Race-Neutral Explanations' or '20 Time-Tested Race-Neutral Explanations.' It might include: too old, too young, divorced, 'long, unkempt hair,' free-lance writer, religion, social worker, renter, lack of family contact, attempting to make eye-contact with defendant, 'lived in an area consisting predominately of apartment complexes,' single, over-educated, lack of maturity, improper demeanor, unemployed, improper attire, juror lived alone, misspelled place of employment, living with girlfriend, unemployed spouse, spouse employed as school teacher, employment as part-time barber, friendship with city council member, failure to remove hat, lack of community ties, children same 'age bracket' as defendant, deceased father and prospective jurors' aunt receiving psychiatric care. Recent consideration of **Batson** issues makes us wonder if the rule would be imposed only where the prosecutor states that he does not care to have an African-American on the jury. We are reminded of the musing of Justice Cardozo, 'We are not to close our eyes as judges to what we must perceive as men.'"

People v. Gaston, 256 Ill.App.3d 621, 628 N.E.2d 699 (1st Dist. 1993) Two African-American venire members were improperly excluded from the jury. The Court concluded that while a venireperson's own unemployment is a race-neutral reason for exclusion, the unemployment of a relative has little impact on one's ability to serve as a juror. In addition, the prosecutor acted improperly when he excluded a venirewoman because she was "extremely religious" and might therefore "look beyond someone's guilt." The venirewoman had responded, when asked about her hobbies and family, that she did not have "too many hobbies" but read the Sun-Times and attended church. Since the prosecutor asked no other questions about her religious practices or whether they would affect her ability to be a juror, the Court concluded that there was no reasonable basis for believing that she was "extremely religious."

People v. Sims, 249 Ill.App.3d 246, 618 N.E.2d 1083 (1st Dist. 1993) The prosecution's explanations for its use of peremptories were not sufficiently race-neutral. The prosecutor excused two employees of the U.S. Postal Service because he believed that postal workers are "dishonest and have no respect for the law." The Court found that this notion "smacks of the kind of non-specific, subjective and racially suspect" explanation which the **Batson** decision was intended to "obliterate," and stated that such a "baseless explanation should have been a warning to the trial court to employ a heightened scrutiny in examining the remaining explanations[.]" The Court rejected the State's claim that it had excused a 62-year-old venireman because he was employed only as a stock person at a shoe store, and the prosecutor expected a man of that age to be employed beyond that level. "This explanation is not only ludicrous but . . . bespeaks a brand of bourgeois arrogance on the part of the State in deciding what 'level of employment' a man of 62 years should possess."

People v. Banks, 241 Ill.App.3d 966, 609 N.E.2d 864 (1st Dist. 1993) The prosecution exercised six straight peremptory challenges against black jurors. The State withdrew its last challenge after defendant made a **Batson** objection and the trial court stated that it was "a very wise decision" to withdraw the challenge because the juror was "impeccable." The judge asked the prosecution to explain its other challenges so that the case would not have to be "sent back" for a **Batson** hearing, and found that the explanations were race-neutral. The Appellate Court found that the prosecutor's explanations were not race-neutral, and that in some instances the trial court failed to adequately scrutinize those explanations. The Court

rejected the prosecution's assertion that it rejected a 65-year-old female black juror (who rented an apartment, was a widow and had a grown daughter) because she had a "limited background." The Court found the prosecutor's reasoning to be "nonsensical and completely meaningless." The prosecutor improperly excused another black juror on the ground that she was divorced and might identify with the defendant because she had three children of roughly the same age. The prosecution offered no reason for distinguishing the black juror from white jurors with children of comparable age, and found that the trial judge failed to make "a sincere and reasoned attempt to evaluate the prosecutor's explanation. Furthermore, the judge's open disdain for **Batson** (calling it the "worst decision ever handed down," "poorly written, poorly understandable, certainly wrong" and "ludicrous and ridiculous") indicated that he did not attempt to fairly evaluate the prosecution's statements.

People v. Mitchell, 228 Ill.App.3d 167, 592 N.E.2d 175 (1st Dist. 1992) A new trial was warranted because the prosecution failed to offer race-neutral explanations to rebut the inference of purposeful discrimination against two black prospective jurors, the only blacks who were not excused for cause. As to one juror, the prosecution merely stated that defense counsel "knows our reason." As to the other juror, the prosecution claimed that it had a rap sheet indicating that a man of the same name and age had once been arrested in Los Angeles. Because there was nothing in the record indicating that the prospective juror had ever been to Los Angeles, and because the prosecution failed to ask the judge to clarify the juror's identity, the Court found that the explanation was pretextual.

People v. Walls & Byrd, 220 Ill.App.3d 564, 581 N.E.2d 264 (1st Dist. 1991) The Court found that the State's explanations for its use of peremptories were pretextual. The State challenged one black juror because she was an unmarried mother of children who were about the same age as the defendants and because she was affiliated with an organization known as the "Eastern Star." The Court noted that several jurors who were accepted by the State were parents of children of approximately the same age and that there was no indication that the parental status of any of the jurors would make them biased. In addition, the juror's membership in the "Eastern Star" was not a legitimate race-neutral reason where the prosecutor was not even aware of the nature of that organization. The prosecutor stated that another black prospective juror was excluded because her age was close to that of defendants and because she "stared at" the defendants. The Court noted that two white males of similar ages were accepted, and held that the act of looking at the defendants, even if it occurred, did not disqualify the person from sitting on a jury. A third black juror was excluded because she resided near another "highly-publicized" gang-related incident in which the prosecutor had been involved and because her husband worked for a company where the prosecutor had many friends. The Court found this explanation "untenable" because the State "gave no indication of how or why either of these two factors, even if true, caused them to believe that the juror would have been biased or detrimental to their case in any way."

People v. Allen, 168 Ill.App.3d 397, 521 N.E.2d 1172 (2d Dist. 1988) The explanation by the State for the exclusion of a black juror was insufficient where "the prosecutor acknowledged he had challenged the juror on account of the shared race with the defendant and because racial issues may be raised at trial. The prosecutor thought the juror would be isolated, as the only black on the panel, and placed in a difficult position. The explanation offered for exclusion of this juror essentially related to the juror's race and that is the standard which **Batson** seeks to avoid."

People v. Brown, 152 Ill.App.3d 996, 505 N.E.2d 397 (4th Dist. 1987) The prosecutor used a peremptory challenge to exclude the only black venireman. In explaining the peremptory challenge, the prosecutor noted that the black venireman “had seen defendant in taverns and that this [venireman] was the only potential juror who had any knowledge of defendant.” The Court held: “Although this explanation may not be sufficient to challenge a juror for cause, we believe that this is the type of neutral explanation which is acceptable pursuant to the standards for determining discrimination in the selection of jurors which were set forth in **Batson**.”

§32-4(d) Supreme Court Rule 431(b); *Zehr* questions

Illinois Supreme Court

People v. Seby, 2017 IL 119445 The parties agreed that the trial court violated **Illinois Supreme Court Rule 431(b)**, which requires the court to ask potential jurors whether they “understand and accept” the four **Zehr** principles: (1) defendant is presumed innocent; (2) the State must prove defendant guilty beyond a reasonable doubt; (3) defendant does not have to offer any evidence on his behalf; and (4) if defendant does not testify it cannot be held against him. Here the trial court asked jurors whether they “had any problems with” or “believed in” the **Zehr** principles. The Illinois Supreme Court held that this was clear error.

The evidence was closely balanced. Both sides presented a plausible version of events concerning the issue of whether defendant knowingly resisted the performance of a known police officer’s authorized acts and whether that violation was the proximate cause of injury to the officer. **720 ILCS 5/31-1(a), (a-7)**. The testimony of the State’s witnesses was largely consistent, but so was the testimony of the defense witnesses. Neither side presented accounts that were fanciful. The outcome of the case thus turned on how the trier of fact resolved a contest of credibility. And since both sides were credible, the evidence was closely balanced.

Since there was clear error and the evidence was closely balanced, defendant established plain error under the first prong. The court rejected the State’s argument that the closeness of the evidence is only one consideration in deciding whether there was prejudice. The State’s argument would impermissibly add the seriousness requirement of the second prong onto the closeness requirement of the first prong to “yield a hybrid requirement.” The State’s argument ignores the fact that “prejudice rests not upon the seriousness of the error but upon the closeness of the evidence.” An error is prejudicial when it occurs in a close case because its impact on the result is potentially dispositive.

People v. Belknap, 2014 IL 117094 At the time of trial, Supreme Court **Rule 431(b)** required the trial court to ask each potential juror whether he or she understood and accepted several principles, including: (1) the presumption of innocence, (2) the reasonable doubt standard; (3) that the defendant is not required to offer evidence; and (4) that the defendant’s failure to testify could not be held against him. The Supreme Court reiterated that the trial judge is required to ask not only whether the prospective juror accepts such principles but also whether he or she understands them. The court accepted the State’s concession that the trial judge erred by asking prospective jurors only whether they accepted the **Rule 431(b)** principles and not also whether they understood them.

The trial court’s failure to comply with Supreme Court **Rule 431(b)** can constitute plain error only under the first prong of the plain error test, for clear or obvious error where the evidence is so closely balanced that the error alone threatened to tip the scales of justice

against the defendant. **People v. Thompson**, 238 Ill. 2d 598, 939 N.E.2d 403 (2010). When reviewing a forfeited claim under the first prong of the plain error doctrine, the reviewing court must undertake a commonsense analysis of all of the evidence in context.

After examining the evidence, the Supreme Court rejected the Appellate Court's holding that the evidence was closely balanced. Although there were no eyewitnesses to the crime, other evidence pointed to the defendant as the perpetrator and excluded any reasonable possibility that someone else inflicted the injuries on the decedent. In addition, the testimony of two jailhouse informants concerning defendant's statements was consistent although the informants were not in the jail at the same time and there was no evidence that they had communicated with each other about defendant. The court concluded that viewing the evidence in a common sense manner under the totality of circumstances, the evidence was not closely balanced. Defendant's conviction for first degree murder was affirmed.

People v. Wilmington, 2013 IL 112938 The trial court admonished the veniremembers concerning the **Rule 431(b)** principles, and subsequently asked whether they accepted three of them - the presumption of innocence, the reasonable doubt standard, and the fact that defendant was not required to present evidence. However, the trial court failed to ask whether the jurors understood the above three principles, and failed to ask whether the jury understood or accepted that they could not hold the defendant's failure to testify against him. No objection was raised in the trial court.

In **People v. Thompson**, 238 Ill.2d 598 (2010), the Supreme Court held that where the second prong of the plain error requirement is involved, the defendant is entitled to relief only if he or she can establish that the violation of **Rule 431(b)** resulted in a biased jury. Here, defendant argued an issue not reached in **Thompson** – whether the first prong of the plain error rule applied because the evidence was closely balanced.

The court concluded that the evidence was not closely balanced, and that the first prong therefore did not apply. Although the jury sent notes to the judge during deliberations, there was no indication that it had reached an impasse or experienced trouble reaching a verdict. In addition, the testimony of the expert witnesses did not render the case closely balanced. And, there was un rebutted evidence that the defendant gave an inculpatory statement that was corroborated by at least some of the physical evidence.

People v. Thompson, 238 Ill.2d 598, 939 N.E.2d 403 (2010) Supreme Court **Rule 431(b)** requires the trial court to ask each potential juror whether he or she understands and accepts the presumption of innocence, the reasonable doubt standard, that the defendant need not present any evidence, and that the defendant's failure to testify cannot be held against him. The method of inquiry must allow each juror to respond to specific questions concerning these principles.

Rule 431(b) contemplates a question and answer procedure by which the trial judge addresses each veniremember concerning their understanding and acceptance of the principles. Such questioning may occur in groups or individually, but must provide a specific opportunity for each veniremember to indicate his or her agreement and understanding.

The trial court violated **Rule 431(b)** where it omitted from its questioning one of the four **Rule 431(b)** principles - that defendant was not required to present evidence. The trial judge also violated **Rule 431(b)** by asking whether veniremembers understood the presumption of innocence, but not whether they accepted it.

Defendant forfeited the issue by failing to raise it in the trial court, and the forfeiture was not excused. A violation of **Rule 431(b)** does not constitute "structural" error which requires reversal in every case. See **People v. Glasper**, 234 Ill.2d 173, 917 N.E.2d 401

(2009) (holding that the failure to comply with an earlier version of [Rule 431\(b\)](#) was not structural error; same reasoning applied to the amended version of the rule).

Similarly, the forfeiture could not be excused under the “fundamental error” prong of the plain error rule. To satisfy this test, a clear or obvious error must have been so serious as to affect the fairness of the trial and challenge the integrity of the judicial process. Compliance with [Rule 431\(b\)](#) is not indispensable to a fair trial, so the mere failure to comply with [Rule 431\(b\)](#) does not necessarily affect the fairness of the trial or challenge the integrity of the process.

Also, defendant was not excused from objecting to the noncompliance with [Rule 431\(b\)](#) under the **Sprinkle** doctrine, which relaxes the forfeiture rule where the trial court oversteps its authority in the presence of the jury or would not have been willing to consider an objection. There was no reason to believe that the trial court would have ignored an objection or would have refused to follow [Rule 431\(b\)](#) had the issue been raised.

Finally, the court rejected the argument that a “bright line” rule requiring reversal is necessary to force trial courts to comply with [Rule 431\(b\)](#). Most cases in which trial courts failed to follow [Rule 431\(b\)](#) arose immediately after the rule was amended, and there is no reason to believe that trial judges are reluctant to follow the rule.

People v. Glasper, 234 Ill.2d 173, 917 N.E.2d 401 (2009) Under the version of Supreme Court [Rule 431\(b\)](#) applicable to this case, upon the defendant’s request the trial court was required to ask potential jurors about four principles: (1) the presumption of innocence; (2) the reasonable doubt standard; (3) that the defendant was not required to offer evidence; and (4) that defendant’s failure to testify could not be held against him.¹ When defense counsel asked that the trial court to question prospective jurors concerning the principle that defendant’s failure to testify could not be held against him, the judge responded, “I don’t ask them about that. I tell them.”

The refusal to honor defendant’s request clearly violated [Rule 431\(b\)](#):
We reiterate that, under the rule applicable at the time, once a defendant makes the request, the decision to question the venire in accordance with [Rule 431\(b\)](#) is not discretionary – it is a requirement. We likewise reiterate that the rules of this court are not mere suggestions. They have the force of law, and they should be followed.

However, the failure to comply with [Rule 431\(b\)](#) was harmless. First, questioning under [Rule 431\(b\)](#) does not involve a structural error or a fundamental or constitutional right. Indeed, at the time of trial, the right was available only on request. Furthermore, a structural error requiring reversal *per se* must render the trial fundamentally unfair or unreliable, a requirement which the failure to comply with [Rule 431\(b\)](#) cannot satisfy. Thus, the failure to comply with [Rule 431\(b\)](#) may be harmless if the evidence of guilt is overwhelming. After reviewing the evidence, the court found that no rational juror could have voted to acquit.

People v. Zehr, 103 Ill.2d 472, 469 N.E.2d 1062 (1984) It was reversible error for the trial judge to refuse to ask prospective jurors the following questions tendered by the defense: (1) If at the close of all the evidence and after you have heard arguments of counsel you believe that the State has failed to sustain the burden of proof and has failed to prove the defendant guilty beyond a reasonable doubt, would you have any hesitation whatsoever in returning a verdict of not guilty? (2) If the defendant decides not to testify in his own behalf, would you hold it against him? (3) Do you understand that the defendant is presumed innocent and does not have to offer any evidence in his own behalf, but must be proved guilty beyond a reasonable doubt by the State?”

Illinois Appellate Court

People v. Cain, 2021 IL App (1st) 191921 The Appellate Court reversed defendant's convictions for murder and concealment of a homicidal death, and remanded for a new trial, for two independent reasons. First, the police did not record his statement, in violation of Section 103-2.1(b) of the Code of Criminal Procedure. Second, in a closely balanced case, the court violated Rule 431(b) by failing to ask the venire members whether they understood and accepted the principle that, if the defendant chose not to testify, the jury could not hold that choice against him.

With regard to the first issue, the police arrested defendant two weeks after a witness saw defendant pushing a red suitcase down the street the day of the victim's disappearance. The victim's body was later found in a red suitcase in an alley. Defendant told the detective in a custodial interview that he found the victim dead in his bed, and, afraid, decided to dispose of the body. He denied killing the victim. The interview was not recorded.

The statement was presumptively inadmissible under section 103-2.1(b), because it was not recorded and defendant had been charged with murder. The State may overcome the presumption of inadmissibility with proof by a preponderance of the evidence that the statements were voluntarily given and are reliable. To do so, it should present evidence as to the totality of the circumstances, including "the defendant's age, education, intelligence, mental capacity, physical condition at the time of questioning, the legality and duration of the detention and questioning, whether the defendant was advised of his constitutional rights, and any physical or mental abuse by police including the existence of threats or promises." Here, other than establishing that defendant received **Miranda** warnings, that he was 50 years old, and that he had a GED, the State presented no other evidence of voluntariness at the hearing on the motion to suppress. Thus, the State failed to overcome the statutory presumption. On remand, the State would have the opportunity to overcome the presumption.

As for the 431(b) violation, the evidence was closely balanced. Defendant confessed, but only to concealing the body. He did not admit to killing the victim and told the police he had no knowledge of how she died. The medical examiner could not determine with medical certainty how the victim died. Although she concluded that the cause of death was homicide, she did so only because of the manner in which the body was disposed and because she could not come up with any other explanation. No physical evidence supported the idea that she died by homicide. Thus, plain error occurred and reversal was required.

People v. Joseph, 2021 IL App (1st) 170741 The trial court did not violate Rule 431(b). By asking if the venire had "any quarrel with" the four propositions, the trial court satisfied its obligation to determine if the venire accepted them. The court then asked the venire to raise hands if they "cannot apply" the four propositions. The Appellate Court held that this satisfied the court's obligation to determine if the venire understood the propositions. Regardless, the judge later explicitly asked if everybody in the venire could accept and understand the propositions. This technique of reading all of the propositions followed by a compound question asking if the venire both accepts and understands them was found permissible by the Illinois Supreme Court in **People v. Birge, 2021 IL 125644**.

People v. Hartfield, 2020 IL App (4th) 170787 The trial judge did not violate Rule 431(b) when it asked the venire whether it will "follow" its "instructions" relating to the **Zehr** principles, instead of asking whether the venire will "accept" the principles. Nor did it err by asking about all four principles at once, rather than separately.

People v. Bailey, 2020 IL App (5th) 160458 The trial court erred by asking jurors whether they disagreed with each of the four **Zehr** principles and whether they were willing to apply each as instructed, without asking whether jurors understood the principles. Defendant forfeited review of the claim, however, and the evidence was not closely balanced so first-prong plain-error review was not warranted.

Defendant also argued in favor of second-prong plain-error review in this particular case based on a question posed by the jury during deliberations. Specifically, the jury asked the judge to “reiterate” that the jury “should only consider evidence presented in the case.” Defendant asserted that the note meant that the jury was considering evidence outside of the record and that his trial was therefore unfair. The Appellate Court rejected this contention, noting that the principle that the jury must decide the case based only on the evidence before it is important but is not one of the four **Zehr** principles. Thus, there was no “causal connection” between the error and the fact that at least one juror may have considered extraneous information and therefore no structural error.

People v. Moore, 2020 IL App (1st) 182535 The trial court erred when it failed to ascertain whether the jury “understood” each of the principles contain in Rule 431(b). Under the first prong of the plain error test, the error warranted a new trial on one of the two counts of possession of a controlled substance with intent to deliver.

Defendant had been charged with possession of cocaine and possession of marijuana, both with intent to deliver. Most of the cocaine was found on his person when the police stopped him in the vestibule of an apartment building. However, the marijuana was found in a bedroom of a nearby apartment and therefore the State had to prove constructive possession as to the marijuana. The court found evidence on both sides of the question, and concluded it was closely balanced. On one hand, defendant tried to enter that apartment, and a letter addressed to him at that address was found in that bedroom. On the other hand, defendant’s identification listed a different address, and there were numerous other people in the apartment. Because the question of constructive possession was close, the court ordered a new trial on the marijuana count.

People v. Donlow, 2020 IL App (4th) 170374 The trial court complied with Rule 431(b) where it asked the venire whether it “understood and accepted” the four principles, even though one of the jurors responded “I understand” and did not indicate acceptance. Absent evidence that the juror failed to accept the principal, the court did not abuse its discretion in failing to follow up.

People v. Foster, 2020 IL App (2d) 170683 The failure to ask one juror any of the questions required by Rule 431(b) was reversible error in a closely balanced case. Although defendant did not object to the court’s error, the evidence was closely balanced where the sexual assault victim, who was six at the time of the offense and eight at the time of trial, testified on the stand that she did not recall any of the abuse she detailed in prior statements. All of the evidence against defendant was instead admitted pursuant to section 115-10, and while the witnesses who offered this testimony gave consistent accounts of the victim’s prior statements, defendant also took the stand and proclaimed his innocence. Because neither account was fanciful or implausible, the evidence was closely balanced.

People v. Brown, 2019 IL App (5th) 160329 The trial court’s questioning of the jury venire whether they understood the **Zehr** principles and whether they could follow and/or apply

those principles was not plain error. While Rule 431(b) requires that the court ask potential jurors whether they understand and “accept” the principles, asking whether jurors “can” follow and/or apply the principles was adequate.

People v. Daniel, 2018 IL App (2d) 160018 The trial court’s inquiry of jurors whether they “agreed” with the Rule 431(b) principles was inadequate because court did not also ask whether they understood the principles. While the Second District had previously found no error from a similar inquiry in **People v. Blankenship**, 406 Ill. App. 3d 578 (2d Dist. 2010), the Supreme Court has since decided **People v. Belknap**, 2014 IL 117094, and **People v. Wilmington**, 2013 IL 112938, finding error. Although the issue was not preserved, it was first-prong plain error. The evidence was closely balanced on the charged offense of aggravated battery where both sides presented plausible conflicting testimony about whether defendant kicked or punched the complaining witness, and neither version was corroborated by extrinsic evidence.

People v. Lilly, 2018 IL App (3d) 150855 Where the court asked potential jurors if they understood and accepted principles of law set forth in Supreme Court Rule 431(b), and then immediately asked whether they had “any disagreement” with those principles before jurors answered the “understand-and-accept” questions, there was no error. “Each potential juror was given an opportunity to respond, having heard each question, and not one registered any misunderstanding or nonacceptance.”

The dissenting justice would have held that the potential jurors were not given an opportunity to respond to the questions of whether they understood and accepted the principles by the court’s procedure. Asking potential jurors whether they understand and accept is meaningless if they aren’t given a chance to respond to those specific questions.

People v. McGuire, 2017 IL App (4th) 150695 Under Illinois Supreme Court Rule 431(b), the trial judge must ask all potential jurors whether they “understand” and “accept” that the defendant is presumed innocent, the State bears the burden of proving guilt beyond a reasonable doubt, the defendant has no obligation to present evidence, and the defendant’s decision not to testify cannot be held against him. Here, the trial court erred by asking the prospective jurors whether they “disagreed” with these principles but not whether they “understood” and “accepted” them.

However, the court held that the error was forfeited where, when asked by the trial court, the prosecutor and defense counsel stated that they believed the prospective jurors had been properly admonished concerning Rule 431(b). By answering in the affirmative each time the trial court asked, defense counsel waived the issue for appeal.

People v. Dismuke, 2017 IL App (2d) 141203 The trial court did not comply with Rule 431(b) where it gave confusing and inconsistent instructions concerning whether prospective jurors were to raise their hands or keep them lowered to indicate their “difficulty or disagreement” and failed to take any steps to ascertain whether the jurors “understood” the principles. The Appellate Court found that the trial court could have complied with Rule 431(b) in a more simple manner by merely reciting the principles and asking the potential jurors whether they understood and accepted them.

The evidence was closely balanced, and that the error therefore constituted plain error under the first prong of the plain error test.

People v. Mueller, 2015 IL App (5th) 130013 The trial court violated Supreme Court [Rule 431\(b\)](#) by failing to properly voir dire the potential jurors about the four **Zehr** principles. The court asked if the potential jurors *understood* that defendant was presumed innocent, did not have to present any evidence, and that his failure to testify could not be used against him. But the court never asked the jurors if they *accepted* any of these principles. The court also asked the potential jurors if they would require the State to prove defendant guilty beyond a reasonable doubt, but did not ask if they understood this principle.

Although defendant failed to object to the court's voir dire, the Appellate Court addressed the issue as plain error since the evidence was closely balanced. Reversed and remanded for a new trial.

People v. Richardson, 2013 IL App (1st) 111788 Supreme Court [Rule 431\(b\)](#) requires the trial court to ask potential jurors whether they both understand and accept certain specified principles pertaining to criminal trials. It is not sufficient for the court to make an inquiry that ascertains only that the jurors accept the principles. The court must also determine that the jurors understand the principles.

The court's inquiry whether the jurors had "any quarrel with" the principles specified in [Rule 431\(b\)](#) determined only that the jurors accepted the principles. The inquiry violated [Rule 431\(b\)](#) because it allowed jurors to decide the case although they may not have understood that they must presume the defendant innocent and that the defendant has no obligation to testify or offer any evidence on her behalf.

This Appellate Court noticed this error under the closely-balanced-evidence prong of the plain error rule.

People v. McCovins, 2011 IL App (1st) 081805 The trial judge violated [Rule 431\(b\)](#) where he provided veniremembers with broad statements of legal principles, along with commentary on courtroom procedure and the trial schedule, and then asked whether any potential jurors "cannot abide by any or some or all of the principles I just talked about." The court concluded that such a general question failed to comply with [Rule 431\(b\)](#)'s requirement that each juror be afforded an opportunity to indicate his or her agreement or disagreement with the four principles concerning which admonitions are required.

The court noted, however, that defendant failed to preserve the issue. Because the evidence was not closely balanced, the court concluded that the plain error rule did not apply.

People v. Blair, 2011 IL App (2d) 070862 Supreme Court [Rule 431\(b\)](#) requires the trial court to *voir dire* each veniremember concerning his or her understanding and acceptance of four legal principles: (1) the presumption of innocence; (2) the reasonable doubt standard; (3) that the defendant need not present evidence; and (4) that the defendant's failure to testify cannot be held against him. In **People v. Thompson, 238 Ill.2d 598, 939 N.E.2d 403 (2010)**, the Illinois Supreme Court held that compliance with [Rule 431\(b\)](#) is not required for a fair trial.

Thus, the failure to conduct [Rule 431\(b\)](#) questioning constitutes plain error under the "fundamental error" test only if the failure rises to the level of structural error. As one example of structural error, the court cited a finding that the jury which tried the case was biased.

Because defendant failed to present any evidence that the failure to fully comply with [Rule 431\(b\)](#) in this case resulted in a biased jury, and did not argue that the [Rule 431\(b\)](#) error

was structural in some other way, the “fundamental error” prong of the plain error rule did not apply.

The **Thompson** court had no occasion to address whether the “closely-balanced-evidence” prong of the plain error rule applies to [Rule 431\(b\)](#) error. Because the evidence was not closely balanced here, plain error did not occur. In the alternative, the court found that defendant could not show prejudice where the prospective jurors were preliminarily informed of the principles under [Rule 431\(b\)](#), the error arose from the court’s failure to determine whether each panel understood and accepted all of the principles, and the jury was instructed of the presumption of innocence when defendant testified.

[People v. Luna](#), 409 Ill.App.3d 45, 946 N.E.2d 1102 (1st Dist. 2011) In [People v. Thompson](#), 238 Ill.2d 598, 939 N.E.2d 403 (2010), the Supreme Court held that the trial court’s failure to comply with Supreme Court [Rule 431\(b\)](#), which requires that the judge ascertain that jurors understand and accept four basic legal principles, satisfies the “fundamental error” prong of the plain error rule only if the defendant shows that the error resulted in a biased jury being impaneled. However, **Thompson** left open the issue whether [Rule 431\(b\)](#) violations could be plain error under the “closely balanced evidence” test.

Here, even if the evidence was closely balanced, defendant could not show prejudice from the trial court’s failure to ensure that the venire understood and accepted the principle that no consideration could be given to a defendant’s decision not to testify. Because the defendant did testify, the court concluded that he could not carry his burden of persuasion concerning plain error.

[People v. Vesey](#), 2011 IL App (3d) 090570 Supreme Court [Rule 431\(b\)](#) requires that the court ask each potential jury whether the juror understands and accepts four principles: (1) the defendant is presumed innocent; (2) the State is required to prove defendant’s guilt beyond a reasonable doubt for the jury to convict; (3) the defendant is not required to offer any evidence at trial; and (4) the jury cannot hold the defendant’s failure to testify against him.

Plain error occurred where the court failed to question all of the jurors about each of these principles. The evidence was closely balanced, as there was no corroborating evidence of guilt, and the trial largely came down to the credibility question of a correctional officer’s word against the defendant’s.

[People v. Wallace](#), 402 Ill.App.3d 774, 932 N.E.2d 635 (5th Dist. 2010) Supreme Court [Rule 431\(b\)](#) requires the trial court to question each veniremember individually or in a group concerning four basic principles, and to provide to each juror an opportunity to respond to specific questions concerning those principles. The trial court did not err by conducting the [Rule 431\(b\)](#) questioning in groups of veniremembers rather than individually. [Rule 431\(b\)](#) does not require individual questioning of veniremembers, and specifically permits jurors to be questioned “individually or in a group.”

[People v. Willhite](#), 399 Ill.App.3d 1191, 927 N.E.2d 1265 (4th Dist. 2010) [Rule 431\(b\)](#) does not require that jurors be questioned individually about each principle, or that the trial court receive individual answers. Furthermore, the judge may elect to delay the [Rule 431\(b\)](#) questioning until the parties have conducted questioning and exercised any challenges.

Thus, the trial court did not err by addressing only the jurors who had been accepted by the parties, in groups of four, about the 431(b) principles. The court stressed that the group questioning did not discourage venirepersons from expressing their lack of understanding or

agreement with any of the principles. Furthermore, because the jurors had not yet been sworn to serve, a potential juror who indicated a problem with any of the principles could be questioned further and excused if necessary.

People v. Blankenship, 406 Ill.App.3d 578, 943 N.E.2d 111 (2d Dist. 2010) Under Supreme Court Rule 431(b), the trial court must ask each potential juror whether he or she “understands and accepts” the four **Zehr** principles (the presumption of innocence, the reasonable doubt standard, that the defendant need not offer evidence, and that the defendant’s failure to testify cannot be held against him). The court concluded that no error occurred where the trial court asked each juror whether he or she “agreed” with the principles, but not whether the juror “understood” them.

In **People v. Calabrese**, 398 Ill.App.3d 98, 924 N.E.2d 6 (2d Dist. 2010), the court concluded that a rational juror would not claim to “accept” the **Zehr** principles without believing that he or she also “understands” them. “[I]n common usage, to ‘understand’ a proposition is to comprehend it, while to ‘accept’ that proposition is both to comprehend it and to assent to it.” (Rejecting **People v. Rogers**, 403 Ill.App.3d 584, 934 N.E.2d 540 (2d Dist. 2010)).

Even had there been error, the “fundamental fairness” prong of the plain error rule would not apply. The court interpreted **People v. Thompson**, 238 Ill.2d 598, 939 N.E.2d 403 (2010) as holding that to avail himself of the second prong of the plain error rule based on the failure to comply with Rule 431(b), the defendant must show that the jury was biased.

People v. Gregg, 315 Ill.App.3d 59, 732 N.E.2d 1152 (1st Dist. 2000) Under **People v. Zehr**, 103 Ill.2d 472, 469 N.E.2d 1062 (1984) and Supreme Court Rule 431(b), a defendant who intends to raise an insanity defense is entitled, at his request, to have the prospective jurors informed of the defendant’s burden to prove insanity by a preponderance of the evidence. In addition, the defendant is entitled to determine whether prospective jurors are biased due to a belief that the defendant’s burden of proof for insanity should be beyond a reasonable doubt.

People v. Gilbert, 379 Ill.App.3d 106, 882 N.E.2d 1140 (1st Dist. 2008) At the time of trial, Supreme Court Rule 431(b) stated that “[i]f requested by the defendant,” the trial court must question the jury venire about the presumption of innocence, the reasonable doubt standard of proof, the requirement that defendant need not offer any evidence, and the principle that the failure to testify cannot be held against the defendant. While the case was on appeal, Rule 431(b) was amended to delete the requirement that the defense must request such questioning. The Court held that the amended version of Rule 431(b) did not apply retroactively to trials which occurred before its effective date. The court acknowledged, however, that the amended version of Rule 431(b) imposes a duty on the trial court to question each potential juror *sua sponte*, whether or not the defendant makes a request.

§32-5

Impartial Jury

§32-5(a)

Generally

United States Supreme Court

Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986) The exclusion of prospective jurors who could not impose the death penalty (pursuant to **Witherspoon v. Illinois**, 391 U.S. 510 (1968)) does not violate the fair cross-section requirement of the Sixth Amendment nor violate the right to an impartial jury (i.e., by resulting in a “conviction prone” jury). See also **People v. Johnson**, 114 Ill.2d 170, 499 N.E.2d 1355 (1986).

Illinois Supreme Court

People v. Bush, 2023 IL 128747 Defendant and his cousin, Mayfield, were involved in a neighborhood dispute which intensified over the course of a single day. The dispute culminated in a physical confrontation between two groups of individuals, ending with defendant’s firing the shots that killed one man and injured another. Defendant claimed that he shot in self-defense, fearing for his safety and the safety of others. Ultimately, defendant was convicted of felony murder predicated on mob action, aggravated battery with a firearm, and unlawful possession of a weapon by a felon.

The appellate court reversed defendant’s conviction of aggravated battery with a firearm but otherwise affirmed. In the Supreme Court, defendant argued that the trial court erred in allowing a juror to continue on the jury after she revealed a connection to State witnesses. Specifically, the juror told the court on the second day of trial that she only then realized that her daughter was married to the mother of one of the State’s witnesses and the surviving shooting victim when she saw the mother seated in the courtroom. The juror assured the court that she could be fair and impartial. The Supreme Court held that while there are certain relationships which give rise to a legal conclusion of implied bias, the relationship of step-grandparent, alone, is not sufficient to qualify. Here, the record reflected that the juror’s relationship was not close, and she did not know of her step-grandsons’ involvement in the case prior to the trial. Thus, the court did not err in allowing the juror to remain on the jury.

People v. Moon, 2022 IL 125959 After jury selection, the trial court asked the clerk to swear in the jury. The clerk, however, improperly used the oath given to a venire during *voir dire*, rather than the proper trial oath. Following conviction, defendant appealed and, arguing he was convicted by an unsworn jury and that the lack of a valid oath was plain error. The Appellate Court majority found clear error, but found no prejudice and no second-prong plain error. The Supreme Court reversed.

The right to an impartial jury is guaranteed by both the federal and Illinois constitutions. The Illinois Constitution’s right to an impartial jury, found in article I, sections 8 and 13, protects the right “as heretofore enjoyed.” Thus, the constitution adopted the common law right. A thorough review of the common law preceding the drafting of Illinois’ constitutions led the Supreme Court to conclude that the jury oath was not only typical of the common law jury right, but that it was an essential element of the right to an impartial jury. Thus, the right to a sworn jury is guaranteed by the Illinois Constitution.

This review of the common law also convinced the Supreme Court that trial by an unsworn jury is a structural error and therefore second-prong plain error. The error affects the framework within which the trial proceeds, rather than being merely an error in the trial process itself. The jury oath “preserves the integrity of the jury trial process by impressing upon the jurors their sacred duty to render a true verdict in accordance with the law and evidence, thereby ensuring the defendant’s right to an impartial jury is honored by the persons being sworn.” The Supreme Court also noted that this type of error is not amenable to harmless error analysis, consistent with other errors deemed subject to automatic reversal.

The failure to swear a jury is also second-prong plain error under the double jeopardy clause. Jeopardy cannot attach until a jury is sworn, so the failure to swear the jury would allow for a second prosecution after an acquittal. An error that prevents jeopardy from attaching affects the framework of the trial process. That jeopardy never attached to the defendant further supports the conclusion that the error is structural and requires automatic reversal.

The Supreme Court noted that the Appellate Court majority's decision to find clear error but not reversible error under the second prong, used flawed reasoning. The majority looked to other aspects of the trial, including the *voir dire* oath, 431(b) admonishments, and jury instructions, to conclude that defendant could not show prejudice. But these facts were irrelevant to the second-prong analysis. Once second-prong plain error is found, reversal is required irrespective of prejudice.

Finally, the court noted that neither the constitution, statute, nor rule has set forth the content or form of the jury oath. A review of other jurisdictions and common law convinced the court that, while no specific form is required, the oath must contain the following elements: solemnity, a decision based on the law and evidence, and a fair or true verdict.

People v. Runge, 234 Ill.2d 68, 917 N.E.2d 940 (2009) A criminal defendant has a constitutional right to be tried by an impartial jury. A juror is biased where he or she has a fixed opinion which prevents a fair and impartial determination of guilt or innocence.

The trial court has discretion to determine whether the entire jury should be questioned about the possibility that a member of the jury is biased, and must consider whether such questioning might compound the problem of a biased juror by attracting the attention of other jury members. Where the trial court makes an inquiry that is appropriate under the circumstances, its ruling on the possible bias of a juror will be affirmed unless there is an abuse of discretion.

The trial court did not err by allowing a juror whose partiality was questioned [Juror A] to continue to sit on the jury during the guilt/innocence stage, but replacing the juror when additional information came to light at the death penalty stage. During *voir dire*, Juror A said that he would be able to be fair. On the fifth day of the nine-day guilt/innocence phase, however, the foreperson expressed concern to the court that Juror A had been "cheering vocally" when the prosecution "made a good point." The trial court questioned Juror A, determined that he had not made up his mind on defendant's guilt, and allowed him to remain on the jury.

On the following day, the trial court again inquired of Juror A after he threw his notes against the wall when the trial court overruled a State objection. Juror A stated that he was frustrated because he was not able to keep up with the proceedings in his notes, and again said that he had not made up his mind on guilt or innocence. The trial judge again allowed him to remain on the jury.

On the sixth day of the death penalty proceedings (before any mitigation had been presented), the foreperson reported to the trial court that Juror A had made derogatory comments about the defendant and had expressed fear that the defendant's wife, who had been granted immunity, would seek revenge against the jurors if defendant was sentenced to death. The trial court again questioned Juror A, who said that he was frustrated that defendant's wife had been given immunity and knew the jurors' names and addresses, and because the trial was taking so long and he had missed a month of work. In response to the judge's questioning, Juror A said that he believed the defendant should be sentenced to death.

At this point, the trial court elected to replace Juror A with an alternate. The judge

questioned the remaining members of the jury, as a group, and found that none had reached an opinion about the appropriate sentence. The court denied a defense request to question the remaining jury members individually about the actions of Juror A.

The court concluded that the trial judge did not abuse its discretion by leaving Juror A on the jury for the guilt/innocence stage. Juror A clearly stated that he had no final opinions and was waiting to hear all of the evidence, and agreed with the proposition that defendant was presumed to be innocent. Finally, Juror A stated that he threw his notes due to frustration that he was unable to keep up with the evidence, not due to any feelings about the defendant.

Furthermore, the trial court did not err by failing to question all of the jurors about the actions of Juror A. There was no reason to believe that any other juror had been affected by Juror A's conduct, and questioning the entire jury might have caused prejudice by calling attention to Juror A's actions.

People v. Harris, 225 Ill.2d 1, 866 N.E.2d 162 (2007) **Witherspoon v. Illinois** provides that only veniremembers who cannot impose a death sentence may be excused for cause based on their beliefs concerning the death penalty. The right to an impartial jury prohibits removal of a prospective juror for cause where the veniremember's general objections to the death penalty will not substantially impair the performance of his or her duties as a juror. Whether the ability to perform such duties is impaired must be decided based on the record as a whole. The trial court's decision to remove a prospective juror for cause is entitled to "great deference on review." Where the veniremember made ambiguous statements concerning his ability to follow the law, but according to the trial court shook his head "no" several times while stating that he could follow the law, the Supreme Court deferred to the trial court's finding that the individual's demeanor indicated he would be unable to perform his duties.

People v. Roberts, 214 Ill.2d 106, 824 N.E.2d 250 (2005) The Court held that 725 ILCS 5/115-4(g) and Supreme Court Rule 434(e), which provide that "[i]f before the final submission of a cause a member of the jury dies or is discharged he shall be replaced by an alternate juror in the order of selection," were intended to require the replacement of a juror who dies or is discharged *before* deliberations begin. Neither §115-4(g) nor Rule 434(e) were intended to prohibit substitution of a juror *after* deliberations have started. The trial court has discretion, as part of its responsibility to manage the jury process, to substitute a juror after deliberations have commenced. The trial court abuses its discretion by the post-submission substitution of a juror if, based on the totality of the circumstances, there is "potential prejudice" to the defendant. Considerations in determining potential prejudice include: (1) whether the original jurors and alternate juror were exposed to prejudicial outside influences; (2) whether the original jurors formed opinions about the case in the absence of the alternate; (3) whether the reconstituted jury was instructed to begin deliberations anew; (4) whether there is any indication that the jury failed to follow the court's instructions; and (5) the length of the deliberations before and after substitution. Here, defendant was prejudiced by the post-submission replacement of a juror. First, the alternate juror was aware of improper contact between a witness and the excused juror, but was not questioned to insure that she was not biased. In addition, the 11 original jurors had voted twice before the jury was reconstituted.

People v. Kuntu, 196 Ill.2d 105, 752 N.E.2d 380 (2001) The right to a jury trial guarantees a fair trial by a panel of impartial jurors. A veniremember is not competent to sit as a juror

if his or her state of mind is such that the defendant will not be afforded a fair and impartial trial. The burden of showing that a venireperson possesses a disqualifying state of mind rests on the party making the challenge. Determining whether a venireperson can be impartial is within the sound discretion of the trial court, which must rely on the entire *voir dire* examination. After hearing evidence, the trial court found that the State's Attorney and jury foreman were former classmates, had only a casual relationship, and had seen each other only twice in the 28 years since their graduation. The trial court also found that the juror had correctly answered questions during *voir dire* and on his jury card, had not attempted to hide or understate his relationship with the State's Attorney, and would not have been subject to a challenge for cause.

People v. Buss, 187 Ill.2d 144, 718 N.E.2d 1 (1999) The trial judge did not err by denying defendant's challenge for cause to a veniremember who was married to a sheriff's deputy of another county when the juror indicated that she could be fair and impartial. The refusal to excuse the juror was not inconsistent with the judge's excusal for cause of a juror who was employed at a school where the defendant's stepmother worked, because the latter juror acknowledged that her consideration of the evidence might be affected by her relationship with the defendant's stepmother.

People v. Whitehead, 169 Ill.2d 355, 662 N.E.2d 1304 (1996) Defendant claimed that he was denied the right to trial by an impartial jury where the jurors: (1) learned that their names and addresses had been published in a local newspaper, and (2) observed an outburst against the defendant by a witness (the mother of the victim). An outburst from a family member of the victim creates prejudice only where the jurors are influenced to the extent that they cannot remain fair and impartial. Similarly, the publication of jurors' names and addresses is prejudicial only where "an honest juror would therefore give sway to his emotions and disregard the fundamental requirement of a fair trial and decide to convict a person in order to be absolutely secure." Here, there was no prejudice to defendant from the mother's outburst, which was brief and isolated. There was also no reason to believe that publication of the jurors' names and addresses rendered them incapable of rendering an impartial verdict.

People v. Bounds, 171 Ill.2d 1, 662 N.E.2d 1168 (1995) During jury selection, a juror said that her mother might be hospitalized in the near future and she would have difficulty concentrating on the case if her mother was hospitalized. This juror was selected and the jury was sworn, but before any evidence was heard, the judge learned that the juror's mother had been hospitalized and was terminally ill. The court excused the juror from further service. The Supreme Court held that the defendant was not entitled to be tried by the specific jury that had been selected; a defendant only has the right to be tried by an impartial tribunal, a right that was not affected by substitution of the alternate juror.

People v. Towns, 157 Ill.2d 90, 623 N.E.2d 269 (1993) The defendant was not denied a fair trial because it was revealed after trial that one juror, a practicing attorney, had attended law school with the prosecutor. In *voir dire*, the juror stated she knew the assistant prosecutor from her practice of law but that their relationship would not affect her ability to be fair. Defense counsel challenged the juror for cause on the ground that a practicing attorney should not be on the jury. However, defense counsel chose not to exercise a peremptory challenge when the challenge for cause was denied.

People v. Porter, 111 Ill.2d 386, 489 N.E.2d 1329 (1986) Attached to defendant’s post-trial motion was an affidavit of a juror, which stated that a fellow juror had informed him of a third juror who attended church with the victim’s mother. The affidavit also said that “when the jury was given the case to deliberate on,” the juror in question “said as far as she was concerned, they could vote guilty right then, and she made this statement before any discussion was had on the evidence.” Noting that the burden is on the defendant to establish the prejudice or bias of a juror, the Court held that the defendant did not sustain his burden. The Court also held that the juror’s statement upon entering the jury room for deliberations did not establish that she had previously determined defendant’s guilt: “the jury had retired to the jury room to begin its deliberations. In doing so some members of the jury must, of necessity, be first to voice an opinion.”

People v. DelVecchio, 105 Ill.2d 414, 475 N.E.2d 840 (1985) The defendant contended that the trial judge erred by failing to excuse veniremen who heard another prospective juror, who was excused, state, “I think the guy [defendant] shouldn’t be out walking the streets.” The Supreme Court rejected this contention; “[w]e are unable to say that because of this single, isolated comment the jurors were unable to reach a verdict based solely on the evidence.”

People v. Jones, 105 Ill.2d 342, 475 N.E.2d 832 (1985) At the conclusion of defendant’s trial, a janitor found a mimeographed copy of a racist note in the jury room. (The Supreme Court stated that it refused to “disseminate the scurrilous material,” and simply noted that the so-called “joke” contained “denigrating, racist comments which are insulting to black people.”) The note was given to the judge, and the jurors were examined individually about it. Nine of the 12 jurors had not seen the note; three jurors on the panel said they had seen it, and two jurors had read part of it. All three said it would have no prejudicial effect on their deliberations. The juror who had brought the racist note into the jury room was dismissed and replaced by an alternate juror. The defendant’s motion for mistrial was denied. The Supreme Court noted that in most cases involving claims of deprivation of due process, evidence of prejudice to the accused is required. However, “there are circumstances which create ‘such a probability that prejudice will result that [the trial] is deemed inherently lacking in due process.’ Where racist material is found in the jury room during the trial of an accused black man, and the material has admittedly been read by three members of an all-white jury, such circumstances are intolerable, and prejudice to defendant will be presumed.

People v. Silagy, 101 Ill.2d 147, 461 N.E.2d 415 (1984) After testimony had been heard at defendant’s trial, defense counsel asked that a juror be removed and replaced by an alternate because the juror had been observed “periodically dozing during the trial.” The trial judge stated that he had not observed such behavior, and the juror said he did not think he had missed any of the testimony. The judge also asked why defense counsel had not called the court’s attention to the alleged problem earlier, and counsel acknowledged that she should have objected earlier. The Supreme Court found that it was not shown that the above juror “slept regularly during the trial [and] the trial court found that the evidence was insufficient to prove that he was asleep at any time.” Also, “if the defendant or his attorney did see the juror sleeping, there was a duty to call it to the attention of the court at that time.”

Illinois Appellate Court

People v. Polk, 2024 IL App (1st) 181933 Matters of jury selection and jury management are within the sound discretion of the trial court, including the decision whether to replace a

juror after deliberations have begun. The primary consideration in determining whether a court has abused its discretion is the potential prejudicial impact of the court's decision. In evaluating potential prejudice from a juror's dismissal, a court should consider the totality of the circumstances, including: (1) whether the alternate juror and remaining original jurors were exposed to outside prejudicial influences; (2) whether the original jurors had formed opinions about the case in the absence of the alternate juror; (3) whether the reconstituted jury was instructed to begin deliberations anew; (4) whether there is any indication that the jury failed to follow the court's instructions; and (5) the length of deliberations both before and after the substitution.

If the record demonstrates any reasonable possibility that the reason for a juror's removal during deliberations stems from his or her views regarding the sufficiency of the evidence, the dismissal of that juror constitutes error. Such a standard is meant to ensure that the defendant's constitutional right to a unanimous jury is protected and to guarantee that a juror will not be removed in a manner that gives the appearance of manipulating the jury into rendering a guilty verdict.

Here, the court did not abuse its discretion when it dismissed two jurors who sent out a note to the judge stating that they felt the instructions were "structured in a style to come to one verdict, and we can't complete our civic duty due to that." The appellate court agreed with the circuit court's conclusion that the note was a clear expression that those jurors would not follow the law as instructed. The jurors did not express any concerns about the evidence in the note, and thus the court did not abuse its discretion by removing jurors who refused to uphold their oath.

On the other hand, the court did err when it denied the defense request to interview one of the excused jurors about her allegations of racial animus in the jury's deliberations. While the general rule prevents inquiry into the motive, method, or process by which the jury reached its verdict to impeach that verdict, there is a narrow exception to the no-impeachment rule for evidence showing racial bias during deliberations. This juror reported that other jurors had been using the n-word during deliberations. She came forward independently after trial and expressed a desire to speak with the defense. The appellate court remanded to allow the defense to obtain an affidavit from the juror and for further proceedings, if necessary.

People v. Spears, 2024 IL App (1st) 181491 Matters of jury selection and jury management are within the sound discretion of the trial court, including the decision whether to replace a juror after deliberations have begun. The primary consideration in determining whether a court has abused its discretion is the potential prejudicial impact of the court's decision. In evaluating potential prejudice from a juror's dismissal, a court should consider the totality of the circumstances, including: (1) whether the alternate juror and remaining original jurors were exposed to outside prejudicial influences; (2) whether the original jurors had formed opinions about the case in the absence of the alternate juror; (3) whether the reconstituted jury was instructed to begin deliberations anew; (4) whether there is any indication that the jury failed to follow the court's instructions; and (5) the length of deliberations both before and after the substitution.

If the record demonstrates any reasonable possibility that the reason for a juror's removal during deliberations stems from his or her views regarding the sufficiency of the evidence, the dismissal of that juror constitutes error. Such a standard is meant to ensure that the defendant's constitutional right to a unanimous jury is protected and to guarantee that a juror will not be removed in a manner that gives the appearance of manipulating the jury into rendering a guilty verdict.

Here, the court did not abuse its discretion when it dismissed two jurors who sent out a note to the judge stating that they felt the instructions were “structured in a style to come to one verdict, and we can’t complete our civic duty due to that.” The defense challenged the court’s failure to inquire further, but the appellate court disagreed. The circuit court did not err in interpreting the note as a clear expression that they would not follow the law as instructed due to their disagreement with the instructions. The jurors did not express any concerns about the evidence. This was sufficient to demonstrate an abdication of their oath without requiring further inquiry.

On the other hand, the court did err when it denied the defense request to interview one of the excused jurors about her allegations of racial animus in the jury’s deliberations. While the general rule prevents inquiry into the motive, method, or process by which the jury reached its verdict to impeach that verdict, there is a narrow exception to the no-impeachment rule for evidence showing racial bias during deliberations. The juror reported that several jurors in favor of convicting the defendants had been “jumping on tables” and “throwing chairs.” When asked whether “they” had been using the n-word, the juror (a Black woman) stated, “Yes, they were calling us every name but the child of God.” The juror had come forward independently and expressed a desire to speak with the defense, but the court’s order hampered the defense’s ability to investigate her allegations. This was an abuse of discretion, and the appellate court remanded for further inquiry into the juror’s claims.

People v. Marks, 2023 IL App (3d) 200445 During voir dire, defense counsel asked a member of the venire if he agreed that “African Americans [are] more likely to commit crimes than whites.” The veniremember responded, “Yes, it seems that way. You know? If you watch the news, you—yes.” When the court questioned him, he stated that he believed he could be fair and impartial during trial and that he had not read or heard anything about the case. The veniremember ultimately served on the jury.

Defendant argued the trial court violated due process by allowing this juror to serve, and that counsel was ineffective for failing to strike the juror. The appellate court disagreed. A trial court has no affirmative duty to remove jurors *sua sponte*. While a defendant may show that a trial court abused its discretion if its *voir dire* “thwarted the selection of an impartial jury,” the defendant could not point to anything unfair about the *voir dire*. The court allowed defense counsel to ask this question, and the court excused another veniremember who provided a similar answer.

Nor was counsel ineffective. Counsel’s choices during jury selection are matters of trial strategy and “virtually unchallengeable.” Based on the fact that counsel challenged other veniremembers, and chose not to use an available peremptory challenge on this juror, the appellate court found counsel’s decision was strategic. The court also found no prejudice because the juror stated he could be impartial, and defendant could not show that the absence of this juror would have led to a different result on retrial.

People v. Wilson, 2022 IL App (5th) 190377 The trial court violated defendant’s right to an impartial jury by substituting a juror after deliberations had begun without questioning the alternate about possible exposure or influence after he left the courthouse.

The need for substitution arose when the bailiff reported that some of the deliberating jurors had their cell phones with them. After questioning the jurors, it was discovered that one juror had used her phone to look up the definitions of words defined in the jury instructions, including “knowingly.” The juror was dismissed for cause and replaced with an alternate. The alternate had left the courtroom five hours earlier, after being admonished not to discuss or read about the case.

Under [People v. Roberts, 214 Ill. 2d 106 \(2005\)](#), a trial court may substitute a juror after deliberations at its discretion. A defendant who alleges the court abused its discretion must show prejudice, taking into consideration: (1) whether the alternate juror and any original jurors were exposed to prejudicial outside information or influences; (2) whether the original jurors formed opinions regarding the case before the substitution; (3) whether the court instructed the reconstituted jury to begin its deliberations anew; (4) any indications that the jurors failed to follow instructions; and (5) the length of time jurors deliberated before and after the substitution.

Here, the factors weighed in favor of prejudice. The alternate left the courthouse for five hours, raising the possibility of exposure to outside information or influence. **Roberts** held that trial courts must “take significant precautions to avoid prejudice,” and here that required questioning the alternate upon his return. The trial court did not do so. Second, the jurors in this case did form an opinion before the substitution, having signed verdict forms already. The fourth factor also weighed in favor of prejudice, because jurors indicted during questioning about the cell phones that they had stopped faithfully performing their duties, where one juror admitted to playing video games on his phone and another stopped paying attention to discussions. Finally, the jury deliberated 3.5 hours before substitution and 26 minutes afterward, suggesting the jury did not begin deliberations anew as instructed.

Even though defense counsel failed to object, an error affecting the impartiality of the jury rises to the level of second-prong plain error, and therefore the court ordered a new trial.

[People v. Harris, 2020 IL App \(5th\) 160454](#) The fact that a juror and the victim’s father worked for the same company was not enough, standing alone, to disqualify the juror. They worked in different departments and had minimal interaction with one another. And, while they had a distant familial relationship, it was of little consequence where there was no showing that the juror was biased.

[People v. Holliday, 2020 IL App \(5th\) 160547](#) The trial court did not err in refusing to discharge defendant’s jury where there had been a disturbance in the courthouse on the morning of jury selection. The relatively minor disturbance involved the shooting victim and two other men and happened in the hallway, not in the courtroom, while the jury was still being selected. After the jury was impaneled, the court asked whether any of the jurors had witnessed anything that would cause them concern or difficulty, and none responded in the affirmative. On this record, there was no evidence that any selected juror actually witnessed the incident. Therefore, discharge of the jury was not required.

[People v. Luellen, 2019 IL App \(1st\) 172019](#) After a State witness testified that he originally failed to appear in response to a subpoena because he was fearful, the jury sent out multiple notes indicating that at least one juror had safety concerns. The court individually questioned the jurors and replaced one juror who said he was not sure he could give both sides a fair trial. The court then denied defendant’s motion for mistrial.

The jury’s notes did not show that jurors had engaged in premature deliberations. Before the close of evidence, jurors are not required to remain silent with each other so long as they keep an open mind. The court had repeatedly admonished the jury not to begin deliberations until instructed. And, the fact that one of the notes was signed by someone identified as the “foreman” did not mean the jurors had deliberated. Several jurors had jury

experience that would have exposed them to the concept of selecting a foreperson to communicate with the court.

Also, there was no error in admitting evidence of the witness's fear. The witness did not testify about threats, just his own fear from coming forward. The witness's testimony was probative to explain why he had ignored a subpoena and had to be arrested in order to secure his testimony. Further, defendant invited any error where his counsel attempted to diminish the witness's credibility by commenting on his custodial status during opening statements.

People v. Borizov, 2019 IL App (2d) 170004 The circuit court did not err in summarily dismissing defendant's *pro se* post-conviction petition at the first stage. The petition alleged ineffective assistance of appellate counsel for not raising more of the 31 claims preserved in the post-trial motion. The Appellate Court held that the petition failed to state a gist of a claim because it did not specify which claims appellate counsel failed to raise.

