

CH. 54 WAIVER - PLAIN ERROR - HARMLESS ERROR	1
§54-1 Forfeiture.....	1
§54-1(a) Generally	1
§54-1(b) Application of the Forfeiture Rule	5
§54-1(b)(1) No Trial Objection; Delayed Trial Objection; Withdrawn Objection.....	5
§54-1(b)(1)(a) Issue Forfeited.....	5
§54-1(b)(1)(b) Issue Not Forfeited	10
§54-1(b)(2) Issue Raised in a Pretrial Motion <i>in Limine</i>	14
§54-1(b)(3) Issue Not Raised in a Post-Trial Motion; Post-Trial Motion Untimely	16
§54-1(b)(3)(a) Issue Forfeited.....	16
§54-1(b)(3)(b) Issue Not Forfeited	19
§54-1(b)(4) Issue Not Raised in the Trial Court; Issue Raised for the First Time on Direct Appeal; Issue Not Subject to Forfeiture	25
§54-1(b)(4)(a) Issue Forfeited.....	25
§54-1(b)(4)(b) Issue Not Forfeited	31
§54-1(b)(5) Objection on a Specific Ground; Objection on an Inconsistent or Different Ground	34
§54-1(b)(5)(a) Generally.....	34
§54-1(b)(5)(b) Issue Forfeited.....	35
§54-1(b)(5)(c) Issue Not Forfeited	37
§54-1(b)(6) General Objection.....	40
§54-1(b)(6)(a) Generally.....	40
§54-1(b)(6)(b) Issue Forfeited.....	40
§54-1(b)(6)(c) Issue Not Forfeited	41

§54-1(b)(7) Agreed to or Invited Error; Stipulated Evidence	41
§54-1(b)(7)(a) Generally	41
§54-1(b)(7)(b) Issue Forfeited	44
§54-1(b)(7)(c) Issue Not Forfeited	51
§54-1(b)(8) Basis for Objection is Trial Judge’s Conduct	54
§54-1(b)(9) Forfeiture During Appeal – Issue Not Raised in Original Appellate Brief, Reply, PRH, PLA	57
§54-1(b)(9)(a) Issue Forfeited	58
§54-1(b)(9)(b) Issue Not Forfeited	59
§54-1(b)(10) Forfeiture in Collateral Proceedings	62
§54-1(b)(10)(a) Issue Forfeited	62
§54-1(b)(10)(b) Issue Not Forfeited	64
§54-1(b)(11) Forfeiture by the State	66
§54-1(b)(11)(a) Issue Forfeited	66
§54-1(b)(11)(b) Issue Not Forfeited	72
§54-1(b)(12) Other Considerations	75
§54-1(b)(12)(a) Issue Forfeited	75
§54-1(b)(12)(b) Issue Not Forfeited	75
§54-1(c) Forfeiture Not Applicable – Voidness and Constitutional Claims	77
§54-2 Plain Error	80
§54-2(a) Generally	80
§54-2(b) Clear and Obvious Error	82
§54-2(c) Closely Balanced Prong	85
§54-2(d) Substantial Rights Prong	91

§54-2(e) Application of Plain Error	106
§54-2(e)(1) Jury Selection Error	106
§54-2(e)(1)(a) Plain Error	106
§54-2(e)(1)(b) No Plain Error	110
§54-2(e)(2) Prosecutorial Misconduct.....	112
§54-2(e)(2)(a) Plain Error	112
§54-2(e)(2)(b) No Plain Error	115
§54-2(e)(3) Evidentiary Issues.....	119
§54-2(e)(3)(a) Plain Error	119
§54-2(e)(3)(b) No Plain Error	125
§54-2(e)(4) Trial Judge’s Remarks.....	126
§54-2(e)(4)(a) Plain Error	126
§54-2(e)(4)(b) No Plain Error	127
§54-2(e)(5) Jury Instruction Error	128
§54-2(e)(5)(a) Plain Error	128
§54-2(e)(5)(b) No Plain Error	137
§54-2(e)(6) Sentencing Errors	140
§54-2(e)(6)(a) Plain Error	140
§54-2(e)(6)(b) No Plain Error	145
§54-2(e)(7) Other.....	148
§54-2(e)(7)(a) Plain Error	148
§54-2(e)(7)(b) No Plain Error	154
§54-3 Harmless Error and Structural Error	155
§54-3(a) Generally	155

§54-3(b) Structural Error	159
§54-3(c) Non-Structural Constitutional Error – Harmless Beyond a Reasonable Doubt Standard.....	162
§54-3(d) Factors in Harmless Error Analysis.....	166
§54-3(d)(1) Whether the Evidence Is Overwhelming or Closely Balanced	166
§54-3(d)(1)(a) Harmless Error	167
§54-3(d)(1)(b) Not Harmless Error	171
§54-3(d)(2) Whether the Error Could Have Affected The Witness’s Credibility in a Case in Which Credibility is Crucial to the Verdict	177
§54-3(d)(2)(a) Harmless Error	177
§54-3(d)(2)(b) Not Harmless Error	177
§54-3(d)(3) Whether the Error Is of a Substantial or Insubstantial Nature	179
§54-3(d)(3)(a) Harmless Error	179
§54-3(d)(3)(b) Not Harmless Error	180
§54-3(d)(4) Whether the Properly-Admitted Evidence Is Similar to or Cumulative of the Erroneously-Admitted or Erroneously- Excluded Evidence	181
§54-3(d)(4)(a) Harmless Error	181
§54-3(d)(4)(b) Not Harmless Error	183
§54-3(d)(5) Whether Corrective Action Occurred	185
§54-3(d)(5)(a) Harmless Error	185
§54-3(d)(5)(b) Not Harmless Error	185
§54-3(d)(6) Whether the Error was Repeated or Was Merely a Single, Isolated Incident	186
§54-3(d)(6)(a) Harmless Error	187

§54-3(d)(6)(b) Not Harmless Error	187
§54-3(d)(7) Whether the Error Was Emphasized or Highlighted	187
§54-3(d)(7)(a) Harmless Error	187
§54-3(d)(7)(b) Not Harmless Error	188
§54-3(d)(8) Whether the Cumulative Errors Were Prejudicial ...	188
§54-3(d)(8)(a) Harmless Error	188
§54-3(d)(8)(b) Not Harmless Error	188
§54-3(d)(9) Other.....	191
§54-3(d)(9)(a) Harmless Error	191
§54-3(d)(9)(b) Not Harmless Error	191

CH. 54

WAIVER - PLAIN ERROR - HARMLESS ERROR

§54-1

Forfeiture

§54-1(a)

Generally

Illinois Supreme Court

In re Samantha V., 234 Ill.2d 359, 917 N.E.2d 487 (2009) In order to preserve a claim of error for review, a minor must object at trial. However, minors are not required to file post-adjudication motions.

People v. Lucas, 231 Ill.2d 169, 897 N.E.2d 778 (2008) The forfeiture doctrine applies to the State as well as defendant. The Court rejected the State's argument that defendant forfeited an issue because the State failed to raise the issue in the appellate court.

"A failure to raise an issue in a post-trial motion following a jury trial constitutes a waiver of that issue." But see, **People v. Kelly**, 76 Ill.App.3d 80, 394 N.E.2d 739 (5th Dist. 1979) ("the law is well settled" that a defendant convicted in a bench trial need not file a post-trial motion if he raised the issue in the trial court); **People v. Ocasio**, 148 Ill.App.3d 418, 503 N.E.2d 1059 (1st Dist. 1986).

People v. Terrell, 185 Ill.2d 467, 708 N.E.2d 309 (1998) In a concurring opinion, Chief Justice Freeman discussed the majority's "nonchalant and . . . inconsistent" treatment of issues which it held to be forfeited. Justice Freeman stated that on direct review there are only three grounds on which a reviewing court may excuse procedural default: (1) the defense made a timely trial objection but omitted the issue from the post-trial motion, and the claim could later be asserted in a post-conviction petition; (2) the issue involves a challenge to the sufficiency of the evidence; or (3) "plain error" is involved.

People v. Reed, 177 Ill.2d 389, 686 N.E.2d 584 (1997) The plain language of PA 88-311, which modified 730 ILCS 5/5-8-1(c) by requiring a written post-sentencing motion in order to preserve sentencing issues for appeal, "shows a clear legislative intent to make a post-sentencing motion the functional equivalent of a post-trial motion for purposes of preserving issues for appeal."

People v. Keene, 169 Ill.2d 1, 660 N.E.2d 901 (1995) In capital cases, the failure to file a post-trial motion can be excused for three categories of errors: (1) errors for which a trial objection was made and that could be asserted in a post-conviction petition, (2) challenges to the sufficiency of the evidence, and (3) "plain" errors that undermine the fairness of the trial.

In re W.C., 167 Ill.2d 307, 657 N.E.2d 908 (1995) In delinquency proceedings, the minor is not required to file a written post-trial motion to preserve alleged errors for appeal.

People v. Enoch, 122 Ill.2d 176, 522 N.E.2d 1124 (1988) To preserve an issue for appeal, the issue must be both raised by an objection during trial and placed in the post-trial motion. See also, **People v. Wade**, 131 Ill.2d 370, 546 N.E.2d 553 (1989); **People v. Johnson**, 114

Ill.2d 170, 499 N.E.2d 1355 (1986); **People v. Herrett**, 137 Ill.2d 195, 561 N.E.2d 1 (1990); **People v. Nevitt**, 135 Ill.2d 423, 553 N.E.2d 368 (1990); **People v. Valko**, 201 Ill.App.3d 462, 559 N.E.2d 104 (1st Dist. 1990); **People v. Richmond**, 201 Ill.App.3d 130, 559 N.E.2d 302 (4th Dist. 1990)

A post-trial motion is required to be in writing and "specify the grounds" for reversal. In the absence of plain error, the failure to specify in writing the grounds for a new trial constitutes a forfeiture. See also, **People v. Hairston**, 46 Ill.2d 348, 263 N.E.2d 840 (1970) (issue must be specifically urged in a written post-trial motion); **People v. Henderson**, 142 Ill.2d 258, 568 N.E.2d 1234 (1990) (issue pertaining to prosecutor's closing argument was not specifically raised in post-trial motion, but only referred to in general terms).

The requirement for a written post-trial motion is forfeited by the prosecution's failure to object to an oral motion. See also, **People v. Bartlett**, 175 Ill.App.3d 686, 530 N.E.2d 90 (2d Dist. 1988).

People v. Friesland, 109 Ill.2d 369, 488 N.E.2d 261 (1985) The rule that the State's failure to object to an oral post-trial motion constitutes forfeiture applies only where no written motion is filed.

People v. Lutz, 73 Ill.2d 204, 383 N.E.2d 171 (1978) A motion in arrest of judgment, without any prior objection, properly challenges the charging document and preserves the issue for appeal. See also, **People v. Smith**, 99 Ill.2d 467, 459 N.E.2d 1357 (1984).

People v. Gokey, 57 Ill.2d 433, 312 N.E.2d 637 (1974) In both civil and criminal cases, a defendant waives the right to a directed verdict by introducing evidence after his motion has been denied. See also, **People v. Wilson**, 143 Ill.App.3d 236, 572 N.E.2d 937 (1991) (where defendant elects to present evidence following the denial of his motion for a directed finding at the close of the State's case, any error in the trial judge's ruling is waived unless the motion is renewed at the close of all evidence).

People v. Pickett, 54 Ill.2d 280, 296 N.E.2d 856 (1972) The general rule (that defendant's failure to raise an issue in the written motion for a new trial constitutes forfeiture) applies to both constitutional and non-constitutional issues.

People v. Thigpen, 33 Ill.2d 595, 213 N.E.2d 534 (1966) The court should have conducted a hearing outside the jury's presence regarding the admissibility of defendant's statement, even if no specific request was made, where it should have been apparent to the court that defendant was objecting to the admission of the statement. Remanded for trial court to hold a hearing on the voluntariness of defendant's confession.

Illinois Appellate Court

People v. Hauck, 2022 IL App (2d) 191111 In order to preserve an issue for appeal, an objection must include specific grounds. Boilerplate language cannot serve as a "catch-all" to preserve issues for appeal. But, an issue raised on appeal does not have to be *identical* to the objection raised at trial so long as the trial court had the opportunity to review "the same essential claim."

Here, in the trial court defendant objected to the State's introduction of cell phone records on the basis that the record-keeper's certification was not notarized and appeared to be a self-generated computerized form. On appeal, defendant argued that the certification

failed to comply with [Illinois Rule of Evidence 902\(11\)](#) in that it was not made under oath subject to the penalty of perjury as required by the Rule, and accordingly the cell phone records were not self-authenticating and the State did not otherwise establish the necessary foundation to admit the records as business records under Rule 803(6). Defendant's objection in the trial court may not have specifically referenced the requirements of Rule 902(11), but it did give the trial court the opportunity to review the issue and make a determination of whether the certification satisfied the "under oath" requirement of the Rule. Accordingly, it was not forfeited.

People v. Torres, 2019 IL App (1st) 151276 In a shooting case where the question was whether defendant had the intent to kill, and should be convicted of attempt murder, or whether he merely had the intent to frighten, and should be convicted of a lesser offense, the State elicited false testimony from defendant's accomplice that he had pled guilty to attempt murder for his role in the incident. The accomplice did not plead guilty to attempt murder, as that charge had been reduced to a lesser offense. Defendant alleged this false testimony violated his right to due process.

The Appellate Court first rejected the State's forfeiture argument, finding that a party does not forfeit an error involving the false, uncorrected testimony elicited by the opponent. Also, whether the prosecutor actually knew the statement to be false does not matter, as the prosecutor's office knew the accomplice did not plead to attempted murder, and that knowledge is imputed to the prosecutor at trial. Finally, the Court held that if there is any reasonable likelihood that the false testimony could have affected the jury's verdict, the defendant is entitled to a new trial, regardless of the lack of an objection. Because the jury was falsely told that the accomplice pled guilty to attempted murder, the jury could have concluded that defendant must also be guilty of this offense. While the dissent would have found the error harmless, the majority pointed out that even if evidence of defendant's participation in the offense was overwhelming, evidence of his state of mind at the time of the shooting was close. As such, the false statement was material and required a new trial.

People v. Smith, 2017 IL App (1st) 143728 On appeal from his murder and attempt murder convictions, defendant argued that several errors cumulatively denied him a fair trial, including two instances of prosecutorial misconduct and two evidentiary errors, all involving the inflammation of the jury's passions. Some of the errors had been preserved, others forfeited. The Appellate Court, citing **People v. Blue**, 189 Ill. 2d 99 (2000), agreed to consider the errors cumulatively and, to ensure that defendant received a fair trial, decided not to apply the forfeiture rule, which it deemed a limitation on the parties, not the court. It concluded that the errors constituted a pervasive pattern of unfair prejudice that denied defendant his right to a fair trial, and required a new trial regardless of the strength or weaknesses in the State's case.

People v. Aguirre-Alarcon, 2016 IL App (4th) 140455 The trial court imposed a fee to reimburse the county for the cost of appointed counsel without first conducting a hearing to determine defendant's ability to pay as required by statute. [725 ILCS 5/113-3.1\(a\)](#). The Appellate Court held that although defendant failed to object to the fee, application of the forfeiture doctrine would be inappropriate where the trial court failed to follow the procedural safeguards contained in the statute.

People v. McCoy, 2016 IL App (1st) 130988 At defendant's murder trial, the prosecution

erred by cross-examining defendant with impeachment questions which it had neither the intention nor the ability to prove. The court concluded that the error was preserved despite the fact that in the post-trial motion, defense counsel erroneously stated that the State's assertion occurred during closing argument rather than during cross-examination. A post-trial motion must make a sufficiently specific allegation to give the trial judge an adequate opportunity to correct the error. This standard was satisfied where at trial the only reference to defendant's alleged threats occurred during cross-examination.

People v. Tapia, 2014 IL App (2d) 111314 Defendant entered a negotiated guilty plea in exchange for the State's recommendation of a sentencing cap. At the sentencing hearing, the trial court relied upon incorrect information in the pre-sentence investigation report (PSI) which listed a prior conviction from Georgia as a felony rather than a misdemeanor. Defendant did not object to the court's actions, and filed no post-judgment motions or direct appeal.

Defendant filed a post-conviction petition alleging that trial counsel was ineffective for failing to correct the misinformation about the Georgia conviction. At a third-stage evidentiary hearing, the State introduced trial counsel's affidavit which stated that he reviewed the PSI with defendant and defendant never indicated that the description of the Georgia conviction as a felony was inaccurate. Defendant filed an affidavit stating that he did not receive a copy of the PSI until the day of sentencing when trial counsel asked him to quickly look it over. Defendant looked it over but did not notice any errors because he did not understand all the legalese. The circuit court denied the petition and defendant appealed.

The Appellate Court held that defendant forfeited his claim of ineffective assistance by failing to file any post-judgment motions or raise the claim on direct appeal. Ordinarily, forfeiture bars a post-conviction claim that could have been, but was not, raised on direct appeal. Here, support for the claim existed and it could have been raised in a post-judgment motion or on direct appeal. The record shows that defendant reviewed the PSI. Defendant also knew that his Georgia conviction was a misdemeanor. A defendant has the obligation to notify the sentencing court of any inaccuracies in the PSI. By failing to object to the misinformation in the PSI or the court's reliance upon that misinformation, defendant failed to preserve the issue.

Although defendant entered a partially negotiated plea, and thus could not have moved to reconsider his sentence on the sole ground of excessiveness, his claim is not that his sentence was excessive, but rather that due to counsel's ineffectiveness the trial court considered inaccurate information in imposing his sentence. Such claim could have been raised in a post-judgment motion and on direct appeal.

People v. Jones, 364 Ill.App.3d 1, 846 N.E.2d 947 (1st Dist. 2005) A defendant's failure to respond to appellate counsel's Anders motion to withdraw as counsel on direct appeal does not result in a forfeiture of all future claims, such as those properly pursued in a post-conviction proceeding.

People v. Taylor, 409 Ill.App.3d 881, 949 N.E.2d 124 (1st Dist. 2011) To preserve an alleged error for appellate review, the defense must both object at trial and raise the issue in the post-trial motion. Although the reviewing court may reach an unpreserved error under the plain error doctrine, the defendant forfeits the right to plain error review where he fails to request such review. Here, defendant waived plain error review of several evidentiary issues by failing to make an adequate request in the reviewing court.

The court also held that two of the allegations of error would have been rejected on

the merits had they been reached.

People v. Rigsby, 405 Ill.App.3d 916, 940 N.E.2d 113 (1st Dist. 2010) A defendant who has been assessed a DNA analysis fee need not show that he actually paid the fee before he can challenge the fee on appeal. No such prerequisite is contained in the statute.

A court that orders a defendant to provide a DNA sample and pay an analysis fee where a sample is already on file in the database exceeds its statutory authority. Such an order is void and not subject to forfeiture.

People v. Armstead, 322 Ill.App.3d 1, 748 N.E.2d 691 (1st Dist. 2001) The failure to raise a contemporaneous objection to each of a series of statements forfeits appellate review of the statements for which objections were not raised, even where prior objections were overruled. Because the evidence was closely balanced, however, the court applied the plain error rule.

In re D.B., 303 Ill.App.3d 412, 708 N.E.2d 806 (1st Dist. 1999) The statutory requirement that a written report of social investigation be prepared within 60 days before a dispositional hearing (705 ILCS 405/5-22(1)) is not subject to forfeiture, even where the issue is not raised in the trial court. A defendant is not allowed to waive preparation of a presentence report. Thus, he "certainly . . . cannot forfeit [a presentence report] through some sort of procedural default."

People v. Depper, 256 Ill.App.3d 179, 629 N.E.2d 699 (4th Dist. 1994) The two rationales for forfeiture doctrine are to avoid the delay and expense of an appeal where a claim is meritorious and to give the reviewing court the benefit of the judgment and observations of the trial court.

§54-1(b)

Application of the Forfeiture Rule

§54-1(b)(1)

No Trial Objection; Delayed Trial Objection; Withdrawn Objection

§54-1(b)(1)(a)

Issue Forfeited

Illinois Supreme Court

People v. Casillas, 195 Ill.2d 461, 749 N.E.2d 864 (2000) Because the judge's failure to instruct the jury that the indictment was not evidence of guilt involved a non-constitutional right, counsel's failure to tender a proper instruction and object to its omission forfeited the issue.

People v. Hasprey, 194 Ill.2d 84, 740 N.E.2d 780 (2000) Defendant forfeited argument regarding the propriety of the trial judge's response to a jury note where defense counsel failed to object to the response or request a mistrial. Further, the judge was not obligated to declare a mistrial sua sponte where the judge's response cured any misunderstanding.

People v. Heard, 187 Ill.2d 36, 718 N.E.2d 58 (1999) Defendant forfeited a **Batson** objection where he failed to raise the issue until the post-trial motion. Challenges to the composition

of a jury must be raised before the jury is sworn. See also **People v. Primm**, 319 Ill.App.3d 411, 745 N.E.2d 13 (1st Dist. 2000) (where the defense raises a **Batson** objection as to several veniremembers but the State offers explanations only as to some, defendant forfeits the issue for appeal unless he renews his objection for the veniremembers for whom no explanations were given; under some circumstances, however, the State's failure to offer explanations for all challenged veniremembers may be considered under the plain error rule).

People v. Bull, 185 Ill.2d 179, 705 N.E.2d 824 (1998) Defendant forfeited argument that the trial court erred by conducting in camera voir dire of a juror in defendant's absence, where the defense failed to object before the jury was sworn. "An accused may not sit idly by and allow irregular proceedings to occur without objection and afterwards seek to reverse his conviction by reason of those same irregularities."

People v. Phillips, 127 Ill.2d 499, 538 N.E.2d 500 (1989) Defendant forfeited his claim concerning the prosecutor's closing argument where he did not object during trial, though he raised the issue in the post-trial motion. See also, **People v. Henderson**, 142 Ill.2d 258, 568 N.E.2d 1234 (1990) (no objection to argument during trial and issue mentioned only in general terms in the post-trial motion).