Moreover, the one claim briefed in the instant appeal lacked arguable merit. Defendant alleged that appellate counsel should have argued that a juror was biased because she admitted to knowing family of the victim. But the juror was thoroughly questioned by the court and maintained she could be fair. She was also admonished pursuant to Rule 431(b). Pursuant to Supreme Court authority, there is no implied bias when a juror has a tangential relationship to the victim's family, and therefore the claim was fanciful.

People v. Ryder, 2019 IL App (5th) 160027 An investigating officer's brother sat on the defendant's jury. The officer in question had participated in the defendant's custodial interrogation, and the veniremember admitted during *voir dire* to being the officer's brother, though he said he could be impartial. Defense counsel used all of his peremptories and therefore was unable to challenge the brother.

The Appellate Court found no duty on the part of the trial court to *sua sponte* remove the brother from the venire. The "implied bias" doctrine which some federal courts have fashioned in cases where jurors are considered too biased to participate in a fair trial, was waived below when defense counsel failed to challenge the juror. As for counsel's ineffectiveness, even assuming it would be unreasonable to allow the officer's brother onto the jury, the strength of the State's case - a confession to predatory criminal sexual abuse corroborated by credible testimony from the accuser - precludes defendant from showing prejudice.

People v. Bowens, 2013 IL App (4th) 120860 At defendant's trial for attempt first degree murder, aggravated domestic battery, and aggravated battery, the trial judge denied a motion to excuse the judge's husband from the jury for cause. The Appellate Court affirmed on direct appeal, noting that defense counsel's failure to exercise a peremptory challenge against the judge's husband amounted to acquiescence to the husband's jury service, and therefore waived the issue for appeal.

Defendant then filed a *pro se* post-conviction petition alleging that defense counsel was ineffective for failing to use an available peremptory challenge to remove the trial judge's husband from the jury. The judge who had presided over the jury trial also heard the post-conviction petition, and summarily dismissed the petition as frivolous and patently without merit.

Defendant raised the gist of a constitutional claim, finding that where the defense had peremptory challenges available, it was objectively unreasonable for counsel to allow the trial judge's husband to be seated as a juror. The court noted that other jurisdictions have found that regardless whether peremptory challenges are available, the constitutional right to a

fair trial is violated where the spouse or close relative of the trial judge serves as a juror. In addition, the Illinois Supreme Court has held that the conviction must be reversed and a new trial awarded where the wrongful denial of a challenge for cause denies a defendant the right to a trial before a fair and impartial jury.

People v. Strawbridge, 404 Ill.App.3d 460, 935 N.E.2d 1104 (2d Dist. 2010) Although defendant has a fundamental right to an unbiased jury, mere suspicion that a juror is biased does not justify disqualification. Whether to replace a juror is within the discretion of the trial court, whose decision will be disturbed only for an abuse of discretion.

The trial court did not abuse its discretion by refusing to replace a juror who attended the same church as the complainant. The complainant stated that although she knew the juror, they had not seen each other for four or five months. The complainant also stated that the two were not close friends.

The juror said that she recognized the complainant but did not know her very well. In fact, the juror did not recognize the complainant's last name, which had recently changed. The juror stated that she did not socialize with the complainant and could be impartial despite their relationship.

In view of the consistent statements by the juror and the complainant and the limited nature of their relationship, the trial court did not abuse its discretion by refusing to replace the juror.

People v. Gallano, 354 Ill.App.3d 941, 821 N.E.2d 1214 (1st Dist. 2004) It is error to dismiss a juror during deliberations if there is any reasonable possibility that the dismissal stems from the juror's views regarding the sufficiency of the evidence. "This rule of law ensures that a defendant's constitutional right to a unanimous jury verdict is protected and guarantees that a juror will not be excused in a manner that appears to facilitate or manipulate the rendering of a guilty verdict." The trial court erred by dismissing a juror during deliberations after the juror sent a note stating that he was the only jury member who felt there was a reasonable doubt of guilt. The Court concluded that the juror's view of the evidence was the reason for his dismissal; although the State conducted an investigation of the juror's responses during *voir dire* and learned that he had misstated his criminal record, it decided to conduct such an investigation only after learning that the juror was the lone holdout. Under these circumstances, the trial court erred by relying on the juror's untruthfulness during *voir dire* as a justification for replacing him with an alternate juror who had been released and then recalled.

People v. Sanders, 342 Ill.App.3d 374, 795 N.E.2d 329 (5th Dist. 2003) The trial judge did not abuse his discretion by discharging a juror who realized during trial that he knew the victim of one of the offenses and who stated that he could find it "quite hard" to be fair and impartial. The juror was the only African-American on the venire, defendant was an African-American, the juror had made other attempts to be removed from the jury, and the judge expressed doubts whether the juror was being truthful. Although the defendant did not seek to have the juror removed, "[w]e cannot conclude that the trial court abused its discretion by removing a juror who admitted that he would find it 'quite hard' to be a fair and impartial juror." The mere fact that defendant did not object to leaving a juror on a case does not mean that the "circuit judge should surrender his obligation to ensure a fair trial for both the State and the defendant."

People v. Smith, 341 Ill.App.3d 729, 793 N.E.2d 719 (1st Dist. 2003) After the jury had deliberated for several hours the court was informed that one of the jurors had told other jurors that she knew defendant and his two alleged accomplices, and was aware of their gang activities and the relative heights of defendant and one of the accomplices. When questioned in chambers, the juror stated that she recognized defendant and had seen him and the two accomplices selling drugs in her relative's neighborhood. She admitted that she had told several other jurors about her knowledge of defendant and the two accomplices. The jurors to whom the first juror had spoken were also questioned, and said they had been told that defendant was "a bad kid," the three men were gang members, and one of the accomplices was taller and heavier than defendant. The juror who knew defendant was dismissed, as was a second juror who said that he could no longer be impartial. A third juror was allowed to remain on the jury after she said that she would be affected by the statements but could make a decision based solely on the evidence. As a matter of plain error, the Appellate Court held that defendant was denied a trial by an impartial jury. The excluded juror's comments were clearly prejudicial to defendant. Although the trial court conducted extensive *voir dire* and received assurances from the remaining jurors that they could be fair, those actions were not sufficient to preclude any prejudice. The court noted that "[a] juror's statement upon interrogation that he has not been influenced should not be considered conclusive, for jurors themselves are incapable of knowing the effect which prejudicial matters may have upon their unconscious minds."

People v. Bennett, 282 Ill.App.3d 975, 669 N.E.2d 717 (3d Dist. 1996) Defendant's right to an impartial jury and to be present were violated where 16 of the 29 veniremembers were questioned outside his presence. The Court found that defendant could have helped counsel decide whether peremptory challenges should be exercised against any of five members of the petit jury who were questioned in defendant's absence, and that the trial court's asserted reason for excluding defendant (that there was a security risk) was not sustained by the record.

People v. Boston, 271 Ill.App.3d 358, 648 N.E.2d 1002 (1st Dist. 1995) A veniremember testified that she was an administrative assistant with the Cook County State's Attorney's office, knew an Assistant State's Attorney who was a possible witness, worked with the witness's sister and was a friend of a police officer. However, she also said that she would not give the Assistant State's Attorney any more credence than any other witness, she was also the friend of a public defender and she could be fair and impartial. The Appellate Court held that the trial court did not err by refusing to excuse the juror for cause. Veniremembers are not to be excluded merely because they are employed by the government or have some relationship to persons connected with the trial; instead, the standard is whether the prospective juror can be "impartial." Here, the veniremember unequivocally stated that she could be fair.

People v. Stremmel, 258 Ill.App.3d 93, 630 N.E.2d 1301 (2d Dist. 1994) At defendant's trial the venireman called to fill the last spot on the jury, William Maschke, was a 19-year veteran of the Rockford Police Department. The Court held that the trial judge erred by refusing to grant the motion to excuse Maschke for cause. The trial court has broad discretion to determine whether a juror can be impartial, but "the relationship of a prospective juror to a party can be so close" that the juror must be excused as a matter of fundamental fairness. Although a venireman is not automatically disqualified because he is a police officer, Maschke was a 19-year veteran of the police department to which 11

witnesses also belonged. Because Maschke had an especially close relationship to the case he should have been excused for cause.

People v. Reinbold, 247 Ill.App.3d 498, 617 N.E.2d 436 (3d Dist. 1993) Although a venirewoman need not have been excused merely because her father was a State police officer who was not involved in the case, a second venirewoman said that she wanted defendant to prove his innocence, that she would "kinda like to hear his explanation" and that she would "feel better if he tried to tell us he's innocent." The juror also said that she would believe that defendant had "something to hide" if he did not testify. Although the trial judge managed to rehabilitate the juror by "drawing out some evidence of impartiality, . . . a great proportion of the *voir dire* shows that she expected the defendant to prove that he was innocent." See also, **People v. Stone**, 61 Ill.App.3d 654, 378 N.E.2d 263 (5th Dist. 1978).

People v. Johnson, 215 Ill.App.3d 713, 575 N.E.2d 1247 (1st Dist. 1991) The trial judge erred by denying defendant's challenges for cause as to three jurors. The first juror stated that his family members had been victims of a robbery and his sister had been involved in an armed robbery. When the judge asked him if anything about those incidents would affect his ability to be fair, he stated, "I hope not." The second juror had been robbed at knife-point, his friends had been burglarized and one friend had been beaten in front of his home. He responded "not really" when asked whether those crimes would impair his ability to be impartial. The third juror had been robbed and his car had been stolen, and both his mother and his wife had been raped. When asked if those experiences would affect his ability to be fair, he stated "I don't think so." The jurors should have been dismissed for cause because they were crime victims or had friends or relatives who were crime victims, and because each "equivocated" or "expressed self-doubt" when first asked about their ability to be impartial.

People v. Green, 199 Ill.App.3d 927, 557 N.E.2d 939 (4th Dist. 1990) The defendant sought to excuse a prospective juror for cause because she was a secretary in the State's Attorney's office. The challenge for cause was denied, and defendant used a peremptory challenge to excuse her. The Court found that the juror should have been excused for cause. However, the Court held that the defendant failed to preserve the issue because, after using all of his peremptory challenges, he did not ask for an additional peremptory or indicate that he would have excused a juror if the defense had any remaining peremptories.

People v. Rogers, 135 Ill.App.3d 608, 482 N.E.2d 639 (2d Dist. 1985) Defendant presented a consent defense but was convicted of attempt rape. After the verdict had been returned, a juror informed the judge that another juror had read a newspaper article about the case, in violation of the court's admonitions, and had discussed it with other jurors. The article disclosed that defendant had been arrested about three years earlier on charges of kidnapping and rape in separate incidents, that defendant had been convicted of kidnapping, and that he had been released from prison on the day before the incident in the instant case. One juror admitted reading the article and mentioning it to other jurors. He said he told the other jurors that the article did not reveal anything they had not heard in the courtroom. Five other jurors remembered being told about the article. Four of them could not recall the specifics of the discussion. One juror, however, stated that he was told the article revealed that defendant had been released from prison just before the incident. The Court held that defendant was deprived of a fair and impartial jury and that the error was not harmless. The information about defendant's prior arrest for rape was not reversible error by itself, because the complainant's testimony was clear, convincing and corroborated. However,

before trial the judge had granted defendant's motion *in limine* to exclude the fact that defendant had been released from prison on the day before the incident, because such evidence was "unduly prejudicial." Thus, a juror "had information which was specifically excluded by the trial court because of its prejudicial nature."

People v. Gaston, 125 Ill.App.3d 7, 465 N.E.2d 631 (1st Dist. 1984) Several days after the verdict, defendant discovered that the jury foreman was a part-time suburban police officer. The trial judge concluded that the juror was not "terribly biased." Noting that the juror had disclosed that he was an engineering assistant, the Appellate Court found that the juror's failure to disclose his employment as a part-time police officer, "where it would have been natural to volunteer that information[,] raises some question as to his motivation." Furthermore, the trial judge's conclusion that the juror was not "terribly biased" suggested "that the judge himself had some doubt about whether the juror was in fact wholly unbiased." See also, **People v. Witte**, 115 Ill.App.3d 20, 449 N.E.2d 966 (2d Dist. 1983).

People v. Mitchell, 121 Ill.App.3d 193, 459 N.E.2d 351 (2d Dist. 1984) The trial judge abused his discretion by denying a defense motion to reopen *voir dire* in regard to one juror. During *voir dire*, a prospective juror responded that he had not been the victim of a crime. After the juror's panel was accepted and sworn, defense counsel learned that the juror had been the victim of a burglary in 1975. The Appellate Court held that defendant was entitled to reopen *voir dire*. Since this error involves "the right to a fair trial by a panel of impartial jurors [it] cannot be disposed of by the harmless error rule."

People v. Feagans, 118 Ill.App.3d 991, 455 N.E.2d 871 (4th Dist. 1983) Defendant contended that the trial judge refused to excuse for cause a juror who had indicated that he might consider the testimony of a police officer more favorably than the testimony of other witnesses. The Appellate Court held that because defendant failed to exhaust all his peremptory challenges, he was precluded from complaining that the above juror was improperly impaneled.

People v. Oliver, 50 Ill.App.3d 665, 365 N.E.2d 618 (1st Dist. 1977) A juror called as a witness during post-trial proceedings admitted that he believed the identification testimony of a State witness because "he knew, based on an experience he had, that the victim of a crime never forgets the face of the man who did it." The juror also admitted that he had been previously attacked by two men who fled before taking any money. Since no money was taken, the juror did not think a crime had occurred. Thus, he did not affirmatively respond during *voir dire* when asked if he had ever been the victim of a crime. The Court held that a juror with such a belief could not come to the trial with a mind uncommitted on the question of guilt or innocence." The Court also noted that "questions of a defendant's right to a trial by a fair and impartial jury cannot be disposed of by the rule of harmless error."

People v. Peterson, 15 Ill.App.3d 110, 303 N.E.2d 514 (5th Dist. 1973) The trial judge should have excused a juror who told counsel that she prayed defendants would plead guilty so she could go home.

§32-5(b) Publicity

United States Supreme Court

Skilling v. United States, 561 U.S. 358, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010) Transfer to a different venue for trial is required if extraordinary local prejudice will prevent a fair trial, a basic requirement of due process. Juror exposure to news accounts of a crime alone does not presumptively deny due process.

A presumption of prejudice is created by pretrial publicity only in the most extreme cases, taking into account the following factors: (1) the size and characteristics of the community where the crime occurred; (2) the nature of the publicity, in particular, whether it is of the nature or type that potential jurors could not reasonably be expected to ignore; (3) the lapse of time between the charges being brought and the trial, during which the level and intensity of the publicity may diminish; and (4) the jury's verdict, which may undermine the supposition of juror bias if the jury partially acquits. Applying these factors, the Supreme Court found that there was no presumption of prejudice in Skilling's case. A co-defendant's well-publicized decision to plead guilty shortly before Skilling's trial did not change this result. While that plea created a danger of juror prejudice, the trial judge took steps to reduce that risk. The judge delayed Skilling's trial two weeks, and asked the jurors about their exposure to recent publicity during *voir dire*.

There is no hard-and-fast formula that dictates the necessary depth or breadth of *voir dire*. Since jury selection is particularly within the province of the trial judge, reviewing courts should not second-guess a judge's estimation of juror impartiality. Applying these principles, the Supreme Court rejected Skilling's claim that the five-hour *voir dire* conducted by the trial judge was inadequate to detect juror bias. The Court noted in particular that the judge first screened jurors through a comprehensive written survey drafted in large part by defense counsel. The survey helped identify jurors excusable for cause and provided a springboard for further questioning. The judge conducted individual questioning of jurors, informing jurors that there were no right or wrong answers. The parties were provided an opportunity to conduct follow-up questioning. The seated jurors did not display bias.

The Supreme Court therefore concluded that Skilling did not establish that a presumption of juror prejudice arose or that actual bias infected the jury that tried him.

Press Enterprise v. Superior Court, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) *Voir dire* proceedings are open to the public, and may be closed only based on specific findings that closure is essential and alternatives are inadequate. See also, **People v. Gacy**, 103 Ill.2d 1, 468 N.E.2d 1171 (1984) (judge did not err in refusing to close *voir dire* to the public).

Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961) Where a barrage of inflammatory publicity immediately prior to trial resulted in eight jurors forming opinions that defendant was guilty, a fair trial was impossible. See also, **Rideau v. Louisiana**, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963) where defendant's trial became a "hollow formality" after his "confession" was made into a 20-minute film and broadcast three times on television.

Illinois Supreme Court

People v. Kirchner, 194 Ill.2d 502, 743 N.E.2d 94 (2000) During jury selection, the parties learned that several copies of a newspaper article describing the trial were in the jury assembly room before *voir dire*. *Voir dire* disclosed that only one of the jurors selected to hear the case had seen the article, and that juror said she could remain impartial. Three other jurors had seen articles about the case, but did not indicate whether they saw the article in the jury room. Two of these jurors merely glanced at or “skimmed” articles, and all three said they could remain impartial. The Supreme Court held that defendant was not denied an impartial jury. Mere exposure to publicity about a case does not necessarily violate the constitutional right to an impartial jury; a veniremember who is aware of a case may serve as a juror if capable of deciding the case solely on the evidence presented in court.

People v. Olinger, 112 Ill.2d 324, 493 N.E.2d 579 (1986) The trial judge did not err by denying a motion for change of venue based on extensive publicity regarding the murders for which defendant was charged. The Court noted that there had been extensive publicity in the county including front page newspaper articles. However, there was “nothing in the record to indicate that any of the jurors actually accepted had been exposed to any of the prejudicial and inadmissible publicity. Moreover, none of the actual jurors had been challenged for cause by either defendant.”

People v. Taylor, 101 Ill.2d 377, 462 N.E.2d 478 (1984) Due to the extensive publicity and the jurors’ knowledge about the case, the trial judge erred by denying defendant’s motion for change of place of trial. The Court emphasized that several of the jurors were aware that a co-defendant had been released due to insufficient evidence, and that three jurors knew that the release was the result of the co-defendant passing a lie detector test.

People v. Cain, 36 Ill.2d 589, 224 N.E.2d 786 (1967) Defendant was denied an impartial jury where one juror admitted seeing prejudicial newspaper headlines; the trial judge failed to conduct a meaningful examination of the juror, did not admonish juror not to discuss the headlines with other jurors, and did not instruct the jury to disregard newspaper articles.

Illinois Appellate Court

People v. Pelo, 404 Ill.App.3d 839, 942 N.E.2d 463 (4th Dist. 2010) The defendant is entitled to a change of venue as a result of pretrial publicity if a reasonable apprehension exists that he cannot receive a fair and impartial trial. Mere exposure to pretrial publicity is not enough to demonstrate prejudice. The court must examine the “mood” of the jury actually empaneled, giving deference to the trial court’s judgments regarding the ability of the jurors to be fair.

Two jurors admitted having formed an opinion regarding defendant’s guilt as a result of pretrial publicity. The trial judge accepted assurances by both jurors that they could set that opinion aside and decide the case based on the evidence presented and the law provided by the court, though one juror admitted that it would be difficult. The Appellate Court found no error resulted from the denial of the motion for change of venue.

People v. Mack, 107 Ill.App.3d 164, 437 N.E.2d 396 (4th Dist. 1982) The trial judge granted defendant’s change of venue motion and moved the trial from Livingston to McLean County (an adjacent county). The defendant alleged that the trial should have been moved to a more distant county, since a survey showed 78.3% of people interviewed in McLean County thought defendants were guilty or probably guilty. The Court held that the survey

did not make the decision to hold the trial in McLean County erroneous, especially since the trial judge “liberally granted defense challenges of prospective jurors for cause.”

§32-6

Communication with Jury; Jury Examination of Evidence

§32-6(a)

Questions from Jury; Jury Review of Evidence

United States Supreme Court

Weeks v. Angelone, 528 U.S. 225, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000) No constitutional error occurred where, in response to a capital jury’s question whether it was required to impose a death sentence if it found that defendant was death-eligible, the trial court referred to a paragraph of an instruction that had already been given. The instruction to which the judge referred allowed the jury to consider mitigating evidence and the trial court gave an additional instruction specifically informing the jury that it was required to consider mitigation. In addition, defense counsel specifically asserted in closing argument that the jury could choose not to impose a death sentence even if it found that the aggravating factors were proven, the jury continued to deliberate for more than two hours after receiving the judge’s answer, and after the verdict was returned each juror individually affirmed that he or she had considered mitigating evidence. Thus, there was no reasonable likelihood that the jury believed it was precluded from considering mitigating evidence.

Illinois Supreme Court

People v. Hollahan, 2020 IL 125091 The Appellate Court found plain error when the trial court required the deliberating jury to come back into the courtroom, along with the judge and parties, in order to review a video exhibit admitted at trial. The Supreme Court reversed.

The court looked to **United States v. Olano**, 507 U.S. 725 (1992) for guidance. There, the USSC affirmed a conviction over defendant’s complaint that alternate jurors were present for deliberations. The court held that the error was not the type that affects substantial rights without a showing of prejudice. The defendant here, like the defendant in **Olano**, could not show prejudice absent evidence that the deliberations were in some way impacted by the procedure.

Defendant argued that by forbidding discussion during review, or the freedom to rewind and pause the video, the court improperly limited deliberations. But the Supreme Court considered only whether the jurors were influenced by the judge or parties. Because the trial court required silence, defendant could not show any improper influence.

Nor would the Supreme Court have found error in the first place. The suspension of jury deliberations is not an unusual practice, and nothing inhibited the jury’s discussion of the video once they returned to the jury room. The trial court has discretion over whether and how to allow deliberating jurors review evidence, and this procedure was not an abuse of that discretion.

People v. Averett & Tucker, 237 Ill.2d 1, 927 N.E.2d 1191 (2010) Generally, the trial judge must answer jury questions which ask explicit questions or request clarification about points of law arising from facts showing doubt or confusion. However, the judge may exercise discretion and decline to answer jury questions where the instructions are readily

understandable and explain the relevant law, where further instructions would be misleading, where the jury's request involves a question of fact, or where the answer would express an opinion that would likely direct a verdict for one side or the other.

Where the jury asked the trial court to “[c]larify the charges of intent to sell” in a possession of controlled substances case, and the instructions previously given were explicit and readily understandable, the trial court did not err by directing the jury to review the evidence and instructions and continue to deliberate.

In addition, defense counsel acquiesced in the trial court's answer by assisting the trial court in devising an answer to the question and agreeing to that answer. Thus, defendant waived any right to challenge the answer on appeal.

People v. McLaurin, 235 Ill.2d 478, 922 N.E.2d 344 (2009) To preserve a claim of error for review, counsel must both object to the error at trial and raise the error in the post-trial motion. Although judicial misconduct may provide a basis for excusing forfeiture, this rule is applied only where errors are so serious as to threaten the integrity of the judicial process. The court stressed that the rule allowing judicial misconduct to excuse a forfeiture, which was first recognized in **People v. Sprinkle**, 27 Ill.2d 398, 189 N.E.2d 295 (1963), is based not only on the difficulty of objecting to the trial court's improper actions, but also on the risk that the jury might view the defendant unfavorably due to his objection to the conduct of a judge.

The **Sprinkle** rule did not excuse defense counsel's failure to object to defendant's absence when the trial court considered several notes from the jury. Because this was not a case in which the trial court overstepped its authority in the presence of the jury and counsel was in no way prevented from raising an objection, there were no extraordinary compelling reasons to relax the forfeiture rule.

The plain error doctrine allows a reviewing court to remedy a clearly obvious error, despite a waiver, where the evidence is so closely balanced that the jury's verdict may have resulted from the error, or where the error is so serious that the defendant was denied a substantial right and thus a fair trial. Before addressing either prong of the plain error doctrine, the court must first determine whether a clear or obvious error occurred.

The right to be personally present at trial is not an absolute right under either the Federal or Illinois Constitutions, but is instead a right which is intended to secure other, substantive rights of the defendant. Thus, the right to be personally present is violated under Illinois law only if defendant's absence results in the denial of an underlying substantial right, and under the Federal Constitution only if a fair trial has been denied. Because defendant was not denied any substantive right where communications from the jury were considered in his absence but in the presence of counsel, and because defendant was neither denied a substantial right nor a fair trial, reversal was not required.

The court rejected defendant's claim that had he been present he could have urged the court to adopt a different course of action from that which his counsel recommended. The trial court's actions taken in response to the communications from the jury (i.e., providing transcripts and responding to a claim that the jury was deadlocked) were well within the court's discretion.

The court rejected defendant's argument that the trial court committed plain error by sending a bailiff to the jury room to deliver an oral message to the jury to “keep on deliberating,” after the jury had indicated twice that it was deadlocked. Defendant failed to carry his burden under the plain error rule where he failed to allege any specific prejudice which resulted from the instruction and there was no basis to believe that the bailiff did anything other than deliver the judge's message.

People v. Hasprey, 194 Ill.2d 84, 740 N.E.2d 780 (2000) The trial judge did not err by responding to a jury note, sent before the close of evidence, asking how the jurors should vote if they felt that both parties were at fault. The trial court responded by indicating that the jurors should not discuss the case until they had heard all of the evidence and received instructions. Because defense counsel failed to object to the response or request a mistrial, any issue concerning the judge's response was waived. Furthermore, because the response cured any misunderstanding, the judge was not obligated to declare a mistrial *sua sponte*.

People v. Millsap, 189 Ill.2d 155, 724 N.E.2d 942 (2000) Illinois law requires that jury instructions be "settled" before closing arguments, so the parties may tailor their arguments to the instructions the jury will receive. By introducing the theory of accountability in response to a jury inquiry during deliberations, the trial court deprived the defendant of his constitutional right to make a closing argument on the "theory of guilt upon which he may have been convicted." The court noted that the evidence was close on whether there had been a second offender, but in the absence of an accountability instruction there was no reason for defense counsel to address that point in his closing argument. In addition, defendant had no opportunity to argue that the evidence failed to establish the elements of accountability, which differ from the elements of guilt as a principal. "If, as the State insists, an accountability instruction was appropriate in this case, the State should have asked for such an instruction at the proper time. It was too late for the State to change its theory of the case after the case had been sent to the jury. The court should not submit new charges or new theories to the jury after the jury commences its deliberations."

People v. Pulliam, 176 Ill.2d 261, 680 N.E.2d 343 (1997) During deliberations at the sentencing stage of the death penalty case, the jury sent the following note to the trial judge: "What happens if we cannot reach a unanimous decision on either verdict?" The Supreme Court held that the trial court did not err by responding, "You have your instructions. Keep deliberating." The trial judge has a duty to provide clarification where the jury poses an explicit question on a point of law arising from facts about which there is doubt or confusion. Here, however, the jury had been explicitly instructed that it could not sign a death verdict unless the vote was unanimous, and the instructions already given were readily understandable.

People v. McDonald, 168 Ill.2d 420, 660 N.E.2d 832 (1995) Where defendant represented himself at the death penalty hearing, the trial court erred by responding to the jury's questions during deliberations without informing defendant that a communication had been received. However, defendant suffered no prejudice from the *ex parte* communication where standby counsel was present and the trial judge declined to answer the jury's questions.

People v. Childs, 159 Ill.2d 217, 636 N.E.2d 534 (1994) Defendant was charged with murder and armed robbery; however, the jury was also instructed on involuntary and voluntary manslaughter as lesser-included offenses. Defendant claimed that the shooting in question had been accidental and occurred while he was struggling with the decedent over the latter's gun. The State contended that the offense occurred when defendant attempted to commit an armed robbery. During deliberations, the jury sent a note to the trial judge asking whether it could convict of both armed robbery and manslaughter. The trial court directed the jury to read the instructions and continue to deliberate. The judge informed the prosecutors of

the question and his response, but did not attempt to contact defense counsel. The jury eventually returned verdicts convicting defendant of murder and armed robbery.

The Supreme Court remanded the cause for a new trial. First, the judge erred by refusing to respond to the jury's questions. A trial judge may decline to answer jury questions where the instructions are readily understandable and explain the relevant law, where further instructions would be misleading, or where the answer would express an opinion that would likely direct a verdict for one side or the other. However, explicit questions and those requesting clarification about points of law must be answered. The jury here asked an explicit question about a substantive legal issue - whether it was required to find the defendant guilty of murder if it convicted him of armed robbery. The instructions were potentially confusing on this issue; the jury had received instructions but no verdict forms on felony murder, and the wording of one instruction may have created the impression that a manslaughter conviction required an accompanying conviction for murder. Furthermore, the trial court's confusion about the precise nature of the question required it to seek clarification instead of merely refusing to respond.

The Court also held that because an *ex parte* communication between the judge and jury violates a defendant's constitutional rights to appear and to participate in all proceedings, the trial court should have contacted defense counsel before deciding not to respond to the jury's questions. See also, [People v. Oden](#), 261 Ill.App.3d 41, 633 N.E.2d 1385 (5th Dist. 1994) (the trial court erred by failing to give supplemental instructions in response to explicit questions about the doctrine of constructive possession, and by failing to notify defense counsel of the question.)

[People v. Johnson](#), 146 Ill.2d 109, 585 N.E.2d 78 (1991) During its deliberations at a death penalty hearing, the jury sent a note to the judge requesting a psychiatric diagnostic manual and any reports of a psychiatrist who had testified. The judge did not inform either counsel of the jury's request, but told the jury that it had all the information it was going to get. The trial judge erred by not informing the parties about the jury's request. However, reversal was not required because the documents requested had not been admitted into evidence, and the trial judge therefore had no discretion to provide them in any event.

[People v. Franklin](#), 135 Ill.2d 78, 552 N.E.2d 743 (1990) The court did not abuse its discretion in refusing the jury's request for specific portions of a witness's testimony. The trial court noted that it would have been required to excise portions of the testimony to accommodate the jury's request, and it feared this would confuse the jury and highlight sections of the testimony which should have been still fresh in the juror's minds, since they had heard it the previous day.

[People v. Reid](#), 136 Ill.2d 27, 554 N.E.2d 174 (1990) Defendant was charged with murder and armed robbery. During deliberations, the jury asked whether it could find defendant guilty of one charge and not guilty of the other. The judge contacted counsel and said he was going to respond that the jurors should continue deliberating on the basis of the instructions they had received. The Supreme Court held that the trial judge did not err in his response to the jury question. Although the trial court had discretion to directly answer the jury's question by stating that the jury could find defendant guilty on one count and not guilty on the other, it "had no duty to do so under the circumstances of this case." The jury received a complete set of written instructions, and the judge "apparently determined that the jury was not manifestly confused" and "that the written instructions settled any confusion the jury displayed."

People v. Olinger, 112 Ill.2d 324, 493 N.E.2d 579 (1986) The jury asked to see transcripts of the testimony of several witnesses. The judge had an off-the-record discussion with the parties, and over defense objection sent the jury a note stating, “No, the transcripts are not available. You must rely on your memories.” A judge may furnish the jury with transcripts of testimony if he, within his discretion, believes the transcripts will be helpful.

People v. Queen, 56 Ill.2d 560, 310 N.E.2d 166 (1974) The jury sent a request to the judge that it “would like the defendant’s words on the stand.” The trial judge replied, “[Y]ou must decide on the basis of the testimony heard in the courtroom. I cannot have any testimony of any witnesses read to you.” The Supreme Court reversed the conviction, holding that the trial court’s reply was a declaration that the judge lacked discretion to allow the jury’s request for a review of testimony.

Illinois Appellate Court

People v. Glover, 2023 IL App (2d) 220178 The trial court erred in denying defendant’s motion for mistrial after learning that the jury had possession of the State’s closing argument PowerPoint during deliberations. The PowerPoint contained select portions of body camera footage and defendant’s video interview with police, as well as certain jury instructions and notes explaining the State’s theory of the case.

The jury’s possession of the PowerPoint came to the court’s attention when the jury sent out a note during deliberations which stated that a deputy had removed the disc containing the slides and told jurors they were not supposed to have it, the slides “had personal notes from the State that were not evidence or facts,” and the jurors had already “used the PowerPoint extensively.” In denying the mistrial motion, the judge concluded that its presence in the jury room was harmless beyond a reasonable doubt because the same information had been presented during closing arguments.

The appellate court disagreed. It is error to permit the jury to take into the jury room during deliberations any matter that was not admitted into evidence. The jury’s access to extraneous information during deliberations is presumptively prejudicial where defendant shows that the information relates to any matter at issue in the case and may have influenced the verdict. Upon such a showing, the burden shifts to the State to establish that the error was harmless, and a verdict may stand only where it is obvious there was no prejudice to defendant.

Here, the jury’s note stated that many jurors had “formed thoughts” after viewing the PowerPoint and that its contents were “used...extensively.” And, while the court’s subsequent instruction to the jurors reminded them that “closing arguments are not evidence,” it did not direct the jury to disregard any thoughts formed after viewing the PowerPoint in the jury room. Although the PowerPoint was properly used during closing argument, the jury’s access to it during deliberations was the “equivalent of the prosecutor being present in the jury room for nearly six hours, continuing to argue the State’s case for the jurors.”

Further, the evidence was closely balanced; the jury deliberated for four days, submitted numerous questions to the court, and found at least some mitigating circumstances existed when it rejected the charge of first degree murder in favor of second degree. Accordingly, the error was not harmless, and defendant’s convictions were reversed and the matter remanded for further proceedings.

People v. Russell, 2022 IL App (2d) 190733 Defendant was accused of aggravated leaving the scene of an accident causing death (625 ILCS 5/11-401), after striking and killing a bicyclist late in the evening on a rural highway. According to the elements instruction for the offense, the jury must find, *inter alia*, that the defendant knew that the accident involved another person. The jury in this case sent a note during deliberations, asking if the defendant must know of the involvement of another person at the time of the accident, or whether knowledge acquired at some point later would suffice. The State asserted no time restriction applied, while the defense argued the defendant must know at the time of the accident that another person was involved. The court chose to simply re-refer the jury to the original instructions. The jury found defendant guilty.

The Appellate Court found no abuse of discretion. While the defense was correct that the crime clearly requires the defendant's knowledge to be contemporaneous, this fact was obvious from the pattern instructions, where the next element states that defendant failed to immediately stop his vehicle at the scene of the accident and remain until fulfilling the duty to give information and *render aid*. Because this latter element made sense only if the defendant knew of another person, the instruction did not require further clarification.

Regardless, any error would have been harmless because defendant admitted to a friend after the accident that he knew he hit a bicycle and thought he hurt someone.

People v. Allen, 2022 IL App (1st) 190158 The trial court erred when it failed to answer the jury's question during deliberations. The question suggested the jury was considering finding defendant guilty under an accountability theory, not as the principal as alleged in the indictment, and it was incumbent on the court to clarify the jury's confusion.

Police pulled over a car carrying defendant and his friend, Fields, near the scene of a recent double homicide. Defendant fled, but was apprehended a short time later with a gun that was later linked to the shootings. Fields was released, but a few days later he told police that he witnessed defendant shoot the victims.

Defendant was charged with first degree murder and the firearm enhancement for personally discharging the firearm causing death. The State presented Fields' testimony that he and defendant were hanging out with the victims when defendant shot them. Fields and defendant both fled the scene by jumping into Fields' girlfriend's car, which police stopped shortly thereafter. The State also presented the ballistics evidence linking the recovered gun to the shootings. The defense alleged that Fields committed the crime.

The jury sent eight notes during deliberations. The final note asked for a definition of the word "acts" as contained in IPI 7.02, which defines first degree murder and includes the phrase, "the defendant performed the acts which caused the death..." The jury wondered whether "acts" has a "broader" meaning that includes "involvement" in the murder. The defense asked the court to respond "no" because the question suggested the jury was considering finding defendant guilty as an accomplice. The trial court agreed, but decided to send the jury home for the weekend before responding. When the jury returned on Monday morning, before receiving an answer to its last question, it found defendant guilty of murder but not guilty of the firearm enhancement.

The Appellate Court agreed with defendant's claim that the trial court erred when it failed to respond "no" to the jury's question. First, defendant did not forfeit the claim or invite error when it agreed with the court's proposal to send the jury home for the weekend before answering. The defense made clear its position on the need to answer "no," and did not waver from that position despite agreeing that the jury could be sent home.

Second, it was incumbent on the trial court to ensure the jury was properly instructed. The jury posed a question of law, and failure to answer a question of law is prejudicial error

absent certain exceptions, such as when the words in an instruction have a commonly understood meaning. No exceptions applied here, where the jury was grappling with the meaning of the word “acts” in the context of the murder definition. Providing an answer would have clarified the jury’s confusion on the point of law.

The fact that the jury found defendant guilty of murder but acquitted him of the firearm enhancement indicated that it believed defendant was an accomplice. The State’s theory, however, was that defendant was a principal. The jury did not receive accountability instructions. Thus, finding defendant guilty as an accomplice was improper. The State argued that something else might explain the split verdict, such as lenity. But the Appellate Court held that “prejudicial error results not from the *certainty* that the court’s failure to respond to the jury note caused it to convict defendant on an accountability theory, but rather because the court’s failure to answer the jury note left the door open for the jury to convict defendant on an accountability theory that was never argued at trial.”

People v. Cavitt, 2021 IL App (2d) 170149-B The trial court committed plain error when it unduly restricted the jury’s review of a surveillance video that had been admitted into evidence. The video showed footage from a surveillance video, capturing a controlled drug purchase in a McDonald’s parking lot. When undercover officers approached defendant’s car to make an arrest, defendant reversed, appeared to strike an undercover officer with his car, and drove off. The State charged him with attempt murder and aggravated battery of the peace officers in addition to possession of a controlled substance.

Several officers testified about the operation, purchase, attempted arrest, and the defendant’s flight. The State also introduced a 45-minute surveillance video, though it published only the 16-minutes it claimed was relevant to the incident. The video was described as choppy and grainy.

During deliberations, the jury asked for the video and a computer to view it on. The judge declined, reasoning that unfettered access to the video might allow the jury to overemphasize that evidence. The defense did not object, and the judge showed the video one time to the jury in the presence of the parties, forbidding anyone to speak. The jury convicted defendant of all counts, but the judge, in ruling on a motion for a new trial, found that after several viewings of both the full and abridged videos and reviewing the testimony, it would enter a judgment of acquittal notwithstanding the verdict on the attempt murder charge. The judge concluded that defendant intended to flee from, not harm, the officer. The defendant was sentenced for the drug offense, fleeing and eluding an officer, and aggravated battery of a peace officer.

The appellate court found the judge committed plain error by restricting the jury to a single viewing of the video. Because the video was choppy and grainy, and depicted multiple parties acting simultaneously, it was unreasonable for the court to limit the jury to a single viewing. The error was prejudicial given the importance of the video to the allegations, where the defendant maintained his car never struck an officer.

Even after reconsideration pursuant to supervisory order in light of **People v. Hollahan, 2020 IL 125091**, which found no error when a judge required the jury to review evidence in the courtroom during deliberations, the appellate court still found error. Although it followed **Hollahan** in finding no error in using the courtroom and pausing deliberations during the viewing, it found the case distinguishable on the issue of the court’s restrictive control over the jurors’ ability to view the video, including limiting them to one viewing, and prohibiting rewinding. The video here was unclear and related to several different crimes, and therefore the inability to re-watch the video as many times as the jurors thought necessary was prejudicial.

The court also found error in the court's admonishment to the jury not to "overemphasize" the video. This comment infringed on jury's exclusive right to determine how much weight to give the evidence, and therefore violated defendant's right to trial by jury. Finally, these errors constituted second-prong plain error because it undermined the fairness of the trial.

People v. Harris, 2020 IL App (3d) 160169 The trial court's express refusal to allow jurors to take notes during trial was clear error under [725 ILCS 5/115-4\(n\)](#), but it was not second-prong plain error. The dissenting justice would have found plain error, pointing specifically to the jurors' need to take notes here in order to remember important points where defendant's *pro se* representation led to a disjointed presentation of evidence.

People v. Wallace, 2020 IL App (1st) 172388 For purposes of domestic battery, the statutory definition of "family or household members" includes "persons who have or have had a dating or engagement relationship" but does not include casual acquaintanceships. Case law has established that a dating relationship is a serious courtship, at a minimum an established relationship with a significant romantic focus. Here, the State proved the "dating relationship" element beyond a reasonable doubt where the victim testified that she had been dating defendant for several months, they spoke daily and spent time together shopping, in addition to having a sexual relationship, despite defendant's claim that they were merely "bed buddies."

The trial court did not abuse its discretion in refusing to provide the jury with a non-IPI instruction in response to the jury's request for clarification on what constitutes a "relationship" under the law. The jury had been instructed with the appropriate pattern instructions, and "relationship" has a commonly understood meaning and does not require further explanation.

People v. Johnson, 2019 IL App (3d) 150352-B The trial judge erred by not allowing jurors to take notes during trial. [725 ILCS 5/115-4\(n\)](#), which provides that jurors "shall be entitled to take notes during the trial," protects a defendant's right to a fair trial. The statute is mandatory; the trial court has no discretion to ignore it. The error in forbidding note-taking was not harmless beyond a reasonable doubt where the jury sent out four requests to review evidence during deliberations, including one note which described the jury as "deadlocked" if they could not review certain evidence.

People v. Luellen, 2019 IL App (1st) 172019 After a State witness testified that he originally failed to appear in response to a subpoena because he was fearful, the jury sent out multiple notes indicating that at least one juror had safety concerns. The court individually questioned the jurors and replaced one juror who said he was not sure he could give both sides a fair trial. The court then denied defendant's motion for mistrial.

The jury's notes did not show that jurors had engaged in premature deliberations. Before the close of evidence, jurors are not required to remain silent with each other so long as they keep an open mind. The court had repeatedly admonished the jury not to begin deliberations until instructed. And, the fact that one of the notes was signed by someone identified as the "foreman" did not mean the jurors had deliberated. Several jurors had jury experience that would have exposed them to the concept of selecting a foreperson to communicate with the court.

Also, there was no error in admitting evidence of the witness's fear. The witness did not testify about threats, just his own fear from coming forward. The witness's testimony was probative to explain why he had ignored a subpoena and had to be arrested in order to secure his testimony. Further, defendant invited any error where his counsel attempted to diminish the witness's credibility by commenting on his custodial status during opening statements.

People v. Cavitt, 2019 IL App (2d) 170149 The defendant is entitled to a new trial because the trial court committed plain error when it unduly restricted the jury's review of evidence during deliberations. Defendant was alleged to be the driver for an accomplice participating in a controlled buy of over 900 grams of cocaine. The buy took place in a McDonald's parking lot and was captured on surveillance video. After undercover officers approached his car to arrest him, defendant reversed, struck an undercover officer, and drove off. The State charged him with attempt murder and aggravated battery of the peace officers in addition to possession of a controlled substance.

Several officers testified about the operation, purchase, attempted arrest, and the defendant's flight. The State also introduced a 45-minute surveillance video, though it published only the 16-minutes it claimed was relevant to the incident. The video was described as choppy and grainy.

During deliberations, the jury asked for the video and a computer to view it on. The judge declined, reasoning that unfettered access to the video might allow the jury to overemphasize that evidence – a point he made to the jury when explaining the viewing process. The defense did not object, and the judge showed the video one time to the jury in the presence of the parties, forbidding anyone to speak. The jury convicted defendant of all counts, but the judge, in ruling on a motion for a new trial, found that after several viewings of both the full and abridged videos and reviewing the testimony, it would enter a judgment of acquittal notwithstanding the verdict on the attempt murder charge. The judge concluded that defendant intended to flee from, not harm, the officer.

The Appellate Court found plain error. Because the video was choppy and grainy, and depicted multiple parties acting simultaneously, it was unreasonable for the court to limit the jury to a single viewing. The error was prejudicial given the importance of the video to the allegations. The court also found error in the court's admonishment to the jury not to "overemphasize" the video. Finally, this failure to allow for proper jury deliberations constituted second-prong plain error because it undermined the fairness of the trial.

People v. Ryder, 2019 IL App (5th) 160027 No plain error occurred when the jury watched a video of the defendant's confession during deliberations, despite the presence of a bailiff and clerk. Unlike **People v. Henderson, 2017 IL App (3d) 150550**, where an employee of the State's attorney's office was present during deliberations, the instant case involves only neutral observers. Even if error, it would "not rise to the level of structural error under the second prong of the plain-error doctrine."

People v. Hollahan, 2019 IL App (3d) 150556 During deliberations after a DUI trial, the jury asked to see the videotape of defendant's field sobriety test. Due to equipment limitations, the video was shown in the courtroom with the judge, parties, alternates, and jurors all present. The trial court admonished everyone not to speak during the video, and did not offer to allow the jury to re-watch or rewind the video.

The Appellate Court reversed. Defense counsel's acquiescence in the procedure was not an affirmative waiver but rather simple forfeiture. As such, the error could be analyzed for plain error. The Appellate Court held that jury deliberations must be private and

unfettered. Requiring the jury to review the videotape in the courtroom without being able to talk or re-watch or rewind the video impeded deliberations. The presence of the parties was inherently inhibiting. Because the error had a potential chilling effect on jury deliberations, rendering the trial an unreliable means of determining guilt or innocence, it was structural error and reversible as second-prong plain error.

The court expressed strong disagreement with the Fourth District's opinion in [People v. Lewis, 2019 IL App \(4th\) 150637-B](#), which held that the parties *must* be present when jurors review an exhibit in the courtroom. The court also found that two decisions similar to [Lewis](#), [People v. Rouse, 2014 IL App \(1st\) 121462](#) and [People v. Johnson, 2015 IL App \(3d\) 130610](#), were wrongly decided.

[People v. Jaimes, 2019 IL App \(1st\) 142736](#) Defendant was charged with first degree murder, including an allegation that he personally discharged a firearm, as well as aggravated discharge of a firearm. During deliberations the jury asked whether it could find defendant guilty of murder but not guilty of aggravated discharge and also not find the personal-discharge firearm enhancement. The jury also asked the court to “define what is intended as an ‘act’ in first degree murder.” The court responded to both questions that the jury had received the evidence and instructions and should continue deliberating.

The trial court's response was not an abuse of discretion. Defendant wanted the court to respond that he could not be found guilty of murder if the State did not prove he was the shooter because the State had not asserted an accountability theory. The Appellate Court concluded, however, that the jury's questions did not necessarily refer to accountability; the jury could also have been wondering about giving leniency to defendant. By directing the jury back to the original instructions, the court did not inject an accountability theory into the case. And, there was no legal obligation to respond in the negative because personal discharge of a firearm is not an element of first degree murder, even where the victim died of a gunshot wound. The original jury instructions provided an accurate statement of the law, and it was proper to direct the jury to refer back to them.

[People v. Ware, 2019 IL App \(1st\) 160989](#) The trial court did not err when it referred the jury back to the instructions rather than providing an explicit answer to their question during deliberations. In a case where the jury was instructed on first-degree murder, second-degree murder, and the firearm enhancements, the jury asked whether it should proceed to the firearm enhancement if it “select[s]” the charge of second-degree murder. The Appellate Court decided that the instructions clearly explained that the firearm enhancement applies only to first-degree murder and regardless, defendant could not show prejudice, as the refusal to answer the question had no bearing on the jury's decision to find first rather than second-degree murder.

[People v. Lewis, 2019 IL App \(4th\) 150637-B](#) Where the deliberating jury requested to rehear a 911 call, and the disc containing the recording of the 911 call also contained a second call which had not been admitted into evidence, it was not error to have the jury listen to the 911 call in the courtroom in the presence of the judge, counsel, and the defendant. The procedure was no different than the first time the evidence was played during trial. Proper procedures when a jury requests to review evidence are to either (1) send the evidence to the jury room, or (2) bring the jury to the courtroom with the court, the parties, and counsel present; instruct the jury not to discuss the evidence in the court room, and instruct everyone

else not to comment, communicate, or attempt to influence the jury. While those instructions were not given here, there was no indication of prejudice.

People v. Larke, 2018 IL App (3d) 160253 The trial court has no obligation to provide the jury with a direct answer when asked whether a hung jury would result in an acquittal. A trial court should attempt to answer a jury's question only when "the question is explicit and involves a point of law arising from the facts over which there is doubt or confusion." Here, the court used appropriate discretion by stating that the jury had its instructions and should continue to deliberate.

People v. Peel, 2018 IL App (4th) 160100 When the jury poses a question and the parties agree on an answer, the defendant cannot raise the issue on appeal as plain error. The defense affirmatively acquiesced to the answer below and plain error applies to procedural default, not affirmative acquiescence. The issue must be raised as ineffective assistance of counsel.

People v. Lewis, 2018 IL App (4th) 150637 Where the deliberating jury requested to rehear a 911 call, and the disc containing the recording of the 911 call also contained a second call which had not been admitted into evidence, it was not error to have the jury listen to the 911 call in the courtroom in the presence of the judge, counsel, and the defendant. The procedure was no different than the first time the evidence was played during trial. Proper procedures when a jury requests to review evidence are to either (1) send the evidence to the jury room, or (2) bring the jury to the courtroom with the court, the parties, and counsel present; instruct the jury not to discuss the evidence in the court room, and instruct everyone else not to comment, communicate, or attempt to influence the jury. While those instructions were not given here, there was no indication of prejudice.

People v. Henderson, 2017 IL App (3d) 150550 It is a "cardinal principle" of our criminal justice system that jury deliberations shall remain private and secret. The presence of a third party during deliberations is improper and is reversible error if the defendant suffers prejudice as a result of the "intrusion."

During deliberations in this case, the jury asked to review video and audio evidence. The court did not notify the parties of the jury's request but allowed the jurors to review the evidence with the assistance of an employee of the State's Attorney's Office to operate the video and audio equipment. The jury was instructed not to discuss the case as long as that employee was present. The judge then left the jurors in the courtroom to review the evidence with the State's Attorney's employee and the court bailiff. The parties were informed of this procedure only after the jury notified the court that it had reached a verdict. No objection was raised then, nor was the issue raised in the post-trial motion.

This procedure was "so far beyond the pale of what is expected in a criminal jury trial as to 'erode the integrity of the judicial process.'" The court could not say with any confidence that the procedure did not affect deliberations or result in bias, but could say with "absolute certainty" that allowing the jury to view evidence in the courtroom during deliberations with only the State's Attorney's employee and a bailiff present constituted second-prong plain error.

People v. Matthews, 2017 IL App (4th) 150911 Defendant was convicted of unlawful delivery of a controlled substance based upon a controlled buy arranged by a confidential source. During deliberations, the jury asked to rewatch the surveillance video of the

controlled buy. The court replayed the video for the jury in the courtroom in the presence of the parties, court personnel, and the judge. Defense counsel did not object to this procedure in the trial court. Even if this procedure was error, it did not amount to second-prong plain error because it did not affect the fairness of defendant's trial and did not challenge the integrity of the judicial process. The Appellate Court noted that whether this alleged error is structural in nature is "a determination...best left to our supreme court."

People v. Manning, 2017 IL App (2d) 140930 During jury deliberations in a first degree murder case in which the jury was also instructed on second degree murder, the jury asked whether the charge would revert to first degree murder if it was unable to reach a unanimous verdict concerning the mitigating factor which would reduce the charge to second degree murder. With the agreement of defense counsel and the prosecutor, the trial court responded that the verdict must be unanimous.

The Appellate Court held that in view of defense counsel's acquiescence to the trial court's response, the defense was precluded from challenging that response on appeal. The court noted, however, that the trial court's response did not address the jury's confusion.

The jury was asking whether a unanimous verdict finding the elements of first degree murder would stand if the jury was unable to reach a unanimous verdict on the mitigating factor constituting second degree murder. The response that the verdict must be unanimous did not answer this question, because where the jury unanimously finds that the defendant is guilty of first degree murder but cannot agree on whether there is a mitigating factor for second degree murder, there is a split on whether defendant committed first degree murder. "[I]f some jurors vote to find the presence of a mitigating factor, and if other jurors vote otherwise, the jury is not unanimous on the defendant's guilt of first-degree murder." Under such circumstances, the first degree murder verdict cannot stand.

People v. Peoples, 2015 IL App (1st) 121717 The State charged defendant with first degree murder and a firearm enhancement alleging that he personally discharged a firearm that proximately caused death. Six witnesses testified at trial that the fatal shots were fired from a white van. Three of those witnesses identified defendant as being one of the men in the van and of those three, two testified that defendant fired a gun. The State charged defendant as the principal and argued that he personally fired the fatal shots. The State never argued or pursued a theory at trial that defendant was accountable for the shooting and did not request accountability instructions.

During deliberations, the jury sent a note asking whether someone can be guilty of murder and "not pull the trigger." The note further stated that "we are struggling with the concept of a guilty verdict but not having enough evidence that shows or proves [defendant] was the shooter." Over defendant's objection, the court answered the jury's question: "Dear Jury, the answer is Yes." Five minutes later the jury found defendant guilty of first degree murder, but acquitted him of the firearm enhancement.

The Appellate Court held that the trial court's response to the jury's question was incorrect. Under the facts of this case, where the State never pursued a theory of accountability at trial, it was improper to instruct the jury that it could convict on a theory of accountability. The Court also found that the error was not harmless beyond a reasonable doubt. There was a serious risk that defendant was convicted on a theory never presented to the jury and which defendant never had a chance to contest.

The Court, however, did not find that the error required an outright reversal of defendant's conviction. Although the guilty verdict on first degree murder conflicted with the acquittal of the firearm enhancement, legally inconsistent verdicts do not mandate outright

reversal of a conviction. And even though the facts of this case strongly suggested that the jury did not believe defendant was the “principal shooter,” such a conclusion would still be speculation, and a reviewing court “may not guess as to why a jury did what it did, no matter how obvious it may seem.” The Court remanded the case for a new trial.

People v. Hasselbring, 2014 IL App (4th) 131128 A judge is required to answer questions from the jury if clarification is requested, the original instructions are incomplete, the jurors are confused, or the question concerns “a point of law arising from facts over which doubt or confusion exists.” But in answering the jury’s questions, a judge may not misstate the law or infringe on the province of the jury. And a judge should not answer a question requiring a conclusion on the issues at trial, or express an opinion that would direct a verdict.

Here defendant was charged with aggravated driving with a drug, substance, or compound in his breath, blood, or urine. **625 ILCS 5/11-501(a)(6), (d)(1)(F)**. The trial evidence showed that defendant had Benzoyllecgonine, a cocaine metabolite but not itself a controlled substance, in his blood and urine. During deliberations, the jury sent a question to the court asking if “the cocaine metabolite” qualified as a substance. Over defendant’s objection, the trial judge answered the question by stating that the cocaine metabolite qualified as a drug, substance, or intoxicating compound. Approximately 30 minutes later, the jury found defendant guilty.

The Appellate Court held that the judge’s answer was improper. The ultimate issue here was whether defendant had a drug, substance, or compound in his blood or urine resulting from his use of cocaine. The jury only asked whether the metabolite was a substance, but the court went beyond the question and answered that it was also a drug and an intoxicating compound. This answer essentially directed a verdict for the State and resolved the ultimate issue for the jury. Additionally, since there was no evidence that the metabolite was an intoxicating compound, the answer conflicted with the evidence.

Defendant’s conviction was reversed and remanded for a new trial.

People ex rel. City of Chicago v. Le Mirage, 2013 IL App (1st) 093547 A trial court must instruct a jury that has posed an explicit question or asked for clarification on a point of law. This is true even where the jury was properly instructed prior to deliberation. A trial court may refuse to answer a jury’s question if the instructions already given are readily understandable and sufficiently explain the law, further instruction would not be useful or may mislead the jury, the jury’s inquiry is ambiguous, or answering the question would require expressing an opinion that would likely direct the verdict.

The court instructed the jury that to convict defendants of indirect criminal contempt it must find that defendants willfully violated a court order, but the court did not provide the jury with **IPI Criminal 4th No. 5.01B**, which defines the mental state of knowledge and informs the jury that conduct performed knowingly or with knowledge is performed willfully. After the jury began to deliberate, it asked the court to define “willfully.”

The term “willfully” has no plain or ordinary meaning. It may mean intentionally or knowingly depending on context. To the extent that Illinois equates willfulness with knowledge, rather than intent, it is out of step with other jurisdictions, as well as the term’s common meaning. Therefore, when the jury exhibited confusion regarding the meaning of the term by asking for a definition, the court erred in failing to give the jury **IPI Criminal 4th No. 5.01B**.

While finding error, the Appellate Court declined to find plain error because the evidence was not closely balanced on the issue of defendants’ willful violation of the court’s order, nor was the error so serious that it affected the fairness of the trial.

People v. Williams, 2013 IL App (4th) 110936 When a jury asks an explicit question or request clarification on a point of law arising from facts over which there is doubt or confusion, the trial court has a duty to provide further instruction. A court may refrain from answering a jury question (1) when the previously-given instructions sufficiently explain the relevant law; (2) where further instruction would serve no useful purpose or would mislead the jury; (3) when the jury's question is one of fact; or (4) where the court's response would require it to express an opinion that would likely direct the verdict.

Once jury deliberations commence, the court must refrain from submitting new charges or new theories to the jury. The danger of instructing on new crimes or theories is that the jury may convict defendant of a crime or on a theory that the defendant had no opportunity to defend against.