People v. Collins, 106 Ill.2d 237, 478 N.E.2d 267 (1985) Issues pertaining to the introduction of hearsay, impeachment on collateral matters, and prosecutor's closing argument were forfeited by defense's failure to object. See also, **People v. Williams**, 139 Ill.2d 1, 563 N.E.2d 431 (1990) (the failure to object to hearsay testimony during trial forfeited the issue for appeal, and also allowed the trier of fact to give that evidence its natural probative value); **People v. Green**, 125 Ill.App.3d 734, 466 N.E.2d 630 (4th Dist. 1984) (defendant forfeited double jeopardy claim where he failed to object to declaration of mistrial at his first trial "and more significantly . . . raised no objection at the start of the second trial. . . ."); **People v. Struck**, 136 Ill.App.3d 842, 483 N.E.2d 1047 (1st Dist. 1985) (defendant forfeited hearsay claim).

People v. Caballero, 102 Ill.2d 23, 464 N.E.2d 223 (1984) Defendant forfeited claim that the prosecutor's closing argument was improper. Although defense counsel objected to the statement, the judge did not rule on the objection and counsel did not request a ruling or call the judge's attention to the fact that no ruling had been made. See also, **People v. Redd**, 173 Ill.2d 1, 670 N.E.2d 583 (1996).

People v. Sanders, 56 Ill.2d 241, 306 N.E.2d 865 (1974) Where defense counsel failed to object to testimony concerning a prior inconsistent statement for which there was a lack of foundation, objection was forfeited though counsel moved to strike the testimony on the next day of trial. See also, **People v. Williams**, 28 Ill.2d 114, 190 N.E.2d 809 (1963).

Illinois Appellate Court

People v. Guitierrez, 2024 IL App (2d) 230260 Illinois Rule of Evidence 103(a)(2) states that when evidence is excluded, an offer of proof must be made unless "the substance of the evidence . . . was apparent from the context within which questions were asked." In this case, defendant was accused of sexual abuse by his girlfriend's 13 year-old daughter, and he testified the complainant falsely accused him because he took away her cell phone as punishment. Defense counsel next asked defendant about the contents of the threat. The

State objected on hearsay grounds. The defense responded that the testimony would not be admitted for the truth of the matter asserted but rather to show bias or motive. The court sustained the objection. After the jury convicted him, defendant raised the issue in a post-trial motion, and explained that the defendant would have testified that the complainant told him he'd "pay for this" and called him a swear word.

The appellate court held that by failing to make a contemporaneous offer of proof of the threat, defendant forfeited his challenge to the trial court's ruling. The content of the threat was not apparent from the questions that were asked. At the time of the objection, the defense had made only a general reference to a threat, which did not reveal "the substance of the evidence" as required by the rule. Therefore, a contemporaneous offer of proof was required to preserve the error. Defendant cited Rule 103(b)(1), which states that "where the court has not made a previous ruling on the record concerning the admission of evidence, *a contemporaneous trial objection or offer of proof* must be made to preserve a claim of error for appeal." Because the word "or" separates the "contemporaneous trial objection" from "offer of proof," defendant argued his post-trial offer of proof was sufficient. But the appellate court found "contemporaneous" modified both clauses, such that the offer of proof must be made at the time of the ruling. And while the plain error rule might have allowed the appellate court to reach the issue, defendant did not argue plain error in his briefs. Regardless, the defense was able to tie the phone confiscation to the complainant's motive, and the exact wording of the threat would not have added much to that argument such as its omission could have prejudiced defendant.

People v. Baker, 2023 IL App (1st) 220328 The appellate court affirmed defendant's conviction for unlawful use of a weapon by a felon, despite the fact that it was based on a predicate felony committed at age 17. Although defendant argued on appeal the predicate was invalid because if committed at the time of the instant offense, it would have been disposed of in juvenile rather than adult court, defendant did not make this argument below. In fact, defendant stipulated to both the existence of the prior offense, and to its satisfaction of the element of the current offense.

Importantly, defendant had other adult convictions that would have satisfied the UUW/felon statute. As such, the integrity of the system was not at stake such that the plain error rule would require the court to overlook defendant's forfeiture and stipulation.

People v. Owens, 2022 IL App (3d) 190151 At defendant's jury trial, the trial court erred when it ordered defendant to be handcuffed during his cross-examination. Defendant had testified in his own defense, unrestrained, but then became defiant and refused to answer questions during the State's cross-examination, telling the court to send him back to his cell. The court removed the jury and had a conference with the parties, warning defendant that if his conduct continued, he would waive his right to be present for the remainder of the trial. The judge also noted that during the break defendant had been handcuffed by the courtroom deputy, so the court instructed that defendant remain restrained when the trial resumed. Defendant's cross-examination resumed with him seated at counsel table instead of on the witness stand, flanked by deputies, and handcuffed. Defendant refused to answer questions, the parties rested, and the jury ultimately found defendant guilty on some counts and not guilty on others.

On appeal, defendant argued that the trial court erred in failing to conduct a hearing to determine whether shackling was necessary, as required by [Illinois Supreme Court Rule 430](#) and **People v. Boose**, 66 Ill. 2d 261 (1977). The State argued that the record clearly showed the need for shackling. The Appellate Court disagreed, noting that the court simply

accepted the deputy's opinion that defendant's attitude had "changed for the worse" and required shackling, rather than exercising its discretion to determine whether the factors enumerated in [Rule 430](#) warranted shackling. Further, there is no authority for the proposition that a hearing is not required simply because the record shows a need for shackling. The absence of a hearing denied defendant due process and was an abuse of the court's discretion.

Because defendant failed to raise a timely objection to the court's shackling decision, however, the issue was forfeited. Defendant asked for reversal because the error was structural or, alternatively, second-prong plain error. The Appellate Court disagreed. A **Boose** error is not structural error because it does not affect the framework of the trial process or render the verdict fundamentally unfair or unreliable. Nor did the error fall under the second prong where it did not affect the integrity of the judicial process. If the jury even knew defendant was handcuffed (he was told to keep his hands under the table, though he was admonished for raising them), they also knew that the shackling was related to his repeated outbursts and not to any presumption of guilt, as he was not shackled at the outset of the trial. Also, there was no indication that the shackling hindered his right to participate in his own defense or consult with counsel. Thus, the error was forfeited and not reviewable as plain error.

[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. 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. Cavette, 2018 IL App (4th) 150910 The court's statement to the jury that it should consider the stipulated evidence of defendant's two prior felony convictions "along with all of the other evidence of the case" was plain error. Defendant's prior convictions were admitted for the limited purpose of establishing the prior-felonies element of armed habitual criminal. While the court was not required to give a limiting instruction without one being requested, the court was required to give an accurate statement of the law to the jury when it spoke on the subject.

This was plain error under the closely-balanced evidence prong. Only a single eyewitness testified to having seen defendant with a gun. The gun and drugs were not found on defendant, but rather were recovered from a friend's apartment, and neither was forensically linked to defendant. The jury had been deadlocked prior to reaching a verdict, and the court's erroneous instruction to consider defendant's criminal history the same as any other evidence threatened to tip the scales against defendant.

People v. Betance-Lopez, 2015 IL App (2d) 130521 Defendant was convicted of two counts of predatory criminal sexual assault of a child and one count of aggravated criminal sexual abuse. At sentencing, the trial court declined to impose a sentence for aggravated criminal sexual abuse, finding that the conviction merged with predatory criminal sexual assault of a child. On appeal, the State argued for the first time that the trial court incorrectly concluded that aggravated criminal sexual abuse was a less-included offense of predatory criminal sexual assault of a child and asked the court to remand the cause for sentencing on the former count.

The court acknowledged that where a criminal defendant appeals a conviction, the reviewing court has authority to grant the State's request to remand for imposition of a sentence on a conviction that was improperly vacated under one-act, one-crime principles. However, the court concluded that defendant was prejudiced by the State's failure to raise the issue in the trial court because he would be subject to mandatory consecutive sentencing if the State's request was granted. Noting that defendant might have decided to not appeal had the State raised the issue below, the court declined to overlook the State's waiver.

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. Martin, 408 Ill.App.3d 891, 946 N.E.2d 990 (2d Dist. 2011) To preserve an issue for review, the defendant is required to both offer a specific objection at trial and raise the

matter in the post-trial motion. An appellant who fails to ask the reviewing court to apply the plain error rule forfeits any argument concerning plain error.

Although a post-trial motion attacking the sufficiency of the evidence is not required to preserve a reasonable doubt issue, a claim that an out-of-court statement was improperly admitted cannot be recast as a reasonable doubt argument in order to avoid forfeiture.

People v. Camp, 128 Ill.App.3d 223, 470 N.E.2d 540 (1st Dist. 1984) Defendant could not complain about the State's substantive use of out-of-court statements, which were introduced to show their effect on defendant, where counsel failed to request an instruction limiting the use of the statements.

People v. Dandridge, 98 Ill.App.3d 1021, 424 N.E.2d 1262 (5th Dist. 1981) Defense counsel's objection to the prosecutor's use of hearsay testimony as substantive evidence during closing argument was properly overruled; counsel did not object or seek to limit the use of the testimony when it was introduced, and objected for the first time during closing argument.

People v. Blackwell, 76 Ill.App.3d 371, 394 N.E.2d 1329 (1st Dist. 1979) Defendant may not claim error because the judge sustained an objection to a question that was withdrawn.

§54-1(b)(1)(b)

Issue Not Forfeited

Illinois Supreme Court

People v. Hope, 184 Ill.2d 39, 702 N.E.2d 1282 (1998) Defendant did not forfeit issue regarding whether veniremembers should be asked about bias due to the interracial nature of the crime by raising it after eight prospective jurors had been questioned. Because the State failed to challenge the timeliness of defense counsel's inquiry, it forfeited any right to object to the timeliness of the defense action. Further, any "tardiness" in raising the issue did not preclude inquiry into potential interracial crime bias; "[a]ny inconvenience in making the inquiry of the two previously selected jurors would have been minor, considering its 'minimally intrusive' nature and the trial court's discretion to question the jurors collectively."

People v. Montgomery, 47 Ill.2d 510, 268 N.E.2d 695 (1971) Defendant was allowed to challenge the use of a 21-year-old conviction to impeach him at trial; though there was no objection during trial, the issue was raised and ruled upon in the motion for new trial.

People v. Zazzetta, 27 Ill.2d 302, 189 N.E.2d 260 (1963) The filing of a motion to suppress after the start of trial preserved the issue for appeal where it "was made as promptly as possible under the circumstances of the case."

Illinois Appellate Court

People v. Trutenko, 2024 IL App (1st) 232333 Defendant did not forfeit his claim of attorney-client privilege by objecting during trial rather than filing a pretrial motion to suppress or motion *in limine*. Several statutes in the Code of Criminal Procedure govern "motions to suppress," and most have provisions that they must be filed pretrial. Motions to exclude privileged communications are not included among these statutes. Rather, [Illinois](#)

[Rule of Evidence 104\(a\)](#) establishes the procedure for determining issues of privilege. That rule provides for the “preliminary” consideration of privilege questions by the court, but does not require a pretrial motion for asserting the privilege. It’s clear from the context of the rule that “preliminary” means before the testimony is admitted, not before trial. The appellate court refused to write into the rules a requirement that attorney-client privilege objections be made pretrial.

The appellate court further held, however, that had the trial court implemented its own procedural rule requiring questions of privilege to be raised and litigated prior to trial, it would have been within its discretion to do so. In such a case, the appellate court would “likely” have found a trial objection untimely.

[People v. Martinez, 2021 IL App \(1st\) 172097](#) Before trial, the defense agreed the child complainant in a sexual assault case – defendant’s daughter – could testify via closed-circuit television. The child would be in the courtroom, while defendant listened to the testimony remotely. The parties also agreed that defendant would listen to the opening statements remotely in order to ensure that the audio and video worked properly. Ultimately, however, defendant could not hear the opening statements. On appeal, he argued a violation of his due process right to be present, and a violation of [725 ILCS 5/106B-5](#) concerning remote testimony.

The Appellate Court found that defendant had not waived or forfeited the claim by agreeing to the procedure. Defendant did not agree to miss opening statements, he merely agreed to listen to them in a different room. Moreover, he had not been advised of his right to be present when he assented to the procedure. The Appellate Court therefore chose to liberally construe the principles of waiver in favor of defendant. However, the right to be present is violated only if the defendant’s absence results in the loss of an underlying substantial right or an unfair trial. Opening statements do not contain evidence, so his absence did not inhibit his ability to defend himself, or his decision whether to testify.

[People v. Romero, 2018 IL App \(1st\) 143132](#) Defendant’s challenge to the court’s questioning of the defense expert was not forfeited even though defendant had not objected to the specific questioning in the trial court. At the time the court pronounced its verdict, and again in his motion for new trial, defendant did object to the judge’s reliance on the answers to his questions. Given that the basis of the objection was the court’s conduct, the forfeiture rule was relaxed. However, the trial court did not demonstrate bias or assume the role of the prosecutor in questioning the defense expert. Instead, the court’s questions were geared toward clarifying portions of the expert’s testimony. The fact that the court did not ask similar questions of the State’s expert did not show bias; in an insanity case, it is the defense expert’s opinion that is of paramount concern.

[People v. Denson, 2014 IL 116231](#) Where the State filed a motion *in limine* to admit co-conspirator statements as an exception to the hearsay rule, defendant filed a response, and the trial court granted the motion *in limine* after a full hearing, the issue was preserved although defendant did not file his own motion *in limine*. The court stressed that the forfeiture rule is intended to encourage defendants to raise issues in the trial court, ensure that the trial court has an opportunity to correct any errors before the case is appealed, and prevent defendant from obtaining a reversal through his or her own inaction. In light of these purposes, the critical consideration is not which party initiated the motion *in limine*, but whether the issue was in fact litigated in the trial court:

Under these circumstances, requiring defendant to recaption

and refile his response to the State's motion as a motion *in limine* of his own would accomplish precisely nothing, other than to clutter the record with duplicative pleadings. Because the trial court was given a full and fair opportunity to rule upon the issue through the State's motion *in limine* and the defendant's response, the issue was preserved when defendant placed it in his post-trial motion, without any need to file his own motion *in limine*.

Furthermore, where statements were admitted after the State's motion *in limine* was granted, defendant was not required to offer a contemporaneous objection when the evidence was presented at trial. Instead, defendant preserved the issue by filing a response to the motion *in limine* and placing the issue in the post-trial motion.

The court acknowledged that in civil cases, a contemporaneous trial objection is required to preserve an issue that has been litigated in a motion *in limine*. In criminal cases, by contrast, the issue must be included in the post-trial motion but need not be the subject of a contemporaneous objection at trial. The court explained the difference in procedure by noting that a post-trial motion is required in all criminal cases but may or may not be required in civil cases.

The court also criticized the State for taking inconsistent positions in the trial court and on appeal. In the lower court, the State indicated that its purpose in filing the motion *in limine* was to avoid having the defense raise an objection at trial that would require the trial to be interrupted. "Given this, we have some difficulty now entertaining the State's argument that defendant forfeited review of the contested statements by failing to make a contemporaneous trial objection, when insulating those statements from a contemporaneous trial objection was the State's express objective. . . ." and implicit request." The court added, "[W]e in no way can condone the State's maneuvering in this case, and we strongly discourage the State from proceeding this way in the future."

In re Jovan A., 2014 IL App (1st) 103835 To preserve an issue for appeal, a criminal defendant must object at trial and raise the issue in a post-trial motion. In juvenile cases, the respondent must object at trial but need not include the issue in a post-adjudication motion. The court found where the respondent repeatedly objected to hearsay testimony when it was introduced, those objections were sufficient to preserve the issue for review although the respondent did not object again when the trial court improperly relied on the hearsay when finding that the minor was delinquent. The court stressed that the State cited no authority for the proposition that an evidentiary issue is forfeited unless the respondent objects during the court's oral pronouncement at the verdict stage.

People v. Easley, 2012 IL App (1st) 110023 Defendant was convicted of unlawful use of a weapon by a felon, a Class 3 felony that was enhanced to Class 2 because the offense was a second or subsequent violation. 725 ILCS 5/111-3(a) provides that when the State seeks an enhanced sentence because of a prior conviction, the charge must give notice to the defendant by stating its intent to seek an enhanced sentence and the prior conviction that will be used to seek the enhancement. An enhanced sentence is defined as a sentence which due to a prior conviction is increased from one level of offense to a higher level offense.

The court concluded that where defendant was charged with the Class 3 offense of unlawful use of a weapon by a felon, and the charge did not give notice that the State intended to seek a conviction for an enhanced Class 2 offense, the essence of the issue was whether the

sentence imposed was proper. The court reached the issue as plain error, although the defense did not raise the question until asked by the Appellate Court during oral argument, because sentencing issues which affect substantial rights are excepted from the waiver doctrine. The court rejected the State's argument that defendant was raising a challenge to the sufficiency of the charging document, and was therefore required to show prejudice because the challenge had not been raised in the trial court.

The court also held that reversal was required although the nine-year sentence which the defendant received for the Class 2 felony was within the authorized sentencing range for a Class 3 conviction. Even where the sentence imposed on an erroneous conviction would have been authorized for the correct conviction, the sentence must be vacated because the trial court relied on an erroneous view of the authorized sentencing range.

The court vacated the enhanced Class 2 sentence and remanded the cause with directions to sentence the defendant to between two and 10 years in prison, the authorized sentencing range for the Class 3 felony of unlawful use of a weapon by a felon.

People v. Hill, 402 Ill.App.3d 903, 934 N.E.2d 43 (1st Dist. 2010) The State filed its notice to seek the death penalty 247 days after arraignment in violation of the provision of Supreme Court Rule 416(c) that such notice be filed within 120 days of arraignment. Almost four years later, the defense filed a motion to strike the notice. The State argued that the defense had forfeited its motion due to that delay and that its motion was barred by the doctrine of laches.

Mere delay in filing the motion to strike did not result in forfeiture. The delay did not amount to acquiescence in the State's effort to seek the death penalty. The defense also filed a motion to bar the State from seeking the death penalty a year after the State filed its notice of its intent to seek the death penalty.

Laches is an equitable doctrine that precludes a litigant from asserting a claim when unreasonable delay in asserting the claim prejudices the other party. While defendant may have lacked diligence in asserting his claim, the State suffered no prejudice.

People v. Rodriguez, 402 Ill.App.3d 932, 932 N.E.2d 113 (1st Dist. 2010) The doctrine of laches bars a party from asserting a claim where the party neglected its right to assert the claim to the detriment of the other party. Laches requires lack of due diligence on the part of one party and prejudice to the other.

The doctrine of laches does not bar the State from asserting that the post-conviction hearing court erroneously granted co-defendant a new sentencing hearing, even though the State failed to appeal that ruling. Defendants can demonstrate no prejudice as a result of that failure to appeal. If the State had appealed, it would have been successful and the co-defendant would have not received a reduced sentence. Defendants would then have no claim that their sentences were unconstitutionally disparate to the reduced sentence of their co-defendant.

People v. Pogue, 312 Ill.App.3d 719, 724 N.E.2d 525 (1st Dist. 1999) Defendant did not forfeit issue regarding trial judge's erroneous denial of a defense request to question prospective jurors about potential bias if defendant did not testify at trial, though counsel did not submit a proposed question before voir dire began and did not object until after 19 veniremembers had been questioned and eight jurors selected.

People v. West, 294 Ill.App.3d 939, 691 N.E.2d 177 (5th Dist. 1998) Defendant did not forfeit argument that the State failed to establish a sufficient foundation for the admission of crime scene photographs, although defendant failed to object the first time the photographs were

identified at trial, where he objected during trial to the use of the photos and raised the issue in the post-trial motion. "The issue is not whether a party objects to evidence when it is first identified or referred to, but . . . whether an objection is made when the evidence is offered." Because defendant objected when the photographs were mentioned by various witnesses, when they were offered into evidence, and in his post-trial motion, he preserved the issue.

Chicago v. Burgard, 285 Ill.App.3d 478, 673 N.E.2d 1082 (1st Dist. 1996) Defendant did not forfeit constitutional argument in ordinance violation case although he failed to present it until after the prosecution had rested, where the State failed to object to the timeliness of the motion, and the trial court ruled on its merits.

People v. Epps, 143 Ill.App.3d 636, 493 N.E.2d 378 (2d Dist. 1986) Defendant did not forfeit claim that a witness was incompetent to testify. Though defendant failed to object during trial, there was a preliminary competency hearing outside the presence of the jury. Further, defense counsel moved for a mistrial when the witness was found competent to testify.

§54-1(b)(2)

Issue Raised in a Pretrial Motion *in Limine*

Illinois Supreme Court

People v. Denson, 2014 IL 116231 In criminal cases, an issue is preserved for review if it is raised in either a motion *in limine* or a contemporaneous trial objection and is included in the post-trial motion. Where the State filed a motion *in limine* to admit co-conspirator statements as an exception to the hearsay rule, defendant filed a response, and the trial court granted the motion *in limine* after a full hearing, the issue was preserved although defendant did not file his own motion *in limine*. The court stressed that the forfeiture rule is intended to encourage defendants to raise issues in the trial court, ensure that the trial court has an opportunity to correct any errors before the case is appealed, and prevent defendant from obtaining a reversal through his or her own inaction. In light of these purposes, the critical consideration is not which party initiated the motion *in limine*, but whether the issue was in fact litigated in the trial court:

Under these circumstances, requiring defendant to recaption and refile his response to the State's motion as a motion *in limine* of his own would accomplish precisely nothing, other than to clutter the record with duplicative pleadings. Because the trial court was given a full and fair opportunity to rule upon the issue through the State's motion *in limine* and the defendant's response, the issue was preserved when defendant placed it in his post-trial motion, without any need to file his own motion *in limine*.

Furthermore, where statements were admitted after the State's motion *in limine* was granted, defendant was not required to offer a contemporaneous objection when the evidence was presented at trial. Instead, defendant preserved the issue by filing a response to the motion *in limine* and placing the issue in the post-trial motion.

The court acknowledged that in civil cases, a contemporaneous trial objection is required to preserve an issue that has been litigated in a motion *in limine*. In criminal cases, by contrast, the issue must be included in the post-trial motion but need not be the subject of a contemporaneous objection at trial. The court explained the difference in procedure by

noting that a post-trial motion is required in all criminal cases but may or may not be required in civil cases.

The court also criticized the State for taking inconsistent positions in the trial court and on appeal. In the lower court, the State indicated that its purpose in filing the motion *in limine* was to avoid having the defense raise an objection at trial that would require the trial to be interrupted. “Given this, we have some difficulty now entertaining the State’s argument that defendant forfeited review of the contested statements by failing to make a contemporaneous trial objection, when insulating those statements from a contemporaneous trial objection was the State’s express objective. . . .” and implicit request.” The court added, “[W]e in no way can condone the State’s maneuvering in this case, and we strongly discourage the State from proceeding this way in the future.”

Illinois Appellate Court

People v. Okoro, 2022 IL App (1st) 201254 After informing police that defendant attempted to sexually assault her, the complainant volunteered that she had been the victim of rape in the past. The defense sought to use this statement as part of the defense. The trial court denied the request, citing the Illinois rape shield statute.

The Appellate Court first held that defendant did not forfeit the claim by failing to raise the issue in a post-trial motion. The issue was raised in a pre-trial motion and is of constitutional dimension. It could be raised again in a post-conviction petition. Under these circumstances, courts will find the claim was not forfeited.

The Illinois rape shield statute bars evidence of the complainant’s prior sexual activity or reputation, subject to two exceptions: (1) evidence of past sexual activities with the accused, offered as evidence of consent; and (2) where the admission of such evidence is constitutionally required. Defendant alleged that his constitutional right to cross-examination required use of the complainant’s statement about a prior sexual assault. The right to cross-examine a witness is not defeated by the statute where the evidence of past sexual conduct is relevant and tends to establish bias, motive, or prejudice.

Here, defendant could not show the relevance of a prior sexual assault. While the defense theorized that a prior rape might have made the complainant hyper-sensitive to being alone with men, this claim was pure conjecture. The defense made no offer of proof in support of this claim, and therefore could not show that the rape shield law must yield in favor of the right to cross-examination.

People v. Bahena, 2020 IL App (1st) 180197 Defendant filed a pretrial motion challenging his warrantless arrest, which was denied. He did not renew the warrantless-arrest issue in his post-trial motion. The Appellate Court declined to find forfeiture, however, because the State did not raise a forfeiture concern. The rules of forfeiture apply equally to the State.

People v. Gist, 2013 IL App (2d) 111140 Where the State moved *in limine* to admit evidence of two prior incidents of domestic violence against the same victim named in the current charges, and the trial court denied the motion after hearing testimony concerning one of the incidents, the State waived any argument that evidence of the second incident should have been admitted even if the first incident was inadmissible. In the trial court, the State failed to argue that evidence of the second incident was admissible separately from the first incident. In addition, the State failed to raise the argument in its motion to reconsider.

People v. Maldonado, 398 Ill.App.3d 401, 922 N.E.2d 1211 (1st Dist. 2010) An issue is preserved for appeal by: (1) objecting at trial or raising the issue in a motion *in limine*, and

(2) presenting the issue in a post-trial motion. The defendant preserved an issue concerning the admissibility of gang-related testimony where the State filed a motion *in limine* to admit the evidence for a limited purpose, defendant replied by objecting to the admission of gang evidence for any purpose, and the issue was raised in the post-trial motion.

2. Even had the defendant not preserved the issue, it would be reviewable as plain error because the evidence was closely balanced and the improper admission of gang-related evidence could have affected the outcome of the case. (See **EVIDENCE**, §§19-2(b)(1), 19-5, 19-16).

In re Commitment of Sandry, 367 Ill.App.3d 949, 857 N.E.2d 295 (2d Dist. 2006) Defendant did not forfeit Frye argument (regarding whether penile plethysmography has obtained sufficient acceptance in the relevant scientific field), although he merely filed a motion in limine, and did not raise an objection at trial when the State attempted to introduce the report of the expert who had relied on PPG testing.

People v. Mason, 274 Ill.App.3d 715, 653 N.E.2d 1371 (1st Dist. 1995) Defendant preserved his objections to gang-related testimony by filing a pretrial motion in limine and a written post-trial motion, both of which were denied. Although several appellate court cases hold that an objection must be made at trial where a pretrial motion in limine was denied, the Court cited Supreme Court precedent as authority that an issue raised in both a motion in limine and the post-trial motion is preserved for review.

§54-1(b)(3)

Issue Not Raised in a Post-Trial Motion; Post-Trial Motion Untimely

§54-1(b)(3)(a)

Issue Forfeited

Illinois Supreme Court

People v. Ratliff, 2024 IL 129356 After waiving counsel and pleading guilty, defendant filed a motion to withdraw his guilty plea. He did not challenge his waiver of counsel in the motion, and, after appointment of post-plea counsel, he did not proceed on the motion, instead filing a motion to reconsider sentence, which was denied. On appeal, defendant argued the trial court failed to comply with Rule 401(a) because it did not admonish him of the charge and sentencing range at the time it accepted his waiver of counsel.

The court held that it lacked jurisdiction to reach the issue, where the notice of appeal was filed only from the motion to reconsider sentence. But the court decided to use its supervisory authority in order to provide guidance to the lower courts on “weighty issues.” The court then held that, even if it had jurisdiction, defendant could not obtain review of the merits of this claim for three reasons.

First, the court held that defendant’s guilty plea waived the claim. “[A] constitutional right, like any other right of an accused, may be waived, and a voluntary plea of guilty waives all errors or irregularities that are not jurisdictional.” This “waiver” is distinct from forfeiture. While forfeited claims may be reached under the plain error doctrine, waived claims may not.

Second, although Rule 604(d) allows defendant to raise claims arising out of a guilty plea, and thereby preserve them for appeal, “offering an important outlet that allows the defendant to avoid waiver of any constitutional claims,” defendant did not raise his 401(a)

claim in a post-plea 604(d) motion. Pursuant to Rule 604(d), the claim must be “deemed waived.” Notably, defendant did not argue below, or on appeal, that his guilty plea was less than knowing or voluntary (presumably an exception to these waiver rules). As with the waiver associated with guilty pleas, a waiver under Rule 604(d) is not a forfeiture and therefore not amenable to plain error analysis.

Finally, even if plain error did apply, defendant could not show second-prong plain error. Defendant established that the trial court failed to comply with Rule 401(a), where it admonished defendant at arraignment, but not at the time of the waiver 11 weeks later. But this error does not rise to the level of a structural error. Several appellate courts have found a 401(a) violation amounts to second-prong plain error because it affects the fundamental right to counsel, but these cases involved trials, which raise different concerns. The “uneasiness and uncertainty” that follows a *pro se* defendant’s trial “disappears when the defendant pleads guilty.” Moreover, these cases lacked any analysis as to why a 401(a) violation is structural. Looking to its recent second-prong jurisprudence, such as [**People v. Moon**, 2022 IL 125959](#), the court distinguished between structural errors, which render a trial fundamentally unfair and defy harmless error analysis, and those errors which may be reviewed for harmlessness. A 401(a) violation is not structural, but rather akin to a trial error, which may be measured for harmlessness. Rule 401(a) is a safeguard to help ensure defendant is afforded his right to counsel, but it is tangential to the right itself. A waiver could be valid absent 401(a) admonishments, and defendant here did not argue that because of the absence of the 401(a) admonishments, his waiver of counsel was not knowing and voluntary.

Two concurring justices believed the court should not have reached the merits due to lack of jurisdiction. One of these justices (J. Cunningham), believed that, despite the general rule that a guilty plea waives all claims, the court’s waiver analysis was incorrect in this case. Under “binding United States Supreme Court precedent,” a defendant can always challenge the waiver of counsel on appeal from a guilty plea, because a guilty plea entered without a knowing waiver of counsel is invalid. Justice Cunningham also noted that the majority’s discussion of Rule 604(d) is in direct conflict with [**People v. Sophanavong**, 2020 IL 124337](#), which held that 604(d) implicates “forfeiture” (failure to make timely assertion of a right), rather than “waiver” (intentional relinquishment of a known right). These two justices also believed, however, that the trial court complied with Rule 401(a).

Justices Neville and Overstreet believed that the notice of appeal conferred jurisdiction on the court to reach the 401(a) issue, but Overstreet otherwise agreed with the majority. Neville would have reversed, finding that the lack of 401(a) admonishments invalidated the waiver of counsel, which in turn invalidated the plea. This is exactly the type of egregious structural error that demands reversal irrespective of whether it was raised below.

[**People v. Sophanavong**, 2020 IL 124337](#) Defendant forfeited his claim of noncompliance with section 5-3-1 by failing to raise the issue in his motion to withdraw the guilty plea. Under Rule 604(d), issues not raised in a motion to withdraw the plea may not be raised on appeal. While previous Supreme Court decisions held that section 5-3-1 imposes a requirement on the circuit court which may not be waived by a party, the majority here distinguished those cases by noting that waiver is different than forfeiture. The court held that the defendant’s failure to raise the section 5-3-1 issue in a post-plea motion, in violation of Rule 604(d), went above and beyond the doctrine of waiver. It further held that defendant’s agreement to a negotiated plea waived all non-jurisdictional errors, including the violation of section 5-3-1.

The State did not raise forfeiture in the Appellate Court. Nevertheless, the Supreme Court majority entertained and accepted the State's forfeiture argument, noting that forfeiture is a limitation on the parties, not the court.

Justice Burke, specially concurring, would have found that section 5-3-1 is not subject to forfeiture, being a requirement imposed on the court and not the parties, but would have found the error harmless in a case where the parties agreed on a sentence and the judge was apprised of defendant's criminal history.

In dissent, Justice Karmeier noted the absurdity of the majority's holding that the legislature's mandatory requirement could somehow be ignored because a party unintentionally neglected to invoke the requirement, particularly where prior cases held that parties had no ability to intentionally waive that requirement.

In a second dissent, Justice Neville marveled that the majority was willing to overlook forfeiture in order to address the State's forfeiture argument, but did not even consider overlooking forfeiture to review the defendant's section 5-3-1 argument. This disparate treatment of the parties indicates that the majority put its thumb on the scale of justice in favor of the State. Justice Neville further suggested that a sentence, particularly a *de facto* life sentence, imposed with out a PSI, violates [Article I, Section 11 of the Illinois Constitution](#).

People v. Young, 128 Ill.2d 1, 538 N.E.2d 461 (1989) Defendant forfeited his claim regarding the State's use of a prior consistent statement where he did not raise the issue in the post-trial motion, though he objected during trial. See also, **People v. Salazar**, 126 Ill.2d 424, 535 N.E.2d 766 (1988); **People v. Furby**, 138 Ill.2d 434, 563 N.E.2d 421 (1990); **People v. Henderson**, 142 Ill.2d 258, 568 N.E.2d 1234 (1990); **People v. White**, 181 Ill.App.3d 798, 537 N.E.2d 1315 (1st Dist. 1989); **People v. Mitchell**, 200 Ill.App.3d 969, 558 N.E.2d 559 (5th Dist. 1990).

People v. Friesland, 109 Ill.2d 369, 488 N.E.2d 261 (1985) Defendant forfeited issue (regarding the production of accomplice's mental health records) by failing to assert it in the written post-trial motion, though counsel raised the issue during oral argument on the post-trial motion and defendant filed a pre-trial discovery motion requesting production of the documents.

People v. Nelson, 41 Ill.2d 364, 243 N.E.2d 225 (1968) Defendant forfeited issue concerning improper remarks to jury by a deputy sheriff; defense knew of the remarks before filing the written post-trial motion, but failed to raise the issue.

Illinois Appellate Court

People v. Tatum, 2019 IL App (1st) 162403 Defendant's failure to raise speedy trial objection in post-trial motion forfeited claim that his 120-day statutory speedy trial right was violated even though defendant objected when the State requested and obtained an extension of the term in an effort to locate a missing witness. To find that defendant had preserved the claim simply by objecting to the continuance would obviate the need for a defendant to include most issues in a post-trial motion in order to preserve them. While there is a constitutional right to a speedy trial, the constitutional issue exception did not apply because defendant argued only that his statutory speedy trial right was violated.

Further, there was no error, and therefore no plain error, where the trial court considered the State's efforts to find the missing witness and concluded that an extension

might allow the State to locate the witness. While it may have been a close call, the court's decision was not arbitrary or unreasonable, and thus not an abuse of discretion.

People v. Bowens, 407 Ill.App.3d 1094, 943 N.E.2d 1249 (4th Dist. 2011) Defense counsel waived the argument that the trial court erred by allowing the State's lead investigator to sit at the State's counsel table through the case, although the investigator testified after hearing the testimony of other witnesses. Counsel objected to the investigator's presence and filed a motion to exclude witnesses, but failed to raise the issue in the written post-trial motion.

People v. De La Hera, 2011 IL App (3d) 100301 Under **People v. Enoch**, 122 Ill. 2d 176, 522 N.E.2d 1124 (1988), an alleged trial error is preserved for appeal only if the defendant objects at trial and raises the error in a post-trial motion. The fact that an objection is made when evidence is introduced does not excuse the failure to include the issue in the post-trial motion.

The court acknowledged Appellate Court precedent that a post-trial motion is unnecessary to preserve issues which developed at a bench trial and which were raised before the trial court. It concluded, however, that such precedent is based on authority established before the enactment of the Criminal Code of 1963. The court found that **Enoch**, which was based on **725 ILCS 5/116-1**, overruled precedent dispensing with the requirement of post-trial motions in bench trials.

Here, defendant waived issues arising from the admission of certain evidence in a bench trial because he failed to include the issues in a post-trial motion or argue that the plain error rule applied.

People v. Martin, 408 Ill.App.3d 891, 946 N.E.2d 990 (2d Dist. 2011) To preserve an issue for review, the defendant is required to both offer a specific objection at trial and raise the matter in the post-trial motion. An appellant who fails to ask the reviewing court to apply the plain error rule forfeits any argument concerning plain error.

Although a post-trial motion attacking the sufficiency of the evidence is not required to preserve a reasonable doubt issue, a claim that an out-of-court statement was improperly admitted cannot be recast as a reasonable doubt argument in order to avoid forfeiture.

People v. Christmas, 54 Ill.App.3d 612, 370 N.E.2d 65 (1st Dist. 1977) Issue concerning judge's interrogation and rehabilitation of State witness was forfeited because it was not in the written post-trial motion. Though failing to object in front of the jury might be excused as a trial tactic, the failure to include the issue in the post-trial motion is inexcusable.

§54-1(b)(3)(b)

Issue Not Forfeited

Illinois Supreme Court

People v. Cregan, 2014 IL 113600 Three types of claims are not subject to forfeiture for failing to file a post-trial motion: (1) constitutional issues that were properly raised at trial and which may be raised in a post-conviction petition; (2) challenges to the sufficiency of the evidence; and (3) plain errors. The court rejected the argument that the constitutional-issue exception applies only to capital cases, finding that the exception is intended to advance interests of judicial economy.

Whether the Fourth Amendment was violated by a search of defendant's luggage

incident to his arrest was a constitutional issue which could be raised in a post-conviction petition. Therefore, defendant did not waive the issue although he failed to raise it in a post-trial motion.

People v. Segoviano, 189 Ill.2d 228, 725 N.E.2d 1275 (2000) Three issues were not forfeited although the post-trial motion was filed 32 days after the convictions instead of within the requisite 30-day period. The trial court ruled on the issues while it had jurisdiction over the case, and the issues involved potential and substantial prejudice to the defense.

People v. Redd, 173 Ill.2d 1, 670 N.E.2d 583 (1996) Claim that was omitted from pro se motion for new trial, but raised on limited remand for filing of post-trial motion, was preserved.

People v. Thompkins, 121 Ill.2d 401, 521 N.E.2d 38 (1988) In a case where defendant was sentenced to death, the Court considered the merits of defendant's claims though he did not file a post-trial motion. The defense did not file a post-trial motion because defense counsel, the prosecutor, and the trial judge agreed that a defendant sentenced to death need not file a motion for new trial. Though this is not the law in Illinois, "it would be manifestly unfair to hold that defendant should have filed a post-trial motion . . . in light of his obvious reliance on the statements . . . that none was necessary." See also, **People v. Levesque**, 256 Ill.App.3d 639, 628 N.E.2d 272 (1st Dist. 1993) (defendant did not forfeit issue of defense counsel's ineffectiveness where he filed pro se post-trial motion six days late where defendant had been ready to file the motion on time, but acquiesced in the trial judge's request to discuss his complaints with trial counsel before filing the motion; because the motion would have been timely had defendant been allowed to file it when he first attempted to do so, "it would constitute a grave injustice . . . to hold the defendant, by following the wishes of the circuit court, has waived the issues raised in his post-trial motion").

People v. Jones, 81 Ill.2d 1, 405 N.E.2d 343 (1979) Defendant did not forfeit alleged instruction error by failing to include the issue in his post-trial motion where he objected to the instruction during trial. See also, **People v. Depper**, 256 Ill.App.3d 179, 629 N.E.2d 699 (4th Dist. 1994) (defendant did not forfeit his challenge to the sufficiency of the evidence, though the defense omitted the issue from the motion for new trial and instead included it in a motion for judgment **n.o.v.**, which was filed and argued on the same day as a motion for a new trial; the rationales for the forfeiture rule are satisfied where an issue is argued to the trial judge in a motion presented simultaneously with the post-trial motion).

People v. McCabe, 49 Ill.2d 338, 275 N.E.2d 407 (1971) Defendant was allowed to raise argument that marijuana statute was unconstitutional though the issue had not been raised in the written motion for new trial. The defense raised the issue in pre-trial motions, and defense counsel's remarks after trial would be considered an oral motion for arrest of judgment. See also, **People v. Paris**, 295 Ill.App.3d 372, 692 N.E.2d 848 (4th Dist. 1998) (defendant did not forfeit issue that he failed to raise in his first post-trial motion but did raise in a subsequent motion to vacate the judgment).

Illinois Appellate Court

People v. Rubio, 2023 IL App (1st) 211078 Convictions of both possession of child pornography and creation of child pornography do not violate the one-act, one-crime doctrine.

Defendant recorded three separate videos of himself pulling down the pants of a five-year-old girl while she was asleep and touching her buttocks. The videos were all recorded within a matter of a few minutes, and defendant stopped recording when he was caught in the act by the child's mother. The possession of child pornography and creation of child pornography counts were both based on the first of the three videos.

The appellate court looked to the factors identified in [People v. Baity, 125 Ill. App. 3d 50 \(1984\)](#) to determine whether defendant's conduct consisted of a single act or multiple acts, specifically: (1) whether there was an intervening event, (2) how much time elapsed between successive parts of defendant's conduct, (3) whether the identity of the victim was the same, (4) how similar the defendant's conduct was, (5) whether the location of the conduct remained the same, and (6) the intent of the State, as evidenced by the charging instrument. Here, the victim and location were the same throughout the incident, and defendant's conduct was similar, weighing in favor of finding a single act. The State's intent was inconclusive where the indictment did not distinguish between different acts.

But, while very little time elapsed, there were intervening events where defendant stopped recording the first video and then recorded two additional videos, retaining possession of the first video while he continued to record. While defendant's possession of the first video was attendant to its creation at the moment he stopped recording, his retention of that video while he went on to record two more was sufficient to render his possession of it a separate act from its creation.

Further, possession of child pornography is not a lesser included offense of creation of child pornography under the abstract elements test. Each requires an element that the other does not. Creation requires the use of visual media to depict the pornography, while possession does not. And, possession, of course, requires possession, but the creation offense does include possession as an element.

At the outset, the State argued that the one-act, one-crime issue was forfeited because defendant raised it at sentencing but did not raise it in a written post-sentencing motion. The appellate court found the issue adequately preserved where defendant orally moved to reduce his sentence, and the State did not object to that procedure.

[People v. Okoro, 2022 IL App \(1st\) 201254](#) A grand jury indicted defendant for home invasion, alleging *inter alia* that he entered the complainant's dwelling without authority. The evidence at trial showed that defendant entered the apartment with the complainant, A.B.. A.B. alleged that he tried to sexually assault her, causing her to flee the apartment and hide in a stairwell. She returned to her apartment after she believed defendant left, but defendant was still in the apartment and attacked her again.

At the instruction conference, the State asked for two versions of IPI 11.53, one using the "entered without authority" language and the other using the "remained in the dwelling place" language. The defense objection was overruled, and defendant was convicted. He did not raise the issue in his post-trial motion.

On appeal, defendant, citing the lack of the "remained" language in the indictment, alleged a violation of his right to a grand jury under the Fifth Amendment, and a fatal variance. The court rejected his Fifth Amendment claim, because the grand jury clause applies only to federal trials.

The Appellate Court next found that defendant had not forfeited his fatal variance claim. A challenge to the sufficiency of the charging instrument may be raised for the first time on appeal, because due process concerns are implicated.

When the indictment or information is challenged for the first time on appeal, review is limited to determining whether the indictment apprised defendant of the precise offense

charged with sufficient specificity to prepare his defense, and allowed defendant to plead a resulting conviction as a bar to future prosecution arising out of the same conduct.

Here, an Appellate Court majority found no fatal variance. While the indictment did not contain the “remains in the dwelling place” language, it did cite to the home invasion statute which does contain said language. An indictment that cites a statute should be read together with the statute. This citation would give defendant sufficient notice that any and all provisions of the home invasion statute were alleged. Nor could any variance prejudice his preparation of a defense, because defendant learned of A.B.’s version of events in discovery. The probable cause statement included A.B.’s allegation that defendant remained in her apartment after she returned from the stairwell and attacked her again.

People v. Okoro, 2022 IL App (1st) 201254 After informing police that defendant attempted to sexually assault her, the complainant volunteered that she had been the victim of rape in the past. The defense sought to use this statement as part of the defense. The trial court denied the request, citing the Illinois rape shield statute.

The Appellate Court first held that defendant did not forfeit the claim by failing to raise the issue in a post-trial motion. The issue was raised in a pre-trial motion and is of constitutional dimension. It could be raised again in a post-conviction petition. Under these circumstances, courts will find the claim was not forfeited.

The Illinois rape shield statute bars evidence of the complainant’s prior sexual activity or reputation, subject to two exceptions: (1) evidence of past sexual activities with the accused, offered as evidence of consent; and (2) where the admission of such evidence is constitutionally required. Defendant alleged that his constitutional right to cross-examination required use of the complainant’s statement about a prior sexual assault. The right to cross-examine a witness is not defeated by the statute where the evidence of past sexual conduct is relevant and tends to establish bias, motive, or prejudice.