The State charged defendant with child abduction for attempting to lure a child into his vehicle for an "unlawful purpose." There was evidence that defendant attempted to sell a 14-year-old boy a pair of shoes from his car and asked the boy if he wanted a ride after he said he had no money. The boy also testified that defendant was playing pornography on a laptop that he had in the car. Defendant admitted trying to sell the shoes to the boy and playing pornography on the laptop in the car, but told the police that he "doubted" that the boy could have seen the computer screen.

While deliberating, the jury asked, "Is providing a minor access to pornographic material an unlawful act in violation of a criminal statute?" Over defense objection, the court instructed the jury that "other than a lawful purpose" meant any violation of the criminal code, and gave the jury full instructions on the offense of distributing harmful material to a minor. The State had not charged this offense or pursued it as a theory of "unlawful purpose" at trial. Its theory at trial was that the pornography, like the shoes, was merely part of the lure, rather than the reason for the lure.

The Appellate Court reversed defendant's conviction and remanded for a new trial. The instruction introduced a new theory not argued by the State and allowed the jury to convict defendant for distributing harmful material to a minor, a crime it did not charge. Defendant did not have an adequate opportunity to defend against this theory or charge where it did not become a crucial issue until after the jury deliberations began.

The error was not harmless because whether defendant knowingly showed pornography to the boy was a contested issue of fact. Defendant admitted trying to sell shoes to the boy and offering him a ride, but neither is a crime unless the State can prove an unlawful purpose. The court could not conclude that the jury would have convicted defendant without the instruction.

In the course of its decision, the Appellate Court noted that there is a permissive inference instruction (IPI Criminal 4th No. 8.11A) that allows the jury to infer an unlawful purpose if the defendant attempted to lure a child into a car without the consent of a parent or lawful custodian. That instruction was not given to the jury, but should be given at the new trial.

People v. Coots, 2012 IL App (2d) 100592 The trial court has a duty to provide instruction to the jury where it has posed an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion. This is true even though the jury was properly instructed originally. Reversible error can occur when the jury asks the trial court to define a key term used in the instructions but the court refuses the request.

Defendant was charged with the commission of drug-induced homicide, which required that she unlawfully deliver a controlled substance to another where that person's

death was caused by ingestion of the controlled substance. [720 ILCS 5/9-3.3\(a\)](#). The trial evidence allowed the jury to find that defendant either merely jointly possessed the controlled substance with the deceased, or that she delivered the controlled substance to the deceased.

During deliberations, the jury sent a note reading, “With respect to the definition of the term ‘delivery,’ may the jury reasonably interpret the term to mean ‘give[?]’” With the agreement of the parties, the court told the jury to refer to its instructions, which did not include a complete definition of “delivery.”

The jury’s question demonstrated that it was confused about a question of law and was at least entertaining the belief that defendant could be found guilty by doing no more than handing the heroin to the deceased, which would be legally insufficient to support a guilty verdict. While the Appellate Court held that defense counsel was ineffective in failing to request the complete instruction defining “delivery,” and noted that the judge erred in failing to answer the jury’s question, it concluded that it could not hold that the trial court reversibly erred because defendant acquiesced in the mistake.

People v. McSwain, [2012 IL App \(4th\) 100619](#) The trial court has a duty to provide instruction to the jury where it has posed an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion. This is true even though the jury was properly instructed originally. When a jury makes explicit its difficulties, the court should resolve them with specificity and accuracy.

A court may, however, exercise its discretion and decline to answer a question from the jury in certain circumstances. Appropriate circumstances include when the instructions are readily understandable and sufficiently explain the relevant law, when additional instructions would serve no useful purpose or may potentially mislead the jury, when the jury’s request involves a question of fact, or when giving an answer would cause the trial court to express an opinion likely directing a verdict one way or the other.

Determining the propriety of the trial court’s response to a jury question involves a two-step analysis. First, it must be determined whether the trial court should have answered the jury’s question. A court reviews the trial court’s decision on this point for abuse of discretion. Second, it must be determined whether the court’s response to the question was correct. This is a question of law reviewed *de novo*.

In a prosecution for child pornography requiring proof of a “lewd exhibition” of certain body parts, the jury requested a definition of “lewd.” The court provided the six-factor definition set forth in **People v. Lamborn**, [185 Ill.2d 585, 708 N.E.2d 350 \(1999\)](#), as well as directions that mere nudity without lewdness is not child pornography, and that all six factors need not be involved for a photo to be lewd. It refused to define “lewd” for the jury as “obscene, lustful, indecent, lascivious, or lecherous,” even after the jury requested the dictionary definition of the term.

The Appellate Court concluded that the trial court had a duty to answer the jury’s question, and that the responses of the court were correct. The court accurately stated the law and provided the jury with well-established factors to enable it to determine whether the images were lewd. The **Lamborn** factors were readily understandable and sufficiently explained the relevant law.

The court did not abuse its discretion in refusing to provide the dictionary definition of “lewd.” The dictionary definition could potentially mislead the jury or engender further confusion because it provided little concrete guidance and would most likely cause the jury to request still more help from the dictionary.

People v. Laabs, 2011 IL App (3d) 090913 The general rule when a trial court is faced with a question from the jury is that the court has a duty to provide instruction to the jury when the jury has posed an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion. Nevertheless, a trial court may exercise its discretion to refrain from answering a jury question under appropriate circumstances. One such circumstance is where an answer would result in the submission of new charges or new theories to the jury after the jury commenced its deliberations. A response to a jury's question in that circumstance impinges on defendant's constitutional right to make a closing argument to the jury. **People v. Millsap, 189 Ill.2d 155, 724 N.E.2d 942 (2000).**

The State charged defendant with felony murder and allowed four accomplices to plead only to the underlying felony in return for their testimony against defendant. The prosecution proceeded on the theory that defendant was the principal. Defense counsel argued that the accomplices named defendant to avoid being charged with felony murder and that the accomplices' testimony that they were not present when the shooting occurred was not credible. During its deliberations, the jury asked if under Illinois law all robbers are liable for the murder if one of the robbers commits murder during a robbery. The court answered, "Yes," and instructed the jury on the law of accountability.

The Appellate Court found that the court erred in instructing the jury on a new theory of guilt during deliberations in response to the jury's question. The error was not harmless, despite the State's arguments regarding the strength of the evidence, because defense counsel had no opportunity to address the accountability theory in closing argument. Defense counsel's brief comment in closing statement, that one of the accomplices was the shooter (to which an objection was sustained), was not sufficient to interject the issue of accountability into the case and invite the error. The court refused to speculate what prompted the jury to pose the question. Even if the court were to conclude that the error was invited, it "found no authority to suggest that invited error, however slight, would allow us to ignore the clear precedent" of **Millsap**.

People v. Leach, 2011 IL App (1st) 090339 Although jury instructions are to be settled before closing arguments, the jury may be entitled to further instructions if it poses a question during deliberations. Generally, the trial court has a duty to provide further instruction where the jury poses an explicit question or requests clarification on a point of law arising from facts about which there is doubt or confusion. However, the trial court may refuse to answer a jury question where the instructions are readily understandable and sufficiently explain the relevant law, where further instructions would serve no useful purpose or might mislead the jury, where the jury's inquiry involves a question of fact, or where the giving of an answer would cause the court to express an opinion that would likely direct a verdict one way or the other. In addition, the court should not submit new charges or theories to the jury after deliberations have started.

Defendant was charged with aggravated discharge of a firearm for discharging a firearm in the direction of "Anthony White." The evidence showed that defendant discharged the firearm toward a group of several persons.

The instructions indicated that to convict, the jury was required to find that defendant discharged the firearm in the direction of White. During deliberations, the jury asked whether the aggravated discharge charge applied only to White. The trial court responded by giving a new instruction that replaced the phrase "Anthony White" with the phrase "another person."

The trial judge did not err by responding to the inquiry. The jury's request was explicit and concerned a specific charge relating to a specific fact. Furthermore, the inquiry

concerned a question of law and indicated that the jury was confused about whether the charge applied to anyone other than White. Under these circumstances, the trial court acted properly by answering the question.

Furthermore, the court did not err by giving the replacement instruction. The court noted that the essential elements of aggravated discharge of a firearm are that the defendant knowingly or intentionally discharged a weapon in the direction of another. Because the name of a specific victim is not an element of the offense, the addition of White's name to the charge was mere surplusage. Thus, by giving the revised instruction the trial court did not issue a new theory of liability or deprive the defendant of an opportunity to prepare a defense or make an effective closing argument.

People v. Brown, 406 Ill.App.3d 1068, 952 N.E.2d 32 (4th Dist. 2011) When a deliberating jury asks an explicit question or requests clarification on a point of law arising from facts about which there is doubt or confusion, the judge is usually required to provide further instruction. The trial court may refuse to answer, however, if: (1) the instructions are readily understandable and sufficiently explain the relevant law; (2) further instruction would serve no useful purpose or might mislead the jury; (3) the inquiry involves a question of fact; or (4) answering the question would cause the court to express an opinion that could potentially direct a verdict. If the trial court elects to provide instruction to the jury during deliberations, it must refrain from instructing on new theories of the case. Both parties are entitled to instructions pertaining their theories of the case if supported by the evidence.

Where the evidence was conflicting whether the defendant was an initial aggressor, the trial court did not err by giving IPI Crim. 4th, No. 24-25.09, which states that an initial aggressor is justified in the use of force only where he reasonably believes that he is in imminent danger of death or great bodily harm and has exhausted every reasonable means to escape other than using force, in response to the jury's query whether an initial aggressor is required to attempt to escape before using force. Although IPI Crim. 4th, No. 24-25.09 had been refused by the trial court when tendered by the State at the instruction conference, the instruction would have been proper because the evidence was conflicting and the State argued that the defendant was the aggressor. Similarly, the instruction was appropriate in response to the jury's question because the jury was required to resolve the conflicting evidence, the instruction was directly related to a question about the law, the instruction did not direct a verdict, and the trial judge was not injecting a new theory in the case.

People v. Coleman, 391 Ill.App.3d 963, 909 N.E.2d 952 (4th Dist. 2009)

Although defense counsel may not waive the defendant's right to be personally present during communication between the trial court and the jury, reversal is required only if prejudice resulted. The State carried its burden to prove that the error was harmless beyond a reasonable doubt where the jury's only request was for a definition of the term "abate," and after conferring with counsel the trial court responded with an accurate definition. The court stressed that defendant's presence would have had no substantial relationship to his opportunity to defend against the charge.

People v. Davis, 393 Ill.App.3d 114, 913 N.E.2d 536 (1st Dist. 2009) Under Illinois law, a jury is entitled to have its questions answered. The trial judge has a duty to provide instruction to the jury where it imposes an explicit question or point of law arising from facts over which there is doubt or confusion. However, the court may in its discretion decline to answer a jury's question where the instructions are readily understandable and sufficiently explain the law, where further instruction would serve no purpose or potentially mislead the

jury, where the inquiry involves a question of fact, or where providing an answer would cause the court to express an opinion that would likely direct a verdict one way or the other.

Where the jury asked whether the death penalty had been “taken off the table” to get the defendant to confess, and there had been no evidence at trial concerning the applicability of the death penalty, the trial court erred by responding, “no, please continue your deliberations.” On its face, it appeared that the jury’s question concerned the circumstances surrounding defendant’s confession and whether the possibility of a death sentence had been used as a bargaining chip to elicit a confession. By answering, “[N]o,” the judge submitted new evidence that had not been introduced at trial, bolstered the reliability of defendant’s confession, and undermined defendant’s theory of the case, which was to discredit the reliability of the confession by showing that it was fabricated or coerced.

The court rejected the State’s argument that the trial court’s response was based on the fact that it had presided over the suppression hearing, and therefore knew that no evidence had been presented to show that a death sentence had been used as a bargaining chip. First, the jury may base its decision only on facts obtained at trial, not those disclosed at pretrial hearings. Second, the judge did not purport to have relied on any evidence learned at the suppression hearing. Finally, any such reliance would have been error because the judge would have known only that no evidence on this point had been presented at the suppression hearing, not whether the possibility of a death sentence had come up during interrogation.

The court rejected the argument that the erroneous response was harmless, noting that the jury deliberated for more than six hours before asking the question, was sequestered overnight, twice indicated that it was at an impasse, and returned a verdict within twenty minutes after receiving the improper response. Furthermore, defendant’s confession was the primary evidence of his participation in the crime; the only other evidence was the testimony of two eyewitnesses who initially failed to identify defendant and whose credibility was impeached. Finally, a confession is the most powerful piece of evidence the State can offer – a judge’s erroneous response underscoring the credibility of a confession is likely a critical point in the jury’s deliberations.

People v. McLaurin, 382 Ill.App.3d 644, 889 N.E.2d 1124 (1st Dist. 2008) A criminal defendant has a constitutional right to appear and be present during each critical stage of his trial. Jury deliberations are a critical stage. Thus, the defendant has the right to be personally present when communications from the jury are considered. As a matter of plain error, the trial court erred by excluding the defendant from conferences at which the trial court and the attorneys considered notes received from the jury during deliberations. The trial court also erred by directing the sheriff to tell the jury to continue to deliberate. Any communication between the judge and jury during deliberations should have occurred in open court and in the defendant’s presence.

People v. Falls, 387 Ill.App.3d 533, 902 N.E.2d 120 (1st Dist. 2008) Whether and how to answer questions asked by jurors during deliberations is generally left to the discretion of the trial court, whose ruling will be disturbed on appeal only for an abuse of discretion. However, if jurors ask the trial court to clarify the law, the court must do so. Where it was clear that the jury was concerned about whether a defendant charged with resisting a peace officer must have *physically* resisted, and the instruction given by the judge was silent on the Illinois requirement that the offense of resisting a peace officer requires a “physical act” that is intended to interfere with the officer’s exercise of his duties, the trial court erred by failing to give further clarification. The court noted that the jury acquitted defendant on a battery

charge premised on the assertion that defendant struck the officer, and may have erroneously convicted of resisting a peace officer even if it believed the defendant did not engage in a “physical act.”

People v. Parham, 377 Ill.App.3d 721, 879 N.E.2d 1024 (2d Dist. 2007) The trial court erred by failing to give a direct answer to the jury’s question as to whether it could presume, from the mere fact of the indictment, that a crime had occurred. The question showed a fundamental misunderstanding of the criminal process, undermined the presumption of innocence, and denigrated the State’s burden of proof. By merely restating instructions which had previously been given, none of which directly addressed the question, the judge failed to clearly inform the jury that it could not assume that a crime had occurred.

People v. Murray, 364 Ill.App.3d 999, 848 N.E.2d 160 (4th Dist. 2006) A conviction for home invasion was reversed and the cause remanded for a new trial, because the trial court gave an incorrect statement of Illinois law in responding to a jury question.

People v. Andrews, 364 Ill.App.3d 253, 845 N.E.2d 974 (2d Dist. 2006) The trial judge declined to answer a jury’s question whether there had been testimony on where a vehicle had been found. Generally, the trial judge has the duty to provide instruction when the jury poses an explicit question or requests clarification on a point of law about which there is confusion. However, the trial court may refuse to answer a question involving a factual matter.

People v. Derr, 346 Ill.App.3d 823, 806 N.E.2d 237 (5th Dist. 2004) The trial judge may decline to answer jury questions concerning the law where: (1) the instructions are readily understandable and explain the relevant law, (2) further instructions would be misleading, or (3) the answer would express an opinion that would likely direct a verdict for one side or the other. Otherwise, explicit requests for clarification of the law must be answered. “The law expects trial judges to assist confused jurors when they express a lack of understanding about the application of instructions to the facts they must weigh.” The trial court abused its discretion here by giving a non-IPI instruction that may have confused the jury. The jury had asked whether, to prove felony murder predicated on robbery, the State had to show that the offense of robbery occurred “during” the acts which caused death. Instead of responding “yes”, the judge responded with a non-IPI instruction which informed the jury that although the death and robbery need not be “contemporaneous,” there must be “some concurrence” between the force and the taking of the property. The Appellate Court found that the phrase “some concurrence” would be clear to lawyers and judges, but might be difficult for layman and possibly lead to a belief that defendant could be convicted of felony murder even if he removed valuables from the decedent’s body several hours after the death.

People v. Griffin, 351 Ill.App.3d 838, 815 N.E.2d 52 (4th Dist. 2004) Where defendant was charged with first degree murder and involuntary manslaughter, and the jury sent a note during deliberations asking to have the difference between “knowledge” and “intention” explained, the trial court erred by instructing the jury with paragraph 1 of IPI Crim. 4th No. 5.01B, which defines “knowledge” in terms of prohibited conduct, rather than paragraph 2 of the instruction, which defines “knowledge” in terms of a prohibited result. Because the issue at trial was whether the defendant performed the acts recklessly (in which case she would be guilty of involuntary manslaughter) or with knowledge of a strong probability of death or

great bodily harm (in which case she would be guilty of first degree murder), the failure to give the correct definition of “knowledge” constituted plain error.

People v. Lowry, 354 Ill.App.3d 760, 821 N.E.2d 649 (1st Dist. 2004) Where the defendant was charged with attempt first degree murder, aggravated battery with a firearm and armed robbery, the trial court abused its discretion by refusing to give a clarifying instruction where the jury asked for the meaning of the word “knowingly” and whether a “knowing” act could be “accidental.” Because knowledge was an element of the charged offense, the jury’s question was one of substantive law.

People v. Brown, 319 Ill.App.3d 89, 745 N.E.2d 173 (4th Dist. 2001) Where the jury asked whether it could convict “on this charge based on” an incident which had been admitted as other crimes evidence, the trial court erred by merely responding that the jury was required to follow its instructions concerning the use of the other crimes evidence. The trial judge should have informed the jury that it could not consider the other crimes evidence except on the issues of intent, knowledge and lack of accident. Even where the jury has been properly instructed, the trial court should specifically and accurately respond to explicit questions or requests for clarification on points of law arising from facts about which there is no doubt or confusion. The jury’s question “clearly suggests the jury was having serious difficulties dealing with the concept of the limited purpose for which the other-conduct evidence was admitted.”

People v. Hill, 315 Ill.App.3d 1005, 735 N.E.2d 191 (1st Dist. 2000) Reversible error occurred where, after the trial judge left the courthouse during deliberations, a substitute judge refused to answer the jury’s questions because he was “not familiar with the evidence in the case.” A trial court may, in its discretion, decline to answer jury questions where the instructions are legally correct and understandable, further instruction would mislead the jurors, the jury’s questions raise issues of fact, or an answer might direct a verdict for one party or the other. However, the trial court has the duty to instruct the jury where clarification is requested, the original instructions are incomplete, or the jurors are “manifestly confused.” The substitute judge did not exercise his discretion to decline to answer the questions, but said he would not answer because he was not familiar with the evidence. Thus, the judge “chose to abstain from making a decision. . . [A]bstention is not an appropriate response from a trial judge.”

People v. Long, 316 Ill.App.3d 919, 738 N.E.2d 216 (1st Dist. 2000) The Court reversed defendant’s conviction because, at the jury’s request, the trial judge sent to the jury room an arrest report that had not been admitted into evidence. The court concluded that the error was not harmless; the case involved credibility questions, and the report, which quoted defendant making several profane statements, both reinforced the arresting officer’s testimony and “paint[ed] a picture of defendant that, at best, is not flattering.”

People v. Comage, 303 Ill.App.3d 269, 709 N.E.2d 244 (4th Dist. 1999) Where the jury raises an explicit question manifesting confusion on a substantive legal issue, the trial court is obligated to respond unless the instructions are sufficient to explain the relevant law, further instructions might mislead the jury or otherwise serve no useful purpose, the inquiry involves an issue of fact, or answering the question would cause the court to express an opinion that would likely direct a verdict.

A jury inquiry about “the legal definition of a single word without relating it to any

particular fact of the case,” raises an issue of law rather than one of fact. The trial court has a duty to clarify the instructions even where the word or phrase in question has a plain meaning within the jury’s common knowledge. Once the jury requests clarification, the ultimate issue is not whether the instructions were legally adequate, but whether they were clearly understandable to the jury.

Where the jury’s question related to a substantive question of law (the definition of the required mental state for the offense), could have had a significant effect on the case because the jury might have been confused as to the precise elements to which the mental requirement applied, and the trial court failed to give IPI Crim. 3d No. 5.01B[1], which defines the term in question, the trial court erred by refusing to answer the jury’s question.

People v. Fisher, 281 Ill.App.3d 395, 667 N.E.2d 142 (2d Dist. 1996) The trial court can not inform a jury, before deliberations began, that any requests for transcripts of testimony will be refused. The court must exercise its discretion whether to allow a transcript at the time the request is made, and may not “preempt a future request with a blanket admonition” before deliberations begin.

People v. Tomes, 284 Ill.App.3d 514, 672 N.E.2d 289 (1st Dist. 1996) During deliberations for attempt first degree murder and aggravated discharge of a firearm, the jury sent a note to the trial court stating that it had reached a decision on the aggravated discharge of a firearm charge but was “split” on the attempt murder charge. The note asked if the aggravated discharge count could “stand on itself.” The court responded, “[P]lease continue to deliberate on the charge of attempt first degree murder.” Defendant was subsequently convicted of both offenses.

The Appellate Court held that the trial judge’s instruction to continue deliberating, while “certainly susceptible to an innocent construction, . . . is also susceptible to a construction that directs a verdict of guilty as to attempt murder.” The Court stressed that the response improperly implied that a verdict of guilty of aggravated discharge of a firearm could not “stand alone” and that the jurors should resolve their indecision by convicting defendant of attempt murder.

People v. Landwer, 279 Ill.App.3d 306, 664 N.E.2d 667 (2d Dist. 1996) Defendant presented an entrapment defense, and the jury was instructed with an instruction which states that entrapment does not exist if a police officer “merely afforded” an opportunity to commit an offense in furtherance of a “criminal purpose which the defendant originated.” During deliberations, the jury sent a note to the judge asking for clarification of the word “originated.” The judge responded by saying that the word “has a commonly understood and accepted meaning, and needs no further definition.” Approximately 30 minutes later, the jury requested a dictionary. The trial judge clarified that the purpose of the dictionary was to determine the meaning of the word “originate,” and refused to provide a dictionary.

The Appellate Court held that the trial judge erred by refusing the jury’s request for clarification. Illinois law requires that the trial court clarify jury confusion about questions of law, even where the jury was properly instructed and the defense failed to tender an appropriate instruction. In addition, where the failure to instruct the jury precludes it from considering a viable defense, the error may be considered on review despite the defense’s failure to properly preserve the issue. Here, the jury raised an explicit question - the definition of one word. Furthermore, the question was one of law, since “originated” appears both in the pattern instruction and in the statute defining the entrapment defense. Finally, since there were repeated requests for definition of the same term, the record clearly shows

jury confusion.

People v. Kamide, 254 Ill.App.3d 67, 626 N.E.2d 337 (2d Dist. 1993) The State presented evidence that the breathalyzer taken by the defendant registered a blood alcohol level of .14%. However, defendant claimed that he had inhaled several sprays of Ventolin, an asthma drug, before he was pulled over by the officer. A defense expert testified that the breathalyzer determines blood alcohol levels by measuring the infrared absorption qualities of alcohol, and that albuterol, the active ingredient of Ventolin, absorbs infrared light at the same level as ethyl alcohol. Thus, albuterol registers as alcohol on the breathalyzer. During its deliberations, the jury sent the judge a note asking whether consumption of Ventolin is "considered consumption of alcohol?" The trial court responded that the jury was to decide the case on the testimony, exhibits and instructions it had already received.

The Appellate Court held that the trial judge erred by failing to answer the jury's question. In adopting the DUI provisions of the Vehicle Code, the legislature intended to prohibit the operation of motor vehicles only by drivers who are under the influence of ethyl alcohol. Where the jury raises "an explicit question on a point of law arising from the facts over which there is doubt or confusion," the trial judge should attempt to clarify the confusion. Here, the jury's question showed its confusion over the legal meaning of the word "alcohol," and the evidence demonstrated that the defendant may have consumed a type of alcohol not proscribed by the Illinois Vehicle Code. The trial court committed reversible error by refusing to answer the question.

People v. DeRossett, 237 Ill.App.3d 315, 604 N.E.2d 500 (4th Dist. 1992) Defendant was convicted of criminal trespass to real property because he returned to the Urbana Police Station after being escorted to the street and told not to come back. During deliberations, the jury sent a note asking whether defendant had been told not to reenter the police station under any circumstances, or whether he had been told only that he could not return until he had legitimate business. Over objection, the court had the court reporter read to the jury incriminating testimony from the officer's *redirect* examination. The trial judge abused his discretion because on direct examination, the witness had testified that defendant was told he would be arrested if he reentered the station *and continued to create problems*. On redirect examination, the officer merely agreed with the prosecutor's leading questions which implied that the defendant could return under no circumstances. At issue was whether defendant had sufficient notice that returning to the station would cause him to be arrested; reading only the redirect ignored significant evidence and implied that it was irrelevant whether defendant had been told that he could return on legitimate business.

People v. Gregory, 184 Ill.App.3d 676, 540 N.E.2d 854 (2d Dist. 1989) Defendant was charged with burglary and criminal trespass. The foreman of the jury told the judge that the jurors had reached a verdict, and the judge read verdicts of guilty on both charges. A juror then told the judge to read the burglary verdict again, and the judge saw that it was signed by only ten jurors. Out of the hearing of the jury, the judge informed counsel that there were twelve signatures on the criminal trespass verdict but only ten on the burglary. The judge then sent the jury back to deliberate. Within an hour, the jury returned with unanimous guilty verdicts on both charges. The Appellate Court held that the trial judge's actions "imposed such pressure on the jury as to render the accuracy and integrity of its verdict uncertain. The jury could well have concluded the judge's inattention to the detail of the verdict form was born of his expectation that the jury would return guilty verdicts. Even after

his attention was drawn to the burglary verdict forms, he failed to observe the split, thus reinforcing the notion the guilty verdict was expected.”

People v. Brouder, 168 Ill.App.3d 938, 523 N.E.2d 100 (1st Dist. 1988) At defendant’s trial for resisting arrest, the jury sent several notes to the judge indicating that it was confused. Specifically, the jury twice asked “what defines knowingly resisting arrest?” Also, the jury notes stated: “We are confused as to the knowingly resistance to be arrested. Does it mean a mental state of refusing to be arrested and thereby running away, or physically fighting? Will a step or two away mean resistance.” The trial judge replied to the jury: “You have heard all of the evidence. You have been given the instructions. Continue your deliberations.” Thereafter, defense counsel tendered an instruction defining “knowingly.” The judge reserved ruling on this instruction but before a ruling was made, the jury returned a guilty verdict. The Appellate Court concluded that the jury demonstrated confusion as to a question of law and the trial court committed reversible error by refusing to provide the jury with the tendered instruction defining “knowingly.” Compare, **People v. Sandy**, 188 Ill.App.3d 833, 544 N.E.2d 1248 (4th Dist. 1989) (judge did not err in failing to instruct on the definition of knowing conduct where the jury did not request it).

People v. Tansil, 137 Ill.App.3d 498, 484 N.E.2d 1169 (2d Dist. 1985) The defense at trial was insanity. During deliberations, the jury requested a write-up of the opinions of medical experts who had testified regarding their psychiatric evaluations of the defendant. The request was made at 9:30 p.m., and the trial judge refused the request after making several unsuccessful attempts to contact defense counsel. The jury continued deliberations until 10:00 p.m., reconvened the next day at 9:00 a.m. and returned guilty verdicts at 11:00 a.m. The judge then stated on the record that he told the jury, *inter alia*, that it “is not permitted to receive the testimony or parts of the testimony of the witnesses in writing.”

The Appellate Court found that defendant had been denied a fair trial. First, it was reversible error for the trial judge to consider and respond to the jury’s request without the defendant being present. The requested medical testimony was “highly pertinent to the jury’s deliberations, and may well have been crucial to the defendant’s insanity defense.” In addition, the trial judge committed reversible error by instructing the jury that it was not permitted to review the testimony of witnesses. It is within the trial judge’s discretion to allow or refuse a jury’s request to review testimony, and “we interpret the judge’s response to the jury here as an assertion that he had no discretion to consider the request.”

People v. Robinson, 125 Ill.App.3d 1077, 467 N.E.2d 291 (1st Dist. 1984) A police photo album (“mug shot” book), containing defendant’s picture, was submitted to the jury. The album was used during examination of witnesses, there was extensive testimony about defendant’s appearance on the day of the crime and the sole defense witness testified that he was unable to identify the perpetrator in the album. Since “the defense was based on misidentification and identification was a primary issue,” the “probative value of the ‘mug shot’ book outweighs any prejudicial effect.”

People v. Davis, 105 Ill.App.3d 549, 433 N.E.2d 1376 (4th Dist. 1982) Defendant was sentenced to imprisonment when the jury could not unanimously agree on a sentence of death. After the verdict but before the death penalty sentencing hearing, the defendant moved for a mistrial on the ground that the bailiff had failed to tell the trial judge of the jury’s request for a transcript of testimony. The trial judge stated that such a request had been made and that he would have granted the request for one item of the transcript. The judge

then offered to set aside the verdict, give the jury the item requested and allow the jury to deliberate further. When defendant objected to this procedure, the judge denied the motion for mistrial.

The Appellate Court held that the actions of the bailiff were “egregiously wrong” and that the trial judge erred by finding the error harmless. The trial court “may not speculate as to reasons for the request and especially may not decide on its own that the testimony requested is not critical.” This is especially true here, where the evidence was largely circumstantial and conflicting. The trial judge’s proposed solution to the problem was erroneous. “Once a verdict has been rendered, accepted by the court, and judgment entered thereon, and the jury has separated, the Court has lost control of the verdict, and the only remedies are either mistrial or some variety of post-trial relief, such as judgment n.o.v. or new trial.”

People v. Watson, 107 Ill.App.3d 691, 438 N.E.2d 453 (3d Dist. 1982) A judge has broad discretion in allowing exhibits to be taken to the jury room including such items as bloodstained clothing.

People v. Morris, 81 Ill.App.3d 288, 401 N.E.2d 284 (2d Dist. 1980) At defendant’s trial for burglary, the jury sent the trial judge the following question. “If a person comes into possession of property obtained illegally by another, can he be presumed guilty of burglary even though he, himself, may never have illegally entered the building or removed the property?” The jury had not been instructed on accountability, and the trial judge responded: “Not a proper question! You must decide the case on the instructions as given.” The trial judge’s failure to give additional instructions was reversible error. The jury’s question clearly evidenced confusion and the jury may have convicted defendant on the basis of accountability, which was not charged.

§32-6(b)

Jury Considering Matters not in Evidence

Illinois Supreme Court

People v. Taylor, 166 Ill.2d 414, 655 N.E.2d 901 (1995) No reversible error occurred where the jury was erroneously allowed to see a judicial opinion that had not been admitted to evidence.

People v. Holmes, 69 Ill.2d 507, 372 N.E.2d 656 (1978) At trial, there was testimony that the heel of defendant’s shoe matched that of the assailant. A juror visited a shoe store and inspected various heels. The Court held that the improper information brought to the jury’s attention was crucial to the question of identification, and was reversible error because defendant was not confronted with it at trial and had no opportunity to refute it.

Illinois Appellate Court

People v. Laney, 2024 IL App (1st) 221129 The trial court did not err in summarily dismissing defendant’s post-conviction petition alleging the violation of his right to a fair trial based upon the jury’s consideration of outside information during deliberations. While there was evidence that the jurors had shared personal stories and discussed the “Me Too” movement when deliberating on the predatory criminal sexual assault charges against defendant, jurors are specifically invited to consider their own experiences and observations

by IPI 1.01. Defendant's post-conviction claim was an improper effort to impeach the jury's verdict based on the motive, method, or procedure used to reach the verdict. It did not concern outside information related directly to the issues in defendant's case, and thus defendant failed to state the gist of a claim that his right to a fair trial was violated.

People v. Wilson, 2022 IL App (5th) 190377 The trial court violated defendant's right to an impartial jury by substituting a juror after deliberations had begun without questioning the alternate about possible exposure or influence after he left the courthouse.

The need for substitution arose when the bailiff reported that some of the deliberating jurors had their cell phones with them. After questioning the jurors, it was discovered that one juror had used her phone to look up the definitions of words defined in the jury instructions, including "knowingly." The juror was dismissed for cause and replaced with an alternate. The alternate had left the courtroom five hours earlier, after being admonished not to discuss or read about the case.

Under **People v. Roberts**, 214 Ill. 2d 106 (2005), a trial court may substitute a juror after deliberations at its discretion. A defendant who alleges the court abused its discretion must show prejudice, taking into consideration: (1) whether the alternate juror and any original jurors were exposed to prejudicial outside information or influences; (2) whether the original jurors formed opinions regarding the case before the substitution; (3) whether the court instructed the reconstituted jury to begin its deliberations anew; (4) any indications that the jurors failed to follow instructions; and (5) the length of time jurors deliberated before and after the substitution.

Here, the factors weighed in favor of prejudice. The alternate left the courthouse for five hours, raising the possibility of exposure to outside information or influence. **Roberts** held that trial courts must "take significant precautions to avoid prejudice," and here that required questioning the alternate upon his return. The trial court did not do so. Second, the jurors in this case did form an opinion before the substitution, having signed verdict forms already. The fourth factor also weighed in favor of prejudice, because jurors indicted during questioning about the cell phones that they had stopped faithfully performing their duties, where one juror admitted to playing video games on his phone and another stopped paying attention to discussions. Finally, the jury deliberated 3.5 hours before substitution and 26 minutes afterward, suggesting the jury did not begin deliberations anew as instructed.

Even though defense counsel failed to object, an error affecting the impartiality of the jury rises to the level of second-prong plain error, and therefore the court ordered a new trial.

People v. Bedoya, 2021 IL App (2d) 191127 The trial court did not err in denying defendant's motion for mistrial after one juror informed other jurors about a civil lawsuit that had been filed against defendant and the Boys and Girls Club which sponsored the youth program during which defendant sexually abused the minor victim in this case. After jury selection, but before the presentation of evidence, the court learned that one juror told other jurors that her sister worked for the Boys and Girls Club and that "she might be out of this case" because of the lawsuit against the Club. The court excused the juror in question and one other juror who admitted that the information might affect the juror's ability to be fair. And, the court inquired of the other jurors as to what information they had heard, ultimately obtaining assurances from each that they could remain fair and impartial and decide the case on the facts presented at trial.

In finding that the court did not abuse its discretion, the appellate court noted that the mere fact that a lawsuit had been filed against defendant, without any additional detail, limited any prejudicial effect. And, the information was collateral to the issues at trial and

was actually used to defendant's benefit where defense counsel argued that the alleged victim had a motive to lie to increase his family's chance of receiving a financial benefit from a successful lawsuit.

People v. Caguana, 2020 IL App (1st) 180006 After trial, two jurors at defendant's murder trial admitted that they learned from outside sources that defendant's father had tried to have two witnesses in the case killed. Defense counsel filed a motion for new trial. At the hearing on that motion, one juror said he read an article about defendant's father, and the other said she had heard something about the father's case from a friend. The judge denied the motion for new trial, concluding that the jurors' knowledge of outside information did not warrant reversal because it did not directly relate to defendant's case.

The Appellate Court disagreed. It has long been the rule that a jury verdict cannot be impeached by inquiry into the method by which the jury reached its decision. In the case of outside information, a court must decide, based on the content of the outside information, whether the jury's exposure to it resulted in such a probability of prejudice that the proceedings should be deemed inherently lacking in due process. Here, the Appellate Court concluded that such a probability of prejudice existed based on the jurors' exposure to evidence of defendant's father's murder-for-hire plot.

The Appellate Court noted that it was defendant's father, not a friend or acquaintance, who was the perpetrator. The jurors could have thought that this meant defendant's own father thought defendant was guilty, or that defendant asked his father to solicit the murders of the State's key witnesses. And, important credibility determinations might have been impacted since the jurors could have concluded that those witnesses were telling the truth if someone had been willing to kill them to keep them quiet. While the trial court could not inquire into the actual thought process of the jurors in reaching their verdict, it could consider the likely impact of the outside information on a juror. Here, the court should have concluded that there was a probability of prejudice from the outside information. Accordingly, the Appellate Court reversed and remanded for a new trial.

People v. Hanson, 83 Ill.App.3d 1108, 404 N.E.2d 801 (2d Dist. 1980) At defendant's trial for armed robbery, defendant's coat was introduced and taken to the jury room during deliberations. The jury found currency in a pocket of the coat, and the currency bore evidence of cutting. Since the currency had not been introduced into evidence, it could not be considered by the jury. The Appellate Court reversed because the jury could have inferred that the cutting took place during the struggle with the victim, destroying defendant's claim that he did not participate in the offense.

People v. Carr, 53 Ill.App.3d 492, 368 N.E.2d 128 (2d Dist. 1977) Certain written statements of State witnesses, which contained both prior consistent and prior inconsistent statements of the witnesses were taken to the jury room during deliberations. The prior consistent statements allowed the testimony of the State witnesses to be improperly bolstered and re-emphasized. In addition, prior inconsistent statements generally cannot be taken to the jury room; here, allowing the statements in the jury room was even more improper since the written statements contained additional material which was not admissible, and the jury was not sufficiently instructed as to the limited purpose of the impeaching statements. Reversed and remanded.

§32-6(c)

Communication with Jury

United States Supreme Court

U.S. v. Gagnon, 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985) During trial, a juror became concerned because defendant was sketching portraits of the jury. The judge ordered that the sketching stop but defense counsel suggested that the judge question the juror about possible prejudice. The judge stated that the juror would be questioned in chambers and defendant did not object or ask to be present. The judge then questioned the juror in the presence of defendant's counsel. The Court held that defendant did not have a due process right to be present at the *in camera* discussion on such a minor matter.

Rushen v. Spain, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1984) A contention that *ex parte* communications between a trial judge and a juror can never be harmless error was rejected.

Parker v. Gladden, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966) Bailiff's remarks to jury (that "defendant was guilty and that if there was anything wrong the Supreme Court would correct it") violated defendant's right to trial by impartial jury. "The conduct of the bailiff involves such a probability that prejudice will result that the trial is deemed inherently lacking in due process."

Turner v. Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1964) It was a violation of due process for the jury to be in the custody of two deputy sheriffs who were also principal prosecution witnesses. "The relationship was one which could not but foster the jurors' confidence in those who were their official guardians during the entire period of the trial."

Illinois Supreme Court

People v. McDonald, 168 Ill.2d 420, 660 N.E.2d 832 (1995) Where defendant represented himself at the death penalty hearing, the trial court erred by responding to the jury's questions during deliberations without informing defendant that a communication had been received. However, defendant suffered no prejudice from the *ex parte* communication where standby counsel was present and the trial judge declined to answer the jury's questions.

People v. Childs, 159 Ill.2d 217, 636 N.E.2d 534 (1994) Because an *ex parte* communication between the judge and jury violates a defendant's constitutional rights to appear and to participate in all proceedings, the trial court should have contacted defense counsel before deciding not to respond to the jury's questions. See also, **People v. Oden**, 261 Ill.App.3d 41, 633 N.E.2d 1385 (5th Dist. 1994) (the trial court erred by failing to give supplemental instructions in response to explicit questions about a concept that was not involved in the case, and by failing to notify defense counsel of the question.)

People v. Canaday, 49 Ill.2d 416, 275 N.E.2d 356 (1971) Before a jury verdict will be set aside because of an unauthorized communication with the jury, the defendant must show prejudice. Here, the judge's communication with the jury outside court concerned only when the jury was to appear for trial. See also, **People v. Williams**, 38 Ill.2d 115, 230 N.E.2d 224 (1967) (jurors talked with families by telephone, but did not discuss trial); **People v.**

Georgev, 38 Ill.2d 165, 230 N.E.2d 851 (1967) (prejudice would not be presumed where jury mingled with spectators and witnesses before being sworn).

People v. Kawoleski, 313 Ill. 257, 145 N.E.2d 203 (1924) Defendant was entitled to a new trial where sheriff, who was in charge of jury, said that “it should not take more than two or three minutes to convict that bird.” This remark was made during trial and within the hearing of the jury.

Illinois Appellate Court

People v. Polk, 2024 IL App (1st) 181933 Matters of jury selection and jury management are within the sound discretion of the trial court, including the decision whether to replace a juror after deliberations have begun. The primary consideration in determining whether a court has abused its discretion is the potential prejudicial impact of the court’s decision. In evaluating potential prejudice from a juror’s dismissal, a court should consider the totality of the circumstances, including: (1) whether the alternate juror and remaining original jurors were exposed to outside prejudicial influences; (2) whether the original jurors had formed opinions about the case in the absence of the alternate juror; (3) whether the reconstituted jury was instructed to begin deliberations anew; (4) whether there is any indication that the jury failed to follow the court’s instructions; and (5) the length of deliberations both before and after the substitution.

If the record demonstrates any reasonable possibility that the reason for a juror’s removal during deliberations stems from his or her views regarding the sufficiency of the evidence, the dismissal of that juror constitutes error. Such a standard is meant to ensure that the defendant’s constitutional right to a unanimous jury is protected and to guarantee that a juror will not be removed in a manner that gives the appearance of manipulating the jury into rendering a guilty verdict.

Here, the court did not abuse its discretion when it dismissed two jurors who sent out a note to the judge stating that they felt the instructions were “structured in a style to come to one verdict, and we can’t complete our civic duty due to that.” The appellate court agreed with the circuit court’s conclusion that the note was a clear expression that those jurors would not follow the law as instructed. The jurors did not express any concerns about the evidence in the note, and thus the court did not abuse its discretion by removing jurors who refused to uphold their oath.

On the other hand, the court did err when it denied the defense request to interview one of the excused jurors about her allegations of racial animus in the jury’s deliberations. While the general rule prevents inquiry into the motive, method, or process by which the jury reached its verdict to impeach that verdict, there is a narrow exception to the no-impeachment rule for evidence showing racial bias during deliberations. This juror reported that other jurors had been using the n-word during deliberations. She came forward independently after trial and expressed a desire to speak with the defense. The appellate court remanded to allow the defense to obtain an affidavit from the juror and for further proceedings, if necessary.

People v. Spears, 2024 IL App (1st) 181491 Matters of jury selection and jury management are within the sound discretion of the trial court, including the decision whether to replace a juror after deliberations have begun. The primary consideration in determining whether a court has abused its discretion is the potential prejudicial impact of the court’s decision. In evaluating potential prejudice from a juror’s dismissal, a court should consider the totality of the circumstances, including: (1) whether the alternate juror and remaining original jurors

were exposed to outside prejudicial influences; (2) whether the original jurors had formed opinions about the case in the absence of the alternate juror; (3) whether the reconstituted jury was instructed to begin deliberations anew; (4) whether there is any indication that the jury failed to follow the court's instructions; and (5) the length of deliberations both before and after the substitution.

If the record demonstrates any reasonable possibility that the reason for a juror's removal during deliberations stems from his or her views regarding the sufficiency of the evidence, the dismissal of that juror constitutes error. Such a standard is meant to ensure that the defendant's constitutional right to a unanimous jury is protected and to guarantee that a juror will not be removed in a manner that gives the appearance of manipulating the jury into rendering a guilty verdict.

Here, the court did not abuse its discretion when it dismissed two jurors who sent out a note to the judge stating that they felt the instructions were "structured in a style to come to one verdict, and we can't complete our civic duty due to that." The defense challenged the court's failure to inquire further, but the appellate court disagreed. The circuit court did not err in interpreting the note as a clear expression that they would not follow the law as instructed due to their disagreement with the instructions. The jurors did not express any concerns about the evidence. This was sufficient to demonstrate an abdication of their oath without requiring further inquiry.

On the other hand, the court did err when it denied the defense request to interview one of the excused jurors about her allegations of racial animus in the jury's deliberations. While the general rule prevents inquiry into the motive, method, or process by which the jury reached its verdict to impeach that verdict, there is a narrow exception to the no-impeachment rule for evidence showing racial bias during deliberations. The juror reported that several jurors in favor of convicting the defendants had been "jumping on tables" and "throwing chairs." When asked whether "they" had been using the n-word, the juror (a Black woman) stated, "Yes, they were calling us every name but the child of God." The juror had come forward independently and expressed a desire to speak with the defense, but the court's order hampered the defense's ability to investigate her allegations. This was an abuse of discretion, and the appellate court remanded for further inquiry into the juror's claims.

People v. Walker, 2011 IL App (1st) 072889 The trial court did not coerce a verdict where, midway through a two-day trial, it informed jurors that the trial would conclude on the next court date and that "once you start deliberating, you'll continue to work until you reach a verdict." Taken in context, it was clear that the remarks were intended to advise the jurors that they needed to make appropriate plans to deliberate, including notifying their families and bringing any medications they might need. Noting that the jurors were not deliberating or deadlocked when the remarks were made, the Appellate Court concluded that the judge "simply conveyed a schedule timeline for the remainder of the proceedings," without suggesting that the jury would be held indefinitely until a verdict was reached.

People v. Wilcox, 407 Ill.App.3d 151, 941 N.E.2d 461 (1st Dist. 2010) The trial court's comments to a deadlocked jury are improper if, under the totality of the circumstances, the language interfered with the jury's deliberations and coerced a guilty verdict. Coercion is a highly subjective concept that does not lend itself to precise definition. Thus, the reviewing court is required to determine whether the challenged comments imposed such pressure on minority jurors to cause them to defer to the conclusions of the majority in order to reach a verdict.

The length of deliberations after the trial court's comments does not, in and of itself,

determine whether the comments were the primary factor in returning a verdict. However, the fact that a verdict was reached shortly after improper comments were made gives rise to an inference that minority jurors were coerced.

Where the jury deliberated for almost three hours before indicating that it was deadlocked on all counts, the trial court acted improperly by replying that the jurors had taken an oath to reach a verdict and that they should “continue to deliberate and obtain a verdict.” Approximately 40 minutes later, the jury returned verdicts convicting defendant of first degree murder and aggravated unlawful restraint.

The court concluded that the trial court’s response was improper because it conveyed that the jurors were required by their oaths to reach a verdict, and did not leave open the option of failing to return any verdict. The court also noted that the trial court failed to give a **Prim** instruction, which has been approved by the Illinois Supreme Court and which is designed to guide a deadlocked jury while avoiding any coercion.

In the course of its opinion, the court found that the passage of approximately 40 minutes between the trial court’s comments and the verdicts neither suggested nor rebutted an inference that the verdicts were coerced.

The court also found that giving the coercive response constituted plain error under both the first and second prongs of the plain error rule, because the evidence was closely balanced and because the error affected defendant’s right to a fair trial.

People v. Ross, 303 Ill.App.3d 966, 709 N.E.2d 621 (1st Dist. 1999) Reversible error occurred where, in defense counsel’s absence, the trial court interrupted deliberations at 10:30 p.m. to ask whether the jury would be able to reach a verdict that night. A criminal defendant is entitled to appear “in person and by counsel” at all proceedings that involve substantial rights, including jury deliberations. The court rejected the State’s argument that because defendant was personally present, no error occurred. “A defendant has the right not only to be present in person, but also to be present *by counsel* at all critical stages of the proceedings . . . including . . . communications between the court and jury during deliberations.” The State was unable to demonstrate that the improper communication was harmless error. First, the trial judge acted on his own initiative and was not responding to any action by the jury. Second, after learning that the foreman believed that a verdict could be reached that evening, the judge ordered further deliberations but said he would “call [the jury] out shortly.” In light of the fact that a verdict was returned only 16 minutes later, the jury likely interpreted the judge’s remarks as an admonition to have a verdict ready when it was called back.

§32-7

Sequestration of Jury

Illinois Supreme Court

People v. Gacy, 103 Ill.2d 1, 468 N.E.2d 1171 (1984) Trial judge did not err by refusing to sequester the jurors between their selection and the start of trial.

Illinois Appellate Court

People v. McCoy, 405 Ill.App.3d 269, 939 N.E.2d 950 (1st Dist. 2010) The Appellate Court rejected the argument that the trial judge coerced a verdict by informing the jury it would be sequestered, but allowing deliberations to continue when several jurors said they were close to a verdict and would like more time. Whether the trial court’s remarks coerced a verdict is reviewed for an abuse of discretion. The test is whether under the totality of the

circumstances, the language used by the court actually interfered with the deliberations or coerced a verdict.

Simply informing a jury that it will be sequestered is not necessarily coercive. Similarly, although extremely brief deliberations after a reference to sequestration may invite an inference that the verdict was coerced, the time between a mention of sequestration and a verdict is not generally a conclusive indication that the jury was coerced.

The court concluded that because a number of the jurors volunteered that they were close to reaching a verdict and requested additional time, and no juror interjected to claim that the jury was deadlocked or was having difficulty, the judge's remarks did not coerce a verdict. Furthermore, the jury had deliberated for several hours, had requested and reviewed the trial testimony of certain witnesses, and determined that defendant was not guilty of one charge.

Defendant's conviction for attempt first degree murder and aggravated battery with a firearm was affirmed.

People v. Johnson, 388 Ill.App.3d 199, 902 N.E.2d 1265 (3d Dist. 2009) A criminal defendant has a constitutional right to appear personally and by counsel at all proceedings involving his substantial rights. Thus, once the jury has begun to deliberate, the defendant has the right to be present during any communication between the jury and the trial court. If communication between the judge and jury occurs in the defendant's absence, the State has the burden to show beyond a reasonable doubt that the defendant was not prejudiced. As a matter of plain error, the Appellate Court found that the State failed to sustain its burden of showing that the trial court's *ex parte* communication with the jury did not cause prejudice. After deliberating 30 to 40 minutes, the jury sent a note to the judge stating that it was split 11 to one and asking for advice. Without notifying the parties, the judge responded that the jury should continue to deliberate. The Appellate Court concluded that the State could not carry its burden of showing a lack of prejudice by arguing that due to the short duration of deliberations, the trial judge would have refused to give the *Prim* instruction even had the defense been present and requested the instruction.

People v. Dahlin, 184 Ill.App.3d 59, 539 N.E.2d 1293 (5th Dist. 1989) The jury began deliberating at 9:50 p.m. At 10:55 p.m., the jury was brought into court. The judge ordered a recess and sent the deliberating jurors home for the night with instructions to return the following morning. The judge admonished the jurors not to discuss the case with anyone, including their families. The defendant contended it was reversible error to allow the jurors to return home during their deliberations. The Appellate Court adopted the reasoning of **People v. Jackson**, 105 Ill.App.3d 750, 433 N.E.2d 1385 (4th Dist. 1982), which held that issues regarding jury separation may be waived.

People v. Dungy, 122 Ill.App.3d 314, 461 N.E.2d 485 (1st Dist. 1984) Defendant contended that the trial judge should not have allowed jurors to separate and return to their home during deliberations. The Court held that defendant waived any objection to the above procedure where defense counsel failed to object and "participated in the procedure by suggesting additional cautions for the jury." The Court also noted that the defendant "offers no evidence to establish that she was in any way prejudiced by this procedure." (**Note:** Effective July 1, 1997 Supreme Court Rule 436 specifically authorizes the trial court to permit jurors to separate overnight, on weekends or holidays, or in emergencies.)

People v. Saltz, 75 Ill.App.3d 477, 393 N.E.2d 1292 (2d Dist. 1979) The sequestration of a jury is within the discretion of the trial court. The trial court’s refusal to sequester the jury was not an abuse of discretion in light of the admonishments given to the jurors and the limited coverage of the case.

§32-8

Instructions to Jury

§32-8(a)

General Rules

United States Supreme Court

U.S. v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) Where a defendant elects a jury trial, the rights to due process and a jury trial require that the jury determine every element of the offense beyond a reasonable doubt. Thus, where defendant was charged with making material false statements in a matter within the jurisdiction of a federal agency, the trial court erred by instructing the jury that it was to assume that the defendant’s statements were “material.”

Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) Where the State argues defendant’s “future dangerousness” as a reason for imposing a death sentence, the amount of time defendant will serve under a non-death sentence is a relevant sentencing consideration. Thus, due process required that the jury be instructed that if defendant was not sentenced to death, he would be sentenced to life imprisonment and would be statutorily ineligible for parole.

Illinois Supreme Court

People v. Radford, 2020 IL 123975 Defendant argued that he was denied a fair trial because the trial court issued pattern instructions 11.29 and 11.30, describing the mental state requirement for the offense of child endangerment as “willfully” rather than “knowingly,” and did not provide the clarifying instruction 5.01B, which defines willful conduct as knowing conduct. The Supreme Court found no plain error even though the statute required a knowing rather than willful mental state at the time of the offense. The instructions do not require 5.01B, and the terms are synonymous.

People v. Nere, 2018 IL 122566 Under the drug-induced homicide statute, the State must prove that defendant delivered a controlled substance to another person and that person’s death was caused by the ingestion of that substance. 720 ILCS 5/9-3.3(a). Illinois is a “contributing cause” state. The drug-induced homicide statute does not require that ingestion of the controlled substance be a “but-for” cause of the death.

IPI Criminal 7.15 is a generally correct statement of the law of causation for drug-induced homicide. That instruction states, in relevant part, that to find causation, the State must prove:

that defendant’s acts were a contributing cause of the death and that the death did not result from a cause unconnected with the defendant. However, it is not necessary that you find the acts of the defendant were the sole and immediate cause of death.

Here, the IPI should have been modified to refer only to the defendant’s delivery of heroin as a contributing cause of the victim’s death, rather than to “defendant’s acts” as a

contributing cause, because there was evidence that defendant delivered multiple controlled substances, but she was only charged with drug induced homicide on the basis of the heroin. However, the error was harmless because the instructions as a whole clearly conveyed that defendant was only charged with heroin delivery and that the jury had to find the death was caused by the heroin.

People v. Wright, 2017 IL 119561 It is the burden of the party seeking a specific instruction to present it to the court and request that it be given to the jury. Generally, the court must *sua sponte* offer an instruction only where the jury is being instructed on the elements of the offense, the presumption of innocence, or the burden of proof.

Defendant argued on appeal that the trial court should have *sua sponte* instructed the jury on the definition of a firearm and that a BB gun is not a firearm. The Supreme Court disagreed. Contrary to the position defendant took on appeal, at trial he objected to any instructions about the lesser offense of robbery and maintained that he was not involved in the offense at all. Under these circumstances, the trial court had no duty to *sua sponte* instruct the jury about the definition of a firearm.

People v. Wilmington, 2013 IL 112938 Under Illinois law, five decisions ultimately belong to the defendant after consultation with his attorney: (1) what plea to enter, (2) whether to waive a jury trial, (3) whether defendant will testify, (4) whether to appeal, and (5) whether to submit an instruction on a lesser included offense. The latter decision is left to the defendant because electing to submit a lesser included offense instruction exposes the defendant to possible criminal liability which he might otherwise avoid and amounts to a stipulation that the jury could rationally convict of the lesser included offense.

The court concluded that the same rationale does not apply where defense counsel requests an instruction on second degree murder. Second degree murder is not a lesser included offense of first degree murder, but rather a lesser-mitigated offense requiring that all of the elements of first degree murder, plus a mitigating factor, have been proved. The court concluded that because the defendant is not exposing himself to potential criminal liability which he might otherwise avoid, he does not have the right to decide whether an instruction on second degree murder should be submitted.

People v. Bailey, 2013 IL 113690 Where specific findings by the jury with regard to the offenses charged could result in different sentencing consequences, the trial court abuses its discretion when it refuses a request for specific verdict forms. Refusal of separate verdict forms is not harmless when it is not possible to determine from a general verdict that the jury actually found the defendant guilty of each count and this lack of specificity has adverse sentencing consequences for the defendant. The appropriate remedy in such a case is to interpret the general verdict as a finding that would result in the more favorable sentencing consequence for the defendant.

Defendant was charged with intentional, knowing, and felony murder. He elected to have the court determine his eligibility for a death sentence after the State announced its intention to seek the death penalty. At trial, the court refused defendant's request for separate verdict forms on felony murder. The jury returned a general verdict of guilty on the murder charges. The court sentenced defendant to natural life based on its finding that defendant was death eligible because the murder was committed in the course of an inherently violent felony while defendant acted with the intent to kill or knowledge that his acts created a strong probability of death or great bodily harm.

Relying on [Beck v. Alabama](#), 447 U.S. 625 (1980), and [Bullington v. Missouri](#), 451 U.S. 430 (1981), the Illinois Supreme Court concluded that where a jury in a capital case renders a verdict in the guilt phase that contradicts a fact necessary for a finding of eligibility at the sentencing phase, neither the jury nor the court can make an eligibility finding contradicting the jury's verdict. Therefore, if the jury in defendant's case had been given separate verdict forms and had acquitted defendant of intentional or knowing murder, the court would have been foreclosed from finding defendant death eligible because the jury's verdict would have negated an essential element of the death eligibility factor.

Because the defendant's request for separate verdict forms had sentencing consequences, the court abused its discretion in denying the request. The error is not harmless. Even though there is evidence that could support a finding that the murder was committed knowingly or intentionally, it cannot be ascertained from the jury's general verdict whether the jury actually found defendant guilty of intentional or knowing murder or only of felony murder. The general verdict must be interpreted as a verdict of guilty of felony murder only and as an acquittal of intentional and knowing murder. Because such a verdict foreclosed the court from finding defendant death eligible and sentencing him to natural life, the court vacated defendant's sentence and remanded for resentencing of defendant to a term of years.

[People v. Washington](#), 2012 IL 110283 The question of whether sufficient evidence exists to support the giving of a jury instruction is a question of law subject to *de novo* review.

Both self-defense and second-degree murder instructions must be given on request when any evidence is presented showing the defendant's subjective belief that the use of force was necessary. Once presented with evidence of an actual belief in the need for the use of force in self-defense, it is for the jury to determine whether the subjective belief existed, and whether it was objectively reasonable or unreasonable. To obtain a jury instruction on second-degree murder, it is not necessary for a defendant to also produce evidence that his subjective belief was unreasonable.

Because the court granted defendant's request for self-defense instructions, it was error to deny his request for second-degree murder instructions.

[People v. Sargent](#), 239 Ill.2d 166, 940 N.E.2d 1045 (2010) 725 ILCS 5/115-10 authorizes the trial court to admit hearsay statements made by minor declarants who are the victims of specified sex offenses, if the court finds that the statements provide sufficient guarantees of trustworthiness. If such hearsay is admitted, the court "shall instruct the jury that it is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, the court shall consider the age and maturity of the child, . . . the nature of the statement, the circumstances under which the statement was made, and any other relevant factor." (725 ILCS 5/115-10(c))

The court acknowledged that the trial court erred by failing to instruct the jury in accordance with §115-10, but held that defense counsel waived the issue by failing to request an instruction and present the issue in the post-trial motion. Furthermore, the plain error rule did not apply.

Here, the evidence was not closely balanced concerning the two convictions which were affirmed. Furthermore, the error did not affect the fairness of the trial. The function of jury instructions is to accurately convey the law applicable to the evidence. The erroneous submission of a jury instruction constitutes plain error under the "fundamental fairness" prong only if there is a serious risk that the jurors convicted the defendant because they did not understand the law. There was no such risk here, because the jury was given an

instruction based on the general IPI instruction concerning the credibility of witnesses (Crim. No. 1.02) and was therefore aware of many of the principles specified by §115-10.

The court stressed that it was not suggesting that courts have discretion to tender instructions based on general IPI instructions instead of the IPI instruction implementing §115-10 (IPI Crim. No. 11.66), but only that under the circumstances of this case the failure to comply with §115-10 did not constitute plain error.

People v. Mohr, 228 Ill.2d 53, 885 N.E.2d 1019 (2008) Instructions are proper at a criminal trial if there is some evidence in the record to justify them. Instructions which are not supported by either the evidence or the law should not be given. On review, the question is whether the instructions, considered as a whole, fully and fairly announce the law applicable to the theories of the parties. Error exists if the jury instructions are not sufficiently clear to avoid misleading the jury. The court concluded that the trial judge abused his discretion by giving an instruction defining “provocation” where the State had conceded that provocation existed, and there was no issue to be decided.

People v. Green, 225 Ill.2d 612, 870 N.E.2d 394 (2007) Where the jury was properly instructed concerning the elements of the offense of robbery of a person aged 60 or older, a verdict form finding defendant guilty of robbery was adequate to convict of robbery of a person over the age of 60. The court rejected the argument that the verdict form was insufficient to convict of a Class 1 felony because it omitted any reference to the victim’s age.

People v. Piatkowski, 225 Ill.2d 551, 870 N.E.2d 403 (2007) IPI Crim. 4th No. 3.15 lists five factors to be considered by the jury in weighing identification testimony, with the notation “[or]” between each paragraph. In **People v. Herron**, the Supreme Court held that it is “clear and obvious error” to give IPI Crim. 4th No. 3.15 with the term “or” included, because the jury is instructed both to consider all of the factors and that it may choose to consider only a single factor. Whether the inclusion of the word “or” constitutes plain error depends on the circumstances of the case. Here, the testimony of two eyewitnesses linked defendant to the crime - there was no physical evidence, and defendant made no inculpatory statements. Because the evidence on the five factors described by IPI Crim. No. 3.15 was not overwhelmingly in favor of the State, and because the instruction concerned how to evaluate a critical component of the case, plain error occurred.

People v. Parker, 223 Ill.2d 494, 861 N.E.2d 936 (2006) Where the defendant is charged with first degree murder and the jury is also instructed on second degree murder, no error occurs where the jury receives a specific “not guilty of first degree murder” verdict form, but does not receive a general “not guilty” verdict form. Where a jury is instructed only on first and second degree murder, IPI Crim. 4th, No. 26.02 states that the jury should be given a general “not guilty” verdict form. Where the jury is also instructed on additional charges, a specific “not guilty of first degree murder” verdict form is required to avoid confusion with the verdict forms for the additional offenses. Despite IPI No. 26.02, the court concluded that where only first and second degree murder instructions are given, it is not error to give only a specific “not guilty of first degree murder” verdict form. Because second degree murder is a lesser mitigated offense of first degree murder, and the jury was told that it could consider second degree murder only if it found the defendant guilty of first degree murder, signing the specific “not guilty” form for first degree murder “would unambiguously establish the jury’s intention to acquit on all charges.”

People v. Hudson, 222 Ill.2d 392, 856 N.E.2d 1078 (2006) The Supreme Court held that the trial court properly used a non-IPI instruction concerning felony murder, but suggested a more clear instruction to be used in cases in which the death is caused by the intended victim of a forcible felony.

People v. Medina, 221 Ill.2d 394, 851 N.E.2d 1220 (2006) Under Illinois law, five decisions ultimately belong to the defendant after consultation with defense counsel: (1) what plea to enter; (2) whether to waive a jury trial; (3) whether to testify; (4) whether to appeal; and (5) whether to submit an instruction on a lesser included offense. The court discussed the circumstances in which the trial court should personally admonish the defendant concerning his right to decide whether to submit a lesser included offense instruction and noted that in this case, defendant would not have been entitled to a lesser included offense instruction had he requested one. A lesser included instruction is appropriate where the evidence is such that the jury could rationally find the defendant guilty of the lesser offense while acquitting of the greater offense. Where the evidence clearly showed that the defendant was guilty of possession of controlled substances with intent to deliver, and no basis on which he could have been acquitted of that offense and convicted of simple possession of a controlled substance, a lesser included offense instruction would have been improper.

People v. Herron, 215 Ill.2d 167, 830 N.E.2d 467 (2005) At the time of defendant's trial, IPI Crim. 4th No. 3.15 instructed the jury that in evaluating identification testimony it should consider "all the facts and circumstances." In addition, IPI No. 3.15 listed five specific factors to be considered, with the notation "[or]" between each paragraph. The Committee Note to IPI No. 3.15 indicated that the bracketed numbers were intended to guide court and counsel, and should not be included in the instructions submitted to the jury. Adopting the reasoning of **People v. Gonzalez**, 226 Ill.App.3d 629, 761 N.E.2d 198 (1st Dist. 2001), the court held that including "[or]" between the factors in the instruction given to jurors erroneously implies that identification testimony may be deemed reliable if just one of the five listed factors is present. A jury instruction issue rises to plain error where it creates a serious risk that the defendant was incorrectly convicted because the jury did not understand the applicable law. Where only one eyewitness identified defendant, but that witness's physical description of the robber conflicted with the description of another witness, inclusion of the term "or" created a serious risk of an erroneous conviction. See also, **People v. Durr**, 215 Ill.2d 283, 830 N.E.2d 527 (2005)(erroneous jury instruction constitutes plain error only where it creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law.)

People v. Hopp, 209 Ill.2d 1, 805 N.E.2d 1190 (2004) When instructing a jury on conspiracy, the trial court is required to give an instruction defining the offense that is the subject of the conspiracy. The failure to give such an instruction constitutes plain error, however, only if there is a serious risk "that the jurors incorrectly convicted the defendant because they did not understand the applicable law." Conspiracy to commit murder requires that the conspirator intended to kill. Thus, in a prosecution for conspiracy to commit murder, a proper definition of "murder" would inform the jury that the State was required to prove intent to kill. Here, there was no serious risk that the jury misunderstood the law. The court distinguished the failure to define the offense at all from the situation in which an erroneous instruction is given and rejected the argument that the jury might have believed that the State failed to prove intent to kill, finding that the evidence of defendant's intent was overwhelming. The court also noted the jury was instructed to convict of conspiracy to

commit murder only if defendant intended that first degree murder be committed, and therefore “would undoubtedly understand” that the State had to prove intent to kill.

People v. Carter, 208 Ill.2d 309, 802 N.E.2d 1185 (2003) Under **People v. Brocksmith**, 162 Ill.2d 224, 642 N.E.2d 1230 (1994), the defendant has the right to decide whether to tender an instruction on a lesser included offense. Where the parties fail to tender a lesser included offense instruction, or where defense counsel requests such an instruction but defendant objects, the trial court has discretion to give the instruction if the evidence will support both the charged crime and the lesser included offense. In determining whether to give a lesser included offense instruction *sua sponte*, the trial court should consider the views of the prosecution and the defense, along with society’s interest “in avoiding unjustified exoneration of wrongdoers and in punishing an accused only to the extent of the crime.” No one consideration controls; the trial court must balance the factors and determine whether to exercise its discretion. Here, the trial court did not abuse its discretion by refusing to give an involuntary manslaughter instruction where defendant objected to defense counsel’s request and asked that the jury be instructed only on first degree murder.

People v. Pollock, 202 Ill.2d 189, 780 N.E.2d 669 (2002) The trial court erred by giving a non-pattern jury instruction which misstated the law of accountability. The trial court may elect to give a non-pattern instruction where pattern instructions do not accurately reflect the law, but abuses its discretion by giving a non-pattern instruction that is not accurate, simple, brief, impartial and non-argumentative. An inaccurate accountability instruction was not harmless error merely because the trial court also gave the IPI instruction on accountability. Where the jury receives conflicting instructions, only one which is an accurate statement of the law, the error is prejudicial because the jury has not been properly instructed on the applicable law.

People v. Bolden, 197 Ill.2d 166, 756 N.E.2d 812 (2001) The trial court did not err by giving a non-IPI instruction that a person is not entitled to have counsel at a lineup conducted before the commencement of adversarial proceedings. The trial court has discretion to instruct the jury on particular matters and whether to use non-IPI instructions. Because defendant attacked the reliability of the identification procedure and repeatedly argued that defense counsel had been excluded from the room where the identification was made, the trial judge properly gave the jury accurate information concerning the relevant law.

People v. Casillas, 195 Ill.2d 461, 749 N.E.2d 864 (2000) The trial judge’s failure to instruct the jury that the indictment is not evidence of guilt does not raise a constitutional issue. Thus, defense counsel’s failure to tender a proper instruction and object to its omission waived the issue.

People v. Simms, 192 Ill.2d 348, 736 N.E.2d 1092 (2000) Because aggravated criminal sexual assault is a general intent crime, jury instructions need not include a specific mental state.

People v. Williams, 181 Ill.2d 297, 692 N.E.2d 1109 (1998) Although the jury did not initially have the benefit of written instructions while they were being retyped, defendant was not precluded from effectively presenting his second degree murder and self-defense claims. The court noted that the oral instructions were proper, the evidence against the

defendant was overwhelming, and the jury deliberated for more than an hour after receiving the written instructions.

People v. Brocksmith, 162 Ill.2d 224, 642 N.E.2d 1230 (1994) Defendant, rather than defense counsel, has the right to decide whether to request a lesser included offense instruction.

People v. Williams, 161 Ill.2d 1, 641 N.E.2d 296 (1994) The indictment alleged that the defendant shot and killed the decedent. Because the State pursued the theory that defendant was the principal, the trial court erred by giving an accountability instruction on murder. However, the Court also concluded that the improper accountability instruction was harmless because, in view of the evidence and arguments in the lower court, the jury could only have concluded that defendant was guilty as a principal or not guilty at all. See also, **People v. Jamison**, 207 Ill.App.3d 565, 566 N.E.2d 58 (3d Dist. 1991) (error to respond to jury's questions with instructions on accountability where theory at trial was that defendant was principal; error was not harmless where the evidence left doubt of defendant's guilt as principal).

People v. Bush, 157 Ill.2d 248, 623 N.E.2d 1361 (1993) The Court held that the trial court erred by giving a non-IPI instruction that could have confused the jury about the elements of home invasion. Although non-IPI instructions may be given where the pattern instructions do not reflect the law, such instructions must be accurate, simple, brief, impartial and non-argumentative. The non-IPI instruction in this case misstated the limited-authority doctrine in that it said that consent for an entry was vitiated merely because criminal acts were subsequently committed, without regard to whether those crimes were intended at the time of the entry. In appropriate cases the jury should be instructed that a consensual entry to a dwelling is unauthorized where the defendant, or one for whose conduct he is accountable, at the time of the entry intends to commit criminal acts once inside the dwelling.

People v. Ramey, 151 Ill.2d 498, 603 N.E.2d 519 (1992) Death penalty defendant was entitled to have the jury decide whether his mental state at the time of the offense rendered him eligible for a death sentence. Thus, where the jury instructions failed to include a mental state element that is an element of the offense, the defendant is entitled to resentencing.

People v. Ogunsola, 87 Ill.2d 216, 429 N.E.2d 861 (1981) The failure to correctly instruct the jury on the elements of the crime is error so grave and fundamental that it can not be waived. See also, **People v. Stromblad**, 74 Ill.2d 35, 383 N.E.2d 969 (1978).

People v. Wilkerson, 87 Ill.2d 151, 429 N.E.2d 526 (1981) The Court held that the jury instructions, were "so confusing that the jury's verdict is suspect and cannot stand." The instructions did not distinguish between the two defendants (one defendant raised an alibi defense and the other raised self-defense), and the issues instruction for the principal offense did not include self-defense, which was set forth in an accompanying instruction.

People v. Kolep, 29 Ill.2d 116, 193 N.E.2d 753 (1963) No single instruction is required to state all of the relevant law on a given subject. It is sufficient if the series of instructions, considered as a whole, fully and fairly announce the applicable law. See also, **People v.**

Mills, 40 Ill.2d 4, 237 N.E.2d 697 (1968); **People v. Harris**, 33 Ill.App.3d 600, 338 N.E.2d 129 (3d Dist. 1975).

People v. Fryman, 4 Ill.2d 224, 122 N.E.2d 573 (1954) A defendant is entitled to have the jury instructed to the law applicable to the facts testified to, but also that applicable to any state of facts which the jury might legitimately find from the evidence to have been proved. In addition, the defendant is entitled to the benefit of any defense shown by the entire evidence. See also, **People v. Jones**, 175 Ill.2d 126, 676 N.E.2d 646 (1997) (in attempt aggravated criminal sexual abuse case, State's evidence raised defense of reasonable belief that 16-year-old complainant was 17).

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People v. Jones, 2024 IL App (1st) 221555 At defendant's trial for attempt first degree murder of a peace officer and unlawful use of a weapon by a felon, the trial court gave a modified version of IPI 24-25.20 on resisting arrest which told jurors that a person may not use force to resist "an *authorized act* or arrest * * * , even if he believes that the *authorized act* or arrest is unlawful and the *authorized act* or arrest in fact is unlawful." This misstated the law. The criminal code provides only that a person may not use force to resist an unlawful *arrest*. 720 ILCS 5/7-7 ("A person is not authorized to use force to resist an arrest...even if he believes that the arrest is unlawful and the arrest is in fact unlawful."); 720 ILCS 5/31-1. But the law does allow an individual to use reasonable force to resist a police officer's unlawful conduct other than an arrest, including unlawful authorized acts. It was error to instruct jurors to the contrary.

The court also erred in giving IPI 24-25.12, which states in relevant part that "A peace officer need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest or to defendant himself and/or another from bodily harm while making the arrest." Here there was no evidence that the police were seeking to arrest defendant prior to the shooting and thus no evidence that he used force to resist an arrest. Accordingly, there was no evidence to support the giving of the instruction, and the court abused its discretion in giving it.

Ultimately, however, the court found both errors harmless beyond a reasonable doubt. Defendant's claim of self-defense was without merit; even if the court accepted defendant's version of events, his use of deadly force against the officers was neither reasonable nor necessary. Accordingly, even if the erroneous instructions had not been given, a rational trier of fact would have rejected defendant's claim of self-defense.

People v. Polk, 2024 IL App (1st) 181933 Pursuant to **Apprendi v. New Jersey**, 530 U.S. 466 (2000), any fact, other than a prior conviction, that increases the penalty for an offense beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. Here, the offense of conspiring to possess heroin with the intent to deliver is a Class 2 felony, carrying a sentencing range of 3-to-7 years. It becomes punishable by up to 40 years if the object of the conspiracy is to possession between 100 and 400 grams of heroin. Under **Apprendi**, the amount of drugs is a fact that must be presented to the jury and proved beyond a reasonable doubt.

Here, the jury did not decide that defendant agreed to the possession of any particular amount of drugs. The jury was only asked to determine whether he agreed to the possession of drugs, generally. The jury's finding that a specific quantity of drugs were possessed by

certain members of the drug conspiracy was not a finding that this defendant *agreed* to possession of that quantity of drugs. Thus, there was an **Apprendi** violation.

Defendant did not object to the violation, however. Accordingly, the appellate court went on to review the matter for plain error. On that question, the court found that while the evidence was overwhelming that defendant “was an active participant in an elaborate drug trafficking conspiracy,” the evidence was closely balanced as to whether defendant agreed to the possession of the specific quantity of drugs in question. Accordingly, the matter was remanded for resentencing within the range applicable to the lesser quantity of drugs for which the evidence of agreement was not closely balanced.

People v. Polk, 2024 IL App (1st) 181933 In what was the first state RICO prosecution in Illinois, the court modeled the jury instructions after the federal RICO instructions and federal case law. With regard to the “predicate activity” requirement, the instruction told the jury that they must find that “a defendant” agreed that members of the conspiracy would commit at least three separate predicate acts, and that the State did not have to prove actual commission of the acts, that “a defendant” agreed to personally commit the acts, or that “a defendant” agreed to “specific” acts. On appeal, defendant argued that using the phrase “a defendant,” rather than “the defendant” allowed the jury to convict a particular defendant so long as it found that any of the defendants agreed to the commission of the three predicate acts. Defendants noted that the federal instruction refers to “the defendant.”

The appellate court found no functional difference between the instructions given here and the federal instructions. In addition to the “predicate activity” instruction, the jury was told that the State had to prove that “each defendant” agreed with another to the commission of the offense of racketeering through a pattern of predicate activity and that “each defendant” did so with the intent that the offense be committed. And, the statement that a defendant need not have agreed to specific acts simply means that it is sufficient for the State to prove that each defendant agreed to at least three predicate acts, but the State need not prove that any *specific* acts were among those agreed to.

And there is no requirement that the jury be given a specific unanimity instruction that it could not convict of racketeering conspiracy unless it unanimously decided which three specific acts defendant agreed be committed or, alternatively, that it must unanimously agree on the specific types or categories of predicate acts he agreed to. Illinois’s RICO statute does not require unanimity as to specific acts, and federal courts have routinely rejected that same argument. With regard to the types or categories of predicate acts, a handful of federal decisions have held that the jury must be unanimous as to the types of predicate acts defendant agreed to, but no cases have held that a types or categories unanimity instruction is required. Further, the Seventh Circuit has not followed the line of cases requiring unanimity as to types of predicate acts. And, regardless, any error would have been harmless here where the trial evidence was focused on only three types of predicate acts – murder, delivery of a controlled substance, and possession of a controlled substance with intent to deliver – and the evidence that defendant agreed to the commission of offenses in all three categories was overwhelming.

People v. Polk, 2024 IL App (1st) 181933 Matters of jury selection and jury management are within the sound discretion of the trial court, including the decision whether to replace a juror after deliberations have begun. The primary consideration in determining whether a court has abused its discretion is the potential prejudicial impact of the court’s decision. In evaluating potential prejudice from a juror’s dismissal, a court should consider the totality of the circumstances, including: (1) whether the alternate juror and remaining original jurors

were exposed to outside prejudicial influences; (2) whether the original jurors had formed opinions about the case in the absence of the alternate juror; (3) whether the reconstituted jury was instructed to begin deliberations anew; (4) whether there is any indication that the jury failed to follow the court's instructions; and (5) the length of deliberations both before and after the substitution.

If the record demonstrates any reasonable possibility that the reason for a juror's removal during deliberations stems from his or her views regarding the sufficiency of the evidence, the dismissal of that juror constitutes error. Such a standard is meant to ensure that the defendant's constitutional right to a unanimous jury is protected and to guarantee that a juror will not be removed in a manner that gives the appearance of manipulating the jury into rendering a guilty verdict.

Here, the court did not abuse its discretion when it dismissed two jurors who sent out a note to the judge stating that they felt the instructions were "structured in a style to come to one verdict, and we can't complete our civic duty due to that." The appellate court agreed with the circuit court's conclusion that the note was a clear expression that those jurors would not follow the law as instructed. The jurors did not express any concerns about the evidence in the note, and thus the court did not abuse its discretion by removing jurors who refused to uphold their oath.

On the other hand, the court did err when it denied the defense request to interview one of the excused jurors about her allegations of racial animus in the jury's deliberations. While the general rule prevents inquiry into the motive, method, or process by which the jury reached its verdict to impeach that verdict, there is a narrow exception to the no-impeachment rule for evidence showing racial bias during deliberations. This juror reported that other jurors had been using the n-word during deliberations. She came forward independently after trial and expressed a desire to speak with the defense. The appellate court remanded to allow the defense to obtain an affidavit from the juror and for further proceedings, if necessary.

People v. Spears, 2024 IL App (1st) 181491 Pursuant to **Apprendi v. New Jersey**, 530 U.S. 466 (2000), any fact, other than a prior conviction, that increases the penalty for an offense beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. Here, the offense of conspiring to possess heroin with the intent to deliver is a Class 2 felony, carrying a sentencing range of 3-to-7 years. It becomes punishable by up to 40 years if the object of the conspiracy is to possession between 100 and 400 grams of heroin. Under **Apprendi**, the amount of drugs is a fact that must be presented to the jury and proved beyond a reasonable doubt.

Here, the jury did not decide that the defendants agreed to the possession of any particular amount of drugs. The jury was only asked to determine whether they agreed to the possession of drugs, generally. The jury's finding that a specific quantity of drugs were possessed by certain members of the drug conspiracy was not a finding that the defendants *agreed* to possession of that quantity of drugs. Thus, there was an **Apprendi** violation.

None of the defendants objected to the violation, however. Accordingly, the appellate court went on to review the matter for plain error. On that question, the court found that while the evidence was overwhelming that the defendants engaged in a far-reaching drug conspiracy, the evidence was closely balanced as to whether they agreed to the possession of the specific quantity of drugs in question. Accordingly, the matter was remanded for resentencing within the range applicable to the lesser quantity of drugs for which the evidence of agreement was not closely balanced.

People v. Spears, 2024 IL App (1st) 181491 In what was the first state RICO prosecution in Illinois, the court modeled the jury instructions after the federal RICO instructions and federal case law. With regard to the “predicate activity” requirement, the instruction told the jury that they must find that “a defendant” agreed that members of the conspiracy would commit at least three separate predicate acts, and that the State did not have to prove actual commission of the acts, that “a defendant” agreed to personally commit the acts, or that “a defendant” agreed to “specific” acts. On appeal, defendants argued that using the phrase “a defendant,” rather than “the defendant” allowed the jury to convict a particular defendant so long as it found that any of the defendants agreed to the commission of the three predicate acts. Defendants noted that the federal instruction refers to “the defendant.”

The appellate court found no functional difference between the instructions given here and the federal instructions. In addition to the “predicate activity” instruction, the jury was told that the State had to prove that “each defendant” agreed with another to the commission of the offense of racketeering through a pattern of predicate activity and that “each defendant” did so with the intent that the offense be committed. And, the statement that a defendant need not have agreed to specific acts simply means that it is sufficient for the State to prove that each defendant agreed to at least three predicate acts, but the State need not prove that any *specific* acts were among those agreed to.

People v. Spears, 2024 IL App (1st) 181491 Matters of jury selection and jury management are within the sound discretion of the trial court, including the decision whether to replace a juror after deliberations have begun. The primary consideration in determining whether a court has abused its discretion is the potential prejudicial impact of the court’s decision. In evaluating potential prejudice from a juror’s dismissal, a court should consider the totality of the circumstances, including: (1) whether the alternate juror and remaining original jurors were exposed to outside prejudicial influences; (2) whether the original jurors had formed opinions about the case in the absence of the alternate juror; (3) whether the reconstituted jury was instructed to begin deliberations anew; (4) whether there is any indication that the jury failed to follow the court’s instructions; and (5) the length of deliberations both before and after the substitution.

If the record demonstrates any reasonable possibility that the reason for a juror’s removal during deliberations stems from his or her views regarding the sufficiency of the evidence, the dismissal of that juror constitutes error. Such a standard is meant to ensure that the defendant’s constitutional right to a unanimous jury is protected and to guarantee that a juror will not be removed in a manner that gives the appearance of manipulating the jury into rendering a guilty verdict.

Here, the court did not abuse its discretion when it dismissed two jurors who sent out a note to the judge stating that they felt the instructions were “structured in a style to come to one verdict, and we can’t complete our civic duty due to that.” The defense challenged the court’s failure to inquire further, but the appellate court disagreed. The circuit court did not err in interpreting the note as a clear expression that they would not follow the law as instructed due to their disagreement with the instructions. The jurors did not express any concerns about the evidence. This was sufficient to demonstrate an abdication of their oath without requiring further inquiry.

On the other hand, the court did err when it denied the defense request to interview one of the excused jurors about her allegations of racial animus in the jury’s deliberations. While the general rule prevents inquiry into the motive, method, or process by which the jury reached its verdict to impeach that verdict, there is a narrow exception to the no-impeachment rule for evidence showing racial bias during deliberations. The juror reported

that several jurors in favor of convicting the defendants had been “jumping on tables” and “throwing chairs.” When asked whether “they” had been using the n-word, the juror (a Black woman) stated, “Yes, they were calling us every name but the child of God.” The juror had come forward independently and expressed a desire to speak with the defense, but the court’s order hampered the defense’s ability to investigate her allegations. This was an abuse of discretion, and the appellate court remanded for further inquiry into the juror’s claims.

People v. Taylor, 2023 IL App (4th) 220381 Defendant was charged with armed habitual criminal, aggravated battery with a firearm, and unlawful possession of a weapon by a felon, all arising out of the shooting of a man named Artemus Hunter. At trial, defendant testified that Hunter brought the gun to defendant’s apartment when he came to collect money from defendant’s girlfriend, that Hunter pulled the gun on him, and that Hunter was shot when the gun went off accidentally. Defendant then took the gun and fled the scene.

The trial court did not abuse its discretion when it denied defendant’s request for jury instructions on the affirmative defenses of self-defense and necessity. To be entitled to a self-defense instruction, the defendant must present some evidence to support each of the following elements:

- (1) force was threatened against a person; (2) the person threatened was not the aggressor; (3) there was an imminent danger of harm; (4) the threatened force was unlawful; (5) the defendant actually and subjectively believed a danger existed which required the use of force he applied; and (6) that belief was objectively reasonable.

Inherent in an assertion of self-defense is that the defendant admit the conduct for which he is being prosecuted.

Here, defendant did not admit that he shot Hunter. Instead, defendant claimed that he grabbed Hunter’s hand, and when he did, the gun discharged. This testimony would not have supported a claim of self-defense, but rather a verdict of not guilty because defendant did not shoot Hunter at all according to his own testimony. Further, the State’s version of events was that defendant shot Hunter after Hunter took a swing at him. Under the State’s version, defendant lacked an objectively reasonable belief that he needed to use the degree or force he did here. Thus, neither the State’s nor defendant’s versions of the incident supported self-defense, and denial of a self-defense instruction was not error.

To warrant a necessity instruction, there must be some evidence that defendant was without blame in occasioning the situation in question and that he reasonably believed his conduct was necessary to avoid a public or private injury greater than that which would result from his own conduct. Alternatively stated, necessity applies where the threat of harm is immediate and defendant’s conduct was the sole option to avoid injury. Defendant could not meet this burden where his testimony was that he took the revolver because he feared retaliation from Hunter’s friends. This claim was too remote and speculative to constitute evidence of a specific and immediate threat, and thus it was not error to deny a necessity instruction.

People v. Khan, 2021 IL App (1st) 190679 The court did not err by not giving IPI 23.43, defining “actual physical control” at defendant’s trial for aggravated DUI. To establish defendant’s guilt, the State was required to prove that defendant “drove or was in actual physical control of the vehicle. The State’s theory at trial was that defendant drove the vehicle even though he was standing outside of it at the time he encountered the police. During his opening statement defendant admitted driving the vehicle, essentially conceding the issue. While the State presented an alternative argument on actual physical control, it was not really an issue in the case, so IPI 23.43 was not necessary.

People v. Nelson, 2021 IL App (1st) 181483 At the start of defendant’s jury trial, the court gave pretrial instructions to the jurors but failed to swear them in. After a lunch break, and before resuming trial, the judge informed the parties of the error. Defense counsel moved for a mistrial. The State objected, citing **People v. Abadia, 328 Ill. App. 3d 669 (2001)**, where the appellate court affirmed a finding of harmless error under similar circumstances. The court agreed with the State, denied the motion for mistrial, and swore in the jury prior to resuming trial. The court also denied defendant’s post-trial motion raising the issue.

The Appellate Court affirmed. While the failure to swear in the jury at the outset was clear error, the delayed swearing of the jury, before deliberations, was not a structural error warranting automatic reversal. And, because defendant did not object at the time the jury initially was not sworn, but only objected when the matter was brought to his attention by the trial court, the Appellate Court concluded defendant had forfeited the error, requiring plain error review.

The court rejected defendant’s argument that the evidence was closely balanced and went on to note that, even if it was, the delayed swearing of the jury did not threaten to tip the scales of justice against defendant. Accordingly, the court would not have found first-prong plain error, regardless. And, the court declined to find second-prong plain error because the error was not so serious that it affected the fairness of defendant’s trial. The jury was given pretrial instructions which imparted much of the same information as the jury oath, the jury was sworn in as soon as the court noticed the error, and no juror expressed an inability to comply with the oath.

People v. Sperry, 2020 IL App (2d) 180296 Defense counsel was ineffective for agreeing to the trial court’s decision not to further instruct jurors with the definition of “knowingly” when the jury specifically asked a question with regard to the meaning of that term in the instructions on aggravated battery. **IPI Criminal 4th No. 5.01B** need not be given initially but should be given where the jury asks for clarification as to the mental state. Defense counsel should have insisted that the instruction be given here where the jury’s question indicated it was confused over whether the State was required to prove that defendant discharged the gun on purpose or whether it was enough for the State to prove that defendant knew a gun was discharged, which was especially problematic where defendant testified that the gun went off on accident.

People v. Harris, 2020 IL App (3d) 160169 While the accomplice witness instruction, **IPI Criminal No. 3.17**, should normally be given any time an accomplice testifies, the trial court’s failure to give the instruction where the *pro se* defendant did not request it did not amount to second-prong plain error. Failure to give a jury instruction is akin to a typical trial error and is not the type of error indicating a breakdown in the adversarial process that would normally warrant second-prong plain-error review.

The dissenting justice disagreed, noting that the credibility of the accomplice witness was critical to the outcome here, where there was no other evidence corroborating the testimony of the confidential informant because surveillance footage of the incident did not show the alleged drug transaction. The dissenting justice would have found second-prong plain error in that denial of the accomplice witness instruction severely threatened the fairness of defendant’s trial.

People v. Rutigliano, 2020 IL App (1st) 171729 Whether to give a particular jury instruction is within the sound discretion of the trial judge. That discretion is not abused so

long as the instructions as a whole fully and fairly apprise the jury of the relevant legal principles. A court reviews *de novo* whether a jury instruction correctly states the law.

At defendant's trial for murder and attempt murder, evidence was presented that defendant consumed alcohol and marijuana before stabbing and killing one person and attempting to stab another. It was not error to give a non-pattern instruction which told jurors that voluntary intoxication is not a defense to a criminal charge. The instruction was an accurate statement of the law. The instruction did not undermine defendant's ability to argue for second degree murder. The jury was not instructed that voluntary intoxication is not a mitigating factor, and nothing in the instruction prevented the jury from finding that defendant's claim of unreasonable belief in self defense was corroborated by the evidence of his alcohol and marijuana consumption.

The majority concluded that the jury did not err in rejecting second degree murder here. Defendant testified that he committed the offenses out of fear of being attacked, he consumed marijuana and alcohol, and witnesses testified to defendant's strange remarks during the incident. But, the jury was not obligated to find defendant credible, other people consumed the same drinks and marijuana, and evidence showed that some of defendant's remarks demonstrated anger rather than fear. The dissenting justice would have found sufficient mitigation in the form of defendant's sudden onset of irrational fear and would have reduced defendant's conviction to second degree murder.

People v. Donlow, 2020 IL App (4th) 170374 Defendant argued that the trial court erred when it tendered **IPI Criminal No. 3.11** without including the language containing the "personal knowledge" requirement of section 115-10.1. The State agreed but argued the error was harmless where the prior statement introduced at trial was based on personal knowledge.

The Appellate Court refused to accept the State's concession of error, reasoning that the pattern instruction is incorrect to include the personal knowledge requirement. According to the court, the personal knowledge requirement is a consideration for the trial court when ruling on the admissibility of the evidence and is not something the jury need resolve. Once the evidence is admitted, the requirement has been met and the jury should be able to consider the evidence substantively. Moreover, in this case no prior statements were admitted for a limited purpose; everything came in substantively. Thus, there was no need to give No. 3.11 at all.

People v. French, 2020 IL App (3d) 170220 The trial court erred in denying defendant's request for self-defense instructions where defendant presented some evidence to support that defense, specifically defendant's own testimony and the testimony of two additional witnesses. The trial court gave second degree murder instructions, indicating it obviously found that defendant had presented some evidence of his belief in the need for self-defense, but the trial judge determined that defendant's belief was unreasonable. The reasonableness of defendant's belief was a matter that should have been left to the jury.

The Appellate Court rejected the State's harmless error argument. Although the jury had convicted defendant of first degree murder, that conviction was not a complete rejection of self-defense but rather only a rejection that defendant's belief in the need for self-defense was unreasonable. If the jurors believed defendant had a reasonable belief in the need for self-defense, they had been left no option but to find him guilty of first degree murder.

People v. Alexander, 2019 IL App (3d) 160709 Evidence at defendant's trial for unlawful use of a weapon by a felon included that police recovered a gun from the ground along the

route of defendant's flight from a traffic stop. During deliberations, the jury requested a definition of "possession." Over defense objection, the court gave IPI 4.16, which discusses both actual and constructive possession. Because the State had proceeded only on a theory of actual possession, it was error to give IPI 4.16. The instruction introduced constructive possession as a new theory of the case, and defendant did not have the opportunity to address it during the trial.

People v. Sims, 2019 IL App (3d) 170417 At defendant's trial for unlawful possession of a weapon by a felon, the trial court did not err in giving IPI 3.01, instructing the jurors that proof of the specific date of the commission of the offense was not a necessary element. While the trial included evidence of defendant's possession of a gun on a separate, prior occasion, it was clear to the jury which incident was on trial. Thus, there was no risk that the instruction would cause the jurors to convict defendant on the uncharged, prior possession. Further, the instruction was proper because the evidence was that the gun at issue was found sometime after 11 p.m. on the date in question, leaving open the possibility that it might have been found after midnight and therefore on the next day.

People v. Blackwood, 2019 IL App (3d) 160161 Trial counsel was not ineffective for failing to request an adverse inference instruction where police officer conducted field sobriety tests outside of view of squad car video camera. IPI Civil 5.01 provides that if a party fails to offer evidence within its power to produce, the jury may infer that the evidence would be adverse to that party if certain factors are shown. General use of such an instruction in criminal cases could infringe on a defendant's Fifth Amendment right because a criminal defendant is not required to produce any evidence.

Further, while it may be arguable that an adverse inference instruction could be an appropriate discovery sanction where an officer fails to record field sobriety tests, defendant specifically stated that he was not arguing trial counsel's ineffectiveness for failing to seek a discovery sanction.

People v. Strickland, 2019 IL App (1st) 161098 Trial court did not abuse its discretion in refusing accomplice witness instruction, IPI 3.17, with regard to defendant's girlfriend and the man defendant originally had asked to commit the murder in question. Defendant's girlfriend did not actively participate in the murder or agree to assist defendant. While she did drive defendant away from the scene, there was no evidence that she actually knew what defendant had done and she did not directly share in the proceeds of the crime. Likewise, the man defendant solicited did not participate in the offense. While the man initially agreed to participate, he testified that he thought defendant was joking.

Even if the court did err in denying the accomplice witness instruction, any error was harmless. The jury was given IPI 1.02, the general witness credibility instruction, and the Court concluded that IPI 1.02 "negated any effect that the failure to issue IPI 3.17 may have had."

People v. Montgomery, 2018 IL App (2d) 160541 In some cases involving missing evidence, the court may give a non-pattern instruction stating, "If you find that the State has allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State's interest." But the instruction is needed only when the facts suggest that the evidence could contradict the State's evidence at trial. Here, while the officer who recorded the traffic stop and field sobriety tests did not preserve the video for trial, the

instruction was not warranted because nothing suggests that the video would conflict with the officer's testimony.

People v. Mitchell, 2018 IL App (1st) 153355 The trial court did not err in failing to define "kidnaping" in the jury instructions. The court defined felony murder and the predicate felony, aggravated kidnaping. But the aggravated kidnaping instruction does not explicitly define kidnaping. In these circumstances, no error occurs if the undefined term is employed in a "general, nontechnical context." Here, there was no possibility of juror confusion where the defendant duct taped the complainant and transported him in his car before the murder.

People v. Choate, 2018 IL App (5th) 150087 Criminal jurisdiction is an essential element of the offense, and if the location of criminal conduct is unclear, a trial court should instruct jurors to find the crime was committed at least partly within the state. In this case, the evidence showed that the predatory criminal sexual assault occurred in multiple states. But the victim testified that the specific incident alleged in the indictment occurred in Illinois, a claim corroborated by other evidence. As such, the jury would have no reason to believe that the crime may have occurred in another jurisdiction, or convict defendant based solely on conduct occurring in another state. Accordingly, no instruction on geographic jurisdiction was required.

People v. Edmondson, 2018 IL App (1st) 151381 The trial court did not err in failing to amend the pattern attempted murder instruction, which requires a showing that defendant intend to kill "an individual," to specify which of two victims defendant must have intended to kill. In some cases with multiple victims, like **People v. Anderson, 2012 IL App (1st) 103288**, there may be a chance of juror confusion over this instruction. If defendant is found to intend to kill one victim, the jury might use that intent to satisfy the intent element of attempted murder if the "individual" is not specified in the instruction. This potential for confusion did not arise here, however, because it was clear that the defendant intended to kill both the murder victim and the attempted murder victim, where he shot the former point-blank in the head, then turned and fired multiple shots at the latter.

People v Olaska, 2017 IL App (2d) 150567 Defendant stabbed three people in a bar in February 2012; one of those people (Wild) died from his injuries and the other two (Hayes and Castaneda) survived. The jury returned verdicts of guilty of intentional, knowing, and felony murder of Wild (predicated on aggravated battery of Hayes) and of unlawful use of a weapon (UUW) but not guilty of attempt murder of Hayes and Castaneda. At sentencing, the trial court merged all of the murder counts into a single count of knowing murder (Count V) and imposed consecutive prison sentences of 40 years for murder and 3 years for UUW (Count XIV).

According to the Users Guide to the Illinois Pattern Jury Instructions, when an issues instruction refers to an offense which was not charged, only the definition instruction of the uncharged offense should be given. While committee comments are not the law, nothing in Illinois law required deviation from the committee's guidance here. The jury was given the definition instruction for aggravated battery, as well as IPI 24-25.06 concerning justified use of force. Aggravated battery was not a charged offense, but the aggravated battery of Hayes was a predicate for a charge of felony murder of Wild. The jury was also instructed that a person is not justified in the use of force if he is escaping after commission of attempt murder or aggravated battery (Wild was stabbed as defendant was headed toward the exit after stabbing Hayes). While the jury was not given an issues instruction for aggravated battery,

the instructions that were given, coupled with the parties' closing arguments, clarified that the State had to establish that defendant's use of force against Hayes was not justified to sustain aggravated battery both as the felony murder predicate and as a basis for rejecting self-defense in the knowing murder of Wild.

People v. Coan, 2016 IL App (2d) 151036 Under the invited-error doctrine, a defendant may not request to proceed in one manner at trial and later argue on appeal that error occurred. To permit a defendant to use the exact ruling or action that he procured at trial as a means of reversal on appeal would offend notions of fair play and encourage duplicitous behavior. Even plain-error review is forfeited when a defendant invites the error.

Here defendant failed to object to an incorrect jury instruction tendered by the State. The court rejected the State's attempt to portray this as invited error. The State, not defendant, tendered the instruction, and the failure to object did not mean that defendant agreed on the record to using the instruction. In this circumstance, the issue should be reviewed under the plain error doctrine.

People v. Higgins, 2016 IL App (3d) 140112 Under **People v. Brocksmith**, 162 Ill. 2d, 224, 642 N.E.2d 1230 (1994), whether to submit a lesser-included offense instruction is one of five decisions which belong exclusively to the defendant and not to defense counsel. In **Brocksmith**, the court recognized that the decision to tender a lesser-included offense instruction is analogous to the decision to plead guilty and may result in a loss of liberty based on an uncharged offense.

Where defense counsel tenders a lesser-included defense instruction, the trial court must inquire of defense counsel, in defendant's presence, whether counsel has advised defendant of the potential penalties associated with the lesser-included offense and whether the defendant agrees with the decision to tender the lesser offense. **People v. Medina**, 221 Ill.2d 394, 851 N.E.2d 1220 (2006). Here, the court concluded that the trial court's duty to inquire applies only if defense counsel tenders the lesser-included offense instruction. Where the State requests a lesser-included offense instruction, the trial court need not ensure that defendant agrees with defense counsel's decision to not object to the instruction.

The court noted that in this case, the decision to not object to the lesser-included offense instruction appears to have been a valid and effective trial strategy. On the greater offense, defendant would have been subject to a sentencing range of 15 to 60 years. By not objecting the lesser-included offense instruction tendered by the State, defendant avoided a more serious conviction and received a sentence of 12 years, three years less than minimum sentence he could have received on the greater offense.

People v. Jenkins, 2016 IL App (1st) 133656 To convict a defendant of felony resisting or obstructing a police officer, the State must prove that defendant knowingly resisted or obstructed an officer in the performance of an authorized act, and his violation proximately caused an injury to the officer. 720 ILCS 5/31-1(a), (a-7). Proximate cause of injury is the element that elevates this offense from a Class A misdemeanor to a Class 4 felony.

Here defendant was charged with and convicted of the felony version of this offense, but the trial court committed error by failing to instruct the jury on the proximate cause of injury element.

Although defendant failed to object, the Appellate Court found that the incorrect instruction constituted plain error under the closely balanced evidence prong of the plain error doctrine. The arresting officer testified that as he tried to arrest defendant, defendant struggled with him and kicked him in the face causing and injury. Defendant, by contrast,

testified that he did not resist arrest, but only started kicking and screaming in pain after the officer sprayed mace in his face.

The conflicting testimony showed that the jury had to make a judgment of credibility about whether defendant kicked the officer while he was resisting arrest. Where a judgment depends solely on the credibility of witnesses at trial, the evidence is closely balanced.

People v. Robinson, 2016 IL App (1st) 130484 An incorrect jury instruction constitutes second prong plain error where it creates a serious risk that the jury incorrectly convicted the defendant because it did not understand the applicable law.

The State charged defendant with aggravated kidnapping under the inducement theory of kidnapping in that he used deceit or enticement to induce the victim to go from one place to another with the intent to secretly confine her against her will. [720 ILCS 5/10-1\(a\)\(3\)](#). But the jury was incorrectly instructed under the actual secret confinement theory of kidnapping that the State had to prove defendant secretly confined the victim against her will. [720 ILCS 5/10-1\(a\)\(1\)](#).

The erroneous jury instruction constituted second prong plain error. The essential issue at trial was whether defendant induced the victim to accompany him using deceit and enticement. The jury instruction omitted this essential element. The jury thus conceivably convicted defendant without finding an essential element of the offense.

People v. Smith, 2015 IL App (4th) 131020 Illinois Pattern Instructions, Criminal, Nos. 11.15 and 11.16, which define the offense of aggravated battery of a person over the age of 60, have not been updated to reflect 2006 amendments to the statute. Those amendments added, as an element of the offense, that the defendant knows the battered individual to be 60 or older. Before the 2006 amendments, knowledge of the age of the victim was not required.

Because [IPI Criminal 4th Nos. 11.15](#) and 11.16 do not accurately convey the current state of the law, the court asked the Illinois Supreme Court Committee on Pattern Jury Instructions to consider updating the instructions.

People v. Ware, 2014 IL App (1st) 120485 The State charged defendant with armed robbery while armed with a firearm, but the jury was incorrectly instructed that the charge was armed robbery while armed with a dangerous weapon. Although this was error, it was not reversible under the second prong of the plain-error doctrine.

Errors under the second prong are presumptively prejudicial and require automatic reversal only if they are structural, i.e., systemic errors that serve to erode the integrity of the judicial process and undermine the fairness of the trial. A jury instruction error is plain error only when it creates a serious risk the jurors incorrectly convicted defendant because they did not understand the applicable law.

The instructions here misdescribed an element of the offense by referring to a “dangerous weapon,” rather than a “firearm.” But a firearm is still a class of dangerous weapon, and the jury’s verdict, based on substantial evidence that defendant carried a firearm, implicitly found that defendant was armed with a firearm. The error thus did not create a substantial risk that the jurors incorrectly convicted defendant because they did not understand the applicable law.

People v. Cook, 2014 IL App (1st) 113079 In deciding whether a trial court erred in refusing a jury instruction, the reviewing court must determine whether the instructions given as a whole, fairly, fully, and comprehensively apprised the jury of the relevant law. The

correctness of jury instructions depends on whether ordinary persons would fail to understand them. The court does not need to define words or phrases that are self-defining or commonly understood.

The trial court erred in failing to instruct the jury on the definition of “reckless” as it applies to involuntary manslaughter. The jury was instructed with Illinois Pattern Jury Instruction (IPI), No. 7.07, which states that a person commits involuntary manslaughter when he unintentionally cause death “by acts which are performed recklessly.” The committee note to IPI 7.07 states that the court should give IPI 5.01, which defines “recklessness,” and states that a person acts recklessly “when he consciously disregards a substantial and unjustifiable risk,” and “such disregard constitutes a gross deviation from” a reasonable standard of care.

The Appellate Court read the Illinois Supreme Court’s decision in [People v Hopp, 209 Ill.2d 1 \(2004\)](#), as making the committee note to IPI 7.07 (directing the court to give IPI 5.01) a mandatory requirement. Additionally, the Appellate Court noted that a lay person may misunderstand recklessness to mean ordinary negligence. The trial court thus erred in refusing to instruct the jury with [IPI 5.01](#) defining recklessness.

The error however was harmless since the evidence in support of the verdict was so clear and convincing that the result of trial would not have been different had the jury been properly instructed.

[People v. Daniel, 2014 IL App \(1st\) 121171](#) The State charged defendant with armed robbery while armed with a firearm, but the jury was incorrectly instructed that the charge was armed robbery while armed with a dangerous weapon. Although this was error, it was not reversible under the plain-error doctrine.

The plain-error doctrine permits a reviewing court to consider a forfeited 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 defendant, regardless of the seriousness of the error, or (2) the error is so serious that it affected the fairness of defendant’s trial and the integrity of the judicial process, regardless of the closeness of the evidence.

The first prong of the plain-error doctrine did not apply because there was overwhelming evidence that defendant was armed with a firearm, and indeed it was undisputed at trial that he carried a firearm. The second prong did not apply because Illinois courts have narrowed this prong to errors that are structural: systemic errors that erode the integrity of the judicial process and undermine the fairness of trial. Although the jury instructions misstated the law, they did not fall within the class of errors deemed structural.

[People v. Falco, 2014 IL App \(1st\) 111797](#) Jury instructions are necessary to provide the jury with the correct legal principles, allowing it to reach a correct verdict. Under [Illinois Supreme Court Rule 451\(a\)](#), an IPI instruction should be used unless it does not accurately state the law. Where no IPI instruction exists, the court may give a non-IPI instruction.

Defendant was convicted of possession of a firearm with defaced identification marks. [720 ILCS 5/24-5\(b\)](#). The jury was instructed with a non-IPI instruction which tracked the language of the statute defining the offense but, like the statute, omitted any reference to a mental state.

Counsel was ineffective for failing to request an instruction informing the jury that to prove defendant guilty of the charged offense, the State had to prove that he knowingly or intentionally possessed the firearm. Although the statute defining the offense of possession of a firearm with a defaced serial number does not specify a mental state, Illinois law is clear

that the State must prove that the defendant intentionally or knowingly possessed the firearm, although the State does not have to prove that defendant knew of the defacement.

Where the statute does not specify a mental state, and instead one is implied, it is not always necessary to instruct the jury on the necessary mental state. Some mental states, however, may be specific enough to require a jury instruction. Here, the implied mental state of intent and knowledge was specific enough to require instruction. The present offense was no different than any other possession charge. Typical possession cases, such as unlawful use of a weapon, require the State to prove knowing possession and the corresponding IPI instructions inform the jury of this element.

There is no IPI instruction for the offense at issue here, but the jury should have been instructed with a modified instruction that included the appropriate mental state as one of the elements of the offense. In the absence of such an instruction, the jury could have concluded that this was a strict liability offense; there was no likelihood that the jury would have understood that knowledge was the appropriate mental state or that knowledge applied only to possession, not to defacement.

People v. Sangster, 2014 IL App (1st) 113457 Defendant argued that the trial court improperly amended the jury instruction for first degree murder after closing arguments to include the concept of transferred intent, thereby introducing a new theory of guilt at a point in time when defendant had no opportunity to defend against the new theory.

During closing arguments, defendant argued that the shooting was an accident because defendant had no motive to shoot and kill the victim. The State brought up the concept of transferred intent in its rebuttal argument and argued that the victim's death was not an accident. After the arguments were concluded, the trial court sua sponte amended the first degree murder instruction to include the phrase "or another" to encompass the concept of transferred intent.

In **Millsap**, 189 Ill. 2d 155 (2000), the Illinois Supreme Court held that it was improper for the trial court to instruct the jury on accountability for the first time after the jury had begun deliberating. The court noted that jury instructions should be settled before closing arguments to allow the parties to tailor their arguments accordingly. By instructing the jury on accountability after deliberations had begun, the trial court deprived defendant of an opportunity to defend against that theory.

The Appellate Court held that unlike **Millsap**, no error occurred in this case. The trial court did not introduce a new theory of guilt when it amended the jury instruction to include the concept of transferred intent. The amendment did not change the elements of first degree murder since the State still had to prove that defendant performed the acts which caused death while acting with the requisite mental state. The only difference in the instruction was the name of the victim.

The court also noted that the trial court's amendment of the jury instruction was in direct response to defendant's closing argument that he was not guilty because he intended to kill someone other than the victim. The instruction was a proper response to defendant's argument opening the door to the concept of transferred intent.

People v. Love, 2013 IL App (3d) 120113 Illinois Rule of Evidence 201 governs judicial notice of adjudicative facts and provides that judicial notice may be taken at any stage of a proceeding. When a court allows a party's request to prove an adjudicative fact by judicial notice in a criminal proceeding, "the court shall inform the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." Ill. R. Evid. 201(g). This directive is rooted in the criminal defendant's constitutional right to a jury trial.

Outside the presence of the jury in a DUI prosecution, the court took judicial notice that the applicable conversion factor for blood serum alcohol content to whole blood alcohol content is 1.18, as provided by the Illinois Administrative Code. Over objection, the court gave the jury this non-IPI instruction regarding the conversion factor:

In the course of this case, you have heard testimony about the results of a blood draw. There are two ways to measure blood alcohol concentration: by serum levels or by what is called whole blood. Whole blood is [the] standard used by law enforcement and legal proceedings, and it can be calculated by converting the serum level to the whole blood equivalent. In this case, the testimony was that the serum level was .190. The blood serum or blood plasma alcohol concentration results will be divided by 1.18 to obtain a whole blood equivalent. After conversion, the whole blood equivalent is .161.

This instruction violates [Ill. R. Evid. 201](#). It contains no cautionary language advising the jury that it was not mandated to accept the identified conversion factor or adopt the calculations based on a formula using this factor. It also referenced a contested fact, defendant's purported blood serum level, that was not subject to judicial notice, and in this respect became testimonial.

The error was not harmless. A separate instruction informed the jury that *if* it found defendant's alcohol level was greater than 0.08, it *may* presume that defendant was under the influence of alcohol. The judicial notice instruction did not contain similar limiting language that the jury was not required to conclude that defendant's blood alcohol level was .161. The jury could have easily viewed the defective instruction to require it to find that defendant's blood alcohol level was twice the level that supported a strong but permissive presumption of intoxication.

[People v. Colbert, 2013 IL App \(1st\) 112935](#) The function of jury instructions is to provide the jury with accurate legal principles to apply to the evidence so that it can reach a correct conclusion. In a criminal case, fundamental fairness requires that the trial court fully and properly instruct the jury on the elements of the offense, the burden of proof, and the presumption of innocence. The issue of whether the jury instructions accurately conveyed the applicable law to the jury is reviewed *de novo*.

The Appellate Court rejected the defendant's argument that the court should have instructed the jury that to convict of felony murder it had to find the acts comprising the predicate felony of mob action had an independent felonious purpose. The issue of whether a forcible felony can serve as a predicate felony to felony murder is a question of law for the trial judge based on an examination of whether the evidence is sufficient to show that the predicate felony has an independent felonious purpose apart from the murder itself.

[People v. Rexroad, 2013 IL App \(4th\) 110981](#) A person of the age of 17 and upwards commits the offense of indecent solicitation of a child if the person, with the intent that the offense of aggravated criminal sexual assault, criminal sexual assault, predatory criminal sexual assault of a child, or aggravated criminal sexual abuse be committed, knowingly solicits a child or one whom he believes to be a child to perform an act of sexual penetration or sexual conduct as defined in §12-12 of the Criminal Code. [720 ILCS 5/11-6\(a\)](#). Defendant was charged with indecent solicitation of a child when he sent suggestive text messages to a police officer who was pretending to be a teenaged girl.

The instructions provided to defendant's jury defining the elements of indecent

solicitation of a child were defective. They failed to require the jury to find that defendant knew or believed the child was under 17 years of age, and that defendant possessed the intent to commit aggravated criminal sexual abuse. The court noted that these pattern instructions (Nos 9.01, 9.01A and 9.02) have since been modified to correctly state the law.

The Appellate Court affirmed despite the error because it had been forfeited below and did not amount to plain error where the evidence was not closely balanced and the error did not affect defendant's defense that he was not the person who sent the text messages.

People v. Sito, 2013 IL App (1st) 110707 The trial court must instruct the jury with an IPI Criminal instruction unless the court determines that it does not accurately state the law. Ill. S. Ct. R. 451(a). A reviewing court will not disturb the decision to instruct the jury with a non-IPI instruction absent an abuse of discretion.

The court abused its discretion in striking the element of knowledge from IPI Criminal 4th Nos. 16.17 and 16.18, the instructions defining and setting forth the elements of the offense of unauthorized possession or storage of weapons. Unauthorized possession or storage of weapons is not an absolute liability offense.

An error in a jury instruction is harmless if it is demonstrated that the result of the trial would not have been different had the jury been properly instructed. While there was evidence from which the jury could infer that defendant knowingly possessed the knife, the error was not harmless where the jury essentially was instructed not to consider defendant's testimony that he was not aware that he had a knife.

People v. Watt, 2013 IL App (2d) 120183 Jury instructions are intended to guide the jury and to assist in its deliberations and in reaching a proper verdict. In a criminal case, if the court determines that the jury should be instructed on a given subject and the IPI instructions contain an applicable instruction, the IPI instruction shall be given unless the court determines that it does not accurately state the law. Supreme Court Rule 451(a). Whether jury instructions accurately conveyed the applicable law is reviewed *de novo*.

Defendant was charged with armed robbery committed with a firearm. Armed robbery committed with a firearm and armed robbery committed with a dangerous weapon other than a firearm are substantively different offenses. It was error for the court to instruct the jury that it could convict defendant of armed robbery based on his being armed with a dangerous weapon, where armed robbery with a dangerous weapon no longer exists under the current statute. Although the instruction was authorized by IPI, it does not correctly state the law and should no longer be given. The instructions should be modified to reflect the current state the law.

People v. Fonder, 2013 IL App (3d) 120178 Defendant was convicted of felony resisting arrest, which requires the State to prove beyond a reasonable doubt that: (1) defendant knowingly resisted or obstructed a peace officer in the performance of an authorized act within his capacity, and (2) defendant's act was the proximate cause of injury to the officer. In instructing the jurors, the trial judge gave only the IPI instructions for the misdemeanor offense of resisting arrest, which requires that the State establish beyond a reasonable doubt the defendant knowingly resisted or obstructed the performance of any authorized act that was within the official capacity of one known to be a peace officer.