Here, defendant could not show the relevance of a prior sexual assault. While the defense theorized that a prior rape might have made the complainant hyper-sensitive to being alone with men, this claim was pure conjecture. The defense made no offer of proof in support of this claim, and therefore could not show that the rape shield law must yield in favor of the right to cross-examination.

People v. Shafer, 2020 IL App (4th) 180343 Before requiring defendant to wear an “electric stun cuff” around his ankle at trial, the court was required to “make specific findings” as to the 10 factors contained in Rule 410. Here, the trial court considered that the cuff would be hidden by clothing – a factor not included in Rule 410 – but made no findings as to the required factors. Defendant objected to the decision, but failed to include the issue in a post-trial motion.

The issue was not forfeited, because it is a constitutional issue that was objected to at trial. See **People v. Almond, 2015 IL 113817**. And although defendant himself told the judge he was “fine” with the cuff, his attorney lodged an objection, and “counsel’s response was the response that counted.” Thus, the issue could be reached without regard to the plain error doctrine.

The error was harmless, however. The trial court specifically found that the cuff was hidden from the jury’s view, and defendant told the court that it did not cause him discomfort. Moreover, the evidence of guilt was overwhelming.

People v. Edwards, 2020 IL App (1st) 170843 The State charged defendant with unlawful use of a weapon by a felon after he was seen in a car with a gun, and the gun was tossed from

the car during police pursuit. During deliberations, the jury asked for a definition of “possession.” The trial court decided to give the jury the definitional instructions for both actual and constructive possession. Defense counsel objected, arguing that the case had never been about constructive possession and therefore the defense did not have the opportunity to rebut the claim in closing argument. The objection was overruled, defendant was convicted, and defense counsel did not include the issue in a post-trial motion.

Citing [People v. Alexander, 2019 IL App \(3d\) 160709](#), the Appellate Court held that the trial court erred by instructing the jury on a theory of guilt not advanced at trial. The court held that this error violated defendant’s constitutional right to closing argument. The error was not forfeited despite it not being raised in a post-trial motion, because under [People v. Cregin, 2014 IL 113600](#), a reviewing court should review constitutional errors raised at trial even if not included in a post-trial motion. The error was harmless, however, because there was sufficient evidence of actual possession, such that the jury did not need to consider constructive possession.

[People v. Bahena, 2020 IL App \(1st\) 180197](#) Defendant filed a pretrial motion challenging his warrantless arrest, which was denied. He did not renew the warrantless-arrest issue in his post-trial motion. The Appellate Court declined to find forfeiture, however, because the State did not raise a forfeiture concern. The rules of forfeiture apply equally to the State.

[People v. Alexander, 2019 IL App \(3d\) 160709](#) Although defendant’s motion for new trial was filed more than 30 days after the guilty verdict, defendant did not forfeit his claim of error. The motion was filed prior to sentencing, at a time when the trial court still had jurisdiction over the matter. The State failed to challenge the motion’s timeliness, thereby waiving any objection, and the trial court considered and ruled on the motion.

[People v. Sandifer, 2017 IL App \(1st\) 142740](#) The trial court erred in denying defendant’s motion to suppress his confession as involuntary. At the time of his interrogation, the defendant was in the hospital in significant pain from a broken ankle, on morphine and another opiate. Although not all confessions given under the influence of drugs are involuntary, in this case the Appellate Court reviewed defendant’s videotaped statement and found that he appeared barely conscious and in enormous pain during the interview. Under these circumstances, his waiver of **Miranda** warnings could not be deemed voluntary.

Although defendant failed to include this issue in his post-trial motion, the Appellate Court rejected the State’s forfeiture argument, citing [People v. Cregan, 2014 IL 113600](#), which holds that a constitutional issue raised in the trial court is preserved for review regardless of its absence from a post-trial motion. However, the court also found the improper admission of defendant’s custodial statement to be harmless error in light of overwhelming evidence that defendant killed his son.

[People v. Exson, 384 Ill.App.3d 794, 896 N.E.2d 844 \(1st Dist. 2008\)](#) Defendant did not forfeit a speedy trial claim although he failed to raise it in the post-trial motion. Defendant raised several objections in the trial court, and filed a motion to dismiss based on the claim. Because the trial court had ample opportunity to review the issue, and because the speedy trial statute implicates the constitutional right to a speedy trial, the court elected to reach the issue.

[People v. McCoy, 2016 IL App \(1st\) 130988](#) At defendant’s murder trial, the prosecution erred by cross-examining defendant with impeachment questions which it had neither the

intention nor the ability to prove. The court concluded that the error was preserved despite the fact that in the post-trial motion, defense counsel erroneously stated that the State's assertion occurred during closing argument rather than during cross-examination. A post-trial motion must make a sufficiently specific allegation to give the trial judge an adequate opportunity to correct the error. This standard was satisfied where at trial the only reference to defendant's alleged threats occurred during cross-examination.

People v. Almond, 2015 IL 113817 Defendant did not forfeit his Fourth Amendment issue by failing to include it in a post-trial motion. Constitutional issues that were previously raised at trial and could be raised later in a post-conviction petition are not subject to forfeiture on direct appeal simply because they were not included in a post-trial motion.

People v. Ellis, 309 Ill.App.3d 443, 722 N.E.2d 254 (4th Dist. 1999) Despite defendant's failure to file a post-trial motion, the court reversed the trial court's order refusing to appoint counsel for an indigent defendant. The court elected to review the issue due to defendant's argument that "the trial court forced him to proceed pro se and deprived him of a substantial right."

People v. Stevens, 297 Ill.App.3d 408, 696 N.E.2d 828 (1st Dist. 1998) Where the trial court admonished defendant that he was required to file a motion to withdraw his plea but failed to advise him that any issue not included in the motion would be forfeited, issues omitted from the written motion were not forfeited.

People v. Burnfield, 295 Ill.App.3d 256, 692 N.E.2d 412 (5th Dist. 1998) Where defendant filed a motion to suppress, an evidentiary hearing was held, and defense counsel made an appropriate objection at trial, the issue was not forfeited although it was omitted from the post-trial motion. The written motion to suppress and the resulting evidentiary hearing were sufficient to preserve the issue. See also, **People v. Cox**, 295 Ill.App.3d 666, 693 N.E.2d 483 (4th Dist. 1998) (although defendant failed to raise the denial of a motion to suppress in his post-trial motion, the forfeiture doctrine is inapplicable where defendant raises a constitutional issue that was argued at trial and which could be raised in a post-conviction petition).

People v. Maness, 184 Ill.App.3d 149, 539 N.E.2d 1368 (4th Dist. 1989) The court considered issue regarding improper introduction of other-crimes evidence, though defendant did not raise the issue in a post-trial motion. A reviewing court has discretion to consider an issue, notwithstanding defendant's failure to file a motion for new trial, where a litigant has in some manner brought the error to the circuit court's attention. Here, defendant objected to the admission of the evidence before trial and at trial, and the evidence, if erroneously admitted, could substantially prejudice defendant. See also, **People v. Dickerson**, 69 Ill.App.3d 825, 387 N.E.2d 806 (1st Dist. 1979) (court considered issue not included in post-trial motion where defendant presented the issue to the trial court in motion to suppress, and error would be prejudicial).

People v. Tucker, 183 Ill.App.3d 333, 539 N.E.2d 243 (2d Dist. 1989) Though the issue was not raised in the post-trial motion, the court considered (and rejected) defendant's claim that he did not understandingly waive a jury.

People v. Schultz, 173 Ill.App.3d 738, 527 N.E.2d 984 (1st Dist. 1988) Defendant filed a timely post-trial motion, which was merely pro forma pending a review of the record by newly hired appellate counsel. After the statutory time period had run, the defense filed a supplemental motion and motion in arrest of judgement. The State did not object to either the initial or supplemental motions, and the trial judge ruled on the merits. Under these circumstances, defendant did not forfeit the argument at issue.

§54-1(b)(4)

Issue Not Raised in the Trial Court; Issue Raised for the First Time on Direct Appeal; Issue Not Subject to Forfeiture

§54-1(b)(4)(a)

Issue Forfeited

Illinois Supreme Court

People v. Young, 2018 IL 122598 A claim for presentence custody credit under section 5-4.5-100 may be forfeited. In this case, defendant raised the issue for the first time on appeal from the denial of a successive post-conviction petition, and therefore the claim was forfeited. Unlike section 110-14, which contains language authorizing requests for *per diem* monetary credit at any time, section 5-4.5-100 does not contain similar language suggesting that the rules of procedural default do not apply. Also, while a motion to correct the mittimus may be made at any time, here defendant did not seek to correct the mittimus, which accurately reflected the trial court's judgment, but rather attacked the judgment itself. Nor could the issue be reached under Rule 615(b), which refers to the reviewing court's authority to reduce punishment imposed by the trial court. Here, the judgment at issue – the dismissal of the post-conviction petition – did not contain any punishment.

The court agreed to use its supervisory authority to remand the case for a hearing on whether defendant was entitled to additional days of sentencing credit.

People v. Hughes, 2015 IL 117242 Defendant, who was charged with first degree murder, moved to suppress statements which he made during police interrogations after he was brought from Michigan to Chicago. The motion alleged several grounds, including that: (1) defendant was not properly advised of his **Miranda** rights, (2) defendant was incapable of appreciating and understanding the full meaning of **Miranda** rights, (3) the statements were obtained during interrogations which continued after defendant exercised his right to silence and/or elected to consult with an attorney, (4) the statements were obtained through psychological, physical and mental coercion, and (5) the statements were involuntary.

At the hearing on the motion to suppress, trial counsel acknowledged the breadth of the motion to suppress and stated that the defense would proceed on two theories: (1) that defendant's hands had been handcuffed in a very uncomfortable position for the 90-minute drive to Chicago, and (2) that detectives questioned defendant on that drive without informing him of his **Miranda** rights and without making a video recording. Trial counsel stated, "I just want to give notice to counsel those are the grounds we will be proceeding on."

The trial court denied the motion to suppress, finding that the statements were not coerced and that the detectives testified credibly that they had given defendant **Miranda** warnings. Defendant's posttrial motion stated that the trial court erred by denying the motion to suppress, without any amplification.

On appeal, defendant raised several issues concerning his statements, including that

his statements were involuntary because he was 19 years old, had only a ninth grade education, had not done well in school, had little to no sleep at the time of the statement, was suffering from severe emotional distress due to the death of his grandfather, and was the victim of deceptive and coercive police conduct. Defendant also claimed that he was susceptible to suggestion due to substance abuse.

The Supreme Court held that the issues were waived because defendant had not presented them in the trial court.

Although the terms “forfeiture” and “waiver” have been used interchangeably, “waiver” is the voluntary relinquishment of a known right while “forfeiture” is the failure to comply with procedural requirements. Here, the claims which defendant raised on appeal, while not factually “hostile” to the claims raised in the trial court, were “almost wholly distinct” from the issues litigated at trial. Under these circumstances, the issues raised on appeal were not preserved.

The Supreme Court stressed that due to the differences between the issues raised in the trial court and on appeal, the trial court did not have an opportunity to consider and rule on the bulk of the challenges which defendant made on appeal. Likewise, the State did not have an opportunity to present evidence or argument concerning the challenges that were raised on appeal. Although a defendant need not present identical arguments in the trial court and on appeal, “almost entirely distinct” contentions are improper.

In a concurring opinion, Justices Burke, Thomas, and Kilbride noted that the majority failed to address defendant’s plain error argument. However, the concurrence concluded that plain error did not occur.

People v. Thompson, 2015 IL 118151 Defendant filed an untimely 2-1401 petition 17 years after his conviction and sentence. In his petition, defendant raised several issues challenging his representation at trial. The trial court denied the petition. On appeal, defendant abandoned the claims he raised in his petition and argued instead that the sentencing statute mandating natural life imprisonment (for murdering more than one person) was unconstitutional as applied to him since he was 19 years old at the time of the offense, had no criminal history, and impulsively committed the offense after years of abuse by his father.

Defendant argued that his as-applied constitutional challenge constituted a challenge to a void judgment. Since a voidness challenge can be raised at any time, defendant argued that his claim was excused from the two-year limitations period that ordinarily applies to 2-1401 petitions (**735 ILCS 5/2-1401(a), (c)**), and could be raised for the first time on appeal from the dismissal of his petition.

The Supreme Court disagreed. A voidness challenge to a final judgment under section 2-1401 is only available in two specific situations. First, a judgment is void where the court that entered the judgment lacked personal or subject matter jurisdiction. Second, a judgment is void when it based on a facially unconstitutional statute that is void ab initio. (A third type of voidness claim, where a sentence does not conform to statutory requirements, was recently abolished in **People v. Castleberry, 2015 IL 116916**.)

Defendant did not rely on either of the two situations where a voidness challenge could be made. He did not argue that the court lacked jurisdiction or that the sentence mandating natural life was facially unconstitutional. Defendant’s claim was thus subject to the typical procedural bars of section 2-1401 and could not be raised for the first time on appeal from the dismissal of an untimely 2-1401 petition.

The court specifically rejected defendant’s argument that an as-applied constitutional challenge should be treated the same as a facial challenge and be equally exempt from ordinary forfeiture rules. A facial challenge requires a showing that the statute is

unconstitutional under any set of facts. An as-applied challenge, by contrast, only applies to the facts and circumstances of the particular case. In the latter case, it is paramount that the record be sufficiently developed in the trial court to establish the necessary facts for appellate review.

People v. Wells, 182 Ill.2d 471, 696 N.E.2d 303 (1998) The State forfeited argument regarding the applicability of the "laches" doctrine where it did not assert the argument in the lower courts.

People v. Stewart, 104 Ill.2d 463, 473 N.E.2d 1227 (1984) Defendant forfeited issue regarding the violation of his right to remain silent where there was no objection during trial or in the post-trial motion. See also, **People v. James**, 304 Ill.App.3d 52, 710 N.E.2d 484 (2d Dist. 1999) (defendant waived jury selection issue by failing to object to the prosecutor's inquiry of prospective juror and including the issue in the post-trial motion).

People v. Roberts, 75 Ill.2d 1, 387 N.E.2d 331 (1979) Defendant forfeited challenge to a defective attempt murder instruction. See also, **People v. Tannenbaum**, 82 Ill.2d 177, 415 N.E.2d 1027 (1980) (defective theft instruction); **People v. Armstrong**, 183 Ill.2d 130, 700 N.E.2d 960 (1998) (defendant forfeited issue regarding propriety of instructions at eligibility phase of a death hearing by neither raising an adequate objection nor including the issue in his post-trial motion); **People v. Washington**, 127 Ill.App.3d 365, 468 N.E.2d 1285 (1st Dist. 1984) (defendant forfeited issue concerning the failure to instruct the jury on self-defense); **People v. Pecka**, 125 Ill.App.3d 570, 466 N.E.2d 404 (5th Dist. 1984) (failure to instruct on defense of voluntary intoxication); **People v. Turner**, 143 Ill.App.3d 417, 493 N.E.2d 38 (1st Dist. 1986) (failure to instruct on lesser offense)).

People v. Fleming, 50 Ill.2d 141, 277 N.E.2d 872 (1971) The defense of entrapment cannot be raised for the first time on appeal.

People v. LeMay, 35 Ill.2d 208, 220 N.E.2d 184 (1966) Alleged error concerning State's instruction on insanity was forfeited; defense attorney withdrew objections at instruction conference, and issue was not in post-trial motion.

People v. Taylor, 32 Ill.2d 165, 204 N.E.2d 734 (1965) Defendant forfeited claim that he was denied a speedy trial where the issue was not presented to the trial court. See also, **People v. Harris**, 33 Ill.2d 389, 211 N.E.2d 693 (1965) (the Court refused to consider an issue involving a search incident to an unlawful arrest; issue was not raised before the trial court).

Illinois Appellate Court

People v. Presley, 2023 IL App (5th) 230970 The appellate court rejected the State's motion to dismiss defendant's appeal from a pre-trial detention order. The State argued that the appellate court lacked jurisdiction because defendant's notice of appeal failed to specify the relief requested and grounds for relief, as required by Rule 604(h)(2). The court held that despite these deficiencies, the notice of appeal clearly identified the trial court's pre-trial detention order as the basis of the appeal. Rules 604(a)(1) and (h)(1) confer jurisdiction in the appellate court when an appeal is taken from such an order. Rule 606(a) states that, "Appeals shall be perfected by filing a notice of appeal with the clerk of the trial court. *** No step in

the perfection of the appeal other than the filing of the notice of the appeal is jurisdictional.” Thus, the failure to include relief requested or grounds for relief in a notice of appeal is not a jurisdictional defect.

A majority of the court held, however, that defendant’s claim was forfeited. Defendant argued that the State’s detention petition was untimely because the Pre-Trial Fairness Act requires the State to file a petition to deny release at the defendant’s first appearance or shortly thereafter, and here defendant was arrested months before the PFA went into effect. Though this was clear and obvious error under the plain language of the statute, it was not second-prong plain error. Defendant attempted to compare the issue to one of sentencing error, but while both involve the “fundamental right to liberty,” the comparison fell short. In the pre-trial context, a probable cause hearing protects the federal constitutional right to liberty. Absent a finding of no probable cause, defendant’s detention could not be a constitutional violation. For purposes of the Illinois Constitution, a detention hearing sufficiently protects the right to liberty. The hearing in this case established that defendant had several prior convictions, some while on bond, and that he planned and attempted to escape the jurisdiction. Thus, his pre-trial detention comported with due process despite the fact that the State’s petition was untimely, and no plain error occurred.

A dissenting justice would have found the error sufficiently impacted the right to liberty so as to be reached under the second prong of the plain error rule.

People v. Meeks, 2020 IL App (2d) 180263 When defendant was arrested in 2009, he already had criminal charges pending in a 2008 case. The State initially elected to proceed to trial first on the 2008 case, but on the trial date, the State nolle prossed the 2008 charges because it could not obtain a key witness. Defendant subsequently sought, unsuccessfully, to dismiss the 2009 charges on speedy trial grounds.

Under **725 ILCS 5/103-5(e)**, when the State nol-prossed the 2008 case, it had 120 days to bring defendant to trial on the 2009 charges. Within that 120 days, however, defendant was released from custody, at which point he filed a 160-day speedy trial demand pursuant to Section 103-5(b). Defendant’s trial began on the 160th day, and was therefore timely. The Appellate Court refused to consider defendant’s argument, raised for the first time on appeal, that the court also should have counted defendant’s time in custody before the State made its election on the 2008 case, which would have put his trial outside of the 160-day term. Arguments raised for the first time on appeal are forfeited.

In re N.A., 2018 IL App (1st) 181332 On appeal, defendant challenged the sufficiency of the identification evidence, specifically arguing that the eyewitness’s identification was unreliable. In evaluating this challenge, the appellate court refused to consider articles on “weapon focus” and “cross-racial identifications” because those articles had not been presented to the trial court and arguments based on them were therefore forfeited.

The appellate court agreed that the photographic lineup conducted at the eyewitness’s residence did not comply with the lineup statute because it was not video or audio recorded. Although the lineup statute allows a witness to refuse to be video-recorded, it does not allow refusal of audio recording. But, the error was harmless where it had no effect on the reliability of the identification, there was no motion to suppress the identification, and the court was presumed to have considered the lack of recording in assessing the eyewitness’s reliability at defendant’s bench trial.

People v. Bensen, 2017 Ill App (2d) 150085 The court declined to consider the State’s

argument that defendant committed aggravated identity theft where she paid for personal items charged to her company credit card by preparing checks drawn on her employer's account and presenting those checks for her employer to sign. The court decided that it need not reach the issue where the State did not present the theory at trial, but instead argued that defendant committed identity theft by exceeding her authority when she used the company credit card for personal purchases. Due process is violated where a reviewing court considers an alternative argument of guilt which the State raises for the first time on appeal.

Defendant's conviction for aggravated identity theft was reversed. The cause was remanded for the trial court to enter convictions on counts which had merged with the reversed conviction.

People v. Betance-Lopez, 2015 IL App (2d) 130521 Defendant was convicted of two counts of predatory criminal sexual assault of a child and one count of aggravated criminal sexual abuse. At sentencing, the trial court declined to impose a sentence for aggravated criminal sexual abuse, finding that the conviction merged with predatory criminal sexual assault of a child. On appeal, the State argued for the first time that the trial court incorrectly concluded that aggravated criminal sexual abuse was a less-included offense of predatory criminal sexual assault of a child and asked the court to remand the cause for sentencing on the former count.

The court acknowledged that where a criminal defendant appeals a conviction, the reviewing court has authority to grant the State's request to remand for imposition of a sentence on a conviction that was improperly vacated under one-act, one-crime principles. However, the court concluded that defendant was prejudiced by the State's failure to raise the issue in the trial court because he would be subject to mandatory consecutive sentencing if the State's request was granted. Noting that defendant might have decided to not appeal had the State raised the issue below, the court declined to overlook the State's waiver.

People v. Coleman, 2013 IL App (1st) 130030 The State forfeited an alternative argument which it made in the Supreme Court where it failed to raise the argument in the trial court and expressly stated in that court that it was taking a more limited position.

People v. Hall, 2011 IL App (2d) 100262 Under **625 ILCS 5/11-501.2(a)(1)**, blood alcohol test results are admissible in DUI prosecutions only if the tests were performed according to standards promulgated by the State Police. The court noted that the standards promulgated under §11-51.2 apply only to DUI offenses; at trials for other offenses, blood alcohol test results are to be received in evidence under the usual standards governing the admission of evidence.

However, the court refused to overrule the trial court's order excluding the evidence on the non-DUI counts against the defendant. The court concluded that the issue was forfeited because the State failed to raise it until appeal.

People v. Haywood, 407 Ill.App.3d 540, 944 N.E.2d 846 (2d Dist. 2011) The State waived its argument, which it raised for the first time on appeal, that a traffic stop was justified by the possibility that the officer believed defendant was committing a violation by operating a vehicle with a malfunctioning turn signal. Generally, a party may not raise an issue on appeal which was not raised in the trial court. This rule applies to the State where it appeals the trial court's decision in favor of the defendant.

Allowing the State to present an argument for the first time on appeal prevents the defendant from presenting evidence which could have a bearing on the disposition. Here, had

the State raised its “malfunction” theory in the trial court, defendant could have presented evidence and argument that a reasonable officer would not have believed that the turn signal was malfunctioning.