The the trial judge committed plain error by failing to instruct the jury on a critical element of the felony offense charged - that defendant's conduct proximately caused injury to the officer. Jury instructions are intended to provide the jury with the legal principles applicable to the evidence, so that it might reach a correct conclusion according to the law and the evidence. Generally, the decision to give a certain instruction rests in the sound

discretion of the trial court. However, when the issue is whether the applicable law was correctly conveyed by the instructions to the jury, *de novo* review is appropriate.

The failure to instruct the jury on an essential element of the offense satisfied the second prong of the plain error rule - for fundamental error that is so serious that it affects the fairness of the trial and challenges the integrity of the judicial process. Fundamental fairness requires trial courts to insure that the jury receives basic instructions essential to a fair determination of the case. Here, the missing element was critical because it elevated the offense from a misdemeanor to a felony and increased the sentencing range.

People v. Hale, 2012 IL App (4th) 100949 The purpose of jury instructions is to provide the jury with the correct legal principles applicable to the evidence, so that the jury may reach a correct legal conclusion according to the law and the evidence. Although generally the decision to give certain jury instructions rests with the court and that decision will not be reversed on appeal absent an abuse of discretion, the issue of whether the instructions accurately conveyed to the jury the applicable law is reviewed *de novo*.

Fundamental fairness requires that the jury be instructed on the elements of the offense charged. It is the essence of a fair trial that the jury not be permitted to deliberate on a defendant's guilt or innocence without being told the essential characteristics of the crime charged.

Defendant was charged with threatening a public official. Because of the official's position as a law enforcement officer, the State was required to prove not only that the defendant threatened the officer, but also that the threat contained specific facts indicative of a unique threat to the person, family or property of the officer, and not a generalized threat of harm. 720 ILCS 5/12-9(a-5). The jury was not instructed that to convict defendant it had to find that additional element.

This omission deprived the jury of the guidance needed to decide whether the State proved the additional element. It is possible that the jury concluded that defendant made a generalized threat to the officer, but the statute required more before defendant could be convicted. Because a clear and obvious error occurred that undermined the fairness of defendant's trial and challenged the integrity of the judicial process, the court reversed the conviction and remanded for a new trial.

People v. Rogers, 2012 IL App (1st) 102031 Jury instructions convey the legal rules applicable to the evidence presented at trial and thus guide the jury's deliberations toward a proper verdict. There must be some evidence in the record to justify giving an instruction. Proposed instructions that are not supported by the evidence or the law should not be given.

The trial court decides, in the exercise of its discretion, which issues are raised by the evidence and whether a proposed instruction should be given. Its decision is reviewed for an abuse of discretion. A reviewing court must determine whether the instructions, considered together, fully and fairly announce the law applicable to the theories of the State and the defense. Where the instructions are not clear enough to avoid misleading the jury or if the instructions do not accurately state the law, the trial court has abused its discretion.

Defendant was charged with escape under the Electronic Home Detention Law (730 ILCS 5/5-8A-4.1) after he failed to report to the county sheriff's day-reporting program. He had been ordered to participate in that program as a condition of his probation.

Whether his failure to report to day reporting was a violation of a condition of electronic monitoring such that failure to report could be considered an escape under the statute, rather than merely a violation of a condition of probation was a contested issue of fact at trial. Nothing in the electronic-monitoring contract that defendant signed indicated

that day reporting was a condition of electronic monitoring. The State presented witness testimony that electronic monitoring is a condition of day reporting, and that day reporting and electronic monitoring “work side by side.”

The court instructed the jury that to sustain the charge of escape, the State had to prove that the defendant “knowingly violated a condition of the electronic home monitoring program detention program by failing to report to day reporting as required.”

This instruction was erroneous because it did not apprise the jury that it would have to decide as a threshold issue whether day reporting was a condition of electronic monitoring, and then whether defendant violated that condition. The instruction misled the jury into believing that day reporting was a condition of electronic monitoring, and it merely had to decide whether defendant had failed to report to day reporting, thus relieving the State of its burden of proving an element of the escape charge. Therefore, the court abused its discretion in giving the instruction.

People v. Walker, 2012 IL App (2d) 110288 Generally, a party which desires a specific instruction must offer that instruction and ask that the trial court give it. The court usually has no obligation to instruct on its own motion. There are exceptions to this rule in criminal cases, because the court has the burden of seeing that the jury is instructed on the elements of the crime, the presumption of innocence, and the burden of proof. In addition, the trial court must give adequate guidance to the jury in its evaluation of the evidence.

No error occurred in a felony murder case where the trial court failed to *sua sponte* give IPI Crim. 4th No. 7.15A, which states that a person is guilty of first degree murder where he sets forth a chain of events by committing a felony and the death in question is a direct and foreseeable consequence of that chain. In its argument on a motion for a directed verdict and on appeal, the defense claimed that there was an intervening cause of death - the refusal of the decedent, a Christian Scientist, to consent to a blood transfusion that doctors said was necessary to save his life. Defendant did not make that claim before the jury, however, claiming instead that the evidence did not show that he had perpetrated the injuries to the decedent. Defendant also did not ask the trial court to give IPI Crim. 4th No. 7.15A.

The court found that the trial court adequately instructed the jury concerning the presumption of innocence, the burden of proof, and the elements of the offense. Furthermore, the causation instruction of IPI Crim. 4th No. 7.15A is not an essential element of felony murder, and is given only when causation is at issue. In addition, the trial court gave IPI Crim. 4th No. 7.15, which is not as “specialized” as No. 7.15A but which states that the prosecution has the burden to prove that the defendant’s acts were a contributing cause of the death and that death did not result from a cause unconnected to the defendant. Where the defense failed to claim before the jury that the decedent’s refusal of a blood transfusion was an unforeseeable intervening cause sufficient to relieve the defendant from liability for the death, the court found that the instructions that were given provided sufficient direction to the jury to apply the law and evaluate the evidence.

The court stated, however, that had defense counsel’s theory of the case been that the refusal to undergo a blood transfusion was an unforeseeable, intervening cause, the trial court might have been required to give IPI Crim. 4th No. 7.15A in support of that theory.

People v. Lloyd, 2011 IL App (4th) 100094 For purposes of the criminal sexual assault statute, 720 ILCS 5/12-12(f) defines “sexual penetration” as involving two broad categories of conduct. The first category includes any contact “between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person.” Within this category, the term “object” does not include parts of the defendant’s body, including fingers. The second category

includes any “intrusion of any part of the body of one person . . . into the sex organ or anus of another person.”

Defendant was convicted of criminal sexual assault for acts of “sexual penetration” involving his fingers and the complainant’s vagina. At the State’s request and without objection by the defense, the trial court gave the jury only the portion of IPI Crim. 4th, No. 11.65E concerning the first category - “contact” between the complainant’s sex organ by “an object, the sex organ, mouth or anus of” the defendant.

The court concluded that concerning three of the four convictions, failing to give the proper definition of “sexual penetration” did not constitute plain error. For each of the three convictions, the complainant’s testimony clearly demonstrated that defendant inserted his fingers into her vaginal opening. Because the uncontroverted evidence showed digital penetration, the result of the trial on those convictions would not have been different had the proper instruction been given.

Concerning the other conviction, however, the complainant’s testimony did not clearly show penetration by the defendant’s fingers. Based on the evidence, the jury could have found that no penetration occurred. Concerning this count, therefore, plain error occurred because the incorrect definitional instruction could have affected the outcome of the trial.

Defendant’s criminal sexual assault conviction for Count I was reversed, but the other three convictions were affirmed.

People v. Turman, 2011 IL App (1st) 091019 The omission of language that it was for the jury to determine whether the defendant made a statement from an instruction regarding the jury’s consideration of statement evidence (IPI Crim. 4th No. 3.06-3.07) was plain error. At trial, defendant denied making many of the statements contained in a written statement. He testified that the statement was never reread to him even though he signed each page of the statement, and asserted that he did not even know the definition of a word attributed to him in the statement. There was evidence supporting his denial as the grammar and language used by defendant in a note he wrote to the complainant was at odds with the language the prosecution claimed defendant used in the statement. Given the importance of the statement to the State’s case and the closely-balanced nature of the evidence, the error “threatened to tip the scales of justice away from the defendant.” It also satisfied the second prong of the plain-error rule as it “deprived the defendant of a fair trial and impacted the integrity of the judicial process.

This error was not cured by a separate instruction on the jury’s consideration of prior inconsistent statement evidence (IPI Crim. 4th No. 3.11) that informed the jury that it was for the jury to determine if the “witness made the earlier [inconsistent] statement” because it was unclear which instruction the jury chose to follow.

People v. Anderson, 407 Ill.App.3d 662, 944 N.E.2d 359 (1st Dist. 2011) Defendant was convicted of residential burglary after the evidence showed that two entries were made to a residence. Defendant entered the home and began looking around a few minutes after the residents returned to find that a burglary had occurred. He was in possession of a set of keys which had been left on the counter when the occupants left before the burglary.

Defendant told police that he had acted as a lookout when the residence was entered by another person, and that he had been given a set of keys by the first person to see if there was anything else in the residence to steal. At trial, however, defendant testified that in a drug exchange which occurred earlier in the evening, an occupant of the residence had given a set of keys to a relative of the person who first entered the apartment. Defendant testified that when he entered the residence, he was going to attempt to trade the keys for \$20.

Defendant argued that the trial court erred by giving an accountability instruction, because the indictment charged him only in connection with his own entry to the residence. Defendant argued that the erroneous instruction created the possibility that he was convicted based on an uncharged offense - his role as a lookout for the first entry.

Without explaining its holding, the Appellate Court affirmed the trial court's finding that the first and second entries constituted a single burglary. The court also found that if there were separate burglaries, reversal would not be required.

First, in the trial court the State sought to convict defendant as either a principal or an accomplice. Thus, this is not a case in which the State attempted to raise a new theory of culpability on appeal.

Second, the harmless error rule applies where a jury is instructed on multiple theories of guilt, one of which is improper, and the issue is preserved for review. Thus, reversal is not required if in the absence of the error, a rational jury could have found that defendant was guilty beyond a reasonable doubt. Because there was sufficient evidence on which the jury could have concluded that defendant was guilty of burglary based on his own entry to the residence, any error created by instructing concerning the first entry was harmless.

People v. Luna, 409 Ill.App.3d 45, 946 N.E.2d 1102 (1st Dist. 2011) An instruction on a lesser offense is justified where there is credible evidence to support the giving of the instruction. Where there is evidentiary support for an instruction, the failure to give the instruction constitutes an abuse of discretion.

The court rejected the State's argument that a defendant who raises self-defense cannot seek an involuntary manslaughter instruction, because raising self-defense admits an intentional killing while involuntary manslaughter requires an unintentional killing by reckless actions that are likely to cause death or great bodily harm. Because Illinois law allows a criminal defendant to raise inconsistent defenses, the inconsistency between the mental states does not preclude either claim.

However, a defendant may not seek to reduce a first degree murder conviction to involuntary manslaughter based on a claim that he acted with a subjective intent that is not supported by any evidence other than the defendant's testimony. "Illinois courts have consistently held that when the defendant intends to fire a gun, points it in the general direction of his or her intended victim, and shoots, such conduct is not merely reckless and does not warrant an involuntary-manslaughter instruction, regardless of the defendant's assertion that he or she did not intend to kill anyone." (**People v. Jackson**, 372 Ill.App.3d 605, 874 N.E.2d 123 (4th Dist. 2007)). Because the evidence here unequivocally demonstrated that defendant intended to swing a knife in the decedent's direction, and other than defendant's testimony there was no evidence that he merely intended to scare the decedent, an involuntary manslaughter instruction was not justified.

People v. Berardi, 407 Ill.App.3d 575, 948 N.E.2d 98 (3d Dist. 2011) The court noted, in passing, that the trial court erred by refusing to give an instruction which defendant tendered and which stated that mere verbal resistance or argument does not constitute the offense of resisting an officer. Because there was evidence to support defendant's argument that he merely challenged the validity of an order to leave a city office, the failure to give the tendered instruction removed a disputed issue from the jury's consideration. Thus, a new trial would have been required had the court not reversed the conviction for lack of evidence.

People v. Dupree, 397 Ill.App.3d 719, 922 N.E.2d 503 (2d Dist. 2010) Neither the federal nor Illinois constitutions afford a criminal defendant the constitutional right to attend a jury

instruction conference. However, “the better practice would be to allow a defendant to attend” the instructions conference.

Under [People v. Brocksmith](#), 162 Ill.2d 224, 642 N.E.2d 1230 (1994), a defendant has a personal right to decide whether to tender an instruction on a lesser included offense. The court questioned whether an alleged **Brocksmith** violation is itself a constitutional violation which can be raised in a post-conviction petition, or whether the issue may be raised in post-conviction proceedings only by a claim of ineffective assistance of counsel. The court declined to resolve this question because the petition raised the issue in terms of ineffective assistance.

Brocksmith applies to the decision whether to tender second degree murder instructions, although second degree murder is technically not a lesser included offense of first degree murder. The court concluded that the rationale of **Brocksmith** – that a defendant who tenders an instruction on a lesser included offense risks exposure to conviction on an uncharged offense – applies equally to second degree murder.

Defendant’s post-conviction petition raised the gist of an issue of ineffective assistance of counsel where defendant’s affidavit indicated that counsel, rather than the defendant, decided not to request second degree murder instructions. The court found that there was an adequate basis in the evidence on which second degree instructions could have been given. In addition, where defendant argued that he acted in self-defense during a confrontation between members of rival gangs, there was an arguable probability that a second degree murder instruction would have changed the result of the trial.

[People v. McDonald](#), 401 Ill.App.3d 54, 927 N.E.2d 253 (1st Dist. 2010) The trial court erred by instructing the jury concerning the elements of armed robbery and that a person who is committing a forcible felony may not claim self-defense, where the defendant was charged with first degree murder based on intent and knowledge and the jury was given a second degree murder instruction based on serious provocation and an unreasonable belief in self-defense. The prosecution knew before trial that defendant intended to raise self-defense, but did not seek to amend the charges to include armed robbery or first degree murder based on felony murder. By giving an instruction concerning an uncharged offense which had not been raised until the jury instruction stage, the trial court not only deprived the defendant of an opportunity to defend, but also may have suggested to the jury that the parties did not dispute that an armed robbery had occurred.

The court rejected the State’s argument that an armed robbery instruction was necessary to rebut defendant’s claim of self-defense. The trial judge agreed to give an “initial aggressor” instruction, which was supported by the evidence and which would have precluded self-defense if the jury believed defendant was the initial aggressor. Furthermore, because a finding that defendant was the initial aggressor would have negated the findings required for second degree murder - that defendant acted in an *unreasonable* belief that he was entitled to use deadly force or under serious provocation - the armed robbery instruction was not required for the State to rebut defendant’s claim that at most he had committed second degree murder.

[People v. Reed](#), 396 Ill.App.3d 636, 919 N.E.2d 1106 (4th Dist. 2009) The Appellate Court reiterated that no statutory authority exists for using special interrogatories in criminal cases. Thus, an answer to a special interrogatory concerning a sentence enhancement cannot be deemed inconsistent with a jury verdict for purposes of overturning that verdict. (See [People v. Jackson](#), 372 Ill.App.3d 605, 874 N.E.2d 123 (4th Dist. 2007).) The court stressed

that the answer to a special interrogatory should not be used for any purpose other than that for which the interrogatory was asked – whether there are grounds for a sentence enhancement.

The jury's negative answer to a special interrogatory whether defendant personally discharged a firearm which proximately caused death – asked in order to obtain a sentence enhancement under [730 ILCS 5/5-8-1\(a\)\(1\)\(d\)](#) – cannot be used to challenge the jury's verdict convicting the defendant of first degree murder.

People v. Cardamone, [381 Ill.App.3d 462, 885 N.E.2d 1159 \(2d Dist. 2008\)](#) In view of the extensive other crimes evidence submitted, the trial court erred by refusing defendant's request to instruct the jury that it was required to unanimously find defendant's guilt as to each crime charged. The instructions specifying the charges did not provide dates of the alleged conduct or describe the allegations clearly enough that the jury would necessarily base the verdicts on the same acts. “[W]here the majority of the State's case involved uncharged offenses that allegedly occurred in the same time frame as the charged offenses, a separate instruction that the jury had to be unanimous regarding the *charges* was warranted.”

People v. Chatman, [381 Ill.App.3d 890, 886 N.E.2d 1265 \(2d Dist. 2008\)](#) As a matter of plain error, the trial judge erred at a trial for domestic battery and aggravated domestic battery by: (1) instructing the jury on self-defense by an initial aggressor, (2) giving only a partial explanation of self-defense, and (3) failing to instruct on the State's burden concerning self-defense.

People v. Diggins, [379 Ill.App.3d 994, 888 N.E.2d 129 \(3d Dist. 2008\)](#) [720 ILCS 5/24-1.6](#) provides that the holder of a valid FOID card does not commit unlawful use of a weapon by possessing a weapon that is “unloaded and enclosed in a case, firearm carrying box, shipping box, or other container.” The court concluded that for purposes of [§5/24-1.6](#), the term “case” should be defined as a container which completely encloses the weapon. Because the locked center console of a vehicle clearly qualifies, the trial court abused its discretion by instructing the jury that a console could not be a “case,” by refusing to instruct the jury on the container exception, and by prohibiting defendant from arguing that the console qualified for the statutory exception for encased weapons.

People v. Robinson, [374 Ill.App.3d 949, 872 N.E.2d 73 \(1st Dist. 2007\)](#) Citing **People v. Green**, [225 Ill.2d 612, 870 N.E.2d 394 \(2007\)](#), the court concluded that involuntary manslaughter and involuntary manslaughter of a household member are not separate offenses. Instead, involuntary manslaughter of a household member is an elevated sentencing provision for involuntary manslaughter. Thus, a defendant could be convicted of involuntary manslaughter and sentenced for involuntary manslaughter of a household member even where the charge did not refer to the victim's status as a household member. The court also held that where a defendant who is charged with murder requests instructions on involuntary manslaughter, [725 ILCS 5/111-3\(c\)-5](#) does not require the State to provide notice of the possibility of sentencing for involuntary manslaughter of a household member. Section 111-3(c)-5 provides that a factor which increases the authorized sentence for a crime must be provided to the defendant through written notification, either in the charge or otherwise. The court concluded that [§111-3\(a\)-5](#) applies only to the charged crime, not to lesser included offenses on which the defendant requests instructions.

People v. Smith, 372 Ill.App.3d 762, 866 N.E.2d 1192 (1st Dist. 2007) When a defendant is charged with intentional or knowing murder and felony murder and requests a separate verdict form for felony murder, and that request has a basis in the evidence, a separate verdict form must be given. Otherwise, consecutive sentences cannot be imposed based on the offense which is the predicate for felony murder. Affirmed, **People v. Smith**, 233 Ill.2d 1, 906 N.E.2d 529 (2009).

People v. Delgado, 376 Ill.App.3d 307, 876 N.E.2d 189 (1st Dist. 2007) The Court found that the failure to instruct the jury with a definition of a critical element of the offense constituted plain error. Substantial defects in criminal jury instructions are not waived where the evidence is close or the error so serious that it affects the fairness of the trial and the integrity of the judicial process. In a criminal case the trial court must fully instruct the jury on the elements of the offense, the burden of proof and the presumption of innocence. Whether jury instructions are misleading or confusing is determined not by “whether defense counsel can imagine a problematic meaning, but whether ordinary persons acting as jurors would fail to understand them.” Where the defendant was charged with aggravated criminal sexual abuse based upon the transmission of semen to the complainant’s stomach, it was “clear and obvious” error to fail to properly define “sexual conduct” as applied to the case. The failure to define a commonly understood word is not reversible error. However, the term “sexual conduct” is not self-defining as used in Illinois criminal prosecutions, because it is limited to a more narrow meaning than would be assumed by a layman. Here, the evidence was closely balanced and the complainant had a motive to fabricate because she was in trouble with her mother for leaving the house. Under these circumstances, the instructional error “threatened to tip the scales of justice.”

People v. Carmona-Olvara, 363 Ill.App.3d 162, 842 N.E.2d 313 (1st Dist. 2005) A jury instruction regarding inconsistent statements is appropriately given when two statements are inconsistent on a material matter. An issue is material if the contradiction reasonably tends to discredit the testimony of a witness. The materiality of a prior inconsistent statement is to be determined by the trial court. The court found that the trial court erred when it refused to determine whether an inconsistency in the testimony of the arresting officer was material, and also when it refused an instruction on inconsistent statements, because defense counsel did not have a copy of the instruction prepared and the judge refused to delay the proceedings for five minutes.

People v. Uptain, 352 Ill.App.3d 643, 816 N.E.2d 797 (4th Dist. 2004) A defendant is entitled to an instruction on his theory of the case if there is “some foundation” for the instruction in the evidence. Very slight evidence on the theory of defense will justify giving an instruction. In a trial for aggravated criminal sexual abuse, a defendant who produces some evidence that he reasonably believed the complainant to be at least 17 is entitled to an instruction on that affirmative defense. Where defendant presented evidence that the 16-year-old complainant engaged in playful and flirtatious behavior on the night in question, there was sufficient evidence to require the trial court to instruct the jury on the affirmative defense of a reasonable belief that the complainant was at least 17.

People v. O’Quinn, 339 Ill.App.3d 347, 791 N.E.2d 1066 (5th Dist. 2003) Use of a special interrogatory concerning the existence of an extended-term eligibility factor was not error.

People v. Lockett, 339 Ill.App.3d 93, 790 N.E.2d 865 (1st Dist. 2003) Whenever the evidence justifies a self-defense instruction in a first degree murder case, the reasonableness of defendant's subjective belief in the need for self-defense is also placed in issue. Thus, a second degree murder instruction should be given. A second degree instruction was not precluded because the State proceeded only on a felony murder theory. Although a second degree murder conviction may not be based on felony murder, where the evidence is conflicting and would support findings that the defendant committed intentional murder, felony murder or second degree murder, the jury should be instructed on all three theories so it can resolve the conflict. "[W]hether the court should instruct on the offense of second degree murder is to be determined by the evidence, not by the prosecution's choice to proceed against the defendant on a theory of felony murder." See also **People v. Pinkney**, 322 Ill.App.3d 707, 750 N.E.2d 673 (1st Dist. 2000) (a defendant is entitled to an instruction on his theory of the case if there is at least "slight" evidence to support that theory; "[w]hen the evidence supports submitting an instruction on justifiable use or force, a tendered instruction on second degree murder based on the unreasonable use of force should also be given"); **People v. Toney**, 337 Ill.App.3d 122, 785 N.E.2d 138 (1st Dist. 2003) (where evidence was conflicting and the jury was instructed on felony murder and self-defense, the trial court abused its discretion by refusing to instruct on first and second degree murder); **People v. Edmondson**, 328 Ill.App.3d 661, 767 N.E.2d 445 (1st Dist. 2002) (second degree murder instruction should be given where the evidence requires instruction on self-defense).

People v. Jackson, 331 Ill.App.3d 729, 771 N.E.2d 982 (1st Dist. 2002) At defendant's trial, the judge erred by refusing to give a non-IPI instruction defining *modus operandi*. Where IPI instructions do not properly state the law, a non-IPI instruction may be given if it is brief, simple, impartial and free from argument. A trial court abuses its discretion by declining to give a non-IPI instruction where the instructions used are unclear, misleading or inaccurate. The court noted that IPI Crim. No. 3.14, which was given, does not define the term "*modus operandi*." The court rejected the State's argument that typical jurors are familiar with the term "*modus operandi*," and found that the non-IPI instruction tendered by the defense was an accurate statement of Illinois law.

People v. Robinson, 319 Ill.App.3d 459, 748 N.E.2d 624 (2d Dist. 2001) Under 720 ILCS 5/24-1(a)(7)(iii), unlawful use of a weapon is committed by possession of a bomb only where the bomb contains "an explosive substance of over one-quarter ounce." The court reached this conclusion despite IPI Criminal 4th, No. 18.01, which implies that the requirement of more than ¼ ounce of explosive material does not apply to a "bomb".

People v. Hurtado-Rodriguez, 326 Ill.App.3d 76, 759 N.E.2d 1024 (2d Dist. 2001) The trial court committed reversible error where it erroneously gave IPI 3d instructions (rather than IPI 4th) which did not accurately reflect the law in effect at the time of the offense. Because the instructions misstated an element of the offense and a properly instructed jury might have acquitted, the court reached the issue as plain error despite defendant's failure to raise it at trial or on appeal.

People v. Gonzalez, 326 Ill.App.3d 629, 761 N.E.2d 198 (1st Dist. 2001) Under the case law cited by the IPI committee in support of IPI No. 3.15 (Circumstances of Identification) all five factors listed in the instruction must be considered in determining whether an identification is reliable. Because the IPI committee placed "[or]" in brackets to inform persons who prepare jury instructions that only factors supported by the evidence in a

particular case should be included, the trial court erred by including the word “or” in the instruction given to the jury. The instruction likely misled the jury into believing that the existence of a single factor could render an eyewitness identification reliable, in violation of Illinois law requiring that all five factors be considered. The plain error rule applied because the evidence was close and the jury was likely confused by the instruction. In addition, the jury sent two notes to the judge, one of which indicated that it could not reach a verdict, and found defendant guilty only after being told to continue deliberating.

People v. Dunlap, 315 Ill.App.3d 1017, 734 N.E.2d 973 (1st Dist. 2000) Although instruction of the jury generally rests within the sound discretion of the trial court, whether the defendant introduced sufficient evidence to obtain an instruction on an affirmative defense or his theory of the case presents a question of law which is reviewed *de novo*.

People v. Smith, 296 Ill.App.3d 435, 694 N.E.2d 681 (4th Dist. 1998) A defendant is not entitled to have the jury instructed on the possibility of jury nullification, even where the jury asks whether it has the “option of downgrading” the charge to battery if the elements of aggravated battery have been proven. Although “[t]he power of jury nullification exists, . . . it is not authorized by the law. A defendant has no right to have the jury defy the law or ignore the undisputed evidence.”

People v. Biggerstaff, 287 Ill.App.3d 813, 679 N.E.2d 118 (5th Dist. 1997) Defendant was convicted in a jury trial of first degree murder. At the instruction conference, the trial court agreed to instruct the jury on involuntary manslaughter. However, the trial court gave the jury only three verdict forms: “not guilty of first degree murder,” “guilty of first degree murder,” and “guilty of voluntary manslaughter.” The jury was not provided with a general “not guilty” verdict or a “not guilty” verdict for involuntary manslaughter. The failure to provide a verdict form allowing the jury to acquit of involuntary manslaughter constituted reversible error. The State noted that in view of the overwhelming evidence, defense counsel had adopted the strategy of “actively pursu[ing] a guilty verdict on the lesser-included offense of involuntary manslaughter.” Thus, the State argued that the failure to give a “not guilty” verdict for involuntary manslaughter was consistent with defense counsel’s strategy. The Court noted that although defense counsel may elect to concede guilt on a lesser offense to avoid conviction on more serious crimes, such a strategy does not deprive the defendant of the right to a jury verdict on the question of guilt.

People v. English, 287 Ill.App.3d 1043, 679 N.E.2d 494 (3d Dist. 1997) At defendant’s trial for aggravated battery, the trial court gave the jury an instruction which states that a person “is not authorized to use force to resist an arrest which he knows is being made by a peace officer, even if he believes that the arrest is unlawful and the arrest is in fact unlawful.” Defendant was not charged with resisting arrest; the aggravated battery charge concerned fighting with officers at the police station, long after the arrest occurred. The trial judge erred by giving a “resisting arrest” instruction where the defendant was not charged with that crime. A jury can be instructed only on the crimes charged or offenses included within those crimes. The “natural result of giving an instruction based on an uncharged crime is prejudice to the defendant,” because such an instruction injects into the case an issue that is not properly before the jury. The defendant was prejudiced by the erroneous instruction because he claimed that he acted in self-defense when he struck the officer. The erroneous instruction, which stated defendant could not resist even an unlawful arrest, could have led

the jury to conclude that he was not entitled to defend himself at the police station even if he was being assaulted.

People v. Suter, 292 Ill.App.3d 358, 685 N.E.2d 1023 (4th Dist. 1997) IPI Criminal No. 3.01, which provides that the State need not prove the exact date on which the offense occurred, should be given only where there is a technical, nonfatal variance between the date charged and that shown by the evidence. The fact that the defendant presented an alibi defense did not create a variance; “an alibi does not constitute evidence that the offense occurred on another date.” In addition, the Court held that IPI 3.01 should not be given where to do so would unfairly interfere with an alibi defense for a certain date.

People v. Danielly, 274 Ill.App.3d 358, 653 N.E.2d 866 (1st Dist. 1995) As a matter of *dicta*, the Court suggested that where the State has failed to preserve evidence, the following non-IPI instruction should be given upon the defendant’s request:

“If you find that the State has allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State’s interest.”

Such an instruction protects defendants from “any uncertainty that might arise from missing evidence” and is an incentive to the police to “exercise due care in their handling of evidence.”

People v. Cook, 262 Ill.App.3d 1005, 640 N.E.2d 274 (1st Dist. 1994) Defendant was convicted, in a jury trial, of the second degree murder of his girlfriend. Expert testimony presented by the State showed that the girlfriend suffered an extreme beating and was strangled. Defendant testified that he had seen the deceased become violent on prior occasions, that she had told him approximately a week earlier that she had stabbed her ex-husband when she learned that he had been seeing his ex-wife, and that on the day of the offense the deceased had seen him talking to another woman and had warned him not to “sleep too tight.” Finally, the defendant testified that he struck the decedent in self-defense when she attempted to stab him with a boxcutter. The jury was not instructed that the prosecution has the burden of proving beyond a reasonable doubt that the defendant was not justified in using the force employed. Although defense counsel failed to tender the instruction, the Court concluded that the failure to instruct on the State’s burden of proof was plain error because the evidence was close and the outcome of the trial might have been different had the instruction been given.

People v. Crite, 261 Ill.App.3d 1041, 634 N.E.2d 487 (2d Dist. 1994) At his jury trial for first degree murder, aggravated battery with a firearm and unlawful possession of a firearm by a felon, the defendant submitted instructions on several lesser included offenses, including aggravated discharge of a firearm. The jury returned verdicts convicting defendant of the latter offense, second degree murder and unlawful use of a weapon by a felon. The jury was not provided verdict forms for aggravated battery with a firearm, one of the offenses in the original indictment. At the sentencing hearing, the State moved to “correct” the verdict form for aggravated *discharge* of a firearm by entering a conviction for aggravated *battery* with a firearm. The State argued that the jury had based its verdict on the instructions for aggravated battery with a firearm and that the correction was akin to a “typographical error.” The trial court granted the motion over a defense objection. The trial judge erred by amending the verdict form to reflect a conviction for an offense other than the one selected by the jury. The Court rejected the State’s argument that the trial judge was merely correcting a “typographical error.” Aggravated discharge of a firearm, the offense on which the verdict

form was returned, is a Class 1 felony, while aggravated battery with a firearm is a Class X felony. The Court concluded that the distinction between offenses with different sentences is more than "an error in mechanics."

People v. James, 255 Ill.App.3d 516, 626 N.E.2d 1337 (1st Dist. 1993) The evidence showed that four fires had been set in the apartment of the defendant's former girlfriend on a night when defendant had twice gained entry to the building without being "buzzed in." In addition, defendant had been asked to leave because he was drunk and "acting strange." The State tendered verdict forms of "guilty" and "not guilty" of aggravated arson. The trial court agreed to give a lesser included offense instruction on arson, and said that it would give verdict forms of "guilty of aggravated arson," "guilty of arson," and "not guilty of any arson related offense." In reading the instructions to the jury, however, the judge said that the three verdict forms would be "guilty of aggravated arson," "not guilty of aggravated arson," and "guilty of arson." The jury convicted defendant of aggravated arson. On appeal, defendant asserted that failing to give the jury the option of acquitting him of arson had the effect of directing a verdict on that count. The Court held that a trial court commits plain error where it neglects to give an instruction which it accepted during the instruction conference, especially where the instruction would have given the jury the option of acquitting the defendant of an offense. The fact that correct instructions were found in the common law record does not prove that the instructions were tendered to the jury, and the State offered no other evidence to show that the report of proceedings was inaccurate. Reversible error occurs where the jury is not provided with verdict forms permitting it to acquit the defendant on all of charges.

People v. Lovelace, 251 Ill.App.3d 607, 622 N.E.2d 859 (2d Dist. 1993) According to police witnesses, during a melee outside a teen dance club a deputy sheriff ordered the defendant to get in his car. Defendant refused, and the deputy attempted to make an arrest. The officer and the defendant struggled, and the defendant slammed the officer to the ground, causing a broken collar bone and head injuries. Other witnesses, including the defendant, testified that he told the officer that the car was locked and he could not open it. These witnesses also testified that defendant did not slam the officer to the ground, but that the defendant and several officers were involved in a struggle which ended with defendant falling to the ground on top of the deputy. At the instruction conference, the trial judge agreed to give only the first paragraph of the IPI instruction defining "knowing" behavior. The Court held that the trial judge erred by failing to give both paragraphs of the pattern instruction. The Committee Comments to the instruction provide that the first paragraph applies where the offense is "defined in terms of prohibited conduct," and the second paragraph applies where the offense is defined "in terms of a prohibited result." When "both conduct and result are in issue," both paragraphs are required. The Court concluded that because the charges alleged that defendant acted "knowingly," both conduct and result were in issue and both paragraphs of the instruction should have been given.

People v. Pearson, 252 Ill.App.3d 1, 623 N.E.2d 895 (2d Dist. 1993) Defendant was convicted of one count of aggravated criminal sexual assault involving oral sex but acquitted of a second count alleging sexual intercourse. The complainant testified that defendant took her to his home under the guise of selling her cocaine, but instead forced her to submit to repeated sexual acts. The definition instruction for aggravated criminal sexual assault correctly informed the jury that the State was required to prove that defendant committed an act of sexual penetration by the "use of force or threat of force." In addition, a separate

instruction defined "use of force or threat of force." However, the issues instruction stated that defendant could be convicted of aggravated criminal sexual assault upon a finding that he had committed an act of sexual penetration while displaying a dangerous weapon. As a matter of plain error, the Appellate Court found that the incomplete instruction denied defendant a fair trial. The Court stated, "while it may be gleaned from the four instructions. . . that the use of force or the threatened use of force is an element of the crime, such a proposition is not readily evident from a reading of these instructions. Furthermore, standing alone, the elements instruction setting forth expressly what it is that the State must prove is erroneous, as it lacks the element of use of force or the threatened use of force."

People v. Cadwallader, 181 Ill.App.3d 488, 536 N.E.2d 1319 (4th Dist. 1989) In reading the instructions to the jury the trial judge noticed that one of the issue instructions, as typed, failed to include the required final paragraph. Since the typed instruction was defective, the judge sent the jury to deliberate without the written instructions. Shortly thereafter it was discovered that a necessary paragraph was also missing from another instruction. After about 35 minutes of deliberations, the jury was returned to the courtroom and read the corrected instructions. The Appellate Court held that it was "plain error for the jury to have been deprived, for any amount time, of the essential instructions that would have explained the elements of the crimes charged, the presumption of innocence, and the burden of proof." For about half its deliberations the jury was "without jury instructions to guide them"; thus, "was erroneously left to its own speculation and improvisation."

People v. Carr, 149 Ill.App.3d 918, 501 N.E.2d 241 (1st Dist. 1986) Both the State and the defendant are entitled to instructions on any theory of the case that is supported by the evidence.

People v. Sanders, 129 Ill.App.3d 552, 472 N.E.2d 1156 (1st Dist. 1984) In orally giving the issues instruction for attempt murder, the trial judge stated that "if any one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty." (The IPI instruction for the offenses states that the defendant should be found guilty only if all of the propositions have been proven beyond a reasonable doubt.) The Court held that the instruction was "plain error" since it authorized the jury to convict defendant if less than all the elements were proven.

People v. Cox, 74 Ill.App.2d 342, 220 N.E.2d 7 (4th Dist. 1966) Giving a flight instruction is error in the absence of proof that defendant knew or should have known that he was a suspect.

§32-8(b)

Burden of Proof; Presumption of Innocence

United States Supreme Court

Victor v. Nebraska & Sandoval v. California, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) Two defendants challenged their convictions on the ground that their juries had been given improper instructions defining reasonable doubt. The Supreme Court held that neither instruction violated due process. Although the reasonable doubt standard is a component of due process and the instructions as a whole must convey the concept of

reasonable doubt to the jury, the Constitution neither requires nor prohibits an instruction defining reasonable doubt. Therefore, such an instruction violates due process only if there was a reasonable likelihood that the jury understood it to allow a conviction on evidence insufficient to establish guilt beyond a reasonable doubt. Although the instructions here used archaic phrases such as "moral evidence" and "moral certainty," those phrases were defined in terms of the evidence introduced in the case and the need for "near certitude," an "abiding conviction of guilt," and the degree of certainty that would cause a reasonable person to act in a grave matter. Considering these definitions, it is unlikely that the jury would have interpreted the phrases inconsistently with the reasonable doubt standard.

Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1991) When determining whether an instruction is unconstitutional, the reviewing court must consider the instruction as it could have been interpreted by a reasonable jury. Here, due process was violated by an instruction which equated "reasonable doubt" with "grave uncertainty" and "actual substantial doubt," and also defined "reasonable doubt" in terms of a "moral certainty," because the instruction could have misled reasonable jurors about the degree of doubt required for acquittal.

Carella v. California, 491 U.S. 263, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989) The jury was instructed that a person shall be presumed to have embezzled a vehicle that he fails to return within five days of the expiration of the rental agreement. The jury was also instructed that intent to commit theft by fraud is presumed from the failure to return rental property within 20 days of a demand. The instructions violated due process under **Sandstrom v. Montana**. The instructions gave "mandatory directions" which foreclosed independent jury consideration of whether the facts proved the elements of the offenses, and relieved the State of its burden of proof.

Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985) At defendant's trial the jury was instructed that "[t]he acts of a person of sound mind are presumed to be the product of the person's will, but the presumption may be rebutted," and that "a person of sound mind is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted." These instructions violated the due process requirement that the State prove every element of the offense, since a reasonable juror could have understood the instructions as creating a mandatory presumption that shifted to the defendant the burden of persuasion on the element of intent. See also, **Sandstrom v. Montana**, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); **Koehler v. Engle**, 466 U.S. 1, 104 S.Ct. 1673, 80 L.Ed.2d 1 (1984).

Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978) The trial court's refusal to give a tendered instruction on the presumption of innocence violated defendant's right to a fair trial. Instructing the jury that the prosecution bears the burden of proof beyond a reasonable doubt is not a sufficient substitute for a presumption of innocence instruction. See also, **Kentucky v. Whorton**, 441 U.S. 786, 99 S.Ct. 2088, 60 L.Ed.2d 640 (1979), where the failure to give a presumption of innocence instruction did not, in and of itself, violate the Constitution. Such a failure must be evaluated in light of the totality of the circumstances - all the instructions given, the arguments of counsel and the weight of the evidence.

Illinois Supreme Court

People v. Downs, 2015 IL 117934 The Federal Constitution does not require or prohibit a jury instruction defining reasonable doubt. A reasonable doubt instruction violates due process only if there is a reasonable likelihood that the jurors understood the instruction to allow conviction upon proof that is less than beyond a reasonable doubt.

Illinois, like some other jurisdictions, does not define reasonable doubt. The rationale behind this rule is that “reasonable doubt” is self-defining and needs no amplification. Thus, not only is there no IPI definition of “reasonable doubt,” the Committee Notes state that no instruction should be given. **IPI Criminal 4th No. 2.05**, Committee Note.

During deliberations, the jury asked, “What is your definition of reasonable doubt, 80%, 70%, 60%?” The court concluded that the trial judge did not err by responding, “We cannot give you a definition[;] it is your duty to define.” The court concluded that this answer was “unquestionably correct” in light of Illinois precedent that the jury should not be given a definition of reasonable doubt.

The court rejected the argument that error occurred in the context of this case because in view of the jury’s reference to percentages ranging from 60 - 80%, the failure to provide a definition allowed the jury to use a standard that was less than reasonable doubt. The court noted the difficulty of giving a cogent definition of “reasonable doubt,” and held that in its view “it is better to refrain” from giving a definition at all. The court also noted that defense counsel did not object to the trial court’s response and that had error occurred the issue could only be reached as plain error.

People v. Casillas, 195 Ill.2d 461, 749 N.E.2d 864 (2000) A written instruction informing the jury of the presumption of innocence and the State’s burden of proof is a “time-honored and effective method of protecting a defendant’s right to a fair trial, which is guaranteed by the due process clause of the Fourteenth Amendment.” The trial court has the burden of seeing that the jury is instructed on the presumption of innocence and the State’s burden of proof but the failure to give such an instruction does not necessarily compel a finding that the defendant was denied due process and a fair trial. Here, the Supreme Court concluded that due process was satisfied, despite the absence of a written instruction, where the trial judge verbally instructed the venire of the presumption of innocence and burden of proof, repeated such instructions at various points during the trial, and gave an elements instruction indicating that defendant could be convicted only if all of the propositions had been proven beyond a reasonable doubt. In addition, the burden of proof and presumption of innocence were discussed during closing arguments, and the evidence of guilt was overwhelming.

People v. Layhew, 139 Ill.2d 476, 564 N.E.2d 1232 (1990) The Appellate Court reversed because the jury was not given a written instruction on the presumption of innocence or the burden of proof. The Court did not examine the totality of the circumstances to determine whether defendant received a fair trial in the absence of the above instruction, but instead issued a “directive” that the failure to give the above instruction will result in reversal. The Supreme Court reversed, however, holding that the failure to give the jury a written instruction on the presumption of innocence and burden of proof is not automatically reversible error; the reviewing court must look to the totality of the circumstances to determine whether defendant received a fair trial. Here, the jury was “adequately informed” about the presumption of innocence and burden of proof “where the trial court provided an

extensive dissertation on these principles before the trial started. . . . and these concepts were repeated during the trial and included within three jury instructions.”

People v. Housby, 84 Ill.2d 415, 420 N.E.2d 151 (1981) At defendant’s trial for burglary, the jury was given the IPI instruction on possession of recently stolen property (“[i]f you find that the defendant had exclusive possession of recently stolen property, and there was no reasonable explanation of his possession, you may infer that the defendant obtained possession of the property by burglary”). The Supreme Court upheld the use of this instruction.

People v. Cagle, 41 Ill.2d 528, 244 N.E.2d 200 (1969) The concept of reasonable doubt needs no definition, and the giving of an instruction defining it is error. See also, **People v. Failor**, 271 Ill.App.3d 968, 649 N.E.2d 1342 (4th Dist. 1995).

People v. Harper, 36 Ill.2d 398, 223 N.E.2d 841 (1967) It is improper to instruct the jury that attempt escape from custody raises a “presumption of guilt” of the crime charged.

Illinois Appellate Court

People v. Hampton, 2024 IL App (1st) 230171 The appellate court majority found first-prong plain error because the trial court failed to instruct the jury that armed habitual criminal requires knowing possession in a closely balanced case.

At the time of trial there was no AHC pattern instruction. The trial court instructed the jury that “a person commits AHC when he possesses any firearm after previously being convicted of two qualifying felony offenses.” While this language tracked the statute, it failed to accurately state the law because under **People v. Ramirez**, 2023 IL 128123, when a possessory criminal statute lacks an explicit mental state, the implied mental state is knowledge.

First-prong plain error occurred because the evidence was closely balanced. The defendant argued at trial that he was unaware of the gun’s presence in the car. He told the police that the car belonged to his girlfriend and the gun was hidden underneath the seat. Defendant’s girlfriend testified the gun and car belonged to her. Multiple jury notes indicated that the jury was closely divided.

The dissent pointed out that in the time between the verdict and the instant decision, the rules committee created pattern instructions for AHC which mirror the instructions given here. The majority found, however, that these pattern instructions misstate the law because they omit a mental state. The majority noted that all other pattern instructions involving the possession of a weapon include knowledge as an element.

People v. Phillips, 2022 IL App (1st) 181733 Defendant alleged on appeal that the trial court made two prejudicial comments to jurors during *voir dire*. In the first comment, while trying to explain the concept of reasonable doubt to a veniremember, the court stated that “if you have doubt, a significant doubt, then you shouldn’t find them guilty.” The Appellate Court agreed this comment was improper. In **People v. Downs**, 2015 IL 117934, the Supreme Court held that a trial court should refrain from providing a definition of “reasonable doubt.” And while the constitution does not prohibit courts from providing a definition, any definition must not lessen the State’s burden. This comment lessened the State’s burden. The term “significant doubt” is materially different from “reasonable doubt.” The former suggests a lessened burden of proof. Thus, the Appellate Court found clear error.

This error required reversal under both prongs of the plain error rule. Given the fundamental importance of proper jury instruction on the State's burden of proof, the trial court's "significant doubt" comment clearly constituted second-prong plain error. In fact, a faulty reasonable doubt instruction is one of the limited number of enumerated "structural errors." Furthermore, in a case involving a contested cause of death, with conflicting expert opinions on whether defendant's sexual assault of an 81-year-old woman contributed to her death from heart disease four days later, the closely-balanced prong applied as well.

The trial court did not err, however, when in response to a request to define reasonable doubt, it stated that it was not allowed to provide a definition, and told the venire they would have to use "common life experiences . . . to determine what they feel is a reasonable doubt." Courts have consistently endorsed similar responses to jury requests for reasonable doubt definitions, finding no error in suggesting that the jurors use their own common sense and life experiences to determine the meaning of reasonable doubt.

People v. Green, 2017 IL App (1st) 152513 The trial judge did not commit a clear or obvious error during voir dire when comparing the reasonable doubt standard to the preponderance of the evidence standard and using his hands to visually represent a scale. The comments accurately stated the law by identifying that the burden of proof was beyond a reasonable doubt, distinguishing it from the lesser standard of proof in civil cases, and emphasizing that reasonable doubt is the highest standard of proof at law. These comments were unlike the line of cases finding that the judge or State improperly attempted to define reasonable doubt, and in any event, the Illinois Supreme Court has since taken a more permissible approach to this issue in **People v. Downs, 2015 IL 117934**, finding that instructing jurors to determine the meaning of reasonable doubt is not *per se* reversible error.

People v. Cacini, 2015 IL App (1st) 130135 Defendant was convicted, in a jury trial, of attempt first degree murder and aggravated battery. The trial court concluded that the evidence was sufficient to warrant giving self-defense instructions, and gave **IPI Criminal 4th No. 24-25.06**, which provides the general definition of self-defense. However, the trial judge failed to also give **IPI Criminal 4th No. 24-25.06A**, which informs the jury as the final proposition in the issues instructions that the State bears the burden of proving beyond a reasonable doubt that defendant lacked justification to use force in self-defense. The Committee Note to **IPI Criminal 4th No. 24-25.06** instructs the trial court to give both to give both No. 24-25.06 and No. 24-25.06A when instructing on self-defense.

As a matter of plain error under the second prong of the plain error rule, the Appellate Court reversed and remanded for a new trial.

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. The jury must be instructed as to the affirmative defense and the State's corresponding burden of proof. **IPI Criminal 4th Nos. 24-25.06** and **24-25.06A** fulfill this requirement. Supreme Court Rule 451(a) requires the trial court to use the Illinois Pattern Jury Instructions, Criminal, related to a subject when the court determines that the jury should be instructed on the subject.

Supreme Court Rule 451(c) provides that if the interests of justice so require, substantial defects in criminal jury instructions are not waived by the failure to make timely objections. The purpose of Rule 451(c) is to permit the correction of grave errors and errors in cases that are so factually close that fundamental fairness requires that the jury be

properly instructed. Rule 451(c) is coextensive with the plain-error clause of [Illinois Supreme Court Rule 651\(a\)](#).

Under the plain-error doctrine, “[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded” unless the appellant demonstrates plain error. The plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either: (1) 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) the error is so serious that it affected the fairness of the defendant’s trial and challenged the integrity of the judicial process.

Although defense counsel failed to tender [IPI Criminal 4th No. 24-25.06A](#), failed to timely object to the absence of the instruction, and failed to include the issue in his posttrial motion, the Appellate Court concluded that the trial judge’s failure to give No. 24-25.06A constituted plain error. The court concluded that the omission of a burden of proof instruction may have caused the jury to believe that defendant had to prove that he acted in self-defense, especially since neither party’s closing argument clarified the burden of proof and the State’s closing argument could easily have been misinterpreted.

Defendant’s convictions for attempt first degree murder and aggravated battery were reversed and the cause remanded for a new trial.

[People v. Gashi, 2015 IL App \(3d\) 130064](#) Trial courts should not attempt to define reasonable doubt for the jury. The concept of reasonable doubt is self-explanatory and needs no further explanation. Providing a definition of reasonable doubt is more likely to confuse a jury than clarify its meaning.

Noting a split among the Illinois Appellate Courts on this issue, the Appellate Court held here that it was structural error under the second prong of plain error for the trial court to tell the jury during *voir dire* that there is no definition of reasonable doubt, so “that is for you [the jury] to decide.” Such a statement implies a broad range of meanings for the concept of reasonable doubt, and it is reasonably likely that the jury would overestimate the latitude it had in defining reasonable doubt.

The dissent did not believe that the trial court’s comments were erroneous. Nothing in the court’s comments created a reasonable likelihood that the jury believed it could convict on anything less than reasonable doubt.

[People v. Thomas, 2014 IL App \(2d\) 121203](#) The failure to correctly instruct the jury on the State’s burden to prove defendant guilty beyond a reasonable doubt is a violation of due process. The proper inquiry is not whether the jury could have applied a particular instruction in an unconstitutional manner, but whether there is a reasonable likelihood that the jury actually applied the instruction improperly.

The United States Supreme Court has held that as a matter of federal constitutional law a trial court is neither prohibited from nor required to define reasonable doubt. Under Illinois law, however, courts are discouraged from defining reasonable doubt for a jury. There is no recommended jury instruction providing such a definition, and the committee notes recommend that courts give no instruction defining the term.

But defining reasonable doubt does not necessarily constitute reversible error. Instead, the question is whether the instructions taken as a whole created a reasonable likelihood that the jury believed it could convict under a lesser standard than reasonable doubt.

Here, the trial court answered the jurors’ request for the legal definition of reasonable doubt by telling them that “it is for you to decide.” The Appellate Court held that this response

was “unquestionably correct.” The court did not attempt to define reasonable doubt for the jury. Instead, it left the jurors to wrestle with its meaning themselves, which is in keeping with our legal system’s confidence that jurors will act diligently and thoughtfully in applying the law. “[A]bsent any concrete demonstration of error or confusion, jurors should be trusted to apply the reasonable doubt standard appropriately.”

People v. Velez, 2012 IL App (1st) 101325 A permissive presumption permits but does not require a jury to find that one fact is proved by the existence of another fact. A permissive presumption does not violate due process where: (1) there is a rational connection between the basic fact and the presumed fact; (2) the presumed fact more likely than not flows from the basic fact; and (3) the inference is supported by corroborating evidence of guilt.

Defendant was charged with child abduction by luring or attempting to lure a child under the age of 16 into a motor vehicle for other than a lawful purpose. **720 ILCS 5/10-5(b)(10)**. The jury was instructed in conformity with **IPI Criminal 4th No 8.11A**: “If you find that the defendant lured, or attempted to lure a child under 16 years of age into a motor vehicle, and that he did so without the consent of a parent or lawful custodian, you may infer it was for other than a lawful purpose. You are never required to make this inference. It is for the jury to determine whether the inference should be made. You should consider all of the evidence in determining whether to make this inference.”

Allowing the jury to infer that defendant acted with other than a lawful purpose from the fact that he attempted to lure a 14-year-old girl into his van did not violate due process. There is a rational connection between the proved fact and the presumed fact. Defendant used words and gestures designed to direct the girl to enter his van. She felt fearful, tried to ignore him, and increased her pace in order to escape from him. Defendant called her “baby girl” and drove alongside her. The absence of evidence that defendant touched, harmed, or threatened her did not eliminate the rational connection between the proved and presumed fact. There is no requirement that defendant actually touch or harm the child to be guilty of child abduction. It is more likely than not that defendant lured the child for an unlawful purpose. The inference was supported by evidence that defendant left when the girl told him she saw her mother, tried to change his appearance later that day, and denied to the police that he had any interaction with the girl, all of which demonstrated his consciousness of guilt.

People v. Walker, 2012 IL App (2d) 110288 Generally, a party which desires a specific instruction must offer that instruction and ask that the trial court give it. The court usually has no obligation to instruct on its own motion. There are exceptions to this rule in criminal cases, because the court has the burden of seeing that the jury is instructed on the elements of the crime, the presumption of innocence, and the burden of proof. In addition, the trial court must give adequate guidance to the jury in its evaluation of the evidence.

No error occurred in a felony murder case where the trial court failed to *sua sponte* give IPI Crim. 4th No. 7.15A, which states that a person is guilty of first degree murder where he sets forth a chain of events by committing a felony and the death in question is a direct and foreseeable consequence of that chain. In its argument on a motion for a directed verdict and on appeal, the defense claimed that there was an intervening cause of death - the refusal of the decedent, a Christian Scientist, to consent to a blood transfusion that doctors said was necessary to save his life. Defendant did not make that claim before the jury, however, claiming instead that the evidence did not show that he had perpetrated the injuries to the decedent. Defendant also did not ask the trial court to give IPI Crim. 4th No. 7.15A.

The trial court adequately instructed the jury concerning the presumption of innocence, the burden of proof, and the elements of the offense. Furthermore, the causation

instruction of IPI Crim. 4th No. 7.15A is not an essential element of felony murder, and is given only when causation is at issue. In addition, the trial court gave IPI Crim. 4th No. 7.15, which is not as “specialized” as No. 7.15A but which states that the prosecution has the burden to prove that the defendant’s acts were a contributing cause of the death and that death did not result from a cause unconnected to the defendant. Where the defense failed to claim before the jury that the decedent’s refusal of a blood transfusion was an unforeseeable intervening cause sufficient to relieve the defendant from liability for the death, the court found that the instructions that were given provided sufficient direction to the jury to apply the law and evaluate the evidence.

The court stated, however, that had defense counsel’s theory of the case been that the refusal to undergo a blood transfusion was an unforeseeable, intervening cause, the trial court might have been required to give IPI Crim. 4th No. 7.15A in support of that theory.

People v. Turman, 2011 IL App (1st) 091019 The term “reasonable doubt” is self-defining and needs no further elaboration. The principle that a jury is entitled to have its legal questions answered does not include a request to have reasonable doubt defined.

After deliberating several hours, the jury asked for a “more explicit, expansive definition of reasonable doubt.” With the agreement of the parties, the court responded that “reasonable doubt is not defined under Illinois law. It is for the jury to collectively determine what reasonable doubt is.”

By instructing the jury that it could collectively determine what reasonable doubt is, the court allowed the jury to use a standard that in all likelihood was below the threshold of the reasonable doubt standard. The best response for the court to have made would have been to refuse to give the jury an additional explanation.

The court found this instruction to be plain error under both prongs of the plain-error rule. A 17-year-old defendant was charged with criminal sexual assault of 19-year-old college student who had drunk excessive amounts of alcohol, on the theory that he knew that she was unable to give knowing consent to sexual acts. Faced with this difficult task, it was critical that the jury understand what standard of proof it was to utilize. Under the first prong, because of the closeness of the evidence, the clear error threatened to tip the scales of justice against the defendant. Under the second prong, the error was so serious that it affected the fairness of the defendant’s trial and his right to due process, thereby challenging the integrity of the judicial process.

People v. Dodd, 173 Ill.App.3d 460, 527 N.E.2d 1079 (2d Dist. 1988) At the defendant’s trial for retail theft, the following instruction was given:

“If any person removes merchandise beyond the last known station for receiving payment for the merchandise in that retail mercantile establishment, such person shall be presumed to have possessed, carried away or transferred such merchandise with intention of retaining it or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the full retail value of such merchandise.”

The Appellate Court followed **People v. Flowers, 134 Ill.App.3d 324, 480 N.E.2d 198 (4th Dist. 1985)**, and held that the above instruction is unconstitutional:

“We believe, as did the **Flowers** court, that possession with intent to permanently deprive a merchant of possession of merchandise without paying its full retail value does not necessarily flow beyond a reasonable doubt from the predicate fact of removing merchandise

beyond the last known station for payment. We agree that ‘it is not completely unreasonable to hypothesize a person carrying an item of merchandise past the last payment station, without paying for it, due to inadvertence or thoughtlessness and not due to an intention of retaining it without paying its full retail value.’ We thus conclude that the instruction’s mandatory presumption is constitutionally infirm.”

People v. Cage, 146 Ill.App.3d 726, 497 N.E.2d 386 (1st Dist. 1986) The Court reversed because the jury was not given written instructions on the presumption of innocence and the burden of proof. The instructions were not requested by the defendant, but “the trial court bears the burden on its own motion of seeing that the jury is instructed [regarding these basic protections.]” The Court held that the trial judge’s statement during *voir dire* (that the defendant was innocent until the State proved him guilty beyond a reasonable doubt) was not sufficient to properly instruct the jury. Since the trial judge also told the jury during *voir dire* that the applicable law would be stated in the instructions, this “counteracted” the trial court’s explanation.