People v. Woodall, 333 Ill.App.3d 1146, 777 N.E.2d 1014 (5th Dist. 2002) Although attorneys employed by the State's Attorney Appellate Prosecutor's office were not properly appointed to prosecute defendant, the issue was forfeited where defendant failed to object in the trial court or show that he was prejudiced. But see, **People v. Ward**, 326 Ill.App.3d 897, 762 N.E.2d 685 (5th Dist. 2002).

People v. Centeno, 333 Ill.App.3d 604, 777 N.E.2d 529 (1st Dist. 2002) Where the State never asserted in the trial court that police had probable cause to arrest defendant before his confession, the court refused to consider that argument when raised in oral argument. "The general rule that a prevailing party may raise, in support of a judgment, any reason appearing in the record does not apply when the new theory advanced is inconsistent with the position advanced below. . . . Because the State's probable cause argument is directly at odds with its position taken at the pretrial hearing, it will not be considered."

People v. Martinez, 317 Ill.App.3d 1040, 740 N.E.2d 1185 (1st Dist. 2000) On appeal, the State may not assert explanations for its use of peremptories if those explanations were not raised in the trial court. Thus, the State's argument that readers of a particular publication might be predisposed to acquit could not be considered on appeal.

Furthermore, where at trial the State did not respond to a defense argument, its silence could be reasonably viewed as indicating agreement.

People v. Capuzi, 308 Ill.App.3d 425, 720 N.E.2d 662 (2d Dist. 1999) By failing to raise the issues in the trial court, the State forfeited arguments that the good faith exception applied and that defendants lacked standing to raise Fourth Amendment challenges. See also, **People v. Damian**, 299 Ill.App.3d 489, 701 N.E.2d 171 (1st Dist. 1998) (State forfeited any argument that the evidence was admissible under the "good-faith exception" where it failed to raise that argument during the hearing on the motion to suppress, in the motion to reconsider, during oral argument on the motion to reconsider, or in the notice of appeal; "[t]he failure of the prosecution to argue the good-faith exception before the trial judge deprived the judge of the opportunity to address such an argument or conduct any necessary hearing"); **People v. Thompson**, 337 Ill.App.3d 849, 787 N.E.2d 858 (4th Dist. 2003) (in appealing the trial court's ruling on a motion to suppress, the State forfeited its argument that officers had a sufficient basis to make a **Terry** stop where it failed to assert that basis at the suppression hearing; the trial judge had no opportunity to consider the argument and the defendants had no opportunity to rebut it).

People v. Walker, 22 Ill.App.3d 711, 318 N.E.2d 111 (1st Dist. 1974) Defendant may not urge a different theory on appeal than that advanced at trial.

People v. Spencer, 7 Ill.App.3d 1017, 288 N.E.2d 612 (1st Dist. 1972) Defendant forfeited contention that trial judge should have recused himself because it was not raised at trial. Appellate court reviewed the entire record and found no prejudice.

§54-1(b)(4)(b) Issue Not Forfeited

Illinois Supreme Court

People v. Marshall, 242 Ill.2d 285, 950 N.E.2d 688 (2011) An order entered by a court exceeding its statutory authority is void and is not subject to forfeiture. Because the court exceeded its statutory authority in ordering defendant to pay the DNA fee where his DNA was already in the database pursuant to an earlier conviction, the order assessing the fee was void.

People v. Wagener, 196 Ill.2d 269, 752 N.E.2d 430 (2001) Defendant did not forfeit an **Apprendi** challenge, for purposes of direct appeal, although he failed to raise the issue at trial. Not only was **Apprendi** decided more than two years after trial, but a party may challenge the constitutionality of a statute at any time. Compare **People v. Jackson**, 199 Ill.2d 286, 769 N.E.2d 21 (2002) (because a voluntary guilty plea waives the right to require the State to prove the elements of the crime beyond a reasonable doubt before the jury, a defendant who pleads guilty after being informed that an extended term is possible waives any **Apprendi** challenge to that sentence); **Hill v. Cowan**, 202 Ill.2d 151, 781 N.E.2d 1065 (2002) (same).

People v. Williams, 188 Ill.2d 293, 721 N.E.2d 524 (1999) Defendant did not forfeit his double jeopardy argument by failing to raise it in response to the trial court's denial of the motion for a directed verdict or in the post-trial motion. The "goal of maintaining a sound body of precedent may override considerations of waiver"; here, it was appropriate to relax the forfeiture rule.

People v. Woodard, 175 Ill.2d 435, 677 N.E.2d 935 (1997) Defendant did not forfeit \$5.00 per day credit against fine for pretrial custody though he failed to request the credit in the trial court.

People v. Bryant, 128 Ill.2d 448, 539 N.E.2d 1221 (1990) A "constitutional challenge to a statute can be raised at any time." Thus, defendant could challenge the statute under which he was convicted though he did not raise the issue in the trial court. **People v. Christy**, 139 Ill.2d 172, 564 N.E.2d 770 (1990) (defendant did not forfeit argument regarding the constitutionality of the penalties for armed violence based on kidnapping despite his failure to present the issue to the trial court); **People v. Wooters**, 188 Ill.2d 500, 722 N.E.2d 1102 (1999) (although defendant raised a single-subject challenge for the first time on appeal, the State conceded that "the constitutional dimension of the question permits this court to address" the argument); **People v. Ferneti**, 104 Ill.2d 19, 470 N.E.2d 501 (1984). But see, **People v. Starnes**, 273 Ill.App.3d 911, 653 N.E.2d 4 (1st Dist. 1995) (**Bryant** rule applies only to statutes under which defendant was convicted, not to statutes involving collateral matters).

Illinois Appellate Court

People v. Bailey, 2021 IL App (1st) 190439 The requirement that a defendant object and include an alleged error in a written post-trial motion does not apply where the claim is that the trial court failed to properly admonish a defendant before accepting an admission to

a probation violation. Such a claim is not subject to forfeiture. It would be unfair to require a defendant to ensure the accuracy and completeness of his own admonitions.

Here, the trial court failed to admonish defendant about the applicable sentencing range and failed to tell defendant that he would be subjected to a two-year term of mandatory supervised release, when accepting his admission to a probation violation in exchange for a 10-year prison sentence. This failed to substantially comply with Supreme Court Rule 402A. Relying on **People v. Whitfield**, 217 Ill. 2d 177 (2005), the appellate court vacated the sentence and remanded to the circuit court for defendant to either withdraw his admission or accept a sentence of eight years of imprisonment plus two years of mandatory supervised release.

In re T.B., 2020 IL App (1st) 191041 The defendant did not forfeit his arguments about the suggestiveness of the show-up identification, made as part of his attack on the sufficiency of the evidence. A defendant does not have to file a motion to suppress a show-up in the trial court before arguing on appeal that it was too suggestive to support the conviction. And here, the show-up was particularly suggestive where the complainants viewed the defendant together as he was surrounded by police officers. Nevertheless, the evidence was sufficient where the complainants had ample opportunity to observe the offender, and made their identification within minutes of the offense.

People v. Wise, 2019 IL App (2d) 160611 The State argued that defendant failed to preserve his challenge to the search warrant. The State reasoned that on appeal, defendant based his challenge on the informant's failure to testify before the issuing judge, while below he argued the informant lacked reliability. The Appellate Court found the issue was not forfeited, as the two claims were sufficiently related. The State also alleged defendant forfeited the claim because his attorney failed to raise it in a post-trial motion, he did not obtain a ruling on his *pro se* post-trial motion which did raise the issue, and he lacked authority to file a *pro se* motion. The Appellate Court decided not to address this argument, because defendant's appellate brief also raised ineffective assistance of counsel. If defendant could establish his challenge to the search warrant was meritorious, counsel would be ineffective and the matter of forfeiture would be moot.

People v. Mullen, 2018 IL App (1st) 152306 The trial judge's inquiry of the public defender as to how many times he had appeared in court on defendant's case was inadequate to form the basis for assessment of a public defender fee, consistent with **People v. Hardman**, 2017 IL 121453. The inquiry was sufficient to constitute "some sort of hearing," however, such that remand for a new public defender fee hearing was permitted.

People v. Ramirez, 2017 IL App (1st) 130022-B On direct appeal, defendant alleged that the sentencing court considered improper factors. The claim was not included in the post-trial motion, and while appellate counsel raised plain error, she did so in a three-sentence argument which did not specify which prong applied. The Appellate Court found both the plain error argument, and the underlying sentencing issue, forfeited. On rehearing, a different appellate attorney asked the court to find the original appellate attorney ineffective and to consider the sentencing issue on its merits. The Appellate Court refused, finding the ineffectiveness claim forfeited.

The Illinois Supreme Court remanded in a supervisory order issued in light of **People v. Veach**, 2017 IL 120649. The Appellate Court found **Veach** inapplicable, but nevertheless

decided to reach the issue of appellate counsel's ineffectiveness, citing **Veatch's** admonishment to consider ineffectiveness claims when the record permits, and the principle that waiver is a limitation on the parties, not the courts.

Although the Appellate Court found appellate counsel's failure to include a complete plain error argument constituted deficient performance, it did not find prejudice. The sentencing court did not consider improper factors. First, its "passing reference" to defendant's use of a gun, without more, did not arise to improper consideration of facts inherent in the offense. Second, despite defendant's denial that he was a gang member, the sentencing court properly cited defendant's gang involvement in aggravation, where he fired a gun from a crowd of people flashing gang signs.

People v. Wood, 2014 IL App (1st) 121408 Defendant argued on appeal that trial counsel provided ineffective assistance by requesting a finding of guilty but mentally ill without first presenting an insanity defense as required by statute, and by failing to call his expert to testify that defendant suffered from paranoid schizophrenia.

The State argued that defendant forfeited this particular claim of ineffective assistance by failing to raise it in his pro se post-trial motion which contained other claims of ineffective assistance. The Appellate Court rejected the State's argument, noting that the State did not "even acknowledge the obvious" problem with its argument, which would have required defense counsel to object to his own ineffectiveness. Carried to its logical extreme, the State's argument would mean that all ineffectiveness claims would be forfeited, since counsel would seldom if ever object to his own representation.

The court further questioned the entire premise of the State's argument. According to the State, if a defendant raised some claims of ineffectiveness in a pro se motion, other claims of ineffectiveness would be forfeited; if a defendant raised no claims of ineffectiveness, however, he would not have forfeited any ineffectiveness claims. The State cited no authority for its proposition, and the court noted that adopting such a rule would impose undue hardship on defendants who believe they have received ineffective assistance but cannot retain new counsel to present their claims.

The court also noted that ineffective assistance claims and the plain-error rule overlap because a successful claim of ineffective assistance would necessarily satisfy the second prong of the plain-error rule since ineffective assistance of counsel is considered a substantial impairment of fundamental rights.

People v. Despenza, 318 Ill.App.3d 1155, 744 N.E.2d 912 (3d Dist. 2001) The court considered an issue regarding trial court's authority to order the DOC to withhold 50% of defendant's monthly income to pay court costs despite defendant's failure to raise it at trial or in the post-trial motion.

People v. Ousley, 297 Ill.App.3d 758, 697 N.E.2d 926 (3d Dist. 1998) Although failing to object to a jury instruction forfeits any error concerning the propriety of that instruction, it does not forfeit the requirement of legally consistent verdicts. Thus, the court reversed verdicts acquitting defendant of a predicate offense but convicting him of a compound offense (because they are legally inconsistent), notwithstanding defendant's failure to object.

In re E.C., 297 Ill.App.3d 177, 696 N.E.2d 846 (4th Dist. 1998) Where the trial court committed a juvenile to DOC for a period in excess of that statutorily authorized, the unauthorized portion was void and could be challenged any time. Thus, counsel did not forfeit the issue by failing to raise it in the trial court. See also, **People v. Rankin**, 297 Ill.App.3d

818, 697 N.E.2d 1246 (4th Dist. 1998); **People v. Peacock**, 359 Ill.App.3d 326, 833 N.E.2d 396 (4th Dist. 2005).

People v. Parker, 288 Ill.App.3d 417, 680 N.E.2d 505 (4th Dist. 1997) Defense counsel's failure to raise his own ineffectiveness does not constitute forfeiture.

People v. King, 151 Ill.App.3d 644, 503 N.E.2d 384 (3d Dist. 1987) Defendant may raise a reasonable doubt argument on appeal though the issue was not raised in the trial court. See also, **People v. Zizzo**, 301 Ill.App.3d 481, 703 N.E.2d 546 (2d Dist. 1998); **People v. Gutierrez**, 105 Ill.App.3d 1059, 433 N.E.2d 361 (2d Dist. 1982); **People v. Depper**, 256 Ill.App.3d 179, 629 N.E.2d 699 (4th Dist. 1994).

§54-1(b)(5)

Objection on a Specific Ground; Objection on an Inconsistent or Different Ground

§54-1(b)(5)(a)

Generally

Illinois Supreme Court

People v. Caballero, 206 Ill.2d 65, 794 N.E.2d 251 (2002) The Court discussed the doctrine of judicial estoppel, which holds that a party who takes a particular factual position in one proceeding is estopped from assuming a contrary position in subsequent proceedings.

People v. Eyler, 133 Ill.2d 173, 549 N.E.2d 268 (1989) An objection on a specific ground waives all grounds not specified. See also, **People v. Enis**, 139 Ill.2d 264, 564 N.E.2d 1155 (1990); **People v. Canaday**, 49 Ill.2d 416, 275 N.E.2d 356 (1971); **People v. Stewart**, 104 Ill.2d 463, 473 N.E.2d 1227 (1984); **People v. Harris**, 146 Ill.App.3d 632, 497 N.E.2d 177 (2d Dist. 1986).

Illinois Appellate Court

People v. Ealy, 2015 IL App (2d) 131106 In a jury trial for first-degree murder, defendant adequately preserved the issue of the admissibility of his refusal to consent to DNA testing where he repeatedly argued in the trial court that the probative value of the evidence was substantially outweighed by the prejudicial effect. Although an issue is preserved for appellate review only where there is an objection at trial and the issue is included in the post-trial motion, the issue raised on appeal need not be identical to the objection raised at trial. Instead, a claim is preserved when it is clear that the trial court had an opportunity to rule on essentially the same issue.

People v. Mandarino, 2013 IL App (1st) 111772 Defendant, a former police officer, was prosecuted for aggravated battery after he beat a motorist with a collapsible baton during a traffic stop. On appeal, defendant argued that the trial erred by admitting lay opinion that defendant's use of force against the motorist was unreasonable and unnecessary. The Appellate Court concluded that defendant forfeited the issue where he did not argue at trial or in the post-trial motion that the testimony was inadmissible lay opinion. Although trial counsel raised other objections, appellate arguments that do not correspond to objections raised at trial are forfeited.

Even if the lay opinion was improperly introduced, the plain error rule did not apply. The court found that the evidence was not closely balanced where a video recording of the incident supported the trial court's finding that defendant's conduct was "unprovoked, unnecessary, and totally unacceptable." The video showed that the complainant did not threaten or move toward defendant or make any movement suggesting he was attempting to escape. At most, the only "aggressive behavior" displayed by the complainant was swearing at the defendant during a traffic stop, "something that police officers deal with often in their careers."

§54-1(b)(5)(b) **Issue Forfeited**

Illinois Supreme Court

People v. Hughes, 2015 IL 117242 At a hearing on a motion to suppress, trial counsel stated that the defense would proceed on two theories: (1) that defendant's hands had been handcuffed in a very uncomfortable position for the 90-minute drive to Chicago, and (2) that detectives questioned defendant on that drive without informing him of his **Miranda** rights and without making a video recording. Trial counsel stated, "I just want to give notice to counsel those are the grounds we will be proceeding on."

The trial court denied the motion to suppress, finding that the statements were not coerced and that the detectives testified credibly that they had given defendant **Miranda** warnings. Defendant's posttrial motion stated that the trial court erred by denying the motion to suppress, without any amplification.

On appeal, defendant argued his statements were involuntary because he was 19 years old, had only a ninth grade education, had not done well in school, had little to no sleep at the time of the statement, was suffering from severe emotional distress due to the death of his grandfather, and was the victim of deceptive and coercive police conduct. Defendant also claimed that he was susceptible to suggestion due to substance abuse. The Supreme Court held that the issues were waived because defendant had not presented them in the trial court. The claims on appeal, while not factually "hostile" to the claims raised in the trial court, were "almost wholly distinct" from the issues litigated at trial. Under these circumstances, the issues raised on appeal were not preserved. Due to the differences between the issues raised in the trial court and on appeal, the trial court did not have an opportunity to consider and rule on the bulk of the challenges which defendant made on appeal. Likewise, the State did not have an opportunity to present evidence or argument concerning the challenges that were raised on appeal. Although a defendant need not present identical arguments in the trial court and on appeal, "almost entirely distinct" contentions are improper.

People v. Eyler, 133 Ill.2d 173, 549 N.E.2d 268 (1989) Defendant forfeited review of his argument regarding the improper introduction of "opinion" evidence, where defendant objected at trial on the ground of relevancy. See also, **People v. Killebrew**, 55 Ill.2d 337, 303 N.E.2d 377 (1973); **People v. Harp**, 193 Ill.App.3d 838, 550 N.E.2d 1163 (4th Dist. 1990).

People v. O'Neal, 104 Ill.2d 399, 472 N.E.2d 441 (1984) The State could not urge on appeal a ground in support of the trial court's refusal to give a certain defense tendered instruction, where at trial the State had relied on a different ground. See also, **People v. Franklin**, 115 Ill.2d 328, 504 N.E.2d 80 (1987).

Illinois Appellate Court

People v. Hernandez-Chirinos, 2024 IL App (2d) 230125 Defendant was convicted of predatory criminal sexual assault and abuse of his 12 year-old stepdaughter. The complainant made an outcry against defendant to her mother, who brought her to a hospital, where it was discovered she was pregnant. In her initial interview with a child advocate, the complainant made several allegations of abuse against defendant. But DNA testing soon revealed the father of complainant's child was her stepbrother, not her stepfather. In a second interview, the complainant alleged her stepbrother sexually abused her as well, and that she did not reveal that abuse in the first interview because she feared her stepbrother and did not want to upset her mother.

The parties agreed that the rape shield statute did not prevent the admission of evidence of the stepbrother's abuse, nor would it prevent the defense from cross-examining the complainant about her omission of this allegation from her initial interview. But the trial court denied the defendant's argument that the completeness doctrine required the State to publish the recording of the second interview after the first interview.

At trial, the jury heard the initial interview, the complainant's testimony about the sexual abuse by both her stepfather and stepbrother, various other outcry statements to friends, and a stipulation to the stepbrother's arrest for predatory criminal sexual assault of the complainant. The defense cross-examined the complainant about her omissions, inconsistencies, and whether she blamed defendant only because she feared her stepbrother or upsetting her mother. After hearing this evidence the jury convicted defendant of all counts.

On appeal, defendant argued that the second interview should have been played for the jury pursuant to the completeness doctrine and **Illinois Supreme Court Rule 106**, and that counsel was ineffective for failing to play it during the defense case-in-chief. The appellate court first highlighted the distinction between the common law completeness doctrine and **Rule 106**, noting that defendant's objection below never mentioned **Rule 106**. Under **Rule 106**, a party may seek introduction of any written or recorded statement that "ought in fairness" be considered, regardless of when it was made. Under the common law completeness doctrine, however, the writings or recordings must have been made at the same time. Because defendant's motion included only the common law grounds, he forfeited a **Rule 106** objection. Because the statement defendant sought to admit was made a month after the initial statement, the common law completeness doctrine does not apply.

Regardless, the appellate court would not find plain error with regard to **Rule 106**, because counsel could have played the recording in the defense case-in-chief. The trial court's denial of defendant's motion to publish the statement pertained only to the State's case-in-chief.

Further, counsel was not ineffective for failing to introduce the statement during the defense case-in-chief because the jury had already heard ample evidence about the stepbrother's abuse and the complainant's initial failure to disclose that abuse. The jury would have fully understood the allegations against the stepbrother, and the potential implications for the complainant's credibility. In light of this, defense counsel could have strategically determined that playing the recording would have minimal probative value and only serve to make the complainant more sympathetic in the eyes of the jury.

People v. Tolliver, 2022 IL App (2d) 210080 Defendant was convicted of armed habitual criminal after an officer searched his car and found a gun. The officer testified that he

observed defendant make a u-turn, pull into a gas station for a few minutes, then pull out and park at a bar next door. Defendant went into the bar for several minutes. The officer tried to run the registration numbers from the temporary rear license plate, but it was difficult to read. Eventually he ran the numbers successfully and found the car registered to a female. When defendant left the bar, the officer approached, spoke with defendant, learned his license was revoked, and arrested him. The officer then ordered a K-9 unit, searched the car, and found a gun.

Defendant moved to suppress and the trial court denied the motion. On appeal, defendant argued that the motion to suppress should have been granted because the officer lacked probable cause. Illinois law requires all vehicles to have a legible license plate, but defendant argued his plate must have been legible because the officer was able to successfully run the numbers. The appellate court affirmed, finding sufficient cause to believe defendant failed to comply with the statute's requirement that his car have a "clearly legible" registration. The officer testified defendant's plate was hard to read, and he tried multiple times to run the plate numbers before doing so successfully.

Regardless, no seizure occurred in this case until the officer learned of the revoked license. Defendant stopped his car of his own volition, and the officer's act of approaching him and asking him about his plate and license was a consensual encounter during which a reasonable person would have felt free to leave.

Defendant also argued that the officers prolonged the stop by searching the vehicle after he was already in custody and the car was legally parked in the bar parking lot. Defendant did not raise this issue below, however, so the issue was forfeited, and defendant did not ask for plain error review.

People v. Scott, 2019 IL App (1st) 163022 Defendant forfeited his chain of custody argument in a controlled substance case. At trial, defendant moved to bar the admission of the drug evidence because the recovering officer testified that the heroin weighed 0.6 grams while the forensic chemist testified that it weighed 1.09 grams. The defendant did not, however, allege an insufficient chain of custody at trial, and therefore forfeited that argument on appeal. Regardless, the Appellate Court found that the officer and chemist testified to the storage and inventorying of the evidence in sufficient detail to satisfy the State's burden of showing a chain of custody, disavowing **People v. Howard**, 387 Ill. App. 3d 997 (2d Dist. 2009).