People v. Ayala, 142 Ill.App.3d 93, 491 N.E.2d 154 (1st Dist. 1986) Defendants contended that reversible error occurred where the trial judge failed, *sua sponte*, to give the jury an instruction on the presumption of innocence and the burden of proof. The Court applied the test set out in **Kentucky v. Whorton**, 441 U.S. 786 (1979), and concluded that under the totality of circumstances the defendants received a fair trial. The Court noted that during *voir dire*, the principles of presumption of innocence and reasonable doubt were “outlined and explained.” The jurors were questioned about the State’s burden of proof, and all jurors were present. “Thus, the jurors heard the questions about fairness and burden of proof numerous times.” The Court also noted that in his closing argument defense counsel “repeatedly emphasized” the presumption of innocence and the requirement of proof beyond a reasonable doubt. In addition, the verdict “finds ample support in the record since it was based on the testimony of an eyewitness to the crime.” The Court concluded that although the “written presumption of innocence and burden of proof instruction should have been tendered to the jury, we conclude that its omission did not deny defendants a constitutionally fair trial.”

People v. Grant, 101 Ill.App.3d 43, 427 N.E.2d 810 (1st Dist. 1981) At defendant’s trial the jury was not instructed that the State must prove one of the mental states set forth in the Criminal Code. The Appellate Court held that a trial judge “bears the burden of seeing that the jury is instructed on the elements of the crime charged, on the presumption of innocence and on the question of burden of proof.” Here, because the instructions failed to include an essential element (mental state) of the crimes charged, the convictions must be reversed.

§32-8(c)

Conflicting Instructions

Illinois Supreme Court

People v. Woods, 2023 IL 127794 Defendant and her then-fiancé, Andrew Richardson, were charged with numerous offenses arising out of the physical abuse of defendant’s 7-year-old son, Z.W. Evidence at trial was that a man walking his dog had encountered Z.W., alone, on a city sidewalk. Z.W. told the man he was going to a playground. The man observed visible scars and bruises on Z.W. and called the police. Z.W. told the police, a social worker, medical

personnel, and others that both defendant and Richardson had struck him with various objects, including a baseball bat, a belt, and a wire cord. Additionally, Richardson held Z.W. against a burner on the stove, and defendant burned Z.W. with a hair iron. A physical examination revealed extensive injuries and scars consistent with Z.W.'s claims. Defendant testified that Z.W.'s injuries were either accidental or were caused by Richardson. The State argued that defendant was guilty both as a principal and under a theory of accountability, and defendant was convicted of four counts of aggravated battery of a child.

On appeal, defendant alleged instructional error in that the jury was given conflicting instructions on accountability. Specifically, the jury was given [IPI Criminal 5.03](#), the general accountability instruction, which provides, in part, that a person is legally responsible for the conduct of another when she “knowingly...aids, abets, agrees to aid, or attempts to aid the other person in the planning or commission of an offense.” And, over a defense objection predicated on [People v. Pollock, 202 Ill. 2d 189 \(2002\)](#), the trial court gave the State’s non-pattern instruction on parental accountability, which stated that, “[a] parent has a legal duty to aid a small child if the parent knows or should know about a danger to the child” and has the physical ability to protect the child.

The supreme court held that the parental accountability instruction was improper because it allowed for conviction based on a negligent mental state. But, the court concluded that directly conflicting instructions may be harmless where they do not concern a disputed essential issue in the case and thus there is no risk that the jury relied on the incorrect instruction. Here, defendant’s knowledge for purposes of accountability was not an essential element because she was proved guilty beyond a reasonable doubt as a principal. Thus, the error in including the “should know” language was harmless.

The court noted that the parental accountability instruction at issue here was predicated on language which appears in the committee notes to [IPI Criminal 5.03](#) which plainly misstates the law of accountability. While the court did not issue an amendment to the note, it did “suggest that until such time as the drafting committee proposes an amendment, any instruction on parental accountability not include the ‘should have known’ language.”

[People v. Bush, 157 Ill.2d 248, 623 N.E.2d 1361 \(1993\)](#) The trial court erred by giving a non-IPI instruction that could have confused the jury about the elements of home invasion. Although non-IPI instructions may be given where the pattern instructions do not reflect the law, such instructions must be accurate, simple, brief, impartial and non-argumentative. The non-IPI instruction in this case misstated the limited-authority doctrine in that it said that consent for an entry was vitiated merely because criminal acts were subsequently committed, without regard to whether those crimes were intended at the time of the entry. In addition, it conflicted with IPI instructions concerning the elements of home invasion. The Court held that in appropriate cases the jury should be instructed that a consensual entry to a dwelling is unauthorized where the defendant, or one for whose conduct he is accountable, at the time of the entry intends to commit criminal acts once inside the dwelling.

[People v. Jenkins, 69 Ill.2d 61, 370 N.E.2d 532 \(1977\)](#) At defendant’s trial for attempt murder, where the central issue was whether his use of force was justified, two directly conflicting instructions were given to the jury. The defense instruction correctly stated that defendant could be convicted only if he was not justified in using the force in question, but the State’s instruction omitted any reference to that essential element. Where the instructions are contradictory, the jury cannot perform its constitutional function. 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. See also, [People v. Alvine](#), 173 Ill.2d 273, 671 N.E.2d 713 (1996) (conflicting instructions on murder).

[People v. Stanko](#), 402 Ill. 558, 84 N.E.2d 839 (1949) “The law requires that the jury shall be instructed only concerning the crime charged. The giving of an instruction defining a different offense is not cured by the presence of an accurate one, because it cannot be shown whether the jury followed the correct or the erroneous instruction.” See also, [People v. English](#), 287 Ill.App.3d 1043, 679 N.E.2d 494 (3d Dist. 1997).

Illinois Appellate Court

[People v. Hilson](#), 2023 IL App (5th) 220047 During deliberations on the charge of armed habitual criminal, the jury asked whether they were to decide if defendant had possession of the gun “at the time of arrest or any time before the arrest?” In response, the court gave IPI 3.01, which told the jurors that defendant was charged with committing the offense on October 7, 2020, but that if they found the charged offense was committed, “the State is not required to prove that it was committed on the particular date charged.” Defense counsel objected but did not state a basis for the objection.

On appeal, defendant argued that IPI 3.01 conflicted with the stipulation that “on October 7, 2020,” defendant had been previously convicted of the necessary qualifying offenses, a separate element of the offense of armed habitual criminal. The appellate court disagreed. Considering the instructions as a whole, the court found that the instructions were not in conflict and there was no error. Regardless, any error was harmless because the outcome would have been the same; defendant stipulated to the prior convictions, which occurred in 2007 and 2008, and there was no danger the jury was misled by IPI 3.01. And, finally, defense counsel was not ineffective for not specifically challenging IPI 3.01. Because there was no error in the giving of that instruction, defendant could not demonstrate deficient performance or prejudice.

[People v. Royster](#), 2018 IL App (3d) 160306 In giving non-IPI instructions on the parental-discipline affirmative defense to aggravated battery and domestic battery, the court did not err in requiring the jury to find the corporal punishment both reasonable and necessary. Much of the authority explicitly requires a necessity showing, and while some authority mentioned only reasonableness, this authority implicitly acknowledged a necessity requirement. Nor did instructions requiring the State to prove the conduct was not either reasonable or necessary conflict with the instruction requiring the defendant to prove his conduct was both reasonable and necessary; the former is the proper inverse of the latter.

[People v. Brown](#), 2017 IL App (1st) 160025 At defendant’s trial for resisting a police officer, the State’s evidence showed that the police stopped defendant’s vehicle for driving without headlights. When defendant fled, four officers got out of the police car with drawn weapons and chased after defendant. When they caught defendant and tried to subdue him, he punched one of them.

Defendant testified that he did not know the four individuals were police officers. When they got out of their car with drawn weapons, defendant got out of his car and ran. When one of the officers caught up to defendant, tackled him, and began punching and choking him, defendant rolled himself into a ball and covered his head to avoid being hit. The trial court denied defendant’s request to instruct the jury on self-defense.

The Appellate Court held that defendant was entitled to a self-defense instruction since there was some evidence of excessive force on the part of the police and there was a genuine issue about whether defendant's resistance may have been the result of the violent confrontation.

People v. Ayers & Hoskins, 331 Ill.App.3d 742, 771 N.E.2d 1041 (1st Dist. 2002) Reversible error occurred where the court gave contradictory first and second degree murder instructions, some of which omitted the element of justifiable use of force. These instructions allowed the jury to convict defendant of first degree murder without ever considering whether he was justified in using force. Reversal is required if the jury is "presented with two self-contained, inherently contradictory and inconsistent issues instructions defining the elements requisite for a finding of guilty."

People v. Foster, 23 Ill.App.3d 559, 319 N.E.2d 522 (4th Dist. 1974) Conviction reversed because jury was given contradictory instructions on intoxication. The jury was instructed that "an intoxicated person is . . . responsible . . . unless his intoxication renders him incapable of acting intentionally," and that "a voluntary condition of drunkenness is no excuse for the commission of a crime." As a whole the instructions were misleading, confusing and incorrect.

§32-8(d)

Admissions - Confessions

(Note: IPI 3.06-3.07, does not use the terms "admission" or "confession." The Committee Note states that "whether a statement is an admission, confession, or false exculpatory statement is a legal conclusion that ought not to be communicated to the jury.") Prior to the adoption of this instruction numerous decisions dealt with the question of whether the jury should be instructed that a defendant's statement was a "confession" or a less incriminating "admission." See **People v. Floyd**, 103 Ill.2d 541, 470 N.E.2d 293 (1984); **People v. Cook**, 33 Ill.2d 363, 211 N.E.2d 374 (1965).

Illinois Appellate Court

People v. James, 2017 IL App (1st) 143391 IPI 3.06-3.07, regarding statements of the defendant relating to the charged offense, contains bracketed language requiring the jury to determine "whether the defendant made the statements." The language should be removed only when the defendant admits he made the statements at issue. In this case, the defendant argued the trial court erred in removing the language where he never admitted to making the statements at issue – various commands and threats leveled by the offenders at the complainants during a home invasion. The Appellate Court held that "statements relating to the charged offense" do not refer to the types of threats or commands at issue in this case, which are more accurately characterized as "utterances." Rather, the history of the instruction reveals that it was intended to cover admissions or confessions. Thus, the error was not in omitting the bracketed language, but in giving the instruction at all. But this error was forfeited, and regardless, harmless. Even if the jury used the instruction to analyze the utterances, and would have determined that the co-defendants, and not defendant, made them, the outcome could not have changed because the defendant was tried under a theory of accountability.

People v. Turman, 2011 IL App (1st) 091019 The court also found omission of language that it was for the jury to determine whether the defendant made the statement from an instruction regarding the jury’s consideration of statement evidence (IPI Crim. 4th No. 3.06-3.07) was plain error. At trial, defendant denied making many of the statements contained in a written statement. He testified that the statement was never reread to him even though he signed each page of the statement, and asserted that he did not even know the definition of a word attributed to him in the statement. There was evidence supporting his denial as the grammar and language used by defendant in a note he wrote to the complainant was at odds with the language the prosecution claimed defendant used in the statement. Given the importance of the statement to the State’s case and the closely-balanced nature of the evidence, the error “threatened to tip the scales of justice away from the defendant.” It also satisfied the second prong of the plain-error rule as it “deprived the defendant of a fair trial and impacted the integrity of the judicial process.

This error was not cured by a separate instruction on the jury’s consideration of prior inconsistent statement evidence (IPI Crim. 4th No. 3.11) that informed the jury that it was for the jury to determine if the “witness made the earlier [inconsistent] statement” because it was unclear which instruction the jury chose to follow.

§32-8(e)

Affirmative Defenses

Illinois Supreme Court

People v. Kite, 153 Ill.2d 40, 605 N.E.2d 563 (1992) Defendant, a Menard inmate, was convicted of unlawful possession of a weapon by a person in custody of a DOC facility. The Appellate Court reversed because the trial judge refused to instruct the jury on necessity. The Supreme Court reinstated the conviction, finding that there was insufficient evidence to justify a necessity instruction. Several factors are to be considered in determining whether an inmate is entitled to a necessity instruction in a weapon case: whether the inmate received a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future; whether there was time to complain to authorities or a history of having made futile complaints; and whether defendant had the time and opportunity to resort to the court system. Although the latter two factors are not necessary in every case, the defendant must always show a specific and immediate threat.

People v. Crane, 145 Ill.2d 520, 585 N.E.2d 99 (1991) The defendant was charged with murder for beating and burning the victim and thereby causing his death. In regard to the beating defendant claimed he acted in self-defense. In regard to the burning (pouring gasoline over the victim and setting him on fire), he claimed that he believed the victim was already dead. The trial judge instructed the jury on self-defense but refused to give an instruction on mistake of fact. The Supreme Court held that it was reversible error to refuse the mistake of fact instruction. The defense was supported by the evidence: two police officers testified that defendant told them he believed the victim was dead prior to the burning, the expert witnesses were unable to conclusively determine whether the victim was alive at the time of the burning, and one expert testified that a lay person seeing an unconscious body with the victim’s injuries might reasonably conclude he was dead. A mistake of fact is a valid defense if it negates a mental state that is an element of the offense. Here, the mistake of fact, if believed by the jury, would have negated the mental state required for murder.

People v. Pegram, 124 Ill.2d 166, 529 N.E.2d 506 (1988) The victim went to his restaurant and bar about 5 a.m. to count the previous night's receipts. Shortly thereafter the defendant, who assisted the restaurant porter, knocked on the door and was admitted by the victim. The victim returned to the office, and defendant began his cleaning chores by taking trash to the rear of the building. When he unlocked the back gate, two masked men with guns entered, pointed a gun at his head and said defendant's brains would be blown out unless he did what they said. The defendant further testified that he did not know either of the masked men. Other evidence tended to show that the defendant may have been acting in concert with the masked men as they robbed the victim. The Supreme Court held that the jury should have been instructed on the defense of compulsion because the defendant's testimony constituted "some evidence" sufficient to raise the defense. The Court concluded that defense counsel's failure to tender an instruction on the defense of compulsion, and on the State's burden of proof for that defense, denied defendant effective assistance of counsel.

People v. Berry, 99 Ill.2d 499, 460 N.E.2d 742 (1984) At defendant's trial for murder, he raised the defense of self-defense. The jury was given appropriate definitional instructions, including one on justified use of force, but was not given an instruction which includes as an element the requirement that the State prove beyond a reasonable doubt that defendant was not justified in using the force he used. The Supreme Court held that the failure to instruct the jury properly was plain and reversible error. The Court distinguished **People v. Huckstead**, 91 Ill.2d 536, 440 N.E.2d 1248 (1982), in which the jury was told of the State's burden in regard to self-defense by both the defense counsel and the prosecutor in closing argument; thus, the jury was sufficiently informed. Here, however, the jury was not apprised of the State's burden in regard to self-defense. "Grave error resulted," because the evidence in this case was "factually close."

People v. Huckstead, 91 Ill.2d 536, 440 N.E.2d 1248 (1982) The defendant was charged with murder, and presented the defense of self-defense. The jury was instructed on the presumption of innocence, the elements of murder and justified use of force. However, the defendant did not tender, and the judge did not give *sua sponte*, an instruction, which included justified use of force in the elements of the offense. In his post-trial motion, defendant did not urge the failure to give the above instruction as error. The Supreme Court held that defendant waived his claim. The Court also refused to consider the issue as plain error — the evidence was not factually close, and the instructions that were given were not conflicting. In addition, the instructions which were given, coupled with the closing arguments by both sides, apprised the jury that the State had the burden of proving that defendant was not justified in the force he used.

People v. Haywood, 83 Ill.2d 540, 413 N.E.2d 410 (1980) After defendant raised an intoxication defense the State was allowed, over objection, to give two instructions on intoxication. One of the instructions was IPI but the other was a non-IPI which stated that defendant's intoxication is a defense "only if [it] is so extreme as to suspend entirely his power of reason, rendering him incapable of any mental action." The Court held that giving the above non-IPI instruction was reversible error. 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." Here, the non-IPI instruction served "to confuse the jury," which could have construed this instruction as requiring defendant to be devoid of any mental activity whatsoever.

People v. Unger, 66 Ill.2d 333, 362 N.E.2d 319 (1977) Defendant, who was on trial for escape, sufficiently raised the defense of necessity by testifying that he left the prison honor farm to save his life after being subjected to a death threat and threats of forced homosexual activity. Although the State's evidence cast doubt on the defendant's motives for escape, defendant was entitled to have the jury consider the defense on the basis of his testimony.

People v. Bratcher, 63 Ill.2d 534, 349 N.E.2d 31 (1976) A defendant is entitled to the benefit of any defense shown by the entire evidence, even if the facts on which such defense is based are inconsistent with the defendant's own testimony. "[V]ery slight" evidence upon a given theory of a case will justify an instruction.

Chicago v. Mayer, 56 Ill.2d 366, 308 N.E.2d 601 (1974) Defendant claimed that his conduct was necessary to protect an injured person during a demonstration. He was found guilty of disorderly conduct and interfering with a police officer. The trial court denied defendant's instruction because defendant was not a "reasonable man," but a medical student. The Supreme Court held that a "necessity defense must be viewed in light of the factual situation of the particular case which might include a defendant in a peculiar position to reasonably believe or anticipate an injury not apparent to someone who lacks similar knowledge, information or training." Reversed and remanded.

People v. Poe, 48 Ill.2d 506, 272 N.E.2d 28 (1971) Alibi is not an affirmative defense, and no instruction on alibi need be given.

Illinois Appellate Court

People v. Jones, 2024 IL App (1st) 221555 At defendant's trial for attempt first degree murder of a peace officer and unlawful use of a weapon by a felon, the trial court gave a modified version of IPI 24-25.20 on resisting arrest which told jurors that a person may not use force to resist "an *authorized act* or arrest * * * , even if he believes that the *authorized act* or arrest is unlawful and the *authorized act* or arrest in fact is unlawful." This misstated the law. The criminal code provides only that a person may not use force to resist an unlawful *arrest*. 720 ILCS 5/7-7 ("A person is not authorized to use force to resist an arrest...even if he believes that the arrest is unlawful and the arrest is in fact unlawful."); 720 ILCS 5/31-1. But the law does allow an individual to use reasonable force to resist a police officer's unlawful conduct other than an arrest, including unlawful authorized acts. It was error to instruct jurors to the contrary.

The court also erred in giving IPI 24-25.12, which states in relevant part that "A peace officer need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest or to defendant himself and/or another from bodily harm while making the arrest." Here there was no evidence that the police were seeking to arrest defendant prior to the shooting and thus no evidence that he used force to resist an arrest. Accordingly, there was no evidence to support the giving of the instruction, and the court abused its discretion in giving it.

Ultimately, however, the court found both errors harmless beyond a reasonable doubt. Defendant's claim of self-defense was without merit; even if the court accepted defendant's version of events, his use of deadly force against the officers was neither reasonable nor necessary. Accordingly, even if the erroneous instructions had not been given, a rational trier of fact would have rejected defendant's claim of self-defense.

People v. Vesey, 2024 IL App (4th) 230401 Defendant was convicted of aggravated battery of a peace officer after the trial court refused his request for a self-defense instruction. The appellate court majority affirmed.

The appellate court first analyzed the various statutes at play when an officer and civilian use force against each other, including [720 ILCS 5/7-7](#); section 5/7-5; and section 5/7-5.5, as well as the general self-defense statute, section 7-1(a). Pursuant to these statutes, in the arrest context, a defendant may not assert self-defense unless he can first establish that the officer used excessive force, a finding the trial court skipped in this case. The appellate court proceeded to address the question of whether self-defense applied, however, assuming that the trial court would have found the officer's use of force excessive.

Here, defendant was making bizarre and frightening statements during visitation with his young daughter, causing officers to arrive at the scene and eventually get between defendant and his daughter. When defendant walked toward his daughter, an officer placed his hand on defendant's chest, and defendant swiped it away. Another officer placed him under arrest via face-to-face tackle, taking him to the ground backwards. Defendant grabbed the officer's neck for five seconds, which was the act of battery charged in the indictment.

According to the majority, these facts could have supported the trial court's finding that defendant was not in fear. "The use of force in one's defense is justified only in situations involving fear for one's safety, as opposed to situations merely involving frustration, anger, or astonishment." The trial court could have reasonably found that defendant was frustrated, or instinctively reacting to the situation, rather than fearful. Accordingly, the trial court did not abuse its discretion.

The dissent would have remanded because body camera footage showed the officer violently tackled defendant over a retaining wall, knocking him backwards, such that there was some evidence that defendant's act of clinging to the officer's neck was done instinctively out of fear. The dissent believed the majority failed to use the "some evidence" standard and instead used an inappropriately deferential standard. The majority, however, had cited [People v. McDonald, 2016 IL 118882](#), for the proposition that the denial of a request for an instruction should be reviewed for an abuse of discretion.

People v. Taylor, 2023 IL App (4th) 220381 Defendant was charged with armed habitual criminal, aggravated battery with a firearm, and unlawful possession of a weapon by a felon, all arising out of the shooting of a man named Artemus Hunter. At trial, defendant testified that Hunter brought the gun to defendant's apartment when he came to collect money from defendant's girlfriend, that Hunter pulled the gun on him, and that Hunter was shot when the gun went off accidentally. Defendant then took the gun and fled the scene.

The trial court did not abuse its discretion when it denied defendant's request for jury instructions on the affirmative defenses of self-defense and necessity. To be entitled to a self-defense instruction, the defendant must present some evidence to support each of the following elements:

- (1) force was threatened against a person;
- (2) the person threatened was not the aggressor;
- (3) there was an imminent danger of harm;
- (4) the threatened force was unlawful;
- (5) the defendant actually and subjectively believed a danger existed which required the use of force he applied; and
- (6) that belief was objectively reasonable.

Inherent in an assertion of self-defense is that the defendant admit the conduct for which he is being prosecuted.

Here, defendant did not admit that he shot Hunter. Instead, defendant claimed that he grabbed Hunter's hand, and when he did, the gun discharged. This testimony would not

have supported a claim of self-defense, but rather a verdict of not guilty because defendant did not shoot Hunter at all according to his own testimony. Further, the State's version of events was that defendant shot Hunter after Hunter took a swing at him. Under the State's version, defendant lacked an objectively reasonable belief that he needed to use the degree or force he did here. Thus, neither the State's nor defendant's versions of the incident supported self-defense, and denial of a self-defense instruction was not error.

To warrant a necessity instruction, there must be some evidence that defendant was without blame in occasioning the situation in question and that he reasonably believed his conduct was necessary to avoid a public or private injury greater than that which would result from his own conduct. Alternatively stated, necessity applies where the threat of harm is immediate and defendant's conduct was the sole option to avoid injury. Defendant could not meet this burden where his testimony was that he took the revolver because he feared retaliation from Hunter's friends. This claim was too remote and speculative to constitute evidence of a specific and immediate threat, and thus it was not error to deny a necessity instruction.

People v. Miller, 2021 IL App (1st) 190060 At his second trial for possession of a stolen vehicle (after a prior reversal and remand on appeal), the owner of the vehicle in question testified that it was inoperable and had been parked in front of her house for some time. One day, she noticed the car was missing and called the police and reported it stolen. Her husband testified that the vehicle was recovered by the police and that the steering column was torn up when it was found. The husband was confronted with his testimony at defendant's first trial where he said the vehicle was "a piece of junk" and he had sold the vehicle to a tow truck driver. The husband said he lied about selling the vehicle at the first trial, claiming that defendant promised to get his wife another car but since had not followed through on that promise.

Defendant, who operated a towing and repair service, presented evidence that one of his workers had purchased the inoperable vehicle from the owner's husband with the intent of scrapping it at a junkyard. After the worker and defendant picked up the vehicle, however, they decided to see if it could be repaired because it looked to be in decent shape. A mechanic testified that he initially thought the vehicle was junk, but ultimately was able to get it running.

At the jury instruction conference, defendant requested instructions on the defense of mistake of fact. Defendant argued that there was at least some evidence that he believed his worker had lawfully purchased the vehicle and thus lacked the requisite mental state for possession of a stolen motor vehicle. The trial court refused mistake of fact instructions.

The Appellate Court found that defendant "more than met" the some evidence standard, and the mistake of fact instructions should have been given. That the mistake of fact (believing the husband could lawfully sell the vehicle) may have been made by defendant's employee, rather than defendant himself, was inconsequential. To the extent defendant relied on the purchase as legitimate, even if he was not directly involved in the transaction, it was his mistake as well. The Appellate Court reversed and remanded for a new trial.

People v. Elizondo, 2021 IL App (1st) 161699 The State charged defendant with the first-degree murder of his sister's boyfriend. Several witnesses testified that the incident occurred when the boyfriend attempted to intervene in an argument between defendant and his sister. Defendant punched the boyfriend, who fell and lost consciousness when his head hit the sidewalk. The defendant continued to strike the boyfriend's head against the pavement. None

of these witnesses saw the boyfriend physically attack defendant. Defendant testified, however, that the boyfriend did attack him, and that he punched him in self-defense. The jury found defendant guilty of second-degree murder.

Defendant alleged on appeal that his conviction should be reduced to involuntary manslaughter. He further alleged that counsel erred in failing to request pattern jury instruction 5.01B(2), defining “knowledge,” where the distinction between murder and manslaughter required the jury to determine whether defendant acted with knowledge.

The Appellate Court affirmed. A defendant commits involuntary manslaughter when, without lawful justification, he unintentionally kills an individual by recklessly performing acts that are likely to cause death or great bodily harm. Here, a rational trier of fact could have found that defendant’s conduct constituted knowing murder where the evidence showed that defendant intended to do great bodily harm. Eyewitnesses saw defendant strike the head of the unconscious boyfriend on the sidewalk. Defendant admitted to striking him, and the autopsy reports confirmed the type of severe head trauma that would result from a head striking the pavement multiple times. Defendant’s statements after the offense, including threats to his sister and mother, and a comment that the boyfriend got what he deserved, further undermine the argument that defendant acted recklessly. The jury received verdict forms for first-degree murder, second-degree murder, and involuntary manslaughter, and it chose second-degree murder. This verdict was supported by the evidence and would not be disturbed on appeal.

Nor was counsel’s failure to request a “knowledge” instruction deficient. A court need not define the term “knowledge” in an original set of jury instructions, because the term is within the jury’s common knowledge; a court should instead provide the instruction when asked by the jury. Here, there was no request for further definition by the jury and the instruction was not otherwise required to be given.

People v. Ammons, 2021 IL App (3d) 150743 During deliberations on a charge of aggravated battery of a police officer, the jury sent out a note inquiring whether a defendant placed under arrest has the right to defend himself against unlawful force. With the parties’ agreement, the judge responded that the jury should continue deliberating based on the law already provided (which included a self-defense instruction). Defendant was convicted, and on appeal argued that the court’s response was error. The Appellate Court declined to review the issue as plain error since the parties had agreed to the provided response in the trial court. Regardless, there was no error because there was no evidence that the officers used excessive force prior to defendant’s alleged acts of resistance. Instead, the evidence showed that defendant resisted the officers from the outset of his interaction with them, before either officer used any physical force at all to place defendant under arrest. Accordingly, defendant was not even entitled to the self-defense instruction that he received.

The trial court did not err by instructing the jury on resisting arrest, either. There was evidence that defendant resisted arrest, and even though he was charged only with aggravated battery, the resisting instruction was relevant to a determination of whether defendant acted without legal justification for purposes of aggravated battery. The court was not required to provide the corresponding issues instruction and verdict form for resisting arrest, however, where defendant did not request a lesser-included offense instruction and, regardless, no rational jury would have acquitted defendant of aggravated battery on the evidence presented at trial.

People v. Collins, 2021 IL App (1st) 180768 The trial court did not error when it rejected defendant’s proposal to include the bracketed instructions contained in [IPI Crim. No. 18.35G](#).

The pattern instruction includes the basic definition of a firearm, while the bracketed information provides exceptions to the definition, including for BB guns or paint guns. The committee notes state that the bracketed information should be included when appropriate. Here, the trial contained no evidence that the object held by defendant and identified by one witness as a real firearm, was either a BB gun or a paint gun. Thus the bracketed instruction containing these exclusions would not be appropriate in this case.

Furthermore, the evidence was sufficient to establish firearm possession beyond a reasonable doubt. Although no gun was recovered, a video showed defendant threatening one of the victims with an object that appeared to be a firearm. Coupled with another victim's testimony that defendant carried a "semiautomatic," which he recognized based on his own familiarity with guns, and threatened to kill him, suggesting the firearm was real, the circumstantial evidence was sufficient under [People v. McLaurin, 2020 IL 124563](#).

[People v. Bruemmer, 2021 IL App \(4th\) 190877](#) Criminal abuse or neglect of an elderly person is committed where an individual knowingly fails to perform acts which he or she knows or reasonably should know are necessary to maintain the life or health of the elderly person and that failure causes the person's life to be endangered or health to be injured. The statute also provides an exemption where the caregiver made a good faith effort to provide for the elderly person's health and personal care but failed through no fault of his or her own.

The Appellate Court first determined that defendant bears the burden of proof as to the good-faith exemption provided in the statute. Here, the charge against defendant alleged that she failed to provide adequate care for her elderly father. At trial, defense counsel presented evidence of the things defendant did to take care of her father and argued that she did the best she could under the circumstances. Ultimately, though, trial counsel provided ineffective assistance where he failed to move for a directed verdict and failed to request a jury instruction on the statutory good-faith exemption.

At the close of the State's case-in-chief, defense counsel specifically reserved the right to make a motion for directed verdict at a later time. Counsel then presented defense witnesses who described how defendant cared for her father and how he did well in her care. But, counsel never made a motion for directed verdict, despite that evidence. The Appellate Court concluded that there was no strategic reason for counsel not to make that motion on the basis of the good-faith exemption, and therefore his performance was deficient. The court went on to state that "motions for directed verdict should be standard practice," no matter how infrequently they are actually granted. But, defendant suffered no prejudice from this error because there was adequate evidence from which the jury could find defendant guilty.

Counsel's failure to request a good-faith jury instruction was also found to be deficient performance. While counsel presented evidence and argument in support of a good-faith finding, the jury instructions that were given failed to inform the jury that defendant's good-faith efforts could excuse her from criminal liability. And, defendant was prejudiced by this error because it limited the jury's understanding of the evidence, thereby calling the verdict into question. Thus, the judgment was reversed and the matter remanded for a new trial.

[People v. O'Neal, 2021 IL App \(4th\) 170682](#) On appeal from a conviction for unlawful use of a weapon by a felon and armed habitual criminal, defendant alleged counsel offered no meaningful adversarial testing and was ineffective under **Cronic**. Defendant pointed out that, because counsel failed to convince the court to provide a self-defense instruction, counsel did little more than admit defendant's commission of the offense. Counsel also failed to seek a necessity defense instruction.

The Appellate Court refused to apply **Cronic**, noting that counsel also filed a motion *in limine*, gave an opening statement, cross-examined witnesses, made objections, gave a closing argument, and sought a self-defense instruction. Nor was counsel ineffective under **Strickland** for failing to seek a necessity instruction. Although defendant testified he grabbed the gun to stave off an attack, he had previously testified that he possessed the gun prior to this encounter. Thus, it was likely the court would have rejected the request, as it had with the self-defense instruction.

People v. French, 2020 IL App (3d) 170220 The trial court erred in denying defendant's request for self-defense instructions where defendant presented some evidence to support that defense, specifically defendant's own testimony and the testimony of two additional witnesses. The trial court gave second degree murder instructions, indicating it obviously found that defendant had presented some evidence of his belief in the need for self-defense, but the trial judge determined that defendant's belief was unreasonable. The reasonableness of defendant's belief was a matter that should have been left to the jury.

The Appellate Court rejected the State's harmless error argument. Although the jury had convicted defendant of first degree murder, that conviction was not a complete rejection of self-defense but rather only a rejection that defendant's belief in the need for self-defense was unreasonable. If the jurors believed defendant had a reasonable belief in the need for self-defense, they had been left no option but to find him guilty of first degree murder.

People v. Slabon, 2018 IL App (1st) 150149 Under **720 ILCS 5/6-3**, only involuntary intoxication is a permissible defense in Illinois. Evidence of voluntary intoxication may be relevant, however, if defendant is charged with a specific intent crime requiring proof of a specific mental element. It was unnecessary to determine whether aggravated battery of a nurse was a specific intent crime here because the trial evidence disproved any notion that defendant's voluntary intoxication prevented him from knowing that the victim was a nurse. A police officer, doctor, and the victim all testified that she identified herself as a nurse to defendant, and defendant's own testimony supported that conclusion. Further, defendant had been permitted to introduce evidence of his intoxication at his jury trial.

The court did not err in instructing the jury that voluntary intoxication is not a defense to aggravated battery. That was an accurate statement of the law, and it did not tell the jury that it could not consider the intoxication at all.

People v. Bardsley, 2017 IL App (2d) 150209 Although even slight evidence of self defense is sufficient to allow consideration of the defense by the trier of fact, self defense is an affirmative defense that must be raised by the defendant. Once the defendant has adequately raised the affirmative defense of self-defense, the State must rebut the claim beyond a reasonable doubt.

In other words, although a claim of self defense may be based on the State's evidence, the mere existence of such evidence does not trigger the requirement that the prosecution disprove the defense. The defendant is required to raise an affirmative defense in order to avoid forfeiting it, even if the evidence on which the defense is based is contained solely in the proof presented by the State.

Because the defendant did not raise self-defense in the trial court, he forfeited that defense despite the fact that the State's evidence contained a basis to support it. The prosecution had no burden to disprove the defense at trial, and defendant could not raise it for the first time on appeal.

People v. Burnett, 2016 IL App (1st) 141033 A defendant is legally insane if, at the time of the offense, as a result of a mental disease or defect he lacked a substantial capacity to appreciate the criminality of his conduct. Although a defendant must prove by clear and convincing evidence that he is not guilty by reason of insanity, he needs to present only “some evidence” of insanity to properly raise the defense. The “some evidence” standard is enough evidence which, if believed, would be sufficient for a reasonable jury to find by clear and convincing evidence that defendant is not guilty by reason of insanity.

Therefore, an insanity instruction should be given where sufficient evidence has been presented to support a jury finding of insanity by clear and convincing evidence. Neither psychiatric testimony nor expert opinion is necessary to justify an insanity instruction.

Although not controlling, federal case law construing an insanity statute that is similar to the Illinois statute holds that the trial court must construe the evidence of insanity most favorably to the defendant. Whether the trial court erred by failing to instruct the jury on insanity is determined under the abuse of discretion standard.

Here, the trial court abused its discretion by refusing to instruct the jury on insanity. First, the trial court made an error concerning the law where it appeared to believe that sanity could not be an issue where defendant’s expert found the defendant fit to stand trial with medication and gave no opinion of sanity. Second, the evidence was sufficient to allow a reasonable jury to find insanity where defendant had a mental illness at the time of the occurrence and made several statements to police which showed confusion and irrational thinking.

Although the State’s two experts were believed that defendant was sane at the time of the offense, and defendant’s expert gave no opinion on sanity, the reports of all three experts stated that defendant suffered from multiple mental illnesses. Finally, defendant’s IQ was within “borderline range of cognitive functioning.”

Because the trial court erred by failing to instruct the jury on insanity, defendant’s convictions for first degree murder and vehicular hijacking were reversed and the cause remanded for a new trial.

People v. Cacini, 2015 IL App (1st) 130135 Defendant was convicted, in a jury trial, of attempt first degree murder and aggravated battery. The trial court concluded that the evidence was sufficient to warrant giving self-defense instructions, and gave [IPI Criminal 4th No. 24-25.06](#), which provides the general definition of self-defense. However, the trial judge failed to also give [IPI Criminal 4th No. 24-25.06A](#), which informs the jury as the final proposition in the issues instructions that the State bears the burden of proving beyond a reasonable doubt that defendant lacked justification to use force in self-defense. The Committee Note to [IPI Criminal 4th No. 24-25.06](#) instructs the trial court to give both to give both No. 24-25.06 and No. 24-25.06A when instructing on self-defense.

As a matter of plain error under the second prong of the plain error rule, the Appellate Court reversed and remanded for a new trial.

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. The jury must be instructed as to the affirmative defense and the State’s corresponding burden of proof. [IPI Criminal 4th Nos. 24-25.06](#) and [24-25.06A](#) fulfill this requirement. Supreme Court Rule 451(a) requires the trial court to use the Illinois Pattern Jury Instructions, Criminal, related to a subject when the court determines that the jury should be instructed on the subject.

Supreme Court Rule 451(c) provides that if the interests of justice so require, substantial defects in criminal jury instructions are not waived by the failure to make timely

objections. The purpose of Rule 451(c) is to permit the correction of grave errors and errors in cases that are so factually close that fundamental fairness requires that the jury be properly instructed. Rule 451(c) is coextensive with the plain-error clause of [Illinois Supreme Court Rule 651\(a\)](#).

Under the plain-error doctrine, “[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded” unless the appellant demonstrates plain error. The plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either: (1) 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) the error is so serious that it affected the fairness of the defendant’s trial and challenged the integrity of the judicial process.

Although defense counsel failed to tender [IPI Criminal 4th No. 24-25.06A](#), failed to timely object to the absence of the instruction, and failed to include the issue in his posttrial motion, the Appellate Court concluded that the trial judge’s failure to give No. 24-25.06A constituted plain error. The court concluded that the omission of a burden of proof instruction may have caused the jury to believe that defendant had to prove that he acted in self-defense, especially since neither party’s closing argument clarified the burden of proof and the State’s closing argument could easily have been misinterpreted.

Defendant’s convictions for attempt first degree murder and aggravated battery were reversed and the cause remanded for a new trial.

[People v. Washington, 2012 IL 110283](#) The question of whether sufficient evidence exists to support the giving of a jury instruction is a question of law subject to *de novo* review.

Both self-defense and second-degree murder instructions must be given on request when any evidence is presented showing the defendant’s subjective belief that the use of force was necessary. Once presented with evidence of an actual belief in the need for the use of force in self-defense, it is for the jury to determine whether the subjective belief existed, and whether it was objectively reasonable or unreasonable. To obtain a jury instruction on second-degree murder, it is not necessary for a defendant to also produce evidence that his subjective belief was unreasonable.

Because the court granted defendant’s request for self-defense instructions, it was error to deny his request for second-degree murder instructions.

[People v. Gibson, 403 Ill.App.3d 942, 934 N.E.2d 611 \(2d Dist. 2010\)](#) A defendant is entitled to a jury instruction on necessity if there is even slight evidence to support the defense. Under [720 ILCS 5/7-13](#), a necessity defense is available if the defendant: (1) was without blame in developing a situation, and (2) reasonably believed that criminal conduct was necessary to avoid a public or private injury greater than the injury resulting from the crime.

The court acknowledged that defendant was blameless in developing the situation which led to armed robbery and aggravated kidnapping charges - defendant thought he was going to help with a moving job, but was later told that there was going to be a robbery. However, the court found that defendant could not have reasonably believed that participation in the crimes was necessary to avoid a greater injury where he failed to take advantage of several opportunities to withdraw from the enterprise, use his cell phone to call 911, or seek help from nearby police officers.

Because there was no basis for the defense, the trial court did not err by refusing to give a necessity instruction.

People v. Rodriguez, 387 Ill.App.3d 812, 901 N.E.2d 927 (1st Dist. 2008) IPI Crim. No. 3.15 lists five factors to be considered in evaluating eyewitness identifications, including the witness's "level of certainty" when confronting the defendant. The court rejected the argument that because social science research has shown that witness certainty does not increase reliability, the trial court should have omitted the above factor from the version of IPI Crim. No. 3.15 given to the jury. The authority to develop pattern instructions is given to the IPI Committee; a trial judge may decline to use an IPI instruction only if the instruction does not accurately reflect the law or is unsupported by the evidence. Thus, the trial court lacks authority to void an IPI instruction which accurately reflects State law. The court noted, however, that a defendant is free to introduce social science research indicating that a factor in IPI Crim. No. 3.15 is inapplicable to a particular case, and that the trial court would then have authority to modify the instruction in that case.

People v. Gonzalez, 385 Ill.App.3d 15, 895 N.E.2d 982 (1st Dist. 2008) Even very slight evidence justifies an instruction on the defense theory of the case. Under 720 ILCS 5/5-12-16(d), a reasonable belief that the victim was 17 years old or older is an affirmative defense to aggravated criminal sexual abuse. Once the "reasonable belief" affirmative defense is raised, the State has the burden of proving the defendant guilty beyond a reasonable doubt concerning the defense, as well as on all other elements of the offense. The Committee Note to IPI Crim. No. 4th 11.62(A) provides that where the "reasonable belief" defense is raised, the parties must add a fourth proposition to IPI Crim. 4th 11.62(A) to inform the jury that the State has the burden to disprove the defense. In addition, IPI Crim. 4th 4.13, which defines "reasonable belief," should be given. The failure of the trial court to instruct the jury concerning the State's burden of proof and the definition of "reasonable belief" constituted serious error which required reversal, despite the fact that the court informed the jury of the affirmative defense itself.

People v. Sims, 374 Ill.App.3d 427, 871 N.E.2d 153 (3d Dist. 2007) An arresting officer may use force reasonably necessary to effect an arrest, and need not retreat in the face of resistance. An arrestee has no right to use force to resist an arrest by a known police officer, even if the arrest is unlawful, unless the officer uses excessive force. However, an officer's use of excessive force to conduct an arrest authorizes the use of self-defense on the part of arrestee. The trial judge erred by refusing to give a self-defense instruction where the defendant was charged with battery and resisting a peace officer for struggling with arresting officers and kicking one officer.

People v. Dwight, 368 Ill.App.3d 873, 859 N.E.2d 189 (1st Dist. 2006) The trial court abused its discretion by refusing to give an insanity instruction.

People v. Lockett, 339 Ill.App.3d 93, 790 N.E.2d 865 (1st Dist. 2003) The Appellate Court reiterated its prior holdings that: (1) a second degree murder instruction must be given whenever the evidence justifies a self-defense instruction in a first degree murder case, and (2) second degree murder instructions should be given where the evidence is conflicting and would support findings that the defendant committed intentional murder, felony murder or second degree murder. The court found that **People v. Morgan**, 197 Ill.2d 404, 758 N.E.2d 813 (2001) does not preclude second degree murder instructions where the evidence would permit the jury to convict on knowing or intentional murder, although the State also requests felony murder instructions and second degree murder cannot be based on a felony murder theory. Because the evidence conflicted as to whether defendant committed felony murder or knowing and intentional murder, and would have allowed the jury to convict of second

degree murder based on an unreasonable belief in self-defense concerning the latter theory, defendant was entitled to second degree murder instructions on the charge alleging knowing or intentional murder.

People v. Rollins, 295 Ill.App.3d 412, 695 N.E.2d 61 (5th Dist. 1998) Defendant argued that he was entitled to a “mistake of fact” instruction at his murder trial because if the jury believed that the death was caused by drowning, it might have found that defendant lacked the intent to kill because he thought the decedent was already dead when he placed her in the water. In support, defendant cited **People v. Crane**, 145 Ill.2d 520, 585 N.E.2d 99 (1991), which held that the defendant was entitled to a “mistake of fact” instruction where he beat the decedent in self-defense and then burned the body in the mistaken belief that death had already occurred. The Appellate Court held that in **Crane**, the critical consideration was that the actions which injured the decedent were justified. Here, by contrast, defendant’s beating of the decedent was not justified. The “mistake of fact” defense is unavailable where the injuries which lead to a mistaken conclusion that death has occurred were inflicted without justification.

People v. Bedoya, 288 Ill.App.3d 226, 681 N.e.2d 19 (1st Dist. 1997) A defendant is not barred from raising self-defense where he claims that a weapon fired accidentally during a struggle in which he was defending himself. Where a weapon is fired accidentally during the course of a “life and death struggle,” so “there is evidence of self-defense in addition to evidence of accident, the defendant has the right to rely on an accident theory as to the ultimate injury *and* a self-defense theory as to his preceding acts.”

People v. Serrano, 286 Ill.App.3d 485, 676 N.E.2d 1011 (1st Dist. 1997) A defendant may raise a compulsion defense to felony murder where he was compelled to assist in the underlying felony. Although the compulsion defense does not generally apply to murder cases, that general rule evolves “from the rationale that when a person is confronted with a choice of doing two evils, such as his own death or the death of another, [he] ought to sacrifice his own life rather than escape by the murder of an innocent.” Where the defendant was justified in participating in a robbery in order to save his life, however, he does not lose the compulsion defense because the person threatening him “unexpectedly kills someone in the course of the robbery and thus converts a mere robbery into a murder.” The court held that a compulsion instruction should have been given here. Defendant and another witness testified defendant had been forced at gunpoint to participate in the robbery, and defendant testified that he did not contact police because he had been told his family would be harmed if he did.

People v. Taber, 271 Ill.App.3d 576, 648 N.E.2d 342 (4th Dist. 1995) The defendant and the victim were involved in a bar fight; the State claimed that defendant had been the aggressor, while the defendant claimed that he had acted in self-defense. Over defendant's objection, the trial court gave an instruction stating that the State could prove defendant guilty by showing that he knowingly caused bodily harm while on or about a public place of amusement. Defendant argued that the instruction should have contained an additional proposition - “[t]hat the defendant was not justified in using the force that he used.” The Appellate Court held that defendant was denied a fair trial by the trial court's failure to include the language tendered by the defense. Since the State had clearly proven both that defendant knowingly caused bodily harm and that he did so while in a public place of amusement, a jury relying on the issues instruction given by the trial court would have

convicted defendant without ever considering whether his actions had been justified by self-defense.

People v. Hobbs, 249 Ill.App.3d 679, 619 N.E.2d 258 (5th Dist. 1993) The jury was instructed that a person who was attempting or committing a forcible felony at the time of the offense could not raise self-defense. "Forcible felony" was defined as "burglary, robbery, aggravated battery, or any felony which involves the use or threat of physical force or violence against any individual." A new trial was required because the instructions may have deprived the defendant of an affirmative defense. Where the jury is told that commission of a particular offense will bar a claim of self-defense, the elements of that offense must also be defined. In addition, the instruction did not refer to home invasion, the only charge against the defendant which could have been deemed a forcible felony. Furthermore, the jury was clearly confused by the instructions. During deliberations, the jury sent the judge two notes asking for an explanation of the law, and the verdicts eventually returned acquitted defendant of first degree murder while convicting him of armed violence based on first degree murder.

People v. Fernandez, 240 Ill.App.3d 518, 608 N.E.2d 487 (1st Dist. 1992) Conviction for delivery of a controlled substance reversed where the court gave one IPI instruction defining entrapment, but failed to give a second instruction stating that the prosecution has the burden of proving the absence of entrapment. By failing to instruct on the State's burden, the trial judge removed from the jury's consideration a disputed issue which was essential to determining guilt or innocence.

People v. Newbolds, 204 Ill.App.3d 952, 562 N.E.2d 1051 (5th Dist. 1990) The defendant was charged with aggravated battery and unlawful use of weapons by a felon. Following a jury trial, he was convicted of the weapons offense and acquitted of aggravated battery. The Appellate Court held that the defendant was deprived of a fair trial because the jury was not instructed on the defense of necessity. The charges were based on an incident in which defendant's girlfriend, the complainant, was shot. The complainant gave three versions of the incident. The third version, given about three months after the incident, was that she pulled the gun out of her purse to scare defendant when he started arguing with her. Defendant reached for the gun to take it away, and it accidentally discharged while the complainant's finger was on the trigger. The Court stated that the complainant's third version of the incident constituted some evidence that defendant acted out of necessity to prevent immediate and substantial bodily harm to himself.

People v. Lyda, 190 Ill.App.3d 540, 546 N.E.2d 29 (2d Dist. 1989) The Court found that at a trial for resisting an officer, the trial judge erred by refusing the defendant's tendered instruction on the affirmative defense of justifiable use of force in defense of another. The defendant forcibly tried to get past a police officer to assist his brother, who was being arrested. The defendant became agitated when the officers used "forceful measures" to retain his brother. An officer acknowledged that the brother was taken to the hospital because of abrasions to his wrists and ankles. This evidence may have given defendant cause to believe that excessive force was being used. Thus, it was for the jury to determine whether defendant had a reasonable belief that his conduct was necessary to protect his brother from excessive force.

People v. Swartz, 186 Ill.App.3d 399, 542 N.E.2d 515 (4th Dist. 1989) Where the defendant's theory was that he was justified in using force because he had reason to believe complainant was wrongfully interfering with the lawful possession of his automobile, and both parties testified that the complainant's hair was grabbed after she took the defendant's keys and attempted to leave the car, the evidence was sufficient to support the defense of justified use of force in defense of property.

People v. Ellison, 126 Ill.App.3d 985, 466 N.E.2d 1024 (2d Dist. 1984) Defendant was convicted of burglary and theft based on his possession of stolen property. The defendant contended that the trial court erred by refusing his tendered non-IPI instruction based on the statutory defense of ignorance or mistake. The Appellate Court held that the defendant presented evidence in support of his lack of knowledge (his own testimony and an expert opinion as to his mental capacity). Thus, he was entitled to have the jury instructed on this theory of defense. Additionally, the tendered instruction, though non-IPI, was "simple, brief, impartial and free from argument, as required by Supreme Court Rule 451(a)."

People v. Gracey, 104 Ill.App.3d 133, 432 N.E.2d 1159 (5th Dist. 1982) The trial court erred where, as a sanction for defendant's failure to comply with discovery, it refused to instruct the jury on the defenses of intoxication and self-defense.

People v. Rodriguez, 96 Ill.App.3d 431, 421 N.E.2d 323 (1st Dist. 1981) The trial judge erred by refusing to give defendant's tendered instruction on justifiable use of force. The complainant and a disinterested witness testified that the beating was inflicted without any provocation, but a defense witness testified that the complainant attacked the defendant with a tire iron. Although the jury "would not be likely to accept the defense version of the events . . . the credibility of the witnesses can only be resolved by the jury, not the trial court." Thus, defendant was entitled to an instruction on his theory of defense "even if the trial judge believed that the evidence offered in support of that defense was inconsistent or of doubtful credibility."

People v. Nugin, 99 Ill.App.3d 693, 425 N.E.2d 1163 (1st Dist. 1981) The defendant raised the defense of compulsion. The jury was instructed that to support a finding of guilty the State must prove: "That the defendant or one for whose conduct the defendant is responsible did not act under compulsion." The above instruction was erroneous because it told the jury that the State need only prove one of two alternatives — that defendant did not act under compulsion or that one for whose conduct he was responsible did not act under compulsion. This was misleading in that it "deceptively implied that even if defendant were acting under compulsion, he could nonetheless be held responsible for the criminal acts of another."

People v. Harris, 39 Ill.App.3d 805, 350 N.E.2d 850 (4th Dist. 1976) Trial court erred by failing to give the "justifiable use of force in self-defense" instruction tendered by the defense. Defendant testified that on earlier occasions, the deceased had acted as if he had a gun. In addition, a few minutes before the shooting defendant saw the deceased put a gun in his pocket. The deceased was reaching for his pocket when defendant fired. The Court held that this testimony, if believed, would support a finding of reasonable belief that the use of deadly force was justifiable despite the fact that no gun was found on the deceased. Although defendant's testimony was contradicted by other evidence, the conflict was a matter for the jury to resolve.

§32-8(f)

Circumstantial Evidence

Illinois Supreme Court

People v. Bryant, 113 Ill.2d 497, 499 N.E.2d 413 (1986) The Supreme Court held that the second paragraph of IPI 3.02 (“You should not find the defendant guilty unless the facts or circumstances proved exclude every reasonable theory of innocence”) should no longer be used.

§32-8(g)

Defendant’s Failure Testify

United States Supreme Court

Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981) Where the defendant did not testify, the trial judge violated the Fifth and Fourteenth Amendments by refusing to give defendant’s tendered jury instruction that he was “not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way.” “[A] state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant’s failure to testify.”

Lakeside v. Oregon, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978) Neither the privilege against compulsory self-incrimination nor the right to counsel is violated where the trial court, over defense objection, gives an instruction that tells the jury not to draw any adverse inference from the defendant’s decision not to testify. The Court rejected the argument that giving the instruction constitutes an unconstitutional interference with defense counsel’s trial strategy. See also, **People v. Matney**, 293 Ill.App.3d 139, 686 N.E.2d 1239 (2d Dist. 1997).

Illinois Supreme Court

People v. Ramirez, 98 Ill.2d 439, 457 N.E.2d 31 (1983) When requested by the defendant, the trial judge is required to instruct the jurors that they are not to consider the defendant’s failure to testify.

§32-8(h)

Evidence Admitted for Limited Purpose

Illinois Supreme Court

People v. Monroe, 66 Ill.2d 317, 362 N.E.2d 295 (1977) When evidence is admitted for a particular purpose and is inadmissible for another purpose, the party against whom it is admitted may tender instructions appropriately limiting the purpose for which it may be considered.

People v. Richards, 64 Ill.App.3d 472, 381 N.E.2d 307 (4th Dist. 1978) At defendant’s trial for a sex offense, the State was allowed to present evidence of prior sexual activity between defendant and complainant to show the “relationship and familiarity of the parties.” The jury was then instructed that the evidence of the “other crimes” was received “solely on the issues of design.” The Appellate Court held the instruction was erroneous in that it used

the term “crimes” when the defendant had been neither charged nor convicted of any crime. Additionally, the instruction improperly told the jury to consider the prior “instances” in regard to “design,” which was not the purpose for which the evidence was admitted.

People v. Tate, 30 Ill.2d 400, 197 N.E.2d 26 (1964) Reversible error occurred where the jury was not instructed as to the limited purpose for which impeaching evidence could be used. See also, **People v. Bradford**, 106 Ill.2d 492, 478 N.E.2d 1341 (1985) **People v. Taylor**, 66 Ill.App.3d 907, 384 N.E.2d 558 (3d Dist. 1978).

People v. Criss, 307 Ill.App.3d 888, 719 N.E.2d 776 (1st Dist. 1999) The trial judge erred by failing to give a limiting instruction concerning the use of transcripts of tape-recorded conversations, “It . . . is proper for a trial court to permit the jury to use written transcripts of recorded conversations to assist them while they listen to the conversations, when the transcripts are used solely for this limited purpose and are collected from the jurors after they have listened to the tapes.” However, the court should admonish the jury concerning the purpose for which the transcripts are admitted and that it must determine for itself the events allegedly transpiring on the tape.

Illinois Appellate Court

People v. Johnson, 2021 IL App (1st) 190567 Illinois criminal pattern instructions 3.06-3.07 states:“You have before you evidence that the defendant made statements relating to the offenses charged in the indictment. It is for you to determine [whether the defendant made the statements, and, if so,] what weight should be given to the statement. In determining the weight to be given to a statement, you should consider all of the circumstances under which it was made.”

Here, the State admitted a recording of a phone call defendant made from jail after his arrest for murder. During the call, defendant seemed to solicit witness tampering by asking that someone “send his ass away, for real.” The judge provided instruction 3.06-3.07, without objection, and defendant was found guilty of murder.

The Appellate Court held that defendant’s attempted witness tampering was not a “statement relating to the offense” within the meaning of **IPI Criminal 4th No. 3.06-3.07**. Citing **People v. James**, 2017 IL App (1st) 143391, ¶ 117, the court held that when a defendant’s utterance makes no statement of fact about the offense, it is not covered by the instruction. While the call was admissible as other crimes evidence to show consciousness of guilt, the jury was not given the other crimes instruction, 3.14, so that the jury would know such evidence is admitted for a limited purpose.

A majority of the Appellate Court found both prongs of the plain error doctrine applied. The case hinged on a single eyewitness and blurry surveillance footage, while the State presented no confession, physical evidence, or ballistic evidence. Thus, the evidence was closely balanced. The second prong was met where the instructional error permitted the jurors to consider defendant’s attempted witness tampering as evidence of a propensity to commit crimes, and therefore the error “denied the defendant a substantial right and undermined the integrity of the judicial process.”

The dissent disagreed that the evidence was close where the witness knew defendant and his testimony bore other indicia of reliability. It also found that the instructional error did not deprive defendant of a substantial right where the phone conversation was admissible to show consciousness of guilt and the State never invited the jury to consider it for propensity.

People v. Johnson, 2013 IL App (2d) 110535 Jury instructions give jurors the correct principles of law applicable to the facts so they can reach a correct conclusion according to the law and the evidence. Where evidence of other crimes is admitted, a precisely-tailored version of **Illinois Pattern Jury Instructions, Crim. No. 3.14** is to be given. The preferred practice is for the court to instruct the jury of the limited purpose for which the evidence may be considered, not only at the close of the case, but also when the other-crimes evidence is admitted.