People v. Abata, 165 Ill.App.3d 184, 518 N.E.2d 1065 (2d Dist. 1988) Defendant was precluded from raising an additional ground for the suppression of evidence where that ground was not included in his motion to suppress.

People v. Harris, 146 Ill.App.3d 632, 497 N.E.2d 177 (2d Dist. 1986) Where defendant objected to a jury instruction on a specific ground, he forfeited objection on a different ground.

People v. Cowper, 145 Ill.App.3d 1074, 496 N.E.2d 729 (2d Dist. 1986) Where defendant objected to evidence on the ground of hearsay, he waived objection on other grounds. See also, **People v. Gill**, 169 Ill.App.3d 1049, 523 N.E.2d 1239 (1st Dist. 1988).

§54-1(b)(5)(c) **Issue Not Forfeited**

Illinois Supreme Court

People v. Brand, 2021 IL 125945 Defendant did not forfeit his challenge to the admissibility of two Facebook Messenger messages on the basis that they were not properly authenticated. Defendant's general objection to one message and relevance and foundation objections to the other, as well as his argument in the post-trial motion that the court erred in admitting the messages, adequately preserved the issue for review. The trial court had the opportunity to consider the same essential claim that was raised on appeal.

People v. Hernandez, 2016 IL 118672 Judicial estoppel is an equitable doctrine used by the court at its discretion to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment. Judicial estoppel applies when litigants take a factual position, benefit from that position, then take a contrary factual position in a later proceeding. The core concern in judicial estoppel is that a party takes factually inconsistent positions.

Defendant argued that the State was judicially estopped from arguing on appeal that armed robbery with a dangerous weapon did not have the identical elements as armed violence with a category III weapon, which includes bludgeons, since it charged defendant at trial with committing armed robbery with a bludgeon.

The Supreme Court held that judicial estoppel did not apply because while the State took a factual position at trial by arguing that the weapon was a bludgeon, it took a legal position on appeal when it argued that the two statutes did not have identical elements. The State did not take factually inconsistent positions at trial and on appeal and hence was not estopped.

People v. Mohr, 228 Ill.2d 53, 885 N.E.2d 1019 (2008) Defendant did not forfeit argument regarding jury instruction though he objected on different grounds at the instruction conference and in the post-trial motion. The Court did not need to decide how closely objections must be related to preserve an issue, because in this case the objections are "clearly close enough."

People v. Heider, 231 Ill.2d 1, 896 N.E.2d 239 (2008) Defendant did not forfeit the issue whether the trial court improperly considered mental retardation as an aggravating factor. In his motion to reconsider the sentence, defendant raised an issue that was not "completely different" than the issue raised on appeal, and the trial court had an opportunity to review the "same essential claim."

Illinois Appellate Court

People v. Brand, 2020 IL App (1st) 171728 Defendant did not forfeit his argument that incriminating Facebook messages were insufficiently authenticated for admission at trial. The defense objected to the evidence on relevance and foundation grounds, and included the issue in a post-trial motion. This sufficiently alerted the trial court to the potential problem of insufficient authentication.

Substantively, however, the evidence was admissible. Social media content should be treated as documentary evidence and therefore must be authenticated for admission at trial. Authentication occurs when the State establishes the source of the message or post, which can be accomplished in a variety of ways. Here, the complainant testified that she received threats from a Facebook account that used a name other than defendant's, but she also testified that she knew the account to be defendant's, because defendant had previously used

the account to contact complainant. Moreover, the message contained information only the defendant would have known. This testimony was sufficient to authenticate the messages.

People v. Wise, 2019 IL App (2d) 160611 The State argued that defendant failed to preserve his challenge to the search warrant. The State reasoned that on appeal, defendant based his challenge on the informant's failure to testify before the issuing judge, while below he argued the informant lacked reliability. The Appellate Court found the issue was not forfeited, as the two claims were sufficiently related. The State also alleged defendant forfeited the claim because his attorney failed to raise it in a post-trial motion, he did not obtain a ruling on his *pro se* post-trial motion which did raise the issue, and he lacked authority to file a *pro se* motion. The Appellate Court decided not to address this argument, because defendant's appellate brief also raised ineffective assistance of counsel. If defendant could establish his challenge to the search warrant was meritorious, counsel would be ineffective and the matter of forfeiture would be moot.

People v. Ealy, 2015 IL App (2d) 131106 In a jury trial for first-degree murder, defendant adequately preserved the issue of the admissibility of his refusal to consent to DNA testing where he repeatedly argued in the trial court that the probative value of the evidence was substantially outweighed by the prejudicial effect. Although an issue is preserved for appellate review only where there is an objection at trial and the issue is included in the post-trial motion, the issue raised on appeal need not be identical to the objection raised at trial. Instead, a claim is preserved when it is clear that the trial court had an opportunity to rule on essentially the same issue.

People v. Harris, 2014 IL App (2d) 120990 The specific grounds for defendant's objection (to the admission of a logbook showing that a Breathalyzer machine had been certified as accurate) was apparent from the context of the proceedings. When the State first attempted to enter the logbook into evidence, defense counsel objected on hearsay grounds. (A logbook is hearsay and thus would be admissible only where the State lays a proper foundation for its admission as an exception to the hearsay rule.) The court sustained the hearsay objection and the State attempted to lay a proper foundation.

Counsel again objected on the grounds that the logbook was not a business record. The court overruled this objection. Counsel continued to object to testimony about the logbook and the accuracy of the Breathalyzer, objections which the trial court characterized as a "continuing objection to the admissibility" of the logbook. In the post-trial motion, counsel preserved all objections made during trial, and during the hearing on the motion, counsel stated that the State did not lay a proper foundation.

Although counsel may not have specifically stated during trial or in the post-trial motion that she was objecting to the lack of a proper foundation, that ground was apparent from the context of the proceedings. And both the State and the trial court understood the nature of the objection. Defendant thus did not forfeit the issue.

People v. Burton, 409 Ill.App.3d 321, 947 N.E.2d 843 (2d Dist. 2011) The court refused to find that defendant forfeited an argument that the leaseholder of an apartment lacked authority to consent to a warrantless search of the pocket of a coat stored in a closet, where defendant argued in the circuit court that she lacked authority to consent to search of the closet. Although his argument on appeal was more specific than the argument raised below, it still touched on the lack of valid consent for a warrantless search, and thus was not

forfeited.

§54-1(b)(6) General Objection

§54-1(b)(6)(a) Generally

Illinois Supreme Court

People v. Simms, 168 Ill.2d 176, 659 N.E.2d 922 (1995) A general objection forfeits review of an error unless (1) the ground for the objection was clear from the record, (2) trial counsel was ineffective, or (3) there was plain error. Here, none of the exceptions applied to defendant's claim that a police officer illegally questioned him about an unrelated offense without notifying defense counsel. See also, **People v. Duff**, 374 Ill.App.3d 599, 872 N.E.2d 46 (1st Dist. 2007).

Illinois Appellate Court

People v. Thomas, 116 Ill.App.3d 216, 452 N.E.2d 77 (1st Dist. 1983) General allegations in a written post-trial motion are insufficient to preserve an issue for appeal.

§54-1(b)(6)(b) Issue Forfeited

Illinois Appellate Court

People v. Eason, 2020 IL App (3d) 180296 Defendant's challenge to the method of calculating the street value fine was not "raised" in the trial court for purposes of Rule 472 where defense counsel made a general objection to the imposition of the street value fine at sentencing. The Appellate Court dismissed the appeal and remanded the cause so that defendant may file a Rule 472 motion.

People v. Lenz, 2019 IL App (2d) 180124 Generic "due process" claim in defendant's motion for new trial was inadequate to preserve claim that trial court erred in allowing introduction of certain evidence. Defendant failed to argue plain error on appeal, where State raised forfeiture in its brief, so forfeiture would stand.

In re T.Z., 2017 IL App (4th) 170545 T.Z. was charged with aggravated criminal sexual assault and criminal sexual assault against another minor, T.W. At T.Z.'s adjudicatory hearing, T.W. gave audible answers to preliminary questions on direct examination but then whispered his answers to the trial judge when asked about the specific conduct alleged as the basis for the charges against T.Z. The judge then repeated those answers aloud. T.Z.'s counsel unsuccessfully attempted to request a sidebar during this procedure, but did not state the reason for the sidebar and did not object to the "whisper" testimony. T.Z. was adjudicated delinquent based upon the court's finding that T.W. was credible.

On appeal, T.Z. alleged that the whispered answers violated his right to confrontation. The Appellate Court first found that trial counsel's failure to specifically object to the manner of testimony meant that the confrontation issue had been forfeited. The Appellate Court refused to speculate that the requested sidebar was for the purpose of objecting to the whisper

procedure. Thus, the issue was analyzed for plain error.

The *Assistant Defender hoc* whisper method used here violated T.Z.'s confrontation right and amounted to clear and obvious error.

People v. Thomas, 116 Ill.App.3d 216, 452 N.E.2d 77 (1st Dist. 1983) The general allegation that the prosecutor's closing argument contained "prejudicial, inflammatory, and erroneous statements," without setting out the specific remarks complained of, did not preserve the issue. See also, **People v. Lann**, 194 Ill.App.3d 623, 551 N.E.2d 276 (1st Dist. 1990); **People v. Young**, 133 Ill.App.3d 886, 479 N.E.2d 494 (2d Dist. 1988); **People v. Gutierrez**, 136 Ill.App.3d 774, 483 N.E.2d 944 (1st Dist. 1985); **People v. Lann**, 194 Ill.App.3d 623, 551 N.E.2d 276 (1st Dist. 1990).

People v. Rogers, 32 Ill.App.3d 788, 336 N.E.2d 784 (4th Dist. 1975) Defendant's written post-trial motion was insufficient to preserve issue regarding an improper instruction where the motion did not specifically mention the instruction, and, instead, stated that counsel did not have a transcript and intended to present "any and all errors." If this was sufficient, the rationale behind post-trial motions would be destroyed. See also, **People v. Collins**, 127 Ill.App.3d 236, 468 N.E.2d 1343 (1st Dist. 1984).

§54-1(b)(6)(c)

Issue Not Forfeited

Illinois Appellate Court

People v. Duff, 374 Ill.App.3d 599, 872 N.E.2d 46 (1st Dist. 2007) Because defense counsel raised only a general objection, the Crawford objection could be deemed forfeited. But, the court reached the issue because the State did not contend that the general objection forfeited the confrontation issue.

People v. Latto, 304 Ill.App.3d 791, 710 N.E.2d 72 (1st Dist. 1999) Defendant's post-sentencing motion alleging that his sentence was "excessive" preserved the claim that his sentence had been increased because he went to trial.

§54-1(b)(7)

Agreed to or Invited Error; Stipulated Evidence

§54-1(b)(7)(a)

Generally

United States Supreme Court

Ohler v. U.S., 529 U.S. 753, 120 S.Ct. 1851, 146 L.Ed.2d 826 (2000) In federal prosecutions, a criminal defendant who discloses a prior conviction on direct examination, even after the trial court has ruled that the conviction is admissible as impeachment, waives the right to appeal the propriety of that ruling. (Note: Under Illinois law, an appellant who discloses a prior conviction which the trial court has held admissible as impeachment may challenge the propriety of that ruling.) See **People v. Williams**, 161 Ill.2d 1, 641 N.E.2d 296 (1994).

Illinois Supreme Court

People v. Matthews, 2016 IL 118114 Under Illinois Supreme Court Rule 105, when a

defendant files a 2-1401 petition he must notify the State in person, by mail, or by publication. If by mail, service must be sent by certified or registered mail. Once properly served, the State waives any question about the petition's sufficiency if it fails to respond within 30 days. Even if the State does not respond, the court may *sua sponte* dismiss a petition that is deficient as a matter of law. But the court may not *sua sponte* dismiss a petition before the 30-day response period expires.

Defendant filed a 2-1401 petition and served the State by regular first-class mail, not certified or registered mail. The circuit court received the petition on April 11, 2012 and docketed the petition on April 23, 2012. The court dismissed the petition on May 24, 2012. On appeal, defendant argued that the court prematurely dismissed the petition because he did not properly serve the State by certified or registered mail and thus the 30-day period for filing a response never commenced.

The Supreme Court held that defendant could not benefit from his own failure to comply with the service requirements of [Rule 105](#). A defendant may not ask the trial court to proceed in a certain manner and then argue on appeal that the trial court's action was error. Here, by filing a proof/certificate of service, defendant asked the trial court to proceed as though the State had been properly notified of the proceedings. Defendant was therefore estopped from alleging the trial court erred in acquiescing to this request.

[Rule 105](#) was designed to prevent a litigant from obtaining relief without first giving the opposing party an opportunity to respond. It was not designed to allow a litigant to object to lack of service on behalf of the opposing party. A defendant thus cannot challenge the trial court's order based on his own failure to properly serve the State.

The Supreme Court dismissed defendant's 2-1401 petition.

[People v. Carter](#), 208 Ill.2d 309, 802 N.E.2d 1185 (2003) Under the invited error doctrine, a party may not ask the trial court to proceed in a particular manner and then contend on appeal that the suggested course of action was erroneous. See also, [People v. Harvey](#), 211 Ill.2d 368, 813 N.E.2d 181 (2004). Because defendant objected to his attorney's request for a lesser- included offense instruction, he could not challenge the trial court's failure to give the instruction *sua sponte*.

[People v. Hawkins](#), 27 Ill.2d 339, 189 N.E.2d 252 (1963) Defendant may by stipulation waive proof by State, but having done so he cannot then complain of the evidence. See also, [People v. Daniels](#), 164 Ill.App.3d 1055, 518 N.E.2d 669 (2d Dist. 1987).

Illinois Appellate Court

[People v. Moore](#), 2021 IL App (2d) 200407 After the first day of his jury trial, where the State presented evidence that defendant was armed with a firearm at the time of the robbery in question, defendant and the State entered into a fully negotiated agreement whereby defendant pled guilty to a charge of armed robbery with a dangerous weapon other than a firearm in exchange for a 15-year sentence. In accepting the plea, the Court said it had heard adequate evidence during the first day of trial to find a factual basis for the plea. Defendant subsequently sought leave to withdraw the plea arguing, in part, that there was no factual basis for the dangerous weapon element since the evidence on the first day of trial established that defendant was armed with a firearm. That motion was denied, and the Appellate Court affirmed.

[Illinois Supreme Court Rule 402\(c\)](#) provides that the court shall not enter a final judgment on a plea without first determining that there is a factual basis for the plea. There

is a sufficient factual basis if there is a basis anywhere in the record from which the court can reasonably conclude that defendant committed the elements of the offense to which he is pleading guilty. Armed robbery with a firearm under Section 18-2(a)(2) and armed robbery with a dangerous weapon other than a firearm under Section 18-2(a)(1) are mutually exclusive; a charge under one subsection cannot be satisfied with proof that defendant committed the offense under the other subsection.

Here, the Appellate Court agreed with defendant that the record showed that defendant was armed with a firearm and not that he was armed with a dangerous weapon other than a firearm. But, the court concluded that defendant was precluded from challenging his guilty plea under the invited-error doctrine. Defendant sought out the plea agreement after the first day of trial and was fully aware of its terms. He was properly admonished and expressly agreed to plead guilty to armed robbery with a dangerous weapon to ensure a sentence below the mandatory minimum of 21 years for armed robbery with a firearm.

It would be manifestly unfair to allow defendant to withdraw his plea where he had agreed to, and benefitted from, a more lenient sentence and where it could result in a hardship to the State in prosecuting the offense given the passage of time. While the invalid factual basis may have rendered the plea voidable, it was not void and therefore the invited-error doctrine could be applied. Thus, the trial court did not abuse its discretion in denying defendant's motion to withdraw his plea.

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. Pablo, 2018 IL App (3d) 150892 The trial court erred when it allowed the State to unilaterally withdraw a stipulation on the first day of trial. Stipulations are to be encouraged and cannot be withdrawn over objection absent a clear showing that the stipulated matter is untrue and the request to withdraw is seasonably made. Here, the request made on the first day of trial prejudiced the defendant, who was relying on information in the stipulation to formulate a theory of defense. The dissent found that the agreement was merely the proposed testimony of an unavailable witness and that the majority's holding overly restricts a party's right to strike witnesses from its witness list

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. 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. Harding, 2012 IL App (2d) 101011 Under the invited error doctrine, a party may not request to proceed in a certain manner and then contend on appeal that the course of action to which he agreed was erroneous. When the invited error doctrine applies, the plain error doctrine is inapplicable.

Although the trial judge erred by failing to place on the record specific reasons for requiring the defendant to appear in prison attire and shackling defendant’s legs and one hand, defense counsel invited the error by stating that defendant’s leg shackles could remain, asking that the hand shackles be removed to allow defendant to participate in trial by holding a pen, and accepting an arrangement by which only one of defendant’s hands was unshackled. “By not asking for more, such as the removal of all shackles and prison attire, and in light of the deficiencies in the record [which did not show whether the hand which remained shackled was physically attached to anything], we view counsel’s request as specifically limited to a request to remove enough items so that defendant could meaningfully participate in the trial.”

Defendant’s conviction for domestic battery was affirmed.

§54-1(b)(7)(b)

Issue Forfeited

Illinois Supreme Court

People v. Quezada, 2024 IL 128805 The appellate court reversed defendant’s convictions for attempt murder of a peace officer and aggravated discharge of a firearm, finding that two forfeited errors cumulatively deprived defendant of a fair trial. The supreme court reversed the judgment of the appellate court.

The State alleged that defendant shot at police officers who were responding to a domestic disturbance in an apartment complex. On appeal, defendant alleged two trial errors.

First, the trial court committed plain error when it allowed the State to introduce the full recording of a custodial interrogation of a key eyewitness. Defendant acknowledged that his trial attorney had “no objection” to the evidence, but argued on appeal that its admission was second-prong plain error because it contained prior consistent statements, hearsay, gang references, and the officers’ opinions about the offense. Second, defendant argued the trial court committed plain error when it allowed the State to introduce prejudicial gang evidence without sufficient foundation. The appellate court found neither error on its own amounted to plain error, but that the cumulative effect of these errors prejudiced defendant and warranted a new trial.

Before the supreme court, the State argued that the cumulative error doctrine should not apply to forfeited errors. The supreme court rejected this argument, finding it inconsistent with the rule that forfeiture is an admonition to the parties, not a limitation on the jurisdiction of the reviewing court. The reviewing court should be free to find cumulative errors – even forfeited errors – worked in conjunction to deprive a defendant of a fair trial. This does not mean that forfeiture is irrelevant to the analysis. Rather, a claim that cumulative, forfeited errors requires reversal must be analyzed in the context of the plain error doctrine. Thus, a court should consider whether the alleged errors are “clear and obvious,” and, if multiple errors meet this test, determine whether the cumulative impact of those errors affected the fairness of the trial and challenged the integrity of the judicial process.

The appellate court erred because its cumulative error analysis did not apply the plain error framework. The supreme court found defendant could not meet the plain error standard. First, trial counsel “affirmatively acquiesced” to the admission of the interrogation video by informing the trial court that the defense had “no objection.” When a defendant actively invites or acquiesces to the admission of evidence, he cannot challenge the ruling as plain error on appeal. Because only one other alleged error remained, and because this error alone did not warrant reversal, the supreme court reversed the appellate court’s reversal of defendant’s convictions.

People v. Jones, 2023 IL 127810 Defendant was convicted of unlawful possession of ammunition by a felon after police found two bullets in her glove box during a traffic stop. When police confronted defendant with the bullets, she stated that they belonged to her husband. At trial, defendant’s husband claimed ownership of the bullets, describing how he often used defendant’s car to transport his gun, for which he possessed a FOID card.

During deliberations, the jury asked for a definition of “knowingly.” The defense agreed with the State that no additional instruction was required. Defense counsel reasoned that the definition would inform the jury that “knowing” could mean awareness of a “substantial probability” that something exists.

Defendant was convicted and sentenced to two years in prison. On appeal, the appellate court rejected a reasonable doubt challenge, and a due process and ineffectiveness claim for the lack of a jury instruction defining knowledge.

The Supreme Court affirmed. It first held that a rational trier of fact could have found knowing, constructive possession of the bullets. Defendant was driving the car alone and was its only registered owner. She therefore exercised exclusive control over the glove box where the ammunition was found, meaning she had constructive possession. And where possession is established, an inference of culpable

knowledge can be drawn from the surrounding facts and circumstances. While the defense put forth evidence that the bullets belonged to the husband, the credibility of that evidence was a determination for the trier-of-fact.

Nor did the lack of an instruction defining “knowledge” deprive defendant of her due process right to a fair trial or her right to effective assistance of counsel. A due process argument was not available, because counsel’s rejection of the instruction was more than mere forfeiture, it was invited error. Thus, plain error review was not available. Furthermore, counsel’s decision was sound trial strategy, as the “substantial probability” language contained in the instruction created a mental state akin to recklessness and could have reduced the chances for an acquittal.

People v. Harvey 211 Ill.2d 368, 813 N.E.2d 181 (2004) Defendants forfeited issue concerning the "mere-fact" method of impeachment by prior convictions where they either failed to object, requested, or acquiesced in the trial court's use of the mere-fact procedure.

In re Detention of Swope, 213 Ill.2d 210, 821 N.E.2d 283 (2004) Where defense counsel and the State agreed to use depositions to obtain information from DHS treatment providers who refused to discuss the treatment of a sexually violent person with experts appointed under 725 ILCS 207/55, defendant acquiesced in the procedure used in the trial court and could not claim on appeal that due process required the providers to discuss the case with defense experts.

People v. Villarreal, 198 Ill.2d 209, 761 N.E.2d 1175 (2001) Normally, a party who acquiesces in jury instructions may not subsequently claim that he was prejudiced by those instructions. Here, defense counsel's "[a]ctive participation in the direction of proceedings . . . goes beyond mere waiver," as defendant requested the very instructions to which he objected on appeal. See also, **People v. Schickel**, 347 Ill.App.3d 889, 807 N.E.2d 1195 (1st Dist. 2004) (although involuntary manslaughter may not be a lesser-included offense of felony murder, defendant forfeited the issue where defendant and defense counsel invited the trial court in bench trial (on charges of first and second degree murder), to consider involuntary manslaughter as a lesser included offense; because a defendant is "accountable for any mistakes he injects into his own trial," defendant's conviction of involuntary manslaughter constituted "invited" error).

People v. Segoviano, 189 Ill.2d 228, 725 N.E.2d 1275 (2000) Where trial counsel opposed the State's motion for a mistrial, defendant could not contend on appeal that the trial court abused its discretion by failing to order a mistrial. Although in rare cases an error may be so grave that a mistrial is required even over defense objection, this was not such a case.

Illinois Appellate Court

People v. Adams, 2024 IL App (1st) 221474 Defendant pled guilty to armed habitual criminal. Subsequently, one of the predicate convictions (AUUW) was declared unconstitutional. He filed a petition for relief from judgment, asking the court to vacate his AHC conviction because the AUUW predicate, and by extension the AHC, was void *ab initio*. The court initially denied the petition, and defendant appealed. After the AUUW conviction was vacated in a separate proceeding, the circuit court placed the PRJ back on the docket. The State agreed the AHC could not stand, but asked the court to reduce the conviction to

UUW/F, the remaining predicate. Defendant argued that reduction of the offense would be improper and that it should be vacated instead. The court agreed with the State. At sentencing, the court asked the State to amend Count 1, which had charged AHC predicated on AUUW and UUW/F, to show a single charge of UUW/F. Defendant agreed with this procedure, and the court reduced defendant's AHC conviction to UUW/F.

Defendant appealed, arguing that a declaration of voidness precluded any further proceedings on the AHC, including reduction to a lesser-included offense, and that the statute of limitations had passed. The appellate court first found that the circuit court lacked jurisdiction at the time of its order, as defendant had already filed a notice of appeal after the initial denial of the PRJ. Nevertheless, the subsequent order reducing the AHC conviction to UUW/F was valid under the revestment doctrine. Both parties agreed to the proceedings and agreed the prior judgment upholding the AHC conviction was incorrect and required reconsideration.

The appellate court then affirmed the trial court's order. While defendant cited [**People v. Matthews**, 2022 IL App \(4th\) 210752](#), which found an AHC "void" after defendant established one of the qualifying convictions was void, **Matthews** did not hold that it couldn't be reduced to a remaining predicate and lesser-included offense. Here, UUW/F was charged as a predicate of AHC in Count 1, and was a lesser-included offense of AHC. The voidness of the AUUW did not affect the UUW/F conviction. As for the statute of limitation, defendant waived its application by acquiescing below, when the State sought leave to amend the charge in count I from AHC to UUW/F. Defendant thereby waived application of the statute of limitations and invited the trial court to proceed in the manner it did.

[**People v. Johnson**, 2023 IL App \(4th\) 220201](#) Defendant could not invoke plain error on appeal from the trial court's decision to admit a child witness's statements under section 115-10. Defense counsel invited the error by stipulating that the statement met the statutory requirements. The appellate court rejected defendant's argument that the trial court had an independent duty to ensure compliance with section 115-10 regardless of defense counsel's stipulation. In making this argument, defendant attempted to analogize the court's independent duty in fitness cases, but those cases have a constitutional component while section 115-10 does not.

Nor was counsel ineffective for stipulating, as the appellate court found the out-of-court statements sufficiently reliable under section 115-10. The 8-year-old complainant made a spontaneous outcry to her grandmother, accusing her grandfather of sexual assault, and while she denied the claims in an initial interview with the child advocate, she explained in her second interview that defendant told her to keep it secret. The allegations in the second interview were detailed, unlikely to be fabricated, and made without an apparent motive to lie.

Finally, the introduction of the statement did not violate confrontation rights. The confrontation clause is generally satisfied as long as the witness is present and answers questions. Here, the complainant took the stand and answered all questions posed by both parties. Defendant noted that the witness did not provide accusatory testimony and thereby limited his opportunity for cross-examination. He asserted that before introducing the statement, the State had to elicit the accusatory testimony in order to adequately set up cross-examination. The appellate court disagreed and blamed defense counsel for the lack of cross-examination on the statement. Although [**People v. Learn**, 396 Ill. App. 3d 891 \(2009\)](#), found a violation where the child witness could not answer any questions and the prosecutor ceased questioning prior to any accusatory testimony, that case was distinguishable. In

addition to answering all questions, the complainant here confirmed making her prior statements and attested they were true.

People v. Gibson, 2021 IL App (1st) 190137 It was error for defendant to remain shackled during the last day of his bench trial where the judge acknowledged that there was no need for defendant to be shackled except for the fact that the courtroom staff did not have the keys to unshackle him. Defendant had been brought to the courtroom in shackles because “the Sheriff had some issues downstairs” with prisoners from defendant’s division; those issues did not involve defendant.

But, the invited error doctrine precluded relief on appeal where defense counsel told the trial court that defendant wanted to move forward with trial that day, even though he was shackled. The Appellate Court rejected defendant’s argument that the right to be tried without shackles could only be waived by defendant, not counsel.

People v. Martinez, 2021 IL App (1st) 172097 Defendant claimed that the trial court violated his right to confrontation by failing to follow the procedure outlined in **725 ILCS 5/106B-5**. He further claimed a violation of his right to a public trial by improperly excluding spectators under **725 ILCS 5/115-11**, and by reviewing video evidence outside the presence of the parties.

Before defendant’s bench trial, the parties had agreed to have the child witness testify in the courtroom while defendant watched in a separate room over closed-circuit television. Section 106B-5, however, allows for the *witness* to testify from a separate room, not defendant. The Appellate Court found the error forfeited (though not affirmatively waived, as he was not advised of his rights) and did not rise to the level of plain error. No prejudice ensued from the set-up, where defendant could see the witness and communicate with his attorney via intercom to assist in cross-examination.

Defendant also alleged that the trial court erred when it ordered some spectators from “the mom’s family” out of the courtroom pursuant to Section 115-11. Under this statute, parties without a “direct interest in the case” may be removed during a child’s testimony. Defendant forfeited the error by not objecting at the time, but the decision was not plain error. While the trial court did not make a specific finding that the removed spectators were non-interested parties, and a better practice would be for the court to detail its decision on the record, nothing here suggested that the removed parties were directly interested in the case, *i.e.*, a part of the immediate family of the defendant or complainant.

Finally, defendant forfeited any complaint about the court’s decision to view the video evidence outside the presence of the parties, and the decision did not rise to plain error. A trial court may review evidence on its own, as long as the foundation for the evidence is laid in open court and the parties have an opportunity to view it as well. No violation of the right to be present occurred where the court ensured defendant could view the evidence with his attorney, and did not demonstrate the violation an underlying right as a result of his absence from the judge’s viewing. Moreover, the right to confrontation was not violated where the subjects in the video testified and were subject to cross-examination.

People v. Holliday, 2020 IL App (5th) 160547 Where the defense stipulated to the admission of Facebook photos, the doctrine of invited error applied and defendant could not obtain plain error review on the question of whether the photos had been properly authenticated. Defendant’s argument that counsel was ineffective for stipulating to the photos failed, as well, because the record demonstrated that the decision to stipulate was a

strategic choice and because defendant was not prejudiced where there was ample additional evidence to support his conviction.

People v. Holloway, 2019 IL App (2d) 170551 In a prosecution for violation of bail bond, attorney-client privilege was not violated by allowing State to ask defendant's prior counsel about a phone conversation he had with defendant on the date defendant failed to appear for trial. The call did not involve legal advice or strategy, and it was made by counsel from the courtroom when others were present, so defendant could not reasonably expect it would remain secret. Further, defendant both forfeited and invited the error by not objecting to use of the specific statement in question and by attempting to use the statement to discredit his prior counsel and advance his theory of defense that counsel deliberately did not remind him about upcoming court dates. Finally, even if there was error, it was harmless because there was no reason to think the statement had any impact on the sole contested question at trial, that being whether defendant's absence from the proceedings was willful.

People v. Johnson, 2019 IL App (1st) 161104 The State admitted an Illinois State Police certification stating that defendant did not possess a valid FOID card. Defense counsel acquiesced in the certification's entry into evidence. The Appellate Court rejected defendant's attempt to raise the issue as plain error, finding invited error. Moreover the claim could not be raised as counsel's ineffectiveness because decisions about stipulations are strategic.

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. Stevens, 2018 IL App (4th) 150871 Counsel's failure to object to admission of certified report stating that defendant did not have a concealed carry license was invited error. Counsel could have objected at the pretrial hearing where the State indicated it would seek to admit the report or at trial when the exhibit was introduced. If counsel had objected, the State could have cured any error by calling a witness to admit the report. Even if counsel's performance was deficient, there was no prejudice because the record does not show that such witness was not available.

People v. Stewart, 2018 IL App (3d) 160205 At defendant's trial for aggravated unlawful use of a weapon, the State introduced a "certification" letter from the Illinois State Police, stating that defendant did not have a valid FOID card at the time of the offense. The trial judge inquired of defense counsel whether there was any objection, and defense counsel responded that the letter was "self-authenticating." On appeal, defendant argued that admission of the letter violated his right to confrontation.

Defendant affirmatively waived the confrontation issue by counsel's acquiescing to admission of the letter at trial where the court specifically asked for any objections from counsel. Counsel did not provide ineffective assistance by that acquiescence where the record was devoid of any information that defendant actually had a valid FOID card.

People v. Hamerlinck, 2018 IL App (1st) 152759 Defendant was convicted of two counts of aggravated DUI, each alleging a different minimum blood alcohol content (BAC). The Appellate Court vacated the count alleging the lower BAC (.08) and upheld the greater (.16)

on one-act, one-crime grounds.

The Appellate Court rejected defendant's challenge to the admission of his hospital records as proof of his BAC on the basis that the State had not established a chain of custody for his blood. In the trial court, defense counsel stipulated that the hospital records established defendant's BAC was .259 and stated he had no objection to admission of the hospital records as business records. Trial counsel instead defended on the theory that defendant had not been driving the vehicle. Given counsel's repeated concessions to defendant's BAC in the trial court, even if there was error in admission of the hospital records, it was invited error that could not be challenged on appeal.

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. Harding, 2012 IL App (2d) 101011 Under the invited error doctrine, a party may not request to proceed in a certain manner and then contend on appeal that the course of action to which he agreed was erroneous. When the invited error doctrine applies, the plain error doctrine is inapplicable.

Although the trial judge erred by failing to place on the record specific reasons for requiring the defendant to appear in prison attire and shackling defendant's legs and one hand, defense counsel invited the error by stating that defendant's leg shackles could remain, asking that the hand shackles be removed to allow defendant to participate in trial by holding a pen, and accepting an arrangement by which only one of defendant's hands was unshackled. “By not asking for more, such as the removal of all shackles and prison attire, and in light of the deficiencies in the record [which did not show whether the hand which remained shackled was physically attached to anything], we view counsel's request as specifically limited to a request to remove enough items so that defendant could meaningfully participate in the trial.”

Defendant's conviction for domestic battery was affirmed.

People v. Bowens, 407 Ill.App.3d 1094, 943 N.E.2d 1249 (4th Dist. 2011) Defendant waived the argument that the trial judge erred by denying a motion to excuse for cause the trial judge's husband. The 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 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 affirmatively acquiesced to the spouse's service.

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.

People v. Rokita, 316 Ill.App.3d 292, 736 N.E.2d 205 (5th Dist. 2000) The court rejected the State's attempt to argue on appeal several matters it had conceded in the trial court. "The State cannot deny on appeal a fact it admitted in the trial court."

People v. Todd, 249 Ill.App.3d 835, 619 N.E.2d 1353 (5th Dist. 1993) The prosecution forfeited any objection to pro se defendant's failure to file a post-trial motion where the State suggested that the parties use the "stipulated bench trial" procedure so that defendant could preserve an issue for appeal, and by failing to object when the trial court admonished defendant that he could appeal merely by filing a notice of appeal.

People v. Daniels, 164 Ill.App.3d 1055, 518 N.E.2d 669 (2d Dist. 1987) Defendant could not contend on appeal that the introduction of certain evidence was error where he had stipulated to its admission at trial. See also, **People v. Bush**, 214 Ill.2d 318, 827 N.E.2d 455 (2005) (stipulation to chemist's qualifications and his conclusion that the substance recovered from defendant was cocaine forfeited any challenge to the foundation for the chemist's opinion); **People v. Marlow**, 303 Ill.App.3d 568, 708 N.E.2d 579 (3d Dist. 1999) (stipulation to evidence at sentencing hearing).

People v. Virgin, 9 Ill.App.3d 902, 293 N.E.2d 349 (1st Dist. 1973) Where defense counsel concurred in ruling by judge concerning jury request for exhibits and testimony, the issue was forfeited.

§54-1(b)(7)(c)

Issue Not Forfeited

Illinois Supreme Court

People v. Spates, 77 Ill.2d 193, 395 N.E.2d 563 (1979) Defendant properly preserved for review the question of the admissibility of his prior convictions, though he introduced the convictions himself after the trial court denied his motion in limine to prohibit the State from introducing them. Though a "party waives the right to raise an error action taken by the court at the instance of that party[,] it is quite another matter when, after an exclusionary motion is denied, the party himself raises a matter so as to lessen its impact, when the party knows that if he does not raise it, the opponent will." See also, **People v. Brown**, 172 Ill.2d 1, 665 N.E.2d 1290 (1996) (defendant's introduction of gang-related testimony after motion in limine denied).

Illinois Appellate Court

People v. Ryan, 2024 IL App (2d) 220076 The trial court committed second-prong plain error when it held defendant's stipulated bench trial over Zoom without obtaining defendant's waiver. Defendant was charged with possessing a weapon without a FOID card, two counts of aggravated UUV, and violation of conditions of bail bond. At a Zoom hearing, the parties provided the court with a stipulation to the facts of the case, which defendant signed. The stipulation indicated that defendant possessed a loaded shotgun, that he did not have a FOID card, and that he was on bond with a condition that he not possess a firearm. The court continued the case, and at a subsequent Zoom hearing, found defendant guilty of all four counts.

The appellate court held that by conducting a stipulated bench trial and entering guilty verdicts remotely, without defendant's explicit consent, the trial court violated his right to be present. Although defendant did not object, the error was reviewable as plain error. First, the appellate court rejected the State's invited error argument, which was based on defendant's statement over Zoom that he agreed to "proceed in this fashion." This comment referred to the stipulated bench trial itself, not to the fact that it would be held remotely. Next, the appellate court found clear and obvious error because the Illinois Supreme Court's emergency order in place at the time of the trial – January of 2022 – allowed for stipulated bench trials to be held remotely only if the trial court made certain findings and obtained the written consent of the defendant. Moreover, a stipulated bench trial and the announcement of guilt are both critical stages, at which a defendant's presence is required.

The error could be reviewed under the substantial rights prong of the plain error doctrine. The court cited [**People v. Stroud**, 208 Ill. 2d 398 \(2004\)](#), which held that physical presence during a guilty plea contributes to the fairness of the proceeding and therefore a remote guilty plea requires a waiver. Although the State sought to distinguish **Stroud** because the instant case involved a stipulated bench trial rather than a guilty plea, the appellate court found no meaningful distinction. By agreeing to a stipulated bench trial, defendant's guilt became a foregone conclusion and he waived his right to cross-examine the witnesses against him, just as in a guilty plea. Therefore defendant's physical presence would have contributed to the fairness of the proceedings and his absence resulted in an error equivalent to structural error.

On remand, the court instructed that if defendant is re-convicted, only the first count – possession of a firearm without a FOID – can stand. The remaining three counts are based on the same act of possessing a firearm. While the State argued that the charge alleging violation of a bond condition includes an additional act, the court concluded that being on bond is a status, not an act.

[**People v. Collins**, 2020 IL App \(1st\) 181746](#) The trial court erred in admitting the audio from the arresting officer's body camera, because it contained inadmissible hearsay and prior consistent statements. Defendant had been arrested for gun possession. The State alleged officers approached him, he ran, dropped a gun, and was found hiding a short distance away. On the body cam video, the arresting officer can be heard describing defendant dropping the gun and directing fellow officers to the location of the gun. After the defense objection to the evidence was overruled, defense counsel admitted a different officer's body cam footage in defense.

The Appellate Court first rejected the State's argument that defendant "waived" the error by admitting body cam footage in its own case. The defense consistently objected to the body cam footage before, during, and after trial, and used footage in its own case only after losing its objections. A defendant does not sacrifice his preservation of an issue by using the court's ruling to his advantage.

Second, the court noted that the Law Enforcement Officer Worn Body Camera Act ("Act") allows for footage to be admitted into evidence at trial. But, statutory evidentiary rules must submit to court rules when in conflict, and the Illinois Rules of Evidence prohibit hearsay. Thus, the Act's language must be understood as allowing admission only to the extent authorized by the Rules of Evidence.

The statements here were hearsay and admitted to show the truth of the matter asserted – that defendant dropped a gun. Although an officer's out-of-court statements may be admitted to show the course of their investigation, such statements are admissible only when "necessary and important" to explain the State's case. Here, the officers had already

testified to their version of how the gun was dropped and why they returned to the lot to recover it. See **People v. Jura**, 352 Ill. App. 3d 1080 (2004). Finally, the error was not harmless where the case hinged on officer credibility, the entire video was played during closing arguments, and the prosecutor argued that the jury should believe the officer's testimony in part because of the prior statements made on the video.

People v. Wood, 2014 IL App (1st) 121408 Defendant argued on appeal that trial counsel provided ineffective assistance by requesting a finding of guilty but mentally ill without first presenting an insanity defense as required by statute, and by failing to call his expert to testify that defendant suffered from paranoid schizophrenia.

The State argued that defendant forfeited this particular claim of ineffective assistance by failing to raise it in his pro se post-trial motion which contained other claims of ineffective assistance. The Appellate Court rejected the State's argument, noting that the State did not "even acknowledge the obvious" problem with its argument, which would have required defense counsel to object to his own ineffectiveness. Carried to its logical extreme, the State's argument would mean that all ineffectiveness claims would be forfeited, since counsel would seldom if ever object to his own representation.

The court further questioned the entire premise of the State's argument. According to the State, if a defendant raised some claims of ineffectiveness in a pro se motion, other claims of ineffectiveness would be forfeited; if a defendant raised no claims of ineffectiveness, however, he would not have forfeited any ineffectiveness claims. The State cited no authority for its proposition, and the court noted that adopting such a rule would impose undue hardship on defendants who believe they have received ineffective assistance but cannot retain new counsel to present their claims.

The court also noted that ineffective assistance claims and the plain-error rule overlap because a successful claim of ineffective assistance would necessarily satisfy the second prong of the plain-error rule since ineffective assistance of counsel is considered a substantial impairment of fundamental rights.

People v. Johnson, 2013 IL App (2d) 110535 Under Supreme Court Rule 451(c), where a jury instruction suffers from a substantial defect, claims of error are not subject to forfeiture on appeal. An erroneous instruction constitutes a substantial defect when the instruction creates a serious risk that the defendant was incorrectly convicted because the jury did not understand the applicable law, so as to threaten the fundamental fairness of the defendant's trial. To prevail on appeal, the defendant need not prove that the error in the instruction actually misled the jury. Plain error arises in two instances: (1) when the flawed instruction was provided in a case where the evidence was closely balanced; or (2) when the flaw in the instruction is so grave or so serious that it denied the defendant a substantial right and undermined the integrity of the judicial process.

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 plain error because they undermined the integrity of the judicial process. 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 UUW 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.

Plain-error review is forfeited when defendant invites the error. A defendant's agreement to a procedure later challenged on appeal goes beyond mere waiver. Invited error is sometimes referred to as an issue of estoppel in that a defendant cannot request to proceed in one manner and later contend on appeal that the course of action was in error. To allow the defense to use the exact ruling it procured in the trial court as a vehicle for reversal on appeal would offend notions of fair play, encourage defendants to become duplicitous, and deprive the State of the opportunity to cure the defect.

The defense did not invite the error in the other-crimes instruction by agreeing that the instruction should not be modified. The prosecution tendered the flawed instruction and offered no suggestion to cure the defect when it was pointed out by the trial court. Defense counsel was not duplicitous, but was attempting to mitigate any confusion that could result from a convoluted instruction. At the point at which defense counsel agreed to the flawed instruction, it was too late to untangle the evidence to make it understandable to the jury and the only viable option was to grant a mistrial.

§54-1(b)(8)

Basis for Objection is Trial Judge's Conduct

Illinois Supreme Court

People v. Johnson, 238 Ill.2d 478, 939 N.E.2d 475 (2010) The second prong of the plain error rule was not satisfied where defendant failed to object when the trial court responded to a jury question without notifying the parties. The court rejected defendant's argument that the failure to object to the *ex parte* communication was protected by **People v. Sprinkle**, 27 Ill.2d 398, 189 N.E.2d 295 (1963). In **Sprinkle**, the Supreme Court held that the failure to object may be excused where the trial court overstepped its authority in the presence of the jury or would have been unwilling to consider an objection.

The trial court did not overstep its authority by instructing the jury to continue deliberating. Furthermore, nothing in the record suggests that the trial court would have ignored an objection raised after the jury was dismissed, when defendant first became aware of the note. Under these circumstances, **Sprinkle** does not justify relaxing the forfeiture rule.

Defendant's conviction for criminal sexual abuse was affirmed.

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 court found that defendant forfeited the issue by failing to raise it in the trial court, and that the forfeiture was not excused.

The court rejected the argument that defendant was 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.

People v. McLaurin, 235 Ill.2d 478, ___ N.E.2d ___ (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 due to 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 the trial court did not overstep its authority in the presence of the jury and counsel was in no way prevented from objecting, there were no extraordinary compelling reasons to relax the forfeiture rule.

The court concluded that plain error did not occur where the trial court responded to communications from the jury in defendant's absence but in the presence of counsel, or when the judge sent a bailiff to deliver a message to the jury. (See **JURY**, §§32-6(a), (c)).

People v. Dameron, 196 Ill.2d 156, 751 N.E.2d 1111 (2001) Defendant did not forfeit argument that the sentencing judge erroneously relied on evidence outside the record in imposing a death sentence because application of the forfeiture doctrine is less rigid where the basis for the objection is the circuit judge's conduct. **People v. Davis**, 185 Ill.2d 317, 706 N.E.2d 473 (1998); **People v. Woolley**, 205 Ill.2d 296, 793 N.E.2d 519 (2002) (2002) (trial court abused its discretion at death hearing by informing a panel of prospective jurors that a previous jury had sentenced defendant to death in the same case; less stringent standard of forfeiture is applied where alleged error involves an act of the trial judge).