Defendant was tried in a joint trial for UUV by a felon and domestic battery. In addition, the jury heard evidence of two uncharged domestic batteries, as well as threats that accompanied those offenses. At the close of the case, the court instructed the jury that evidence of uncharged conduct could be considered “on the issues of defendant’s intent, motive, design, knowledge, absence of mistake, and propensity.” When the parties stipulated that defendant had been previously convicted of a felony, which qualified for admission solely to prove an essential element of the charge of UUV by a felon, the court advised the jury that the stipulation “can be used by you like any other evidence in this case to come to your verdict.”

These instructions were deficient. At no time during the trial did the court explain to the jury the difference between the charged conduct and the uncharged conduct. As a result, the jury’s verdicts may have been based on the uncharged conduct. The court failed to tailor I.P.I. Crim. 4th No. 3.14 based on the evidence presented to make it clear that the jury should not consider the charged domestic battery, the uncharged domestic batteries, or the evidence of defendant’s threats, as propensity evidence on the UUV by a felon case, and that the jury could not consider the defendant’s felony conviction, the evidence of threats, or the evidence of defendant’s gun possession, as propensity evidence in the domestic violence case.

People v. Fultz, 2012 IL App (2d) 101101 IPI Criminal 4th No. 3.13 instructs the jury that it can consider a defendant’s prior conviction only to assess his credibility as a witness, and not as proof of his guilt. This instruction is to be given only at the request of the defendant.

It was error to give this instruction over the defense objection that it highlighted the defendant’s conviction. The court rejected the State’s argument that the error was harmless because the instruction was accurate and only served to benefit the defendant. It is the prerogative of the defendant to determine whether such instruction is beneficial to the defendant or unduly accentuates his criminal past.

The error, in conjunction with the restriction on cross-examination of a police officer-complainant regarding bias or motive, was not harmless. The evidence was not overwhelming but presented a credibility contest between the defendant and the police officer. The erroneous rulings related to the heart of that issue. The defendant was not permitted to fully challenge the officer’s credibility. The prosecutor relied on the instruction to remind the jury to consider defendant’s prior conviction in assessing whether to believe defendant or the officer.

§32-8(i)

Lesser Included Offenses

United States Supreme Court

Hopkins v. Reeves, 524 U.S. 88, 118 S.Ct. 1895, 141 L.Ed.2d 76 (1998) **Beck v. Alabama**, 447 U.S. 625 (1980), which held unconstitutional a State statute prohibiting lesser included

offense instructions in capital cases when such instructions are generally given in non-capital cases, applies only where under the law of the jurisdiction in question, the lesser crimes are included offenses in non-capital cases. Where the State Supreme Court has held, in both capital and non-capital cases, that second-degree murder and manslaughter are not lesser included offenses of felony murder, **Beck** does not require that lesser included offense instructions be given.

Schmuck v. U.S., 489 U.S. 705, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989) The Court adopted the “elements” approach for the giving of lesser included offense instructions under Rule 31(c). Under this test, an offense is lesser included if its elements are a subset of the elements of the charged offense. The Court rejected the “inherent relationship” test.

Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) Statute was held unconstitutional because it prohibited the judge from instructing the jury on a lesser included, non-capital offense which was supported by the evidence.

Keeble v. U.S., 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973) A defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury to rationally find him guilty of the lesser offense. If the prosecution has not established every element of the offense charged, and no lesser offense instruction is offered, the jury must return a verdict of acquittal.

Illinois Supreme Court

People v. McDonald, 2016 IL 118882 Noting a conflict in its own authority, the court clarified the standard to be used in determining whether sufficient evidence exists to warrant giving a jury instruction on a lesser included offense. The court found that a lesser included offense instruction should be given where there is evidence in the record which, if believed by the jury, would reduce the crime charged to the lesser offense. The court rejected its precedent stating that a lesser included offense instruction is justified if **credible** evidence in the record would support the lesser charge, noting that the trial court is not to weigh the evidence or determine credibility in determining whether a lesser included instruction should be given.

The abuse of discretion standard of review is applied when determining whether the trial court erred by failing to give a lesser included offense instruction. The trial court abuses its discretion by failing to give a lesser included offense instruction if there is some evidence which, if believed, would justify a verdict finding that the lesser offense occurred.

The court concluded that the trial court did not abuse its discretion by refusing to instruct the jury on involuntary manslaughter. Involuntary manslaughter occurs where a person unintentionally kills an individual without lawful justification if the acts which caused the death were likely to cause death or great bodily harm and were performed recklessly. **720 ILCS 5/9-3(a)**. A person acts recklessly by consciously disregarding a substantial and unjustifiable risk that circumstances exist or that a result will follow and such disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation. **720 ILCS 5/4-6**. The difference between first degree murder and involuntary manslaughter lies in the defendant’s mental state.

Because there was a "dearth" of evidence showing recklessness, the trial court did not abuse its discretion by refusing to give an instruction on involuntary manslaughter.

Furthermore, the trial court did not abuse its discretion by refusing to instruct the jury on second degree murder based on serious provocation. Serious provocation is defined as conduct sufficient to excite an intense passion in a reasonable person. [720 ILCS 5/9-2\(b\)](#). Recognized categories of serious provocation include substantial physical injury or physical assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse.

Mutual combat occurs where two parties willingly enter a fight or struggle or where two persons mutually fight on equal terms. Where the evidence showed that on the day of the incident defendant was holding a knife and threatening to kill the decedent, the decedent was unarmed, and defendant suffered only superficial injuries while the decedent suffered three knife wounds, it was not an abuse of discretion for the trial court to find insufficient evidence of serious provocation to warrant an instruction on second degree murder.

People v. Kennebrew, 2013 IL 113998 A defendant may be convicted of an uncharged offense only if it is a lesser included crime and the evidence rationally supports a conviction of the lesser crime and an acquittal of the greater offense. There are three methods for determining whether an offense is a lesser included offense. The "abstract elements" test provides that a crime is a lesser included offense if all of its elements are included within the second offense and it contains no elements that are not also part of the second offense. The "evidence at trial" approach examines the evidence adduced at trial to determine whether proof of the greater offense necessarily established the lesser offense. Finally, the "charging instrument" approach holds that one offense is a lesser included crime of another if the charging instrument contains the "broad foundation" or "main outline" of the lesser offense.

Under the charging instrument test, the charge need not allege every element of the lesser offense so long as any missing element can be reasonably inferred from the allegations of the charge.

The charging instrument approach applies when determining whether an uncharged crime is a lesser included offense for purposes of giving a lesser included offense instruction at trial. By contrast, the abstract elements test applies when determining whether one charged crime is a lesser-included-offense of a second charged offense for purposes of double jeopardy or the one act, one crime doctrine.

Supreme Court Rule 615(b)(3) authorizes a reviewing court to reduce the degree of the offense of which the defendant was convicted. The court concluded that the charging instrument approach applies when determining whether a crime is a lesser offense for purposes of Rule 615(b)(3). The court noted that no issues had been raised concerning double jeopardy or the one act, one crime doctrine, and found that Illinois has chosen to apply the charging instrument approach for purposes of determining whether an uncharged crime is a lesser included offense.

Although the jury did not consider the lesser offense at trial (because it was not charged or the subject of a State-requested instruction), and it was the Appellate Court which determined that the evidence was sufficient to support the conviction for the lesser offense, the court found that the charging instrument approach should be applied. The essential element differentiating predatory criminal sexual assault of a child and aggravated criminal sexual abuse concerns whether the act was committed for purposes of sexual gratification. The court concluded that such a mental state could be inferred from the allegation of "sexual penetration" in the predatory criminal sexual assault charge. Thus, when the jury deliberated the charged offense, it also deliberated the essence of aggravated criminal sexual abuse. Similarly, because the missing element was implied in the charge, the Appellate Court did not reach an element which the jury never considered.

In addition, the court concluded that defendant was not deprived of notice or an opportunity to defend against the lesser included charge. Not only could the missing element be inferred from the charge, but a defendant is deemed to have notice not only of the charged offense but of lesser included offenses as well.

People v. Wilmington, 2013 IL 112938 Under Illinois law, five decisions ultimately belong to the defendant after consultation with his attorney: (1) what plea to enter, (2) whether to waive a jury trial, (3) whether defendant will testify, (4) whether to appeal, and (5) whether to submit an instruction on a lesser included offense. The latter decision is left to the defendant because electing to submit a lesser included offense instruction exposes the defendant to possible criminal liability which he might otherwise avoid and amounts to a stipulation that the jury could rationally convict of the lesser included offense.

The court concluded that the same rationale does not apply where defense counsel requests an instruction on second degree murder. Second degree murder is not a lesser included offense of first degree murder, but rather a lesser-mitigated offense requiring that all of the elements of first degree murder, plus a mitigating factor, have been proved. The court concluded that because the defendant is not exposing himself to potential criminal liability which he might otherwise avoid, he does not have the right to decide whether an instruction on second degree murder should be submitted.

People v. Miller, 238 Ill.2d 161, 938 N.E.2d 498 (2010) Illinois courts have used three methods to determine whether one crime is a lesser included offense of another crime: (1) the “abstract elements” approach, under which the statutory elements of the offenses are compared; (2) the “charging instrument” approach, under which the charging instrument is examined to determine whether the description of the greater offense contains a “broad foundation” or “main outline” of the lesser offense; and (3) the “evidence” or “fact” approach, under which the court looks to the facts adduced at trial to determine whether proof of the greater offense necessarily establishes the lesser offense.

Where the issue is whether the jury should be instructed on an uncharged lesser included offense, the predominant concern is providing notice of the offenses of which a defendant may be convicted. Under these circumstances, the “charging instrument” approach is appropriate.

When determining whether multiple convictions may be entered for closely related acts, however, the defendant has notice of the possible convictions based on the charges. The “abstract elements” approach is more appropriate for these purposes, because it permits defendants to be held accountable for the full measure of their conduct and resulting harm.

Thus, application of the “one act, one crime” doctrine is determined under the “abstract elements” test.

People v. Meor, 233 Ill.2d 465, 910 N.E.2d 575 (2009) The court found that battery was a lesser included offense of criminal sexual abuse as charged here.

People v. Hari, 218 Ill.2d 275, 843 N.E.2d 349 (2006) The trial judge erred by refusing to give an involuntary intoxication instruction where the defendant produced evidence that he experienced an unexpected reaction to prescription medication.

People v. Kolton, 219 Ill.2d 353, 848 N.E.2d 950 (2006) A defendant may not be convicted of an uncharged offense, unless it is a lesser included crime and the evidence at trial rationally supports a conviction on the lesser crime and an acquittal of the greater offense.

Under Illinois law, whether a crime is a lesser included offense is determined under the “charging instrument” approach, which examines the charging instrument to determine whether the “broad foundation” of the lesser offense is alleged. Under this approach, the absence of a statutory element of the lesser charge will not preclude a finding of a lesser included offense, if the missing element can reasonably be inferred from the charge.

Here, aggravated criminal sexual abuse was a lesser included offense of predatory criminal sexual assault of a child. The indictment alleged that defendant committed an act of sexual penetration, without any allegation of defendant’s state of mind or motivation. Aggravated criminal sexual abuse requires an act of “sexual conduct,” which includes the requirement that the act was committed for purposes of sexual gratification or arousal. Despite the omission of an allegation that the act was performed for purposes of sexual gratification, the court found it reasonable to infer that defendant performed the act of sexual penetration for such a purpose. An act of “sexual penetration” is inherently sexual in nature, and “can be neither unintentional nor inadvertent.”

People v. Davis, 213 Ill.2d 459, 821 N.E.2d 1154 (2004) Although defendant was originally charged with both knowing and felony murder, at the jury instruction conference the State dismissed the count charging knowing murder. The court concluded that under these circumstances, the trial court properly refused to instruct the jury on involuntary manslaughter, either as a lesser included offense or because such an instruction was supported by the evidence.

Involuntary manslaughter is not a lesser included offense of felony murder. Illinois law requires that lesser included offenses be determined under the “charging instrument” test. Under this approach, the court must determine whether: (1) the charging instrument includes the “broad foundation” or main outline of the lesser included offense; and (2) the evidence at trial rationally could support a conviction for the lesser included offense. A lesser included offense instruction is proper only if both questions are answered affirmatively. Because felony murder involves no mental state and involuntary manslaughter requires that the defendant acted recklessly, the court concluded that the felony murder charge here did not set forth the “broad foundation” of involuntary manslaughter.

People v. Ceja, 204 Ill.2d 332, 789 N.E.2d 1228 (2003) The trial court refused defendant’s request to instruct on conspiracy to commit murder as a lesser included offense of first degree murder, finding that conspiracy was not a lesser included offense because the charge did not claim that defendant had “agreed” that another should commit the murder. The Supreme Court affirmed. Whether a crime is a lesser included offense is determined by the “charging instrument” approach, under which the court must first determine whether the charging instrument describes the “broad foundation” or “main outline” of the lesser offense. If so, an instruction on the lesser included offense is proper if the evidence at trial could rationally support a conviction on that offense and an acquittal of the greater offense. Because the indictment charged defendant with first degree murder only as a principal, and contained no reference to any “agreement” that could form the basis of a conspiracy instruction, conspiracy was not a lesser included offense in this case.

People v. Baldwin, 199 Ill.2d 1, 764 N.E.2d 1126 (2002) A defendant can be convicted of an uncharged offense if: (1) that offense is identified by the charging instrument as a lesser included offense, and (2) the evidence adduced at trial rationally supports a conviction on the lesser offense. A lesser offense is alleged by the charge only if it “relate[s] to the greater offense to the extent that the charging instrument describes the lesser” offense. In other

words, the charge must set out the “broad foundation” or “main outline” of the lesser offense. A charging instrument need not expressly allege all of the elements of the lesser crime if the missing elements can be inferred from the language of the charging instrument. Aggravated unlawful restraint was not a lesser included offense of home invasion as charged in this case. Neither home invasion count alleged the “broad foundation” or “main outline” of aggravated unlawful restraint, because neither count specifically alleged that defendant used a weapon to detain the complainant.

People v. Knaff, 196 Ill.2d 460, 752 N.E.2d 1123 (2001) Prohibitions against double jeopardy were not violated when the State proceeded on lesser included offenses after the evidence on the charged offenses was found to be insufficient to withstand a motion for directed verdict.

People v. Garcia, 188 Ill.2d 265, 721 N.E.2d 574 (1999) Under long-standing Illinois precedent, a trial judge has discretion to *sua sponte* instruct the jury on a lesser included offense, even where the State did not charge the lesser offense or request an instruction on it and even over defense objection. A defendant should not be permitted to completely escape justice merely because the prosecutor chose to charge only the greater offense, on which the jury believes that the evidence is insufficient to convict. In addition, a lesser included offense instruction insures that any punishment imposed conforms more closely to the crime actually committed than where the jury’s only choices are acquittal or conviction of an offense it believes has not been proven.

The court rejected the argument that **People v. Brocksmith**, 162 Ill.2d 224, 642 N.E.2d 1230 (1994) modified Illinois precedent that the trial court may *sua sponte* give a lesser included offense instruction. **Brocksmith** held only that where the defendant and defense counsel disagree, the defendant has the right to decide whether to seek lesser included offense instructions. **Brocksmith** does not preclude the trial court from giving a lesser included offense instruction in response to the State’s request, even where the defendant objects. The trial court may consider the parties’ strategies, as reflected by their requests for instructions, and may choose to refrain from giving a lesser included offense instruction that might interfere with defense strategy. However, the court may also, in its discretion, consider “society’s interest in punishing the defendant for a crime, no more, no less, than the crime actually committed,” and *sua sponte* instruct on a lesser included offense.

People v. DiVincenzo, 183 Ill.2d 239, 700 N.E.2d 981 (1998) The primary difference between involuntary manslaughter and first degree murder is the defendant’s mental state - involuntary manslaughter occurs when the defendant recklessly performs acts that are likely to cause death or great bodily harm, while first degree murder requires a legally unjustifiable killing by acts which defendant knows are likely to create a strong probability of death or great bodily harm. The court found that there was sufficient evidence of recklessness to entitle defendant to involuntary manslaughter instructions; there was no disparity in size and strength between defendant and the victim, the altercation was of short duration, and three experts testified that the injury causing death was a “rare phenomenon.” Furthermore, defendant did not use a weapon and there was a dispute whether he kicked the decedent while the latter was lying on the ground.

People v. Hamilton, 179 Ill.2d 319, 688 N.E.2d 1166 (1997) Under the indictment in this case, theft was a lesser included offense of residential burglary. Defendant was charged with

residential burglary by knowingly and without authority entering a dwelling place “with the intent to commit therein a theft.” The Court concluded that “[b]y alleging in the indictment that defendant entered the . . . dwelling place with the intent to commit a theft, the charging instrument necessarily infers that defendant intended to obtain unauthorized control over and deprive another of property. . . . Moreover, the indictment expressly charged the specific intent to commit theft, which has been deemed sufficient to satisfy the first step of the charging instrument approach. [T]o warrant an instruction on a lesser offense under the charging instrument approach, it is not necessary for the charging instrument to expressly allege all of the elements of the lesser offense.” The Court also found that the evidence was sufficient to require an instruction on theft, because there was a reasonable basis on which the jury could have acquitted defendant of residential burglary and convicted him of theft.

People v. Landwer, 166 Ill.2d 475, 655 N.E.2d 848 (1995) Defendant was convicted of solicitation of murder for hire. The Appellate Court reversed the convictions because the trial court refused to instruct the jury on solicitation to commit aggravated battery as a lesser included offense.

The Supreme Court reversed the Appellate Court’s holding, concluding that a defendant who raises an entrapment defense is not entitled to instructions on a lesser included offense. Defendant was convicted of soliciting the murder of two of his former employees. Defendant claimed that he had only been interested in having the former employees beaten but that a police informant and an undercover officer persuaded him to have them killed instead. Thus, defendant admitted that he had solicited aggravated battery, but claimed that he had been entrapped into solicitation of murder. The Court held that because defendant raised an entrapment defense, he was not entitled to an instruction on solicitation to commit aggravated battery.

In most circumstances, a charge alleging solicitation to commit murder will allege the “main outline” of solicitation of aggravated battery. Furthermore, since the offenses involve different states of mind, the evidence will typically permit a conviction of the lesser offense and an acquittal of the greater. The situation changes, however, when the defendant claims entrapment. To raise entrapment, the defendant is required to admit all of the elements of the charged offense, including intent. Thus, the only disputed issue is whether the defendant was entrapped. Because the issue of intent no longer distinguishes the offenses, there is no longer a rational basis to acquit the defendant of the greater offense while convicting of the lesser. See also, **People v. Cramer**, 85 Ill.2d 92, 421 N.E.2d 189 (1981) (proper to refuse lesser included instruction where the greater and lesser offense each involved the same disputed issue of fact).

People v. Brocksmith, 162 Ill.2d 224, 642 N.E.2d 1230 (1994) Defendant was charged with theft by deception, a Class 3 felony. At trial, defense counsel successfully tendered a lesser included offense instruction on deceptive practices, a misdemeanor. The jury acquitted defendant of the felony charge but convicted him of deceptive practices. On a consolidated appeal from defendant's conviction and the denial of a post-conviction petition, the Appellate Court held that defense counsel was ineffective because he failed to discover that the statute of limitations on the misdemeanor charge had expired by the time of trial. The Supreme Court failed to reach the issue of ineffectiveness, but held that the conviction must be reversed because defendant was deprived of his right to decide whether to request a lesser included offense instruction.

People v. Novak, 163 Ill.2d 93, 643 N.E.2d 762 (1994) The Court identified three possible theories on which it can be determined whether lesser included offense instructions should be given. The "abstract elements" test is not followed in Illinois because it is too inflexible and unpredictable. The "inherent relationship" test gives the greatest flexibility in conforming the punishment to the crime, but the Court criticized this approach because the lesser offense cannot be identified until all the evidence is in and because the standard is so subjective that it is impossible to formulate governing principles. In Illinois, whether a crime is a lesser included offense is determined by the "charging instrument" test. Under this standard, a crime is a lesser included offense if the charging instrument sets out "the main outline of the lesser offense."

The Court found that the "charging instrument" approach best serves the purposes of the lesser included offense doctrine because it creates a broader range of possible lesser included offenses, and thus allows the punishment to conform to the crime. In addition, since the charging instrument is used to decide whether an offense is a lesser included, both parties have notice of all possible lesser included offenses before the trial begins.

People v. Jones, 149 Ill.2d 288, 595 N.E.2d 1071 (1992) Defendant was tried for armed robbery. The information alleged that he took a car and a purse by pointing a gun and threatening the imminent use of force. The trial judge found insufficient evidence that defendant had threatened the imminent use of force, but convicted him of theft.

The Appellate Court reversed on the ground theft is not a lesser included offense of armed robbery but the Supreme Court concluded that the information here impliedly alleged the elements of theft so as to permit a conviction for that offense. By charging that defendant took another's property by threatening to use force, the charge "clearly informed" defendant that he was being charged with obtaining unauthorized control of the property, as required for theft. The charge also "implicitly set out the required mental states" for theft - that defendant knowingly obtained the property of another and intended to permanently deprive the victims of that property. The theft conviction was reinstated.

People v. Perez, 108 Ill.2d 70, 483 N.E.2d 250 (1985) The defendant, a prison inmate, was convicted of the murder of a fellow inmate. Defendant contended that the trial judge erred by refusing to give defendant's tendered instruction on the lesser offense of aggravated battery. The Court stated that "an included-offense instruction is required only in cases where the jury could rationally find the defendant guilty of the lesser offense and not guilty of the greater offense." Here, the jury "could not have rationally found defendant guilty of aggravated battery."

People v. Arnold, 104 Ill.2d 209, 470 N.E.2d 981 (1984) The trial court did not err, at defendant's trial for murder, by refusing to give a verdict form for "not guilty" of involuntary manslaughter. During closing argument, defense counsel told the jury that defendant was guilty of involuntary manslaughter. "A defendant who admits culpability for a crime cannot expect to have the jury instructed concerning his innocence of the crime." Conviction for murder affirmed.

Illinois Appellate Court

People v. Avdic, 2023 IL App (1st) 210848 Defendant was convicted of felony murder and attempted murder based on a theory of accountability. The evidence at trial showed defendant concocted a plan to steal marijuana from a dealer. He set up the purchase via text,

using a fake name, and recruited three other accomplices to join him. The purchase was to take place in the dealer's car. When defendant's car arrived, two of the accomplices exited and entered the back seat of the dealer's car. They shot the dealer and her passenger and stole the marijuana. The passenger died.

The appellate court remanded for a new trial due to instructional errors. At trial, defendant requested [IPI Criminal No. 7.15A](#), which states that felony murder occurs when the death is "a direct and foreseeable consequence of a chain of events set into motion by the commission of" the underlying felony. The Committee Note states that the instruction is to be given where defendant did not perform the act causing death. The trial court rejected the request.

While the State argued that the instruction was unnecessary because foreseeability is only an issue when a third-party commits the act causing death, neither the caselaw nor the committee notes for the instruction support such a distinction. Although [People v. Watson, 2021 IL App \(1st\) 180034](#), suggested that strict liability applies when a defendant or an accomplice commits the act causing death, the appellate court here, relying on [People v. Lowery, 178 Ill. 2d 462, 467 \(1997\)](#), found this holding incorrect. [Lowery](#) and subsequent cases such as [People v. Hudson, 222 Ill. 2d 392, 401 \(2006\)](#), suggest that the "proximate cause theory" of felony murder, which includes a foreseeability element, applies to all felony murder cases. Thus, the trial court erred when it refused to give the instruction, where there was more than "some evidence" that defendant did not foresee the shooting, including testimony on both sides that defendant intended only to steal the marijuana, not to hurt anyone, and was unaware that his accomplice was armed. Because of this evidence, the State could not prove the error harmless beyond a reasonable doubt.

Additionally, the trial court erred in denying defendant's request for a lesser-included offense instruction. As the predicate offense of the felony murder charge, robbery was a lesser-included offense. Defendants are entitled to lesser-included offense instructions unless no rational jury could have convicted defendant of the lesser charge while acquitting him of the charged offense. Here, because of the foreseeability issues, the appellate court found an acquittal on murder and conviction on robbery a possibility. Although the State pointed out that the defendant denied planning a robbery, and that he only intended a theft without use of force, the appellate court could look at the entire record and conclude that a jury may have believed that defendant did intend a robbery and accordingly convict him of the lesser charge.

Finally, the trial court abused its discretion when it refused [IPI Criminal No. 5.01A](#), defining intent for purposes of the attempt murder charge. The trial court based its decision on the fact that it found the instruction confusing. The appellate court disagreed that this was a valid reason to deny the instruction. And while [People v. Powell, 159 Ill. App. 3d 1005, 1013 \(1987\)](#), held that an instruction on knowledge is not required in an attempted murder case, this holding occurred prior to the adoption of the pattern instruction, and the case involved overwhelming evidence. Thus, it was distinguishable.

[People v. Cornejo, 2020 IL App \(1st\) 180199](#) The trial court did not err in instructing the jury on the lesser-included offense of aggravated robbery at the State's request. Defendant was charged with armed robbery with a firearm for threatening the use of force and carrying on his person a firearm. The victims were not sure if the firearm was real, so the State requested an aggravated robbery instruction allowing for conviction if defendant took property by threatening force and indicating he was armed with a firearm. Defendant was acquitted of armed robbery and convicted of aggravated robbery.

Although aggravated robbery requires the extra element of indicating to the victim that one is armed with a firearm, under the charging-instrument approach as interpreted by

People v. Kolton, 219 Ill. 2d 353, 360 (2006), this element may be inferred if rationally supported by the evidence. Here, the evidence showed that defendant pointed a firearm, or an object he intended the victims to believe was a firearm, during the robbery. Under these facts, aggravated robbery was a lesser-included offense.

People v. Rouse, 2020 IL App (1st) 170491 The trial court did not err in dismissing defendant's post-conviction petition at the second-stage of proceedings. Defendant claimed ineffective assistance of trial counsel for misadvising him of the sentencing range on the lesser included offense of attempt, including that sentences could be concurrent, leading defendant to reject attempt instructions and proceed solely on the three counts of aggravated criminal sexual assault that had been charged. Defendant was convicted and sentenced to consecutive terms totaling 18 years of imprisonment. The Appellate Court concluded that defendant could not establish prejudice, regardless of whether counsel's performance was deficient. The evidence at defendant's jury trial established, at a minimum, multiple acts of contact between defendant's penis and the complainant's mouth and genitals, "however slight," such that there was no likelihood that the outcome would have been different even if attempt instructions had been given.

People v. Hill, 2020 IL App (1st) 162119 As police tried to remove defendant from under a staircase in order to place him under arrest, defendant repeatedly kicked at the officers, striking one in the legs and chest. The State charged him with aggravated battery of a peace officer. At the close of evidence, the defense asked that the jury be instructed on the lesser-included offense of resisting a peace officer. The trial court refused, and defendant was convicted of aggravated battery.

The Appellate Court reversed. The parties agreed that under the charging instrument approach, resisting a peace officer was a lesser-included offense. While the State argued that the jury could not have reasonably convicted defendant of resisting instead of aggravated battery, the Appellate Court majority disagreed. The record contained at least some evidence that defendant kicked his legs only with the knowledge that he was preventing his arrest, not that he would actually strike the officer.

People v. Eubanks, 2017 IL App (1st) 142837 The trial court erred in denying the defense request for a reckless homicide instruction. Defendant was convicted of first degree murder for driving a van at a high rate of speed through a residential neighborhood and killing one pedestrian and maiming another. Although the evidence was sufficient to prove him guilty of knowing first degree murder, there was at least some evidence that he acted recklessly. The Appellate Court noted that similar cases, such as **People v. Belk**, 203 Ill. 2d 187 (2003), resulted in reckless homicide convictions.

The dissent would have found that defendant's trial testimony, in which he denied driving the van, precluded a reckless homicide instruction, which was inconsistent with his defense.

People v. Henson, 2017 IL App (2d) 150594 There are three methods for determining whether a crime is a lesser included offense: (1) the abstract elements approach, (2) the charging instrument approach, and (3) the factual or evidence approach. Where the issue is whether an uncharged offense is a lesser included offense of a charged offense, the charging instrument approach applies. Under this approach, the lesser offense need not be a necessary

part of the greater offense, but the facts alleged in the charging instrument must contain the broad foundation or main outline of the lesser offense.

Where the indictment alleged that defendant committed burglary in that he knowingly entered a motor vehicle with the intent to commit a theft, theft was sufficiently identified to be a lesser included offense. The court stressed that the burglary charge alleged that defendant intended to obtain unauthorized control over property, which is the essence of theft.

Even where a crime is a lesser included offense, the defense is entitled to a lesser included offense instruction only if the evidence would permit a jury to rationally convict of the lesser offense while acquitting of the greater offense. This standard was satisfied here. The evidence showed that on the night in question, trucks at a business had been entered and items removed. Defendant was seen a short distance away from the business premises while in possession of items that had been taken from the trucks. There was no direct evidence that defendant entered into the business's property, and there was no security video from the lot or fingerprints indicating that defendant was at the business.

Although it could be inferred that defendant actually entered the property and removed the items, it could also be rationally inferred that defendant found the items after they had been taken by someone else and intended to keep them. Because the evidence would have allowed the jury to acquit of burglary and convict of theft, defendant was entitled to a lesser included offense instruction.

People v. Higgins, 2016 IL App (3d) 140112 Under **People v. Brocksmith**, 162 Ill. 2d, 224, 642 N.E.2d 1230 (1994), whether to submit a lesser-included offense instruction is one of five decisions which belong exclusively to the defendant and not to defense counsel. In **Brocksmith**, the court recognized that the decision to tender a lesser-included offense instruction is analogous to the decision to plead guilty and may result in a loss of liberty based on an uncharged offense.

Where defense counsel tenders a lesser-included defense instruction, the trial court must inquire of defense counsel, in defendant's presence, whether counsel has advised defendant of the potential penalties associated with the lesser-included offense and whether the defendant agrees with the decision to tender the lesser offense. **People v. Medina**, 221 Ill.2d 394, 851 N.E.2d 1220 (2006). Here, the court concluded that the trial court's duty to inquire applies only if defense counsel tenders the lesser-included offense instruction. Where the State requests a lesser-included offense instruction, the trial court need not ensure that defendant agrees with defense counsel's decision to not object to the instruction.

The court noted that in this case, the decision to not object to the lesser-included offense instruction appears to have been a valid and effective trial strategy. On the greater offense, defendant would have been subject to a sentencing range of 15 to 60 years. By not objecting the lesser-included offense instruction tendered by the State, defendant avoided a more serious conviction and received a sentence of 12 years, three years less than minimum sentence he could have received on the greater offense.

People v. Willett, 2015 IL App (4th) 130702 In determining whether the jury should be instructed on an uncharged crime as a lesser included offense, trial courts use the charging instrument approach. Under this approach, an uncharged crime is a lesser included offense if the facts alleged in the charging instrument contain the broad foundation or main outline of the uncharged offense. The indictment need not explicitly assert all of the elements of the lesser offense, so long as any missing element can be reasonably inferred from the charge.

The charging instrument approach includes two steps. First, the court must determine whether the uncharged crime is a lesser included offense. Second, the court must determine whether the evidence is sufficient to uphold a conviction on the lesser offense. If both steps are satisfied, a lesser included offense instruction should be given.

The State did not contest that reckless conduct was a lesser included offense of aggravated battery to a child. However, it argued that in determining whether the evidence is sufficient to uphold a conviction for the lesser included offense, the trial court is entitled to make credibility determinations. In addition, the State argued that the trial court's decision whether to give a lesser included offense instruction is entitled to deference.

Acknowledging a conflict in Illinois Supreme Court precedent, the Appellate Court concluded that the trial court may not weigh credibility in determining whether the evidence would rationally support a conviction for the lesser included offense:

[F]or all practical purposes, the trial court has no flexibility when it comes to determining whether "some evidence" exists that would allow the jury to rationally find the defendant guilty of the lesser offense and not guilty of the greater offense. Either some evidence supports the lesser offense, or none does. If any such evidence exists, a tendered instruction on the lesser-included offense should be submitted to the jury, regardless of the relative weight or credibility of that evidence.

The court also concluded that the evidence was sufficient to uphold a conviction for reckless conduct. Therefore, the trial court erred by refusing to give a reckless conduct instruction. Defendant's conviction was reversed and the cause remanded for a new trial.

People v. Wrencher, 2015 IL App (4th) 130522 A defendant is entitled to a jury instruction on a lesser-included offense where there is some slight evidence to support the lesser offense and a jury could rationally find the defendant guilty of the lesser offense but acquit him of the greater offense. The Appellate Court held that defendant, who was charged with two counts of aggravated battery of a police officer, was not entitled to a lesser-included jury instruction on the offense of resisting a peace officer. Utilizing the charging instrument approach, the Court found that resisting was a lesser-included offense of the first count of aggravated battery, but that the jury could not have rationally convicted defendant of resisting, but acquitted him of aggravated battery. As to the second count, the Court held that resisting was not a lesser-included offense.

The offense of resisting a peace officer has two elements: (1) the defendant knowingly resisted or obstructed a peace officer in the performance of any authorized act; and (2) the defendant knew the person he resisted or obstructed was a peace officer. [720 ILCS 5/31-1\(a\)](#). To determine whether resisting was a lesser-included offense of aggravated battery, the Court employed the charging instrument approach. Under this test, the charging instrument need not expressly allege all the elements of the lesser offense. Instead, the elements need only be reasonably inferred from the language of the charging instrument.

The first count of aggravated battery alleged that defendant knowing caused bodily harm to the officer by digging his fingernails into the officer's hand, knowing he was a peace officer engaged in the execution of his official duties. [720 ILCS 5/12-4\(b\)\(18\)](#). The Court held that the elements of resisting arrest could be reasonably inferred from the language of this count. Although the count did not expressly allege that defendant resisted or obstructed the officer, causing bodily harm increased the difficulty of the officer's actions, and thereby caused resistance or obstruction.

But the Court found that a rational jury could not have found that defendant's act of

causing bodily harm could have constituted resisting but not aggravated battery. By knowingly digging his fingernails into the officer's hand, the only charged act of resistance, defendant necessarily committed aggravated battery. Thus it would have been rationally impossible to convict defendant of resisting but acquit him of aggravated battery.

The second count of aggravated battery alleged that defendant knowingly made contact of an insulting or provoking nature by spitting blood on the officer's hand, knowing that he was a peace officer engaged in the execution of his official duties. [720 ILCS 5/12-4\(b\)\(18\)](#). The Court held that the elements of resisting arrest could not be reasonably inferred from the language of this count. Spitting is an act of contempt, not an act of resistance or obstruction. It thus did not show that defendant knew he would obstruct the officer by spitting blood. Instead, it only showed that he knew the officer would be disgusted and provoked.

People v. Lee, 2015 IL App (1st) 132059 Defendant was convicted of aggravated cruelty to a companion animal under the Humane Care for Animal's Act (Act). [510 ILCS 70/3.02](#). The indictments alleged that defendant intentionally caused several horses to suffer serious injury or death by failing to provide adequate food, water, shelter, and health care. The evidence showed that the horses were found on defendant's property in deplorable conditions, having been locked in immobile positions for long periods of time with insufficient food and water, and untrimmed hooves (which caused pain and bone deformation). These conditions caused the death of some horses and serious injury to others.

The trial court refused defendant's non-IPI jury instruction on the lesser-included offense of violation of owner's duties. Under the Act, an owner has the duty to provide his animals with: (a) a sufficient quantity of wholesome food and water; (b) adequate shelter and protection from the weather; (c) veterinary care when needed to prevent suffering; and (d) humane care and treatment. [510 ILCS 70/2.06](#). The Act defines an owner as any person who: (a) has a right of property in an animal; (b) keeps or harbors an animal; (c) has an animal in his care; or (d) acts as a custodian of an animal. [510 ILCS 70/2.06](#).

The Appellate Court held that defendant was entitled to an instruction on the lesser-included offense. The allegations in the indictments closely tracked the language of the owner's duties' statute and charged that defendant committed the offense of aggravated cruelty by failing to provide many of the items listed in the statute: adequate food, water, shelter and health care. Although the indictments did not specifically allege that defendant was the owner of the animals, this element could have been reasonably inferred. No one has an obligation to feed, water, shelter, or care for an animal unless he is the owner or is otherwise responsible. Accordingly, the indictment adequately charged the lesser offense.

The court also held that the evidence at trial supported the lesser-offense instruction. Nearly all the evidence detailed the gross deprivation of food and water, humane treatment, and veterinary care. And there was ample evidence that defendant owned the property. The evidence of intent was far from overwhelming, allowing a jury to reasonably conclude that defendant did not intend to cause serious harm or death to the horses. The trial court thus erred by refusing defendant's instruction.

People v. Smith, 2014 IL App (1st) 103436 The trial court did not err by failing to give an involuntary manslaughter instruction at defendant's trial for first-degree murder, attempt first-degree murder, and armed robbery. Defendant testified that he and his former girlfriend struggled over a pistol that the girlfriend was holding, and that the decedent was shot when the gun discharged during the struggle. The Appellate Court found that such testimony, if

believed, would not justify an involuntary manslaughter instruction because it would have resulted in an acquittal rather than in any type of conviction.

Furthermore, an involuntary manslaughter instruction was not justified based on the complainant's testimony that defendant brought a gun to her home and pointed it at the decedent. Defendant argued that the jury could have believed such testimony and that the decedent was unintentionally shot while defendant and the complainant struggled over the gun.

The totality of the evidence showed that defendant acted intentionally. The decedent's injuries were severe and inflicted by a weapon used by the defendant, and a second person besides the decedent was also wounded. In addition, the fact that three bullets struck two victims "belies defendant's assertion that the gun only went off while he and [the complainant] were struggling." The court also noted that both of the victims were defenseless when defendant burst into their bedroom with a firearm and that defendant tried to break the complainant's phone to keep her from calling for help. Furthermore, defendant stole a car which belonged to the complainant's mother, fled from the scene, and used a pseudonym both at the hospital when seeking treatment for his injuries and when he was arrested.

People v. Kidd, 2014 IL App (1st) 112854 Although a defendant cannot generally be convicted of an uncharged offense, in certain circumstances he or she is entitled to have the jury instructed on a lesser-included offense. To determine whether an offense is a lesser-included, the court must decide whether (1) the charging instrument describes the broad foundation or main outline of the lesser offense, and (2) the evidence allows a jury to rationally find defendant guilty of the lesser offense but not guilty of the greater.

Defendant was charged with attempted first-degree murder of a police officer and argued on appeal that the jury should have been instructed on the lesser offense of aggravated assault. Attempt murder of a police officer is defined as taking a substantial step toward the commission of murder with the intent to kill and knowledge that the victim is a police officer. Aggravated assault is defined as knowingly engaging in conduct which places another in reasonable apprehension of a battery while using a deadly weapon or knowing the person is a police officer.

The court found that the jury should have been instructed on aggravated assault. The indictment alleged that defendant committed attempt first-degree murder by pointing a firearm at the officer and pulling the trigger with the intent to commit murder. Defendant testified that she pointed the gun at the officer but did not pull the trigger. If the jury had believed defendant's version of events, it could have rationally convicted her of aggravated assault but not attempted murder. By pointing the gun at the officer, defendant placed him in reasonable apprehension of being battered. And since defendant did not pull the trigger, the jury could have acquitted her of attempt murder.

The court analyzed four prior decisions, two holding that the lesser aggravated assault instruction should have been given, and two holding that it should not, and found that the result here was consistent with all four decisions. In **People v. Ross**, 226 Ill. App. 3d 392, 589 N.E.2d 913 (1st Dist. 1992), the attempt murder indictment charged defendant with "aiming a gun" at the officer and the evidence showed that defendant pointed a gun at the officer but never fired any shots. In **People v. Krueger**, 176 Ill. App. 3d 625, 531 N.E.2d 396 (2d Dist. 1988), the indictment alleged and the evidence showed that defendant fired shots at the victim's house, but did not fire directly at the victim himself. In both cases, as well as the present case, there was evidence that defendant only intended to frighten the victim.

In **People v. Kimball**, 243 Ill. App. 3d 1096, 614 N.E.2d 273 (1st Dist. 1993) and **People v. Jefferson**, 260 Ill. App. 3d 895, 631 N.E.2d 1374 (1st Dist. 1994), by contrast, the

indictments alleged and the evidence showed that the defendants fired shots directly at the victims. Under these circumstances, the defendant was not entitled to a lesser instruction on aggravated assault since there was no evidence that defendant only intended to frighten the victim. The court found the present case similar to **Ross** and **Krueger**, and distinguishable from **Kimball** and **Jefferson**, since there was evidence that defendant merely pointed a gun but did not fire at the officer. The court reversed and remanded for a new trial.

People v. Beasley, 2014 IL App (4th) 120774 A defendant is entitled to a lesser-included offense instruction if the evidence at trial would allow a rational jury to find the defendant guilty of the lesser offense while acquitting him of the greater offense. The basic difference between involuntary manslaughter and first degree murder is the mental state accompanying conduct which resulted in another's death. For first degree murder, the defendant must know that his acts create a strong probability of death or great bodily harm. For involuntary manslaughter, the defendant must recklessly perform acts likely to cause death or great bodily harm.

Standing alone, defendant's testimony that he did not intend to shoot anyone does not provide a sufficient basis for giving an instruction on involuntary manslaughter. However, the court concluded that there was sufficient evidence to support an involuntary manslaughter instruction where a witness testified that defendant did not appear to be pointing the gun at any specific person before it went off, that defendant and the decedent knew each other, and that defendant would not have intentionally shot the decedent. In addition, several witnesses testified that defendant was not pointing the gun at anyone in particular when the shot was fired. The court also noted that there was a basis in the evidence to find that defendant was in a dispute with the decedent and thought the decedent was advancing and threatening to harm him. Finally, defendant testified that the gun went off accidentally and that he had an elevated sense of fear due to previous incidents in which he had been shot.

The court concluded that although the evidence supporting involuntary manslaughter was not as strong as the evidence supporting second degree murder, a rational jury could have accepted defendant's claim that he acted recklessly and did not intend to shoot the decedent. Therefore, the trial court abused its discretion by failing to instruct the jury on involuntary manslaughter. Defendant's conviction was reversed.

People v. Luna, 409 Ill.App.3d 45, 946 N.E.2d 1102 (1st Dist. 2011) An instruction on a lesser offense is justified where there is credible evidence to support the giving of the instruction. Where there is evidentiary support for an instruction, the failure to give the instruction constitutes an abuse of discretion.

The court rejected the State's argument that a defendant who raises self-defense cannot seek an involuntary manslaughter instruction, because raising self-defense admits an intentional killing while involuntary manslaughter requires an unintentional killing by reckless actions that are likely to cause death or great bodily harm. Because Illinois law allows a criminal defendant to raise inconsistent defenses, the inconsistency between the mental states does not preclude either claim.

However, a defendant may not seek to reduce a first degree murder conviction to involuntary manslaughter based on a claim that he acted with a subjective intent that is not supported by any evidence other than the defendant's testimony. "Illinois courts have consistently held that when the defendant intends to fire a gun, points it in the general direction of his or her intended victim, and shoots, such conduct is not merely reckless and does not warrant an involuntary-manslaughter instruction, regardless of the defendant's

assertion that he or she did not intend to kill anyone.” (**People v. Jackson**, 372 Ill.App.3d 605, 874 N.E.2d 123 (4th Dist. 2007)). Because the evidence here unequivocally demonstrated that defendant intended to swing a knife in the decedent’s direction, and other than defendant’s testimony there was no evidence that he merely intended to scare the decedent, an involuntary manslaughter instruction was not justified.

People v. Richardson, 2011 IL App (4th) 100358 Generally, any error relating to jury instructions is forfeited if the defendant does not object or proffer alternative instructions at trial. An exception exists for the failure to instruct on the elements of a crime. The decision whether to instruct the jury on a lesser offense rests with defendant and is one of trial strategy.

Defendant elected to represent himself at trial. Therefore he was responsible for his own representation and was held to the same standards as any attorney. The court had no duty to advise defendant to introduce a lesser-offense instruction *sua sponte* or to inform defendant of the possibility of introducing the jury instruction. Because defendant represented himself at trial, he could not have usurped the decision whether to tender the instruction. Therefore, no error occurred.

People v. Smith, 402 Ill.App.3d 538, 931 N.E.2d 864 (1st Dist. 2010) A defendant is entitled to a lesser-included offense instruction if the evidence would permit the jury to rationally find defendant guilty of the lesser offense and acquit him of the greater offense.

Defendant was convicted of attempt murder of a police officer. The State presented evidence that an officer in an unmarked car boxed defendant’s car into its parking spot as part of an effort by the police to arrest defendant. Other marked cars came to the scene to assist. An officer stood on the sidewalk in front of defendant’s car and identified himself as a police officer. Defendant looked down on the floor of his car, then drove onto the sidewalk, hitting the officer in the side as the officer dove away. Ultimately, defendant crashed into another police car. A gun was found on the floor of defendant’s car. Defendant was ticketed for driving on the sidewalk and eluding the police.

The Appellate Court held that this evidence supported defendant’s request for an instruction on the lesser-included offense of reckless conduct. The evidence that defendant drove onto the sidewalk and made a decision not to use his gun, coupled with the tickets, could support the inference that he disregarded a substantial and unjustifiable risk to the officer and his disregard of that risk constituted a gross deviation from the standard of care that a reasonable person would exercise while driving a car.

People v. Stewart, 406 Ill.App.3d 518, 940 N.E.2d 273 (1st Dist. 2010) Under the charging-instrument approach, criminal damage to property is a lesser-included offense of aggravated arson. Defendant was charged with aggravated arson “in that he, in the course of committing arson, knowingly damaged partially or totally any building or structure of Gregory Sloane, located at 5354 South Princeton, in Chicago, Illinois, and [defendant] knew or reasonably should have known that one of more persons were present therein.” The criminal damage to property statute provides in relevant part that the offense is committed when a person “recklessly by means of fire or explosive damages property of another.” 720 ILCS 5/21-1(1)(b). A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation. 720 ILCS 5/4-6.

Defendant was not entitled to an instruction on the lesser-included offense, however,

because the jury could not rationally acquit defendant of aggravated arson and convict him of criminal damage to property. All of the actions of the defendant evidenced knowing and deliberate conduct. There was no evidence that the defendant accidentally caused the fire or that it accidentally spread to the 5354 building.

People v. Washington, 399 Ill.App.3d 664, 926 N.E.2d 899 (1st Dist. 2010) Because the jury must determine whether a defendant's belief in the need for self-defense is reasonable or reasonable, a second degree murder instruction is required in a first degree murder case in which a self defense instruction is given.

People v. Blan, 392 Ill.App.3d 453, 913 N.E.2d 23 (2d Dist. 2009) A defendant is entitled to a lesser included offense instruction if the evidence would permit a rational jury to convict of the lesser included offense and acquit of a greater offense. A lesser included instruction is required where there is at least "slight" evidence tending to prove the lesser offense or disprove the greater one.

Where defendant was arrested in possession of 31 grams of cannabis, 3.6 grams of which were packaged in four small plastic bags and approximately 28 grams of which were packaged in a single large bag, the trial court erred by refusing defendant's request to give a lesser included offense instruction on possession without intent to deliver. Although the evidence would have allowed a rational jury to find beyond a reasonable doubt that the defendant intended to deliver all of the cannabis, there was at least "very slight" evidence to support the lesser offense where defendant told police that he planned to smoke most of the cannabis, but made up "four nickel bags to sell and make \$20."

Although defendant's confession was uncorroborated and self-serving, its uncorroborated nature "does not cause it to cease to be evidence." Furthermore, its self-serving nature "does nothing to distinguish it from the majority of testimony heard in this (or any) case."

Rejecting precedent from other districts, the court found that the failure to give a lesser included offense instruction cannot be harmless error. Because the refusal to tender a lesser included offense instruction constitutes error only if there is sufficient evidence to allow a rational jury to convict of the lesser offense and acquit of the greater offense, the court held that the normal harmless error inquiry is inherent in deciding whether error occurred at all. In other words, because the finding of error required a conclusion that a rational juror could have convicted of the lesser included offense, "we cannot deem that error harmless on the ground that no rational jury could have sided with defendant."

People v. Toney, 337 Ill.App.3d 122, 785 N.E.2d 138 (1st Dist. 2003) Where the trial court properly found that the evidence supported an instruction on self-defense in a prosecution for "knowing and intentional" murder, the trial court erred by refusing to give a second degree murder instruction.

In re Matthew M., 335 Ill.App.3d 276, 780 N.E.2d 723 (2d Dist. 2002) An instruction on a lesser included offense is proper where there is some evidence to support it. Very slight evidence supporting a defendant's theory of the case justifies an instruction. The court concluded that the jury should have been instructed on criminal trespass to a residence as a lesser included offense of residential burglary. In his statement, the minor claimed that his only role in the offense was to act as a lookout while another person determined whether a window in the victim's residence was open.

There was no evidence that the minor and the principal planned a theft from the

residence, and none of the items stolen from the residence were found in the respondent's possession. Finally, the police were uncertain whether defendant or the principal told them where the stolen items had been hidden. Under these circumstances, a jury could reasonably have concluded that the respondent did not know of the principal's intent to commit a theft and at most intended to participate in a criminal trespass.

People v. McDonald, 321 Ill.App.3d 470, 748 N.E.2d 255 (1st Dist. 2001) Plain error occurred where defendant was convicted of aggravated robbery under an indictment which charged only armed robbery. The armed robbery charge did not allege the "main outline" of aggravated robbery where there was no allegation of an essential element - that defendant indicated verbally or by his conduct that he was armed.

People v. Nunez, 319 Ill.App.3d 949, 745 N.E.2d 639 (1st Dist. 2001) Under **People v. Brocksmith**, 162 Ill.2d 224, 642 N.E.2d 1230 (1994), the decision to seek a jury instruction on a lesser included offense must be made by the defendant rather than by counsel. Similarly, where a defendant is tried at a bench trial on charges for which the statute of limitations has not run, he may be convicted of a lesser included offense on which the statute of limitations has expired only if the decision to submit the lesser included offense, and thereby waive the statute of limitations, is a product of the defendant's informed consent.

Where neither defendant nor defense counsel asked the court to consider the lesser included offense, the charge contained no allegation that the statute of limitations had been tolled, and defense counsel's failure to ask the court to consider a lesser offense was part of a "cohesive trial strategy" based on the claim that defendant had not been involved in the offense, defendant should not have been convicted of the lesser included offense.

People v. DePaolo, 317 Ill.App.3d 301, 739 N.E.2d 1027 (2d Dist. 2000) A defendant is not entitled to extensive admonishments by the trial court concerning the right to decide whether to request lesser included offense instructions. The trial judge properly exercised its discretion by admonishing defendant that he had the right to have input into that decision and by calling a recess when defense counsel indicated that he and the defendant had not discussed the matter. The court rejected the argument that where the evidence suggests that lesser included offense instructions are possible, the judge must give admonishments analogous to those required upon entry of a plea.

People v. Tainter, 304 Ill.App.3d 847, 710 N.E.2d 158 (1st Dist. 1999) The trial court erred by refusing to instruct the jury on the lesser included offense of involuntary manslaughter. Although several factors militated against an involuntary manslaughter instruction (including the discrepancy in size between the defendant and the decedent, the brutality and duration of the beating and the severity of the decedent's injuries), there was a reasonable basis on which the jury could have returned an involuntary manslaughter verdict. Among the factors relied upon by the court were defendant's testimony suggesting that the beating occurred as part of a jealous rage, the victim's ability to return home after the incident, defendant's decision to use his bare fists rather than a weapon, and defendant's consumption of alcohol at the time of the offense.

People v. DeWeese, 298 Ill.App.3d 4, 698 N.E.2d 554 (1st Dist. 1998) Under **People v. DiLorenzo**, 169 Ill.2d 318, 662 N.E.2d 412 (1996), and **People v. Hamilton**, 179 Ill.2d 319, 688 N.E.2d 1166 (1997), a charge may set forth the "main outline" of a lesser offense without alleging all of its elements, because the missing language may be "implicitly contained" in

the charging instrument. An aggravated criminal sexual assault charge alleged the essence of aggravated criminal sexual abuse although it did not expressly assert that defendant's actions were for purposes of sexual gratification - an allegation that defendant touched complainant's vagina by use of force "implicitly connote[d]" that he did so for purposes of sexual gratification or arousal rather than by mistake or inadvertence.

People v. Gramc, 271 Ill.App.3d 282, 647 N.E.2d 1052 (5th Dist. 1995) The Court held that once a jury has been instructed and started its deliberations, the trial court may not tender a lesser included offense instruction even if requested by the defendant. "Once a jury retires to deliberate, the court should not submit new charges and new theories . . . , regardless of which party requests such. If fundamental justice requires the giving of such instructions and verdict forms, it might be better to declare a mistrial, provided that no double jeopardy issues would arise."

People v. Smith, 261 Ill.App.3d 117, 633 N.E.2d 69 (4th Dist. 1994) Defendant was convicted of aggravated battery with a firearm and obstruction of justice, and contended that the trial court erred by refusing to instruct the jury on reckless conduct. The theory of the defense was that the victim had shot himself. Defendant gave police several conflicting accounts, although he consistently said that the victim had shot himself. A third member of the group also gave several inconsistent statements, at times claiming that he had been asleep at the time of the incident, at other times saying the victim had shot himself, and at trial testifying that defendant was "playing with the gun" when it fired, causing a bullet to strike the decedent. The trial court refused to instruct on reckless conduct. The Appellate Court held that reckless conduct occurs where one consciously disregards a "substantial and unjustifiable risk that circumstances exist or that a result would follow," and such "disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise." Handling a gun has been recognized to be reckless conduct, and testimony that the shooting was accidental provided a basis on which the defendant could have been convicted. A reckless conduct instruction should have been given.

People v. Bradley, 256 Ill.App.3d 514, 628 N.E.2d 257 (1st Dist. 1993) Defendant was convicted of two counts of aggravated arson. Two expert witnesses testified that the mattress in defendant's bedroom had been ignited with an open flame and that the fire could not have been started accidentally. In her first statement to police, defendant claimed that the fire started when she dropped a cigarette on the mattress during a struggle with her boyfriend. A short time later, the defendant admitted starting the fire with a cigarette lighter because she was angry with her boyfriend. Defendant later gave a written statement admitting that she had deliberately set the fire. Defense counsel tendered an instruction on criminal damage to property as a lesser included offense. The trial court refused to give the instruction because it believed that there was no evidence of recklessness, an essential element of criminal damage to property.

The Appellate Court held that the trial judge erred by refusing to instruct the jury on criminal damage to property. Defendant's initial claim (that the fire had been started by a dropped cigarette) was evidence of recklessness, and the jury could have believed the statement though it was recanted during a subsequent interrogation.

People v. Hines, 257 Ill.App.3d 238, 629 N.E.2d 540 (1st Dist. 1993) Defendant was charged with armed violence based on aggravated battery causing great bodily harm, aggravated battery causing great bodily harm and aggravated battery by use of a deadly

weapon. He claimed on appeal that the jury instructions were deficient because they allowed him to be convicted of armed violence based not only on great bodily harm aggravated battery, but also on aggravated battery with use of a deadly weapon. (Use of the latter charge as the predicate for armed violence would have violated [People v. Haron](#), 85 Ill.2d 261, 422 N.E.2d 627 (1981), which held that the use of a weapon cannot be used both to enhance a misdemeanor to a felony and as the predicate for armed violence.) The Court concluded that the armed violence instructions should have permitted the jury to convict of armed violence only if it found defendant had committed aggravated battery "based on great bodily harm." Where a defendant is charged with two counts of aggravated battery, one of which could be a predicate felony for armed violence and one which could not, the armed violence instructions must limit the jury's consideration to the proper offense.

[People v. Upton](#), 230 Ill.App.3d 365, 595 N.E.2d 56 (1st Dist. 1992) Defendant was convicted of attempt murder and aggravated battery based on his shooting of a tow truck operator who was repossessing defendant's vehicle because his payments were delinquent. Defendant contended he fired his weapon only to stop what he believed to be a theft of his vehicle. The Court found reversible error because the trial judge refused to give defendant's instructions on reckless conduct. There was sufficient evidence to support the instruction - defendant testified that he saw no commercial identification on the tow truck, the tow truck operator drove off hastily when defendant shouted, defendant was a considerable distance from the car when he fired what he intended as a warning shot, and he fired a second shot at the tires of the truck as he was running and the truck was moving.

[People v. Willis](#), 170 Ill.App.3d 638, 524 N.E.2d 1259 (3d Dist. 1988) The defendant was convicted of aggravated battery and resisting a peace officer. The State presented three witnesses, and the defendant presented no evidence. The testimony showed that a public safety officer was called to a campus incident. The officer began escorting defendant and two other students to a security office. As they entered an elevator, defendant shoved the officer and began wrestling with him. The officer was kicked, probably twice. The defendant was finally subdued by the officer and another individual. The officer and another witness admitted that defendant was "wild and flailing about." The other witness testified that when he grabbed defendant in a "full-nelson hold," defendant attempted to escape and kicked the officer. Defendant requested a jury instruction on the offense of reckless conduct, which was refused.

The Appellate Court held that it was error to refuse the instruction on reckless conduct, since there was sufficient evidence to create an issue of fact as to whether defendant acted knowingly or recklessly. The Court pointed to the testimony that defendant had been "wild and flailing about" and, "more importantly," to testimony that defendant kicked the officer while trying to escape from a third party's full-nelson hold.

[People v. Sibley](#), 101 Ill.App.3d 953, 428 N.E.2d 1143 (1st Dist. 1981) The defendant was convicted of attempt murder arising out of an incident in which he pointed a shotgun at someone, a struggle ensued and a third party was shot. The trial court refused defendant's request that the jury be instructed on the charge of reckless conduct. The trial judge erred by refusing to instruct on reckless conduct. There was evidence that the defendant handled the gun improperly, which may be reckless conduct, and a defendant is entitled to an instruction on a lesser included offense if there is any evidence fairly tending to bear upon it. See also, [People v. Williams](#), 293 Ill.App.3d 276, 688 N.E.2d 320 (2d Dist. 1997) (reckless conduct instruction should have been given as included offense of aggravated discharge of a firearm).

People v. Richards, 28 Ill.App.3d 505, 328 N.E.2d 692 (5th Dist. 1975) In a prosecution for armed robbery, defendant introduced an inoperative .22 rifle and argued that it was not a “dangerous weapon”. The State argued that the defendant’s exhibit was not the weapon used in the crime. The trial court allowed a State instruction which, in part, stated: “The type of weapon used is not a material allegation and need not be proved beyond a reasonable doubt.” Here the jury was presented with two questions: (1) whether defendant was armed with a weapon, and (2) whether the weapon was dangerous. Because the above instruction erroneously removed the second question from the jury’s consideration, the conviction was reversed.

§32-8(j)

Witness Credibility; Accomplice Testimony

Illinois Supreme Court

People v. Tompkins, 2023 IL 127805 A police officer who was involved in a foot chase and the recovery of a firearm did not turn his body-camera on during the incident. At defendant’s trial for UUW/felon, the officer testified that he did not turn his camera on because the events unfolded quickly, and he was focused on apprehending the suspect and ensuring the safety of those around him.

The trial court denied the defense request to instruct the jury with the following non-pattern IPI:

You have heard testimony that Officer Martinez was wearing a body-worn camera but did not turn it on prior to or during his encounter with the defendant. If you find that the officer intentionally did not capture a recording of this encounter, then you should consider that fact when determining what weight to give to Officer Martinez’s testimony.

Defense counsel argued this instruction was warranted under section 10-30 of the Law Enforcement Officer-Worn Body Camera Act. After conviction, he appealed the trial court’s denial of the instruction.

The supreme court affirmed. Although it agreed the court erred in failing to provide an instruction, the tendered instruction here was inaccurate. Section 10-30 states:

The recordings may be used as evidence in any administrative, judicial, legislative, or disciplinary proceeding. If a court or other finder of fact finds by a preponderance of the evidence that a recording was intentionally not captured, destroyed, altered, or intermittently captured in violation of this Act, then the court or other finder of fact shall consider or be instructed to consider that violation in weighing the evidence, unless the State provides a reasonable justification.

Thus, the finder of fact should be instructed to find whether the failure to turn on the camera was intentional; if so, whether the State provided a reasonable justification; and if no reasonable justification, how much weight to give this failure when assessing the evidence.

Here, the tendered non-IPI did not include the reasonable justification provision. Thus, the circuit court was right to reject the instruction. And while the instruction is required under the Act, the defense invited the error by tendering an inaccurate instruction. Finally, any error here was harmless in light of the other instructions on witness credibility, the overall strength of the State’s evidence, and defendant’s ability to argue in closing the failure to turn the camera on.

People v. Fane, 2021 IL 126715 In a 4-3 decision, a majority of the court found the trial court did not abuse its discretion by providing a modified version of the accomplice witness instruction, 3.17, which informed the jury that the defense witness who testified that he participated in the crime with someone other than defendant, was an accomplice whose testimony should be viewed with suspicion.

On appeal, defendant argued that the court abused its discretion by tendering a non-pattern instruction. The pattern instruction on accomplice testimony, 3.17, was designed to cover a particular type of biased witness – witnesses who hope to receive favor from the prosecution by implicating defendant in a crime,. There was no need to expand the instruction to cover a completely different scenario. The State argued that cases have long noted that accomplices must be viewed with suspicion regardless of whether they implicate defendant, or for whom they testify, because they are “tainted with criminality.”

The majority sided with the State, finding that in previous opinions, such as **People v. Touhy**, 361 Ill. 332 (1935) and **People v. Rivera**, 166 Ill. 2d 279 (1995), the court approved the instruction for any accomplice, regardless of whether the witness implicated or exonerated the defendant. An expectation of leniency from the prosecution is but one reason accomplices deserve extra scrutiny; as these cases hold, so too is the fact that they are “confessed criminals.” In light of this authority, the majority could not say the trial court abused its discretion by approving the non-pattern instruction.

The three-justice dissent would have found an abuse of discretion and reversible error. Each case relied on by the majority was factually distinguishable – all approved the accomplice instruction for a defense witness either because the trial court had also approved one for a State accomplice witness and sought to avoid confusion or unfairness, or did so because the defense witness implicated defendant in a prior proceeding. Moreover, the authority cited by the majority in support of the theory that an accomplice witness instruction is warranted because the witness is a “confessed criminal,” viewed more closely, clearly focused on the accomplice’s hope for leniency as the primary concern.

The dissent also found that, by expanding the use of an accomplice witness instruction to defense witnesses who testify they were *not* accomplices of the defendant, the majority has sanctioned an instruction which will essentially inform juries that a defense witness should not be believed. Finally, the dissent believed that the pattern instructions already provide the prosecution with sufficient ammunition to attack defense witnesses who claim to have committed the crime without defendant. Through pattern instruction 1.02, the prosecution is free to highlight any interest, bias, or prejudice the witness may have. This obviated the need for a non-pattern instruction.

People v. Armstrong, 183 Ill.2d 130, 700 N.E.2d 960 (1998) While parties must be allowed to cross-examine witnesses about their drug use, a trial court need not instruct the jury that testimony by narcotics addicts is untrustworthy. It is the function of the jury, not the trial court, to determine the credibility of witnesses.

People v. Harris, 182 Ill.2d 114, 695 N.E.2d 447 (1998) The trial court’s refusal to give an instruction on the credibility of testimony by an accomplice (IPI Crim. No. 3.17) will be overturned only if there was an abuse of discretion. An accomplice instruction should be given where there is probable cause to believe that the witness was guilty of the offense as a principal or an accomplice. Thus, “an accomplice-witness instruction should be given . . . if the totality of the evidence and the reasonable inferences that can be drawn from the evidence

establish probable cause to believe not merely that the person was present and failed to disapprove of the crime, but that he participated in the planning or commission of the crime.”

People v. Rivera, 166 Ill.2d 279, 652 N.E.2d 30 (1995) The trial court has discretion to give the accomplice witness instruction concerning witnesses for the defense as well as witnesses for the prosecution. The Court overruled several appellate court cases and IPI Committee Comments to the contrary.

People v. Steidl, 142 Ill.2d 13, 566 N.E.2d 1351 (1991) An important State witness admitted that he was a drug addict and had ingested drugs during the month when the murders occurred. The trial court refused to give an instruction which stated that the testimony of a drug addict is of “questionable reliability” and should be “scrutinized with great caution.” The Supreme Court stated that refusing to give an addict instruction is not reversible error “where the evidence of the addiction is before the jury so that it can make its own determination of the believability of the witness.” Defendant was given wide latitude to cross-examine on the witness’s drug use. Under these circumstances, the judge did not abuse his discretion.

People v. Cobb, 97 Ill.2d 465, 455 N.E.2d 31 (1983) At trial, the key State witness was a person who testified that she drove the defendants to the scene of the armed robbery and murder. The trial court refused to give a defense tendered “accomplice” instruction, since the above witness testified that she had no knowledge of defendants’ plans and was not fully aware that defendants committed the crimes until the day after the crimes. It was error to refuse the accomplice instruction because, though the witness denied knowledge of the crimes, there was sufficient evidence to justify her indictment as a principal or an accomplice.

People v. Kubat, 94 Ill.2d 437, 447 N.E.2d 247 (1983) The Court rejected the defendant’s contention that the trial judge erred by failing, *sua sponte*, to instruct the jury on the possibility of mistaken identification. The trial judge is ordinarily not required to give instructions which are not requested; in addition, instructions on the credibility of witnesses, presumption of innocence and burden of proof adequately protected defendant’s right to a fair trial. See also, **People v. Hall**, 134 Ill.App.3d 961, 481 N.E.2d 290 (3d Dist. 1985); **People v. White**, 192 Ill.App.3d 55, 548 N.E.2d 421 (1st Dist. 1989).

People v. Parks, 65 Ill.2d 132, 357 N.E.2d 487 (1976) The sole evidence linking defendant to the incident came from an “accomplice.” Defense counsel objected to the giving of an instruction which states that the testimony of an accomplice witness is subject to suspicion, because he did not want the jury told that the State’s witness was an “accomplice.” Defense counsel tendered a non-IPI instruction which did not use the term “accomplice.” The trial judge refused to give defendant’s tendered instruction. Thus, no accomplice testimony instruction was given. The trial judge did not err by failing, *sua sponte*, to instruct the jury concerning the testimony of the “accomplice.” The “accomplice” admitted prior inconsistent statements and was sharply cross-examined, and the jury was instructed on its duty to judge the credibility of witnesses and on the proper consideration of prior inconsistent statements.

Illinois Appellate Court

People v. Quezada, 2022 IL App (2d) 200195 There was no error in trial counsel’s failure to request IPI 3.17, the accomplice-witness instruction. At defendant’s trial, a witness

(Longmire) testified that he was near defendant at the time defendant shot in the direction of police officers, and that he fled with defendant to Longmire's home after the shooting.

The accomplice-witness instruction provides:

When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case.

To determine whether a witness is an accomplice, the court should consider whether there is probable cause to believe that the witness was guilty either as a principal or under a theory of accountability.

Here, Longmire did not fit within either of those categories. There was no evidence that he fired the shots which led to the charges of attempt murder of a peace officer and aggravated discharge of a firearm. And, his presence at the time of the shooting, and flight with defendant after the fact, did not suggest Longmire's participation in the planning or execution of the shooting itself. The fact that the police told Longmire during interrogation that he could be charged "with everything," was a police tactic to gather information and not a statement as to Longmire's actual liability for the offenses here. Because Longmire was not an accomplice within the meaning of IPI 3.17, counsel did not err by not requesting that instruction.

People v. Ammons, 2021 IL App (3d) 150743 During deliberations on a charge of aggravated battery of a police officer, the jury sent out a note inquiring whether a defendant placed under arrest has the right to defend himself against unlawful force. With the parties' agreement, the judge responded that the jury should continue deliberating based on the law already provided (which included a self-defense instruction). Defendant was convicted, and on appeal argued that the court's response was error. The Appellate Court declined to review the issue as plain error since the parties had agreed to the provided response in the trial court. Regardless, there was no error because there was no evidence that the officers used excessive force prior to defendant's alleged acts of resistance. Instead, the evidence showed that defendant resisted the officers from the outset of his interaction with them, before either officer used any physical force at all to place defendant under arrest. Accordingly, defendant was not even entitled to the self-defense instruction that he received.

The trial court did not err by instructing the jury on resisting arrest, either. There was evidence that defendant resisted arrest, and even though he was charged only with aggravated battery, the resisting instruction was relevant to a determination of whether defendant acted without legal justification for purposes of aggravated battery. The court was not required to provide the corresponding issues instruction and verdict form for resisting arrest, however, where defendant did not request a lesser-included offense instruction and, regardless, no rational jury would have acquitted defendant of aggravated battery on the evidence presented at trial.

People v. Jones, 2021 IL App (3d) 190131 Trial counsel was not ineffective for failing to request an instruction on eyewitness identification. Whether to request a specific instruction is generally a matter of strategy. Here, the strategy was obvious because more of the factors for evaluating eyewitness identification clearly favored the State, and the instruction would have drawn the jury's attention to that fact.

People v. Ticey, 2021 IL App (1st) 181002 The trial court erred in omitting the fourth **Zehr** principle during *voir dire* – that defendant's failure to testify could not be held against

him. The trial court also erred when it asked jurors whether they had any “disagreement” with the other principles, rather than asking whether they accepted them. The evidence in the case was closely balanced where one eyewitness testified that defendant participated in the drug transaction at issue, while the other testified that he did not. Accordingly, the court found plain error in the jury *voir dire*.

The trial court also erred in giving IPI 3.17, the accomplice witness instruction, where the “accomplice” witness actually testified for the defense that defendant was *not* involved in the drug sale at issue. Defendant was the driver of the vehicle from which the witness conducted a drug sale. The accomplice instruction was not meant to be used by the prosecution to undercut a defense witness’s testimony but rather is intended to inform the jury that a State’s witness might expect favorable treatment for his or her testimony. Giving the instruction here, where the evidence was closely balanced and the outcome depended on the credibility of the witnesses, was plain error.

People v. Harris, 2020 IL App (3d) 160169 While the accomplice witness instruction, IPI Criminal No. 3.17, should normally be given any time an accomplice testifies, the trial court’s failure to give the instruction where the *pro se* defendant did not request it did not amount to second-prong plain error. Failure to give a jury instruction is akin to a typical trial error and is not the type of error indicating a breakdown in the adversarial process that would normally warrant second-prong plain-error review.

The dissenting justice disagreed, noting that the credibility of the accomplice witness was critical to the outcome here, where there was no other evidence corroborating the testimony of the confidential informant because surveillance footage of the incident did not show the alleged drug transaction. The dissenting justice would have found second-prong plain error in that denial of the accomplice witness instruction severely threatened the fairness of defendant’s trial.

People v. Bailey, 2020 IL App (5th) 160458 Court did not err in failing to give the bracketed portion of IPI 3.10, which states that a witness is not required to speak to an attorney or the attorney’s investigator before testifying. The evidence did not show that a witness refused to speak with the prosecutor or investigators, but rather that she spoke with them and simply told them something inconsistent with her trial testimony.

People v. Moon, 2020 IL App (1st) 170675 In a case involving statements admitted pursuant to section 115-10, the trial court commits clear error if it fails to provide the jury with IPI Criminal No. 11.66. However, this error does not rise to the level of second-prong plain error as long as the jury receives the general instruction on witness credibility, No. 1.02. See **People v. Sargent, 239 Ill. 2d 166, 190 (2010)**.

People v. Schlott, 2019 IL App (3d) 160281 A defendant does not have an automatic right to a lesser-included offense instruction. Such an instruction should be given, however, where the evidence would permit a rational jury to find defendant guilty of the lesser offense and acquit of the greater.

Here, defendant was not entitled to aggravated battery instructions where he was charged with attempt murder. Defendant argued that the lesser offense instructions were warranted because he did not actually kill the victim despite being in a position to do so, and there was evidence that he called 911 and rendered aid to the victim.

In rejecting defendant's argument, the court noted that those actions by defendant occurred after his attack on the victim and did not bear on his state of mind during the offense itself. To convict of the lesser offense, the jury would have to find that defendant never intended to kill the victim, not just that he did not intend her to die after he had already attacked her. Where the evidence showed that defendant threw the victim to the ground, punched her as hard as he could multiple times, and repeatedly cut her with a hunting knife while threatening to kill her by cutting off her head, a rational jury could not have concluded that defendant lacked the intent to kill, and therefore aggravated battery instructions were not warranted.

People v. Trice, 2017 IL App (4th) 150429 Admitting commission of each element of an offense is a precondition to asserting an entrapment defense. Only after such admission will the court consider whether there has been slight evidence of inducement by the State sufficient to warrant the giving of an entrapment instruction.

Here, the State arranged a controlled purchase of drugs using a paid informant. Defendant and another man met up with the informant at a pre-arranged location. The informant testified that she entered defendant's car, gave defendant \$400, and received a bag of cocaine from defendant. In a statement to police, defendant said that he facilitated the meeting between the informant and his passenger, the passenger sold drugs to the informant, and defendant received \$200 as gas money. At trial, however, defendant denied arranging the drug sale and said that all he did was give his passenger a ride. Defendant claimed he did not see or participate in any drug transaction.

Because defendant's trial testimony was not an admission, an entrapment instruction was properly refused. Even if defendant's previous statement to the police was considered an admission, his trial testimony overrode that admission for purposes of determining whether an entrapment instruction was warranted.

Also, defendant's trial counsel was not ineffective for failing to request that the jury be instructed to view the informant's testimony with caution. There is no pattern instruction regarding informant credibility, and the general credibility instruction (IPI 1.02) is adequate. Instructions which comment on particular types of evidence are disfavored.

People v. Zambrano, 2016 IL App (3d) 140178 The jury instruction on the testimony of accomplice witnesses states that when a witness says he was involved in the commission of a crime with defendant, his testimony is "subject to suspicion and should be considered by you with caution." Illinois Pattern Jury Instructions, No. 3.17. This instruction should be given when there is probable cause to believe that the witness, not the defendant, was responsible for the crime as a principle or an accessory under an accountability theory, even where the witness denies being involved in the crime.

Although trial counsel attacked the believability of the witness, he never submitted an accomplice witness instruction. The court held that this failure constituted ineffective assistance.

The evidence showed that the witness was so involved in the offense that, despite his denials, there was probable cause to believe that he acted as an accomplice. Additionally, the State granted the witness use immunity before he testified, further supporting the idea that he acted as an accomplice. Under these circumstances, the court could ascertain no viable strategy for counsel's failure to submit the instruction. The failure to do so constituted deficient performance.

The witness's testimony was detrimental to defendant because it created the inference that defendant was either the shooter or acted in concert with the shooter. His testimony was

sufficient by itself to convict defendant. Counsel's failure to submit the instruction prejudiced defendant by depriving the jury of critical information it needed to evaluate the testimony.

People v. Wheeler, 401 Ill.App.3d 304, 929 N.E.2d 99 (3d Dist. 2010) Defense counsel was ineffective for failing to tender I.P.I. Crim. No. 3.17, which instructs the jury that the testimony of an accomplice should be considered with caution. I.P.I. Crim. No. 3.17 should be given if the evidence, and reasonable inferences drawn from the evidence, create probable cause to believe that a witness participated in the commission of a crime. Where the evidence satisfies this standard, the instruction should be given even if the witness denies involvement in the offense.

The court concluded that there was sufficient evidence to justify instructing the jury concerning the testimony of an accomplice. Although mere presence at the scene of a crime does not establish that one was an accomplice, the witness testified that he drove the defendant to the crime scene, was present during the offense, and drove defendant from the scene. In addition, after the offense the witness took steps to avoid talking to the police although he knew he was being sought.

Although the jury was instructed to consider the witness's interest and bias, the failure to give the I.P.I. accomplice instruction was not harmless error. The evidence was closely balanced, and the State's case relied heavily on the credibility of the accomplice, who was the only witness who could identify defendant's car or place him at the scene. Furthermore, although defendant's cell mate claimed that defendant had admitted the offense, the credibility of that testimony was suspect because the cell mate was promised that in exchange for his testimony, he would receive help in obtaining parole.

Because the result of the trial may well have been different had the jury been instructed that it should closely scrutinize the witness's testimony, counsel's failure to tender the accomplice instruction caused prejudice. The conviction was reversed and the cause remanded for a new trial.

People v. Grabbe, 148 Ill.App.3d 678, 499 N.E.2d 499 (4th Dist. 1986) Defendant was convicted of the murder of his wife based, in critical part, on the testimony of a woman (McCalister) who was dating defendant at the time. McCalister testified that she was present when defendant killed his wife and burned her body. The evidence showed that McCalister had been granted immunity in exchange for her testimony, that she had been charged with the murder but the information was withdrawn, and that she would receive a \$20,000 reward if defendant was convicted. The defendant asked that the jury be instructed that each of these matters affected McCalister's credibility and with the IPI accomplice instruction.

The Appellate Court held that the trial judge properly refused to instruct the jury that the immunity and reward could affect McCalister's credibility; "[w]e interpret the intent of IPI criminal is to leave comment on such obvious factors affecting credibility as leniency and possibility of reward to argument of counsel and to the general coverage of such matters by the general instruction on the credibility of witnesses." The Court further held, however, that it was error to refuse to instruct the jury that the testimony of an accomplice is subject to suspicion.

People v. David, 141 Ill.App.3d 243, 489 N.E.2d 1124 (2d Dist. 1986) The trial court properly refused defendant's instruction concerning the reliability of a witness who is a drug addict or who used narcotics about the time of the alleged crime. "The mere fact that [the witness] used narcotics at about the time the crime occurred does not require the jury to

carefully scrutinize such testimony unless the witness was actually under the influence of the drug at the time of the occurrence to which he testifies.”

People v. Bias, 131 Ill.App.3d 98, 475 N.E.2d 253 (4th Dist. 1985) The trial judge properly refused the defendant’s instruction concerning the difficulty of making a reliable identification when the identifying witness is of a different race than the defendant.

People v. Krush, 120 Ill.App.3d 614, 458 N.E.2d 650 (2d Dist. 1984) The “total exoneration of a defendant by an accomplice witness called by defendant would preclude giving of the [accomplice witness] instruction.” See also, **People v. Szydloski**, 283 Ill.App.3d 274, 669 N.E.2d 712 (3d Dist. 1996) (error to give accomplice instruction where witness claimed she committed offense); **People v. Dodd**, 173 Ill.App.3d 460, 527 N.E.2d 1079 (2d Dist. 1988).

§32-8(k)

“Deadlock” (*Prim*) Instructions; Inquiries About Reaching a Verdict

United States Supreme Court

Rogers v. U.S., 422 U.S. 35, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975) Two hours after retiring at petitioner’s federal trial, the jury asked the trial judge if he would accept a verdict of guilty (to threatening the life of the President) “with extreme mercy of the Court.” The judge, without notifying petitioner or his counsel, responded affirmatively. Five minutes later, the jury returned such a verdict. The Supreme Court held that the trial judge erred by not answering the jury’s inquiry in open court and by failing to give petitioner’s counsel an opportunity to be heard. The error was not harmless in light of how quickly a verdict was rendered after the response.

Jenkins v. U.S., 380 U.S. 445, 85 S.Ct. 1059, 13 L.Ed.2d 957 (1965) A trial judge may not coerce a verdict. Defendant was entitled to a new trial where, when the jury was unable to reach a verdict after two hours, the judge stated, “[Y]ou have got to reach a decision in this case.”

Illinois Supreme Court

People v. Eppinger, 293 Ill.2d 306, 688 N.E.2d 325 (1997) Although it is improper for the trial judge to inquire into the numerical division of the jury, error does not necessarily occur merely because the trial court learns of the division of votes. Whether the error was prejudicial or harmless depends on the particular facts of the case. The error was harmless where the trial court merely inquired as to the vote, but the jury foreman volunteered that the majority favored conviction. In addition, the jury deliberated 45 minutes after the **Prim** instruction was given, making it unlikely that any change in voting was due to the trial court’s comments. Accord, **People v. Watkins**, 293 Ill.App.3d 496, 688 N.E.2d 798 (1st Dist. 1997)(trial court did not err by ordering the jury to continue its deliberations after jury notes disclosed that the vote was 10 to 2 in favor of conviction).

People v. Cowan, 105 Ill.2d 324, 473 N.E.2d 1307 (1985) The defendant was charged with several offenses, and was found guilty of two and not guilty of the others. The jury retired at noon. At 4:14 p.m. the jurors sent a note to the judge saying that they were “totally deadlocked.” The judge did not respond. About 7:00 p.m. the jurors sent a note saying they were “completely and hopelessly unable to reach a verdict” and that “further progress is

impossible (six votes), unlikely (six votes).” The judge did not respond, but ordered the jury sequestered for the night. The next morning the jury deliberated for 45 minutes, then sent another note: “This jury will never reach a unanimous decision on any of the nine counts.” Over defense objection, the judge gave the **Prim** or “deadlock” instruction. The Supreme Court rejected the defendant’s contention that giving the deadlock instruction was coercive and improper under these facts.

People v. Preston, 76 Ill.2d 274, 391 N.E.2d 359 (1979) The Supreme Court upheld the trial judge’s giving of a “deadlock” instruction after the jury had deliberated from 4:25 p.m. to 11:00 p.m. without reaching a verdict. No fixed time can be prescribed concerning how long a jury should be allowed to deliberate before a mistrial is declared; instead, it is the function of the trial court to determine based upon “the length of time spent in deliberation and the complexity of the issues before the jury, when the giving of a supplemental instruction becomes appropriate.” Here, the trial was relatively short (two days) with few witnesses (seven), and only one issue was presented (the credibility of a particular State witness). Under the circumstances, giving the “deadlock” instruction was not premature.

People v. Prim, 53 Ill.2d 62, 289 N.E.2d 601 (1972) The Supreme Court held that trial judges faced with deadlocked juries are to comply with the ABA Standards Relating to Jury Trials. The Court also set out the following instruction as being consistent with such Standards:

“The verdict must represent the considered judgment of each juror. In order to return a verdict it is necessary that each juror agree thereto. Your verdict must be unanimous. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous; but do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict. You are not partisans. You are judges, judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.”

Illinois Appellate Court

People v. Richardson, 2022 IL App (2d) 210316 The trial court committed second-prong plain error by failing to declare a mistrial after the jury stated that it could not reach a unanimous verdict.

Trial judges are given broad discretion to grant mistrials so as to reduce the coercive pressure on deadlocked juries. Relevant factors in reviewing whether a trial court has acted within its discretion in deciding whether to declare a mistrial on the basis of a jury deadlock include: (1) statements from the jury that it cannot agree, (2) the length of the deliberations, (3) the length of the trial, (4) the complexity of the issues, (5) the jury’s communications to the judge, and (6) the potentially prejudicial impact of continued forced deliberations. The

jury's own statement that it is unable to reach a verdict is the most important factor in determining whether a trial court abused its discretion in declaring a mistrial.

Here, after approximately six hours of deliberation, the jury asked "what is the next step if there is not complete (100%) agreement on the verdict?" The court responded by giving a *Prim* instruction. About an hour later, the jury stated it had taken four votes, including one after the *Prim* instruction, and the last two votes were the same. They concluded that they would not be able to reach a unanimous verdict. This statement that the jury could not agree, coupled with the fact that the trial took place in a single day, were two factors strongly in favor of granting a mistrial. Furthermore, the jury questions focused on a dog sniff that led to DNA evidence, but the DNA evidence had been stricken. Under these circumstances, the trial court should have granted a mistrial, rather than prolonging the deliberations another few hours until a guilty verdict was returned.

The error rose to the level of second-prong plain error because errors that affect the fundamental right to trial by an impartial jury are generally considered structural error. Forcing deliberations to continue after the jury concludes it is deadlocked suggests that any later consensus would be the product of coercive pressures. Though the extent of coercion is difficult to measure, this is often the case for structural errors.

People v. Ford, 2022 IL App (1st) 172581 The trial court did not abuse its discretion when it told the jury to keep deliberating after the jury sent out a note stating, "We have 11 G. 1 N.G. The one does not feel like the vote will change." The jury had been deliberating for 4.5 hours at that time. While defense counsel unsuccessfully moved for a mistrial, counsel did not request that the court give the **Prim** instruction. The jury returned with a guilty verdict approximately 90 minutes later.

On appeal, defendant argued that the court's instruction to continue deliberating coerced the jury into rendering a verdict. The Appellate Court rejected this argument, noting that the jury had deliberated an additional 90 minutes before rendering a verdict and that the language of the instruction was non-coercive and a proper exercise of the court's discretion.

And, the court's failure to *sua sponte* give the **Prim** instruction did not constitute second prong plain error. The court rejected the notion that in every case where there is evidence of a potential deadlock, the failure to provide the **Prim** instruction is so flawed as to challenge the integrity of the judicial process. Defendant's conviction was affirmed.

People v. McCoy, 405 Ill.App.3d 269, 939 N.E.2d 950 The Appellate Court rejected the argument that the trial judge coerced a verdict by informing the jury it would be sequestered, but allowing deliberations to continue when several jurors said they were close to a verdict and would like more time. Whether the trial court's remarks coerced a verdict is reviewed for an abuse of discretion. The test is whether under the totality of the circumstances, the language used by the court actually interfered with the deliberations or coerced a verdict.

Simply informing a jury that it will be sequestered is not necessarily coercive. Similarly, although extremely brief deliberations after a reference to sequestration may invite an inference that the verdict was coerced, the time between a mention of sequestration and a verdict is not generally a conclusive indication that the jury was coerced.

The court concluded that because a number of the jurors volunteered that they were close to reaching a verdict and requested additional time, and no juror interjected to claim that the jury was deadlocked or was having difficulty, the judge's remarks did not coerce a verdict. Furthermore, the jury had deliberated for several hours, had requested and reviewed

the trial testimony of certain witnesses, and determined that defendant was not guilty of one charge.

Defendant's conviction for attempt first degree murder and aggravated battery with a firearm was affirmed.

People v. Logston, 196 Ill.App.3d 30, 552 N.E.2d 1266 (4th Dist. 1990) The Court held that the trial judge did not err by refusing to grant a mistrial after the jury said it was deadlocked .After a three-day trial, the jury deliberated nine hours before saying it was deadlocked. After the judge gave a **Prim** instruction, the jury deliberated for six more hours before reaching a verdict - guilty on one count and not guilty on another.

People v. Iozzo, 195 Ill.App.3d 1078, 552 N.E.2d 1308 (2d Dist. 1990) Although it is normally error for the trial judge to inquire into the numerical division of the jury, the trial judge in this case did not err by ordering the jury to continue deliberations after the foreman volunteered the numerical division.

People v. Friedman, 144 Ill.App.3d 895, 494 N.E.2d 760 (1st Dist. 1986) The jury retired to deliberate in the late afternoon. At 9:00 p.m., the judge told the jury that "in about half an hour we have to arrange overnight accommodations for you, which we do very often, and then you would be back here tomorrow morning. So in the meantime, that will be in about forty-five minutes probably. So you may return to the jury room." The jury returned with guilty verdicts on all four counts in about five minutes. The Court noted that the jury had deliberated for more than four hours before the judge's remarks, and for only five minutes thereafter. Thus, "it is likely that the [judge's] comment impermissibly hastened the verdict in this case."

People v. Branch, 123 Ill.App.3d 245, 462 N.E.2d 868 (1st Dist. 1984) After the jury had deliberated for more than 24 hours, the foreman sent a note to the judge which stated that the jury had taken several votes and the result was 11 to one for guilty. The note also stated that the "person who has consistently voted not guilty had indicated to us that they could not vote guilty because they do not want anyone to go to jail. Since the beginning they have felt uncomfortable on the jury." Without apprising counsel of the note, the judge called the jury into the courtroom and told the jurors that, based upon the note, the jury was faced with a dilemma and the person indicated in the note "evidently should not have received jury service." The judge then gave the jury a "deadlock" instruction and stated that in "about an hour we will arrange overnight accommodations.

The Appellate Court held that the trial judge's remarks were improper. The judge's remarks had the effect of intimidating the juror into changing his vote by implying that his refusal to defer to the majority position somehow should have disqualified him from jury service." In addition, "the court's remarks concerning the 'impasse that has been caused' and the possibility of overnight sequestration only reinforced that pressure by insinuating that the juror had created a problem, and that if he failed to alter his position within one hour he would be responsible for further inconvenience to himself and his fellow jurors."

People v. Dungy, 122 Ill.App.3d 314, 461 N.E.2d 485 (1st Dist. 1984) The jury deliberated for five hours, then retired for the night. The next day, the jury deliberated for seven hours before sending out a note that said, "The jury is firm on their votes, no compromises, no total agreement, hung jury." The judge indicated that whether there was a hung jury was a determination for him and not the jury, and gave the **Prim** instruction. The jury continued

deliberations for 40 minutes, and returned a guilty verdict. The Appellate Court held that the trial court did not abuse its discretion. See also, [People v. Thompson](#), 93 Ill.App.3d 995, 418 N.E.2d 112 (1st Dist. 1981).

[People v. Santiago](#), 108 Ill.App.3d 787, 439 N.E.2d 984 (1st Dist. 1982) The Court held that the actions of the trial judge may have improperly coerced the jurors into returning a verdict of guilty. The judge repeatedly called the jury into open court and asked the numerical division of the jury. The judge then ordered the jury to continue deliberations after learning that the majority of jurors favored a guilty verdict and after the foreman indicated that he did not know whether further deliberations would help. It is improper for the trial judge to inquire into the numerical division of the jury. Furthermore, the judge's actions in this case may have caused the jury to believe "that the court concurred with the majority and that deliberations would continue until a unanimous verdict of guilty was returned." Compare, [People v. Eppinger](#), 293 Ill.App.3d 306, 688 N.E.2d 325 (3d Dist. 1997) (error does not necessarily occur merely because the judge learns of the numerical division of votes).

[People v. Patten](#), 105 Ill.App.3d 892, 435 N.E.2d 171 (1st Dist. 1982) The trial court may accept a verdict on less than all of the counts when the jury is deadlocked on the remaining counts. See also, [People v. Jenkins](#), 41 Ill.App.3d 392, 354 N.E.2d 139 (1st Dist. 1976).

[People v. Robertson](#), 92 Ill.App.3d 806, 416 N.E.2d 323 (1st Dist. 1981) The trial judge erred by making the following comments to the jury after giving a **Prim** instruction: "There is no reason at all why this jury cannot arrive at verdicts in this case. I repeat, I don't care what your verdict is, but you can't be deadlocked. You heard one day of evidence and it is a question of you either believe one side or you believe the other. You can't be deadlocked."

[People v. Pankey](#), 58 Ill.App.3d 924, 374 N.E.2d 1114 (4th Dist. 1978) After deliberating for about four hours, the jury informed the court that it was deadlocked. The judge and the attorneys agreed that the jury should be advised to continue and to advise the judge if a verdict could not be reached. Over a defense objection, the court read to the jury "A New Judge's Creed," and concluded by saying "there is no such thing as a hung judge - you will now retire to determine your verdict." The Appellate Court held that the reading of the "Judge's Creed" was improper; it provided no guidance or assistance to the jury, but only added confusion, and was not a proper substitute for a deadlocked jury instruction. In addition, the statement about no such thing as a hung judge was improper and had the effect of "unduly pressuring those in the minority of the jury to 'heed the majority' for the mere purpose of returning a verdict." Reversed and remanded.

[People v. Jackson](#), 26 Ill.App.3d 618, 325 N.E.2d 450 (1st Dist. 1975) The trial court erred by giving the jury a deadlock instruction after the jury had been deliberating from 11:10 a.m. to 9:20 p.m. When asked if the jury might be able to arrive at a verdict, the foreman replied, "[Y]es, sir, I do." Giving the deadlock instruction was premature since there was no indication that the jury was deadlocked.

§32-9

Polling of Jury

United States Supreme Court

Pena-Rodriguez v. Colorado, 580 U. S. ___, 137 S.Ct. 855, 197 L.Ed.2d 107 (2017) The traditional “no impeachment” rule prohibits jurors from testifying about any statements or incidents which occurred during jury deliberations, the effect of such matters on a juror’s vote, or a juror’s mental processes concerning the verdict. However, a juror may testify whether extraneous prejudicial information was improperly brought to the jury’s attention, outside influence was improperly brought to bear on any juror, or a mistake was made in entering the verdict on the verdict form. The purpose of the no impeachment rule is to promote full and vigorous discussion by assuring jurors that after being discharged, they will not be summoned to recount their deliberations or otherwise harassed or annoyed by litigants seeking to challenge the verdict. Thus, the rule gives stability and finality to verdicts.

Although some jurisdictions have adopted variations of the no impeachment rule, a juror’s statements about the deliberative process are generally permitted only in limited circumstances.

Due to the pervasive nature of racial discrimination in the judicial system and the threat which racial bias poses to the just administration of laws, the Sixth Amendment requires an exception to the no impeachment rule where a juror makes statements which show that overt racial bias was a significant motivating factor in a vote to convict.

In such cases, the trial court may consider the juror’s statements and any other evidence and determine whether the right to a jury trial has been violated. To justify an inquiry, there must be a threshold showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury’s deliberations and resulting verdict. Whether the threshold showing has been met is left to the discretion of the trial court, which must consider all of the circumstances.

Where two jurors approached defense counsel after a sex offense trial and stated that a third juror repeatedly expressed anti-Hispanic bias toward defendant and his alibi witness, said that his bias was based on knowledge obtained about Mexican men during his law enforcement experiences, and stated that “nine times out of ten” Mexican men are “guilty of being aggressive toward women,” there was a sufficient showing of racial bias to justify an inquiry by the trial court into the fairness of the deliberative process. The court found that it need not decide in this case the precise procedures the trial court must follow when considering a motion for a new trial based on juror testimony of racial bias or the appropriate standard for deciding whether evidence of racial bias requires that a verdict be set aside and a new trial granted.

Defendant’s convictions were reversed and the cause remanded for further proceedings.

Illinois Supreme Court

People v. Jackson, 2022 IL 127256 After defendant’s jury returned signed verdicts of guilty, defense counsel asked the trial judge to poll the jury. The judge did so, but the polling was incomplete in that the judge asked only 11 of the 12 jurors to confirm their verdict. There was no dispute that the circuit court erred in dismissing the jury without polling the twelfth juror. Defendant forfeited that error, however, by failing to object at the time and failing to include the issue in his post-trial motion. Defendant sought plain error review.

Illinois’s plain error rule is a narrow exception to forfeiture, allowing review of procedurally defaulted errors either where the evidence in a case is so closely balanced that the jury’s verdict may have resulted from the error and not the evidence (first prong), or where the error is so serious that it affected the fairness of defendant’s trial and challenged the integrity of the judicial process (second prong).

Here, defendant argued that the error in failing to poll all twelve jurors was so serious that it affected the fairness of his trial, thereby constituting second prong plain error. The Court noted that it has previously equated second prong plain error with what the United States Supreme Court (USSC) has deemed “structural error.”

The USSC has identified the following structural errors: the complete denial of counsel, denial of self-representation at trial, trial before a biased judge, denial of a public trial, racial discrimination in the selection of a grand jury, and the giving of a defective reasonable doubt instruction. These errors are all such that they “affect the framework within which the trial proceeds.” They are more than mere errors in the trial process itself. While the Illinois Supreme Court has not limited second prong plain error to only those errors identified as structural, it looks to these identified structural errors to determine whether the error being considered is similar.

The right to poll the jury is designed to protect a defendant’s right to conviction only by a unanimous jury. It is a practice that is “rooted deep in our common law.” But, while it is designed to *protect* a fundamental right, polling is not itself a fundamental right. It is a procedure available to those defendants who request it. And, there are additional procedures in place to ensure juror unanimity, including instructing the jury that its verdict must be unanimous, the requirement that each juror individually sign the verdict form, and the requirement that the signed verdict form be returned and announced in open court in front of the jury. Thus, an error in jury polling is subject to harmless error analysis. It does not automatically require reversal of a conviction because it does not necessarily deprive defendant of his right to unanimity. Accordingly, a jury polling error is not an error of the sort that has been deemed structural and is not subject to second prong plain error review.

The Court also distinguished its recent decision in [People v. Moon](#), 2022 IL 125959, where it held that the failure to swear in the jury with the trial oath constituted structural error and went on to find that forfeiture of the error was therefore excused as second prong plain error. While both errors touch upon a fundamental right – jury unanimity here and jury impartiality in [Moon](#) – the failure to swear in the jury with the trial oath affects the framework within which the trial proceeds. The oath requirement has a well-established history in the common law as an essential element of a criminal jury trial. While the jury polling process also has a basis in common law, it is only used at a defendant’s request and is not, therefore, an essential element of a fair trial. Defendant’s convictions were affirmed.

[People v. Williams](#), 209 Ill.2d 227, 807 N.E.2d 448 (2004) One juror gave counsel an affidavit stating that he had been told by another juror that she “had a conversation” with her husband about the case. The trial court did not err in dismissing a claim of juror misconduct based on the alleged conversation. A jury verdict is not subject to impeachment by a juror’s testimony or affidavit which purports to show the “motive, method or process by which the jury reached its verdict.” However, juror testimony or affidavits are admissible to show an improper extraneous influence on the jury. The juror’s affidavit in this case did not show that any extraneous influence affected the verdict, but only that an improper conversation may have occurred. Because there was no indication of the nature of the conversation or a showing of prejudice there was no showing of a constitutional deprivation sufficient to require an evidentiary hearing.

[People v. Hobley](#), 182 Ill.2d 404, 696 N.E.2d 313 (1998) A jury verdict may not be impeached by a juror’s post-trial statements showing the “motive, method or process by which the jury reached its verdict.” However, it is proper to admit testimony or affidavits offered to

show improper, extraneous influences on the jury. Under Illinois law, prejudice is required before a jury verdict may be set aside because of improper outside influences. To demonstrate such prejudice, jurors may be called to testify about the outside influences. However, testimony concerning the effect of those influences on the jurors' mental processes is inadmissible. It is presumed that the right to a fair trial is prejudiced by "any communication with a juror during trial about a matter pending before the jury." Although the presumption is not conclusive, the State has the burden to establish that the communication did not harm the defendant. Here, posttrial affidavits suggested that statements of non-jurors upset several jurors to the point that one believed her life was in danger. Under these circumstances, defendant made a sufficient showing of prejudice to warrant an evidentiary hearing.

People v. McDonald, 168 Ill.2d 420, 660 N.E.2d 832 (1995) When the jury was polled after sentencing defendant to death, the trial court asked each juror whether "was this and is this now your verdict?" One juror answered, "Reluctantly, yes your Honor." On appeal, defendant contended that the juror's response was hesitant and ambiguous, and raised a question about whether he agreed with the verdict. The Court rejected defendant's argument and found the juror's response did not show coercion or possible dissent from the verdict, but merely showed that the juror felt some "reluctance" about passing judgment in a death case.

People v. Cabrera, 116 Ill.2d 474, 508 N.E.2d 708 (1987) A statement that a juror makes after the jury has rendered its verdict, been polled and been discharged will not be admitted to impeach the juror's verdict.

People v. Kellogg, 77 Ill.2d 524, 397 N.E.2d 835 (1979) The Supreme Court held that the trial judge erred by failing to ascertain whether a juror desired to abide by the verdict; the juror's response ("can I change my vote?") during polling indicated some reluctance. Consequently, the record did not reflect that the verdict was unanimous. Reversed and remanded for a new trial.

The Supreme Court also set out several rules concerning the polling of jurors:

1. When a jury is polled, each juror should be questioned individually concerning whether the announced verdict is his or her own.
2. The polling should be conducted to obtain an unequivocal expression from each juror, free from coercive influences that may have dominated the jury room.
3. The trial judge may use discretion in selecting the specific form of question to be asked, as long as a juror is given the opportunity to dissent — the question "was this then and is this now your verdict" may be used.
4. If a juror indicates some hesitancy or ambivalence in his or her answer, the trial judge has the duty to ascertain the juror's present intent by affording the juror the opportunity to make an unambiguous reply as to his or her state of mind.
5. Because of the great influence of the trial judge on the jury, in posing questions to a juror the court must carefully avoid the possibility of influencing or coercing the juror.
6. If the trial judge determines that a juror dissents from the verdict, the proper remedy is for the trial judge to either direct further deliberations or discharge the jury.
7. The judge's determination is subject to review, and a verdict cannot stand if the interrogation precludes the opportunity to dissent or if the record reflects that a juror has not in fact agreed to the verdict. See also, **People v. Bennett**, 154 Ill.App.3d 469, 507 N.E.2d 95 (1st Dist. 1987).

Illinois Appellate Court

People v. Flores, 2021 IL App (1st) 192219 After being found guilty of possession of contraband in a penal institution, defendant requested that the jury be polled. The trial court polled the jury, but only asked 11 of the 12 jurors to confirm their verdict. Defendant did not object, and the State also failed to alert the trial court to the fact that it only polled 11 of the 12 jurors. Defendant also did not include the issue in his motion for new trial.

On appeal, defendant argued that his conviction must be reversed and the matter remanded for a new trial due to the jury polling error. Defendant argued that the court's failure to poll all 12 jurors constituted second-prong plain error in that it interfered with his substantial right to poll the jury. The Appellate Court disagreed, and in doing so declined to follow its prior decision in **People v. Jackson, 2021 IL App (1st) 180672**. In **Jackson**, the court held that the right to poll the jury is "central enough to the proper functioning of our criminal justice system that the error alone is prejudicial." Here, though, the court stated that the fundamental right at issue with regard to polling the jury is the right not to be convicted unless the jury delivers a unanimous verdict. There was no evidence that the verdict here was anything but unanimous, and the circuit court's procedural mistake did not entitle defendant to a new trial under the plain error doctrine.

People v. Jackson, 2021 IL App (1st) 180672 After the jury returned guilty verdicts for first degree murder and attempt armed robbery, defense counsel requested that the court poll the jury. The court then asked 11 of the jurors, "Was this then and is this now your verdict?," and all responded "yes." The jury was dismissed without the court polling the twelfth juror. On appeal, the parties agreed this was error but disputed whether it constituted plain error where defendant did not object or include the issue in the post-trial motion.

The majority concluded that omitting even one juror from the polling of the jury calls into question the integrity of the judicial process and therefore constitutes second-prong plain error, disagreeing with **People v. McGhee, 2012 IL App (1st) 093404**. Polling the jury is designed to ensure unanimity, and each juror must be given the opportunity to either affirm or disavow the verdict. An error need not be "structural" to rise to the level of second-prong plain error. And, a defendant is not required to make a separate showing of prejudice under second-prong plain error. Accordingly, the matter was reversed and remanded for a new trial.

The dissenting justice would have followed **McGhee** and **People v. Sharp, 2015 IL App (1st) 130438**, both finding jury polling errors did not rise to the level of plain error, and would have concluded that polling the jury is merely a procedural device that helps to ensure a unanimous verdict but is not itself a fundamental right. The dissent noted that the jury had been properly instructed, had not communicated any difficulty reaching unanimous verdicts on the charges, and had not voiced any objection to the verdicts during the reading of the verdicts or jury polling.

People v. Manning, 2017 IL App (2d) 140930 During jury deliberations in a first degree murder case in which the jury was also instructed on second degree murder, the jury asked whether the charge would revert to first degree murder if it was unable to reach a unanimous verdict concerning the mitigating factor which would reduce the charge to second degree murder. With the agreement of defense counsel and the prosecutor, the trial court responded that the verdict must be unanimous.

The Appellate Court held that in view of defense counsel's acquiescence to the trial court's response, the defense was precluded from challenging that response on appeal. The

court noted, however, that the trial court's response did not address the jury's confusion.

The jury was asking whether a unanimous verdict finding the elements of first degree murder would stand if the jury was unable to reach a unanimous verdict on the mitigating factor constituting second degree murder. The response that the verdict must be unanimous did not answer this question, because where the jury unanimously finds that the defendant is guilty of first degree murder but cannot agree on whether there is a mitigating factor for second degree murder, there is a split on whether defendant committed first degree murder. "[I]f some jurors vote to find the presence of a mitigating factor, and if other jurors vote otherwise, the jury is not unanimous on the defendant's guilt of first-degree murder." Under such circumstances, the first degree murder verdict cannot stand.

In addition, the trial judge erred in polling the jury by asking only if the first degree murder conviction was each juror's verdict, and by refusing defense counsel's request to ask whether any juror believed that a mitigating factor existed.

A criminal defendant has an absolute right to poll the jury. One purpose of polling is to determine whether a juror's vote was the result of coercion, and another purpose is to uncover any doubt or confusion on the part of individual jurors. The specific form of the question to be asked is left to the trial court's discretion, but polling should be conducted in a manner that elicits an unequivocal response from each juror and does not hinder a juror's expression of dissent.

The jury's question revealed uncertainty concerning the effect of a split verdict on the presence of a mitigating factor. Use of the standard polling question did not resolve the uncertainty, as there was no question that the jury had found the elements of first degree murder. The issue was whether the jury believed that it was obligated to convict defendant of first degree murder if it was unable to agree concerning second degree murder.

Ordinarily the trial court would not be required to speculate concerning the possibility of a split concerning the mitigating factor, but in light of the jury's question such a concern was not mere speculation but a "distinct possibility." Under these circumstances, the trial court should have granted defense counsel's request to poll the jury in a different fashion.

Defendant's conviction was reversed and the cause remanded for a new trial.

People v. McGhee, 2012 IL App (1st) 093404 A defendant has the absolute right to poll the jury after it returns its verdict. The purpose of polling is to ensure that the verdict is in fact unanimous. Jury-polling errors can occur in three distinct scenarios: 1) where the court does not allow enough time between the return of the verdict and the dismissal of the jury for the defendant to request a poll; 2) where a juror gives some type of ambiguous response during the jury poll; and 3) where the court dismisses the jury without conducting the poll after defendant timely requests a jury poll. Each error requires a slightly different analysis.

Addressing the issue as a matter of first impression, the Appellate Court concluded that no structural error occurs in the third scenario where the jury is not polled despite a timely request. Defendant has a substantive right to a unanimous verdict and a conviction based on a non-unanimous verdict is an error requiring automatic reversal. Polling the jury on request, however, is merely a procedural device to help ensure unanimity, and is not the sole means of ensuring a unanimous verdict. The failure to do so does not affect the fairness of the defendant's trial and challenge the integrity of the judicial process.

Because the trial court's failure to poll the jury on request does not require reversal under the second prong of the plain-error rule, and the Appellate Court had found on direct appeal that the evidence was not closely-balanced, defendant could not carry his burden under either prong of the plain-error rule. Therefore, appellate counsel could not be faulted for failing to raise this non-preserved error on direct appeal.

People v. Sullivan, 2011 IL App (4th) 100005 In general, a jury verdict may not be impeached by testimony of the jurors. Thus, post-trial juror testimony showing the motive, method, or process by which the jury reached its verdict may not be considered.

An exception is made to this general rule where the testimony concerns improper external influences which were brought to bear on the jurors. Even where jurors testify as to the nature of such outside influences, however, they may not testify about the effect of those influences on the mental processes by which the jury reached a verdict. The trial court's ruling concerning the admissibility of evidence which might impeach the jury's verdict is reviewed for abuse of discretion.

The trial court did not abuse its discretion by refusing to consider a juror's post-trial letter stating that several jurors ignored their instructions and treated defendant's failure to testify as evidence of guilt. The allegation did not assert that an improper external influence had been brought to bear on the jurors; instead, the letter went solely to the motive, method and process of the jury's deliberations. The court also noted that the trial court polled the jury after the verdict and that each juror, including two who wrote post-verdict letters criticizing the verdict, unequivocally confirmed their votes of guilty.

People v. Dixon, 409 Ill.App.3d 915, 948 N.E.2d 786 (1st Dist. 2011) Under **People v. Babbington**, 286 Ill.App.3d 724, 676 N.E.2d 1326 (1st Dist. 1997), participation by an alternate juror in jury deliberations constitutes plain error which causes substantial prejudice to the defendant. In **Babbington**, the alternate juror deliberated with the jury, stayed overnight in the same hotel as the sequestered jurors, signed the verdict forms, and responded when the jury was polled.

The court concluded that defendant's post-conviction petition failed to assert the gist of a meritorious issue under **Babbington** because it was not apparent that the alternate juror participated in deliberations. Instead, the record rebutted defendant's claim because the four verdict forms bore only the signatures of the 12 jurors, the alternate jurors had been instructed to remain in the courtroom when the jury retired to deliberate, and the only reason to believe that an alternate juror deliberated was the clerk's erroneous polling of an alternate. The court noted that the clerk apparently realized the mistake and did not complete the polling question, but the alternate juror answered "yes" when asked whether "this [was] your verdict." In view of the verdict forms with 12 signatures, the court concluded that the alternate's answer likely reflected only that he agreed with the verdict reached by the jury and not that he had participated in deliberations.

People v. Beasley, 384 Ill.App.3d 1039, 893 N.E.2d 1032 (4th Dist. 2008) Polling the jury insures that the verdict is the product of free and unhampered deliberations. Polling should be done in a manner that elicits an unequivocal response from each juror. If a juror expresses hesitancy or ambivalence, the trial judge must ascertain the juror's present intent by affording an opportunity to make an unambiguous reply. Whether a juror has freely assented to the verdict is a factual question left to the discretion of the trial court. The trial court erred by failing to question a juror who, when asked whether he agreed with the verdict, responded, "Um - I have to say, yes, I guess," while shaking his head. Because the answer expressed hesitancy or ambivalence, the trial court had a duty to ascertain the juror's present intent by giving him an opportunity to make an unambiguous reply. The failure to make such an inquiry required a new trial. After trial, the juror submitted an affidavit stating that he felt "cut off" by the judge's actions during the polling. In the course of its holding, the court acknowledged that a juror's affidavit cannot be admitted to impeach the verdict. However,

the affidavit was admissible to show the juror's reaction to the polling, without regard to whether it would have been admissible to show the process by which the jury came to the guilty verdict.

People v. Wheat, 383 Ill.App.3d 234, 889 N.E.2d 1195 (2d Dist. 2008) The opportunity to poll the jury is a basic right of the criminal justice system. A criminal defendant has an absolute right to request a poll after a verdict is returned and before the jury is discharged. If the jury is not polled despite a timely request, the conviction must be reversed. In determining whether there was a sufficient opportunity to request a poll, the relevant time period is that between when the trial court finishes reading the verdict and when it discharges the jury. After reading the verdict, the trial court must give both parties a reasonable opportunity to poll the jury. The court rejected the State's argument that a two-second pause between the return of the verdict and the discharge of the jury was a reasonable opportunity for the defense to ask that the jury be polled:

A defendant exercising his right to poll the jury is not a quiz show contestant who must anticipatorily press the buzzer before the host is finished asking the question or risk losing points. . . . A defendant is not required to impede on the trial's decorum by interrupting the trial court's reading of the verdict in order to preserve his request to poll.

The court also noted that when defense counsel made a request to poll the jury at the first reasonable opportunity, the trial court denied the request on the ground that the jury had been discharged. However, the judge continued to address the jury for another minute or so. Because the jurors remained in their seats and had not been exposed to any improper matters, the Court concluded that despite the technical "discharge," the trial judge should have granted the request to poll the jury.

People v. Collins, 351 Ill.App.3d 175, 813 N.E.2d 285 (2d Dist. 2004) Generally, a verdict cannot be impeached by evidence of the motives, methods or processes which the jury used to reach its conclusion. However, once the defendant shows that the jury was exposed to outside information relating to an issue in the case and that the verdict may have been influenced, the State has the burden of demonstrating that the verdict was unaffected. A guilty verdict may stand only if it is "obvious" that the defendant was not prejudiced by the extraneous matter. Because a juror admitted that an unauthorized trip to the crime scene aided him in determining guilt, the visit likely affected the foreman's evaluation of the credibility of eyewitnesses, and the crime scene was different at the time of the visit than it had been on the day of the offense, the State failed to carry its burden to show a lack of prejudice from the unauthorized visit.

People v. Lee, 294 Ill.App.3d 738, 691 N.E.2d 117 (3d Dist. 1998) Affidavits by jurors could not be used in determining whether prejudice occurred from the prosecutor's improper argument. A jury verdict may not be impeached by testimony or affidavit showing the motive, method or process by which the verdict was reached.

People v. Smith, 271 Ill.App.3d 763, 649 N.E.2d 71 (2d Dist. 1995) When the jury was polled after returning a verdict each juror was asked, "Was this and is this still your verdict?" When juror Sims responded, "No," the judge asked, "This is not your verdict?" Sims again responded, "No." The court then said, "You did not vote guilty?" Sims responded, "I voted guilty, but it's not what I wanted to do." Defense counsel moved for a mistrial, and the

prosecutor asked that the jury be ordered to deliberate further. The court finished polling the jury, and all jurors affirmed the verdict except one who said that it was his verdict "but I'm not happy with it at all." The court then returned the jury to the jury room.

After the parties researched the law, the jury was returned to the courtroom. When the judge asked whether the jury had deliberated further, the foreman responded "a little bit" and suggested that the jury be polled again. Defense counsel objected and sought a ruling on his motion for a mistrial, but the trial court again asked Sims whether the guilty verdict "was and still is in fact your verdict?" Sims responded, "Guilty, Your Honor." The trial court then asked the second juror the same question, and was told that the juror's "verdict before" had been guilty but that he "just didn't like the presentation of evidence."

The Appellate Court held that the trial court committed reversible error in accepting the verdict. A jury is polled to ascertain whether any juror has been coerced into agreeing to the verdict. To accomplish this purpose, the trial court must not hinder a juror's expression of dissent, and must consider not only the juror's response but also her demeanor and tone of voice. Where a juror dissents, the only appropriate remedies are to discharge the jury or order further deliberations. When juror Sims indicated dissent, the trial court neither discharged the jury nor ordered further deliberations.

In addition, during the second polling the court merely re-examined the two jurors who had made questionable responses, and did not poll the entire jury. Third, juror Sims was not "afforded an opportunity to dissent" during the second polling; the trial judge was obligated to "follow up" on her answers, especially since her demeanor suggested that she might have been coerced into changing her vote.

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