People v. Kliner, 185 Ill.2d 81, 705 N.E.2d 850 (1998) Forfeiture doctrine inapplicable where issue concerned trial court's responses to jury questions in defendant's absence. See also, **People v. Comage**, 303 Ill.App.3d 269, 709 N.E.2d 244 (4th Dist. 1999) (citing **Kliner**, the court reached issue of trial court's failure to respond to jury's question).

People v. Nevitt, 135 Ill.2d 423, 553 N.E.2d 368 (1990) "[A]pplication of the waiver rule is less rigid where the basis for the objection is the trial judge's conduct." Thus, the Court decided the merits of defendant's argument that the trial judge was biased in favor of the State, despite defendant's failure to raise this issue at trial. See also, **People v. Bedenkop**, 252 Ill.App.3d 419, 625 N.E.2d 123 (1st Dist. 1993) ("where the trial judge assumed the role of the prosecutor, defense counsel may have been too intimidated and afraid of being held in contempt to object to the errors"); **People v. Barrow**, 133 Ill.2d 226, 549 N.E.2d 240 (1989); **People v. Ramos**, 318 Ill.App.3d 181, 742 N.E.2d 763 (1st Dist. 2000) (defendant did not forfeit the argument that the trial judge was biased against him, although he failed to raise that issue in the trial court); **People v. Brown**, 200 Ill.App.3d 566, 558 N.E.2d 309 (1st Dist.

1990).

Illinois Appellate Court

People v. Holland, 2023 IL App (4th) 220384 Defendant alleged that the court erred when: (1) it examined three of the four witnesses at his sexual assault trial; and (2) conducted an independent investigation into defendant's prior rape conviction for sentencing.

The appellate court found both errors forfeited. Defendant asked the court to relax the forfeiture doctrine because the errors involved judicial misconduct, citing **People v. Sprinkle**, 27 Ill. 2d 398, 401 (1963). But the appellate court found no grounds to do so. The alleged errors occurred during a bench trial and sentencing, so there was no misconduct in front of a jury, and the record did not support defendant's suggestion that objections would have been futile.

The plain error doctrine did not apply to the trial error, because no clear or obvious error occurred. A judge may question a witness to elicit the truth or clarify issues, as long as the judge does not show bias, and does not assume the role of advocate. Here, the sexual assault case against defendant involved a he-said-she-said accusation, with two occurrence witnesses. The court asked several questions of two of the State's witnesses and of defendant, in an attempt to clarify or expand on testimony and elicit the truth. Most of the questions were open ended, and the judge did not appear to advocate for one side or the other. Thus, there was no abuse of discretion.

The sentencing court did err by conducting an independent investigation into defendant's prior rape conviction. The rape conviction occurred in Maryland, and the sentencing court stated that it had "looked it up on the internet" and found it to be the same offense as the instant case. While it would have been proper to research and take judicial notice of a Maryland statute, the sentencing court did not specify what internet source was used.

The appellate court did not find plain error, however. Defendant argued only the first prong, and the appellate court found the evidence was not closely balanced. Even if the results of the court's internet search were improperly considered, the fact remained that the record showed, and the court could rely on, a prior rape conviction.

People v. Romero, 2018 IL App (1st) 143132 Defendant's challenge to the court's questioning of the defense expert was not forfeited even though defendant had not objected to the specific questioning in the trial court. At the time the court pronounced its verdict, and again in his motion for new trial, defendant did object to the judge's reliance on the answers to his questions. Given that the basis of the objection was the court's conduct, the forfeiture rule was relaxed. However, the trial court did not demonstrate bias or assume the role of the prosecutor in questioning the defense expert. Instead, the court's questions were geared toward clarifying portions of the expert's testimony. The fact that the court did not ask similar questions of the State's expert did not show bias; in an insanity case, it is the defense expert's opinion that is of paramount concern.

People v. Ware, 2014 IL App (1st) 120485 Defendant argued that the trial court improperly refused to consider a plea agreement the parties reached after the trial had commenced. Defendant forfeited the issue by failing to object at trial, but argued that forfeiture should not apply because the error involved conduct by the trial judge.

Although judicial misconduct may provide a basis for relaxing forfeiture under the **Sprinkle** doctrine, this exception applies only in extraordinary situations, such as when a

judge makes inappropriate comments to the jury. The judge's conduct here did present extraordinary or compelling reasons to relax the forfeiture rule.

People v. Faria, 402 Ill.App.3d 475, 931 N.E.2d 742 (1st Dist. 2010) Although the forfeiture rule may be relaxed where an unpreserved issue concerns actions taken by the trial court, forfeiture should be ignored only in the most compelling situations, such as where a judge makes inappropriate remarks to the jury or the case involves capital punishment. (**People v. McLaurin**, 235 Ill.2d 478, 922 N.E.2d 344 (2009)). Here, the forfeiture rule was not relaxed although the trial judge "took over" defense counsel's cross-examination and interrupted counsel repeatedly.

First, because defendant was convicted in a bench trial, there was no jury to be influenced. However, "[h]ad this been a jury trial, we may well have reached a different decision."

Furthermore, the trial judge did not act in counsel's absence or in any way prevent objections from being made.

People v. Peden, 377 Ill.App.3d 463, 878 N.E.2d 1180 (1st Dist. 2007) The court considered the trial court's improper interference with defendant's trial strategy as plain error, although the defendant failed to object at trial or raise the issue in the post-trial motion, because a less rigid standard of waiver applies when an issue involves potential misconduct by the trial judge.

People v. Crawford, 343 Ill.App.3d 1050, 799 N.E.2d 479 (1st Dist. 2003) The court reviewed the trial judge's repeated interruptions of defense counsel's closing argument, notwithstanding the defense's failure to object.

People v. Rowjee, 308 Ill.App.3d 179, 719 N.E.2d 255 (1st Dist. 1999) Defendant did not forfeit issue regarding trial judge's improper private investigation before convicting defendant because the error concerned the judge's conduct.

People v. Westpfahl, 295 Ill.App.3d 327, 692 N.E.2d 831 (3d Dist. 1998) Improper questioning of a witness by trial judge was properly preserved "by registering an objection outside the presence of the jury and prior to the introduction of further evidence."

People v. West, 294 Ill.App.3d 939, 691 N.E.2d 177 (5th Dist. 1998) Defendant did not forfeit his argument that the trial court improperly deliberated the case before the defense rested. Defendant raised the issue in the post-trial motion. And:

"We can understand why, during the closing moments of the [bench] trial before the court rendered its decision, defendant's counsel did not want to raise an issue regarding the court's comments. We would not expect, or require, a party to take that risk. We know that defendant did raise the issue at the first opportune moment, that being in his post-trial motion."

§54-1(b)(9)

Forfeiture During Appeal – Issue Not Raised in Original Appellate Brief, Reply, PRH, PLA

§54-1(b)(9)(a)
Issue Forfeited

Illinois Supreme Court

People v. Whitfield, 228 Ill.2d 502, 888 N.E.2d 1166 (2007) The Court refused to reach the State's forfeiture argument because it failed to raise it in its petition for leave to appeal.

People v. Williams, 193 Ill.2d 306, 739 N.E.2d 455 (2000) A plain error argument is not forfeited on appeal because it was raised for the first time in the reply brief. The State is required to raise the forfeiture argument in the appellee's brief; otherwise, the State's forfeiture argument would itself be forfeited. "Accordingly, we believe it would be unfair to require a defendant to assert plain error in his or her opening brief." See also, **People v. Laugharn**, 297 Ill.App.3d 807, 698 N.E.2d 219 (4th Dist. 1998) (defendant did not forfeit plain error argument that was raised for first time in reply brief).

People v. Anderson, 112 Ill.2d 39, 490 N.E.2d 1263 (1986) The Court refused to consider an issue regarding the validity of defendant's conviction, where defendant challenged his conviction and sentence before the appellate court but defendant's petition for leave to appeal raised only the sentencing issue and asked for a new sentencing hearing. While a reviewing court has discretion to consider such issues, review was unnecessary in light of the limited relief requested in defendant's petition and the fact that the arguments made before the Court were identical to those that the appellate court examined and rejected. See also, **People v. Ward**, 113 Ill.2d 516, 499 N.E.2d 422 (1986).

Illinois Appellate Court

People v. Ramirez, 2017 IL App (1st) 130022-B On direct appeal, defendant alleged that the sentencing court considered improper factors. The claim was not included in the post-trial motion, and while appellate counsel raised plain error, she did so in a three-sentence argument which did not specify which prong applied. The Appellate Court found both the plain error argument, and the underlying sentencing issue, forfeited. On rehearing, a different appellate attorney asked the court to find the original appellate attorney ineffective and to consider the sentencing issue on its merits. The Appellate Court refused, finding the ineffectiveness claim forfeited.

The Illinois Supreme Court remanded in a supervisory order issued in light of **People v. Veach**, 2017 IL 120649. The Appellate Court found **Veach** inapplicable, but nevertheless decided to reach the issue of appellate counsel's ineffectiveness, citing **Veach's** admonishment to consider ineffectiveness claims when the record permits, and the principle that waiver is a limitation on the parties, not the courts.

Although the Appellate Court found appellate counsel's failure to include a complete plain error argument constituted deficient performance, it did not find prejudice. The sentencing court did not consider improper factors. First, its "passing reference" to defendant's use of a gun, without more, did not arise to improper consideration of facts inherent in the offense. Second, despite defendant's denial that he was a gang member, the sentencing court properly cited defendant's gang involvement in aggravation, where he fired a gun from a crowd of people flashing gang signs.

People v. Coleman, 2013 IL App (1st) 130030 The State forfeited an alternative argument which it made in the Supreme Court where it failed to raise the argument in the trial court

and expressly stated in that court that it was taking a more limited position.

People v. Taylor, 409 Ill.App.3d 881, 949 N.E.2d 124 (1st Dist. 2011) To preserve an alleged error for appellate review, the defense must both object at trial and raise the issue in the post-trial motion. Although the reviewing court may reach an unpreserved error under the plain error doctrine, the defendant forfeits the right to plain error review where he fails to request such review. Here, defendant waived plain error review of several evidentiary issues by failing to make an adequate request in the reviewing court.

The court also held that two of the allegations of error would have been rejected on the merits had they been reached.

People v. Stanbridge, 348 Ill.App.3d 351, 810 N.E.2d 88 (4th Dist. 2004) Although the State asserted on appeal that defendant's motion for new trial had been untimely and therefore constituted a forfeiture of the issue raised on appeal, the State forfeited the forfeiture issue where it chose, in the trial court, to argue the untimely motion on the merits.

People v. Keith M., 255 Ill.App.3d 1071, 625 N.E.2d 980 (2d Dist. 1994) On appeal, the State may not urge reversal of a suppression order by invoking a theory that it did not advance at the trial level. Here, the State forfeited arguments in support of search and seizure where it failed to raise them in the trial court. The failure to raise the arguments below not only prevented the trial court from considering them but also deprived the defense of an opportunity to make an adequate record. But see **People v. Keller**, 93 Ill.2d 432, 444 N.E.2d 118 (1982).

§54-1(b)(9)(b)

Issue Not Forfeited

Illinois Supreme Court

People v. Brown, 2020 IL 125203 Defense counsel requested a fitness evaluation after learning that defendant had been “hearing voices.” The results showed defendant fit to stand trial. Rather than holding a hearing on defendant’s fitness, the trial court accepted the parties’ stipulation to the finding of fitness. The case proceeded to trial and defendant was found guilty. The Appellate Court reversed, agreeing with defendant’s argument that the trial court erred when it failed to exercise discretion and make an independent finding of fitness.

On appeal to the Supreme Court, the State argued that the trial court had no obligation to exercise discretion. Discretion is required only after a fitness hearing, and no fitness hearing is required unless the court finds a *bona fide* doubt of fitness, which never occurred here. Alternatively, it argued that the court did exercise discretion. Defendant argued that the State had waived the first issue by failing to raise it below or in its PLA.

The Supreme Court reviewed the first issue on the merits and agreed with the State. It first found that the failure to raise the issue in the Appellate Court is not dispositive, as an appellee may rely on any grounds included in the record when asking to sustain the judgment of the trial court. As for the failure to include the issue in the PLA, the lapse is not jurisdictional, and the court may still consider an issue if it is “inextricably intertwined” with the issue presented. The Supreme Court concluded that the question of whether a fitness hearing was required was intertwined with the issue of whether the judge had a duty to exercise discretion.

On the merits, the Court found that the request for a fitness evaluation occurred pursuant to section 104-11(b), which allows a party to request an evaluation to determine whether a *bona fide* doubt of fitness exists. Only after a *bona fide* doubt is found to exist is the judge required, pursuant to 104-11(a), to hold a fitness hearing and exercise discretion. Here, neither party nor the judge suggested a *bona fide* doubt existed, and therefore the judge could properly accept a stipulation to fitness without holding a hearing or exercising independent discretion.

People v. Sophanavong, 2020 IL 124337 Defendant forfeited his claim of noncompliance with section 5-3-1 by failing to raise the issue in his motion to withdraw the guilty plea. Under Rule 604(d), issues not raised in a motion to withdraw the plea may not be raised on appeal. While previous Supreme Court decisions held that section 5-3-1 imposes a requirement on the circuit court which may not be waived by a party, the majority here distinguished those cases by noting that waiver is different than forfeiture. The court held that the defendant's failure to raise the section 5-3-1 issue in a post-plea motion, in violation of Rule 604(d), went above and beyond the doctrine of waiver. It further held that defendant's agreement to a negotiated plea waived all non-jurisdictional errors, including the violation of section 5-3-1.

The State did not raise forfeiture in the Appellate Court. Nevertheless, the Supreme Court majority entertained and accepted the State's forfeiture argument, noting that forfeiture is a limitation on the parties, not the court.

Justice Burke, specially concurring, would have found that section 5-3-1 is not subject to forfeiture, being a requirement imposed on the court and not the parties, but would have found the error harmless in a case where the parties agreed on a sentence and the judge was apprised of defendant's criminal history.

In dissent, Justice Karmeier noted the absurdity of the majority's holding that the legislature's mandatory requirement could somehow be ignored because a party unintentionally neglected to invoke the requirement, particularly where prior cases held that parties had no ability to intentionally waive that requirement.

In a second dissent, Justice Neville marveled that the majority was willing to overlook forfeiture in order to address the State's forfeiture argument, but did not even consider overlooking forfeiture to review the defendant's section 5-3-1 argument. This disparate treatment of the parties indicates that the majority put its thumb on the scale of justice in favor of the State. Justice Neville further suggested that a sentence, particularly a *de facto* life sentence, imposed with out a PSI, violates [Article I, Section 11 of the Illinois Constitution](#).

People v. Gawlak, 2019 IL 123182 Defendant filed a 2-1401 petition, a post-conviction petition, and a section 116-3 motion for DNA testing. He hired a private attorney to represent him on the 2-1401, and a second attorney to represent him on the 116-3 motion. The latter attorney, clarifying to the court that he did not want to represent defendant on the 2-1401 or the PC, asked to enter a "limited appearance." The circuit court denied counsel's request because it preferred to have one attorney represent defendant on all pending matters. The court held a hearing on the 116-3 motion at which defendant appeared pro se, and denied defendant's request for DNA testing.

The Appellate Court held that Rule 13(c)(6), allowing for limited scope appearances in civil cases, applies to 116-3 motions, and the trial court's refusal to allow counsel's limited scope appearance was arbitrary, in violation of defendant's due process rights. The Supreme Court reversed, agreeing with the State that, although Rule 13(c)(6) applies, the rule requires

attorneys to fill out a form, and here, the attorney failed to comply with this requirement. This gave the circuit court a non-arbitrary reason to deny the limited scope appearance. Although the State did not raise this argument below, or in its PLA, the court declined to find the issue forfeited, noting forfeiture is a limitation on the parties not the courts, and that here, the issue is “inextricably intertwined” with the question presented.

However, the court also reversed the circuit court’s denial of the 116-3 motion, because the record did not establish that the attorney sought a true limited scope appearance. The proceeding on the 116-3 motion was distinct from the other collateral filings, and counsel did not indicate he intended limit his role within the 116-3 proceedings. At a minimum, counsel’s request was unclear, and pursuant to its supervisory authority, the court remanded the case to give defendant an opportunity to retain counsel in accordance with its rules.

People v. Williams, 193 Ill.2d 306, 739 N.E.2d 455 (2000) A plain error argument is not forfeited on appeal because it was raised for the first time in the reply brief. The State is required to raise the forfeiture argument in the appellee's brief; otherwise, the State's forfeiture argument would itself be forfeited. "Accordingly, we believe it would be unfair to require a defendant to assert plain error in his or her opening brief." See also, **People v. Laugharn**, 297 Ill.App.3d 807, 698 N.E.2d 219 (4th Dist. 1998) (defendant did not forfeit plain error argument that was raised for first time in reply brief).

People v. Becker, 239 Ill.2d 215, 940 N.E.2d 1131 (2010) The failure to raise an issue in a petition for leave to appeal is not a jurisdictional bar to the court’s ability to review a matter. When an issue is not specifically mentioned in a party’s petition for leave to appeal, but is inextricably intertwined with other matters properly before the court, review is appropriate.

Although the issue of harmless error was not mentioned in the State’s petition for leave to appeal, it did argue that the appellate court erred in finding that the evidence should have been excluded. The consequence of admitted evidence is inextricably intertwined with the propriety of its admission. Therefore, the Supreme Court could address whether admission of the evidence was harmless error.

People v. McCarty, 223 Ill.2d 109, 858 N.E.2d 15 (2006) Issue concerning whether statute imposing a sentence of 15 to 60 years for manufacture of more than 900 grams of any substance containing methamphetamine includes byproducts of the manufacturing process in the weight calculation, as well as challenges based on due process and the proportionate penalties clause, were not forfeited although one of the two defendants did not file a post-trial motion or raise the issues in the petition for leave to appeal. A challenge to the constitutionality of a statute may be raised at any time. Furthermore, the question concerning legislative intent could be raised for the first time in the Supreme Court because it was directly related to the constitutional challenges.

People v. Roberson, 212 Ill.2d 430, 819 N.E.2d 761 (2004) Although defendant's petition for leave to appeal did not raise the argument on which the court granted relief, the Court elected to reach an issue of sentence credit. Not only did defendant's reply brief present the argument, but a sentence which conflicts with a statute is void and may be challenged at any time. Also, the forfeiture doctrine concerns administrative convenience and does not involve Supreme Court jurisdiction. "[C]oncerns of administrative convenience must be set aside in order to address the proper statutory provisions and to provide the most complete and accurate guidance to our public officers."

People v. Bailey, 159 Ill.2d 498, 639 N.E.2d 1278 (1994) The State's argument (that a search was justified under the "search incident to arrest" doctrine) should not be deemed forfeited though it was not raised until rehearing in the appellate court. See also, **People v. Courtney**, 288 Ill.App.3d 1025, 687 N.E.2d 521 (3d Dist. 1997) (no objection to failure to appoint special prosecution).

Illinois Appellate Court

People v. Vega, 2018 IL App (1st) 160619 Appellate court could consider 8th amendment and proportionate penalties challenges raised for the first time in defendant's reply brief where defendant had argued merely that his sentence was "excessive" in the opening brief. Forfeiture is a limit on the parties, not the court, and "this is an important issue trending in our court." Defendant's argument was that his 61-year aggregate sentence for two counts of attempt first degree murder violated both the 8th amendment and the proportionate penalties clause because he was only 18 years old at the time of the offense, making him more like a juvenile for whom *de facto* life sentencing is prohibited without consideration of youth and its attendant characteristics. Because these were "as-applied" constitutional challenges which defendant had not raised in the trial court, however, the appellate court found the record insufficient to address them on their merits and concluded that they were more appropriate for a post-conviction petition.

People v. Carey, 2016 IL App (1st) 131944 Defendant argued for the first time in a petition for rehearing that the indictment for first degree felony murder was deficient because it failed to specify which of Illinois' two mutually exclusive types of armed robbery (firearm or dangerous weapon) formed the underlying predicate offense.

Generally, issues may not be raised for the first time in a petition for rehearing. The court nonetheless addressed defendant's argument since the failure to charge an offense is a defect that may be attacked at any time.

§54-1(b)(10)

Forfeiture in Collateral Proceedings

§54-1(b)(10)(a)

Issue Forfeited

Illinois Supreme Court

People v. Young, 2018 IL 122598 A claim for presentence custody credit under section 5-4.5-100 may be forfeited. In this case, defendant raised the issue for the first time on appeal from the denial of a successive post-conviction petition, and therefore the claim was forfeited. Unlike section 110-14, which contains language authorizing requests for *per diem* monetary credit at any time, section 5-4.5-100 does not contain similar language suggesting that the rules of procedural default do not apply. Also, while a motion to correct the mittimus may be made at any time, here defendant did not seek to correct the mittimus, which accurately reflected the trial court's judgment, but rather attacked the judgment itself. Nor could the issue be reached under Rule 615(b), which refers to the reviewing court's authority to reduce punishment imposed by the trial court. Here, the judgment at issue – the dismissal of the post-conviction petition – did not contain any punishment.

The court agreed to use its supervisory authority to remand the case for a hearing on whether defendant was entitled to additional days of sentencing credit.

People v. Thompson, 2015 IL 118151 Defendant filed an untimely 2-1401 petition 17 years after his conviction and sentence. In his petition, defendant raised several issues challenging his representation at trial. The trial court denied the petition. On appeal, defendant abandoned the claims he raised in his petition and argued instead that the sentencing statute mandating natural life imprisonment (for murdering more than one person) was unconstitutional as applied to him since he was 19 years old at the time of the offense, had no criminal history, and impulsively committed the offense after years of abuse by his father.

Defendant argued that his as-applied constitutional challenge constituted a challenge to a void judgment. Since a voidness challenge can be raised at any time, defendant argued that his claim was excused from the two-year limitations period that ordinarily applies to 2-1401 petitions (**735 ILCS 5/2-1401(a), (c)**), and could be raised for the first time on appeal from the dismissal of his petition.

The Supreme Court disagreed. A voidness challenge to a final judgment under section 2-1401 is only available in two specific situations. First, a judgment is void where the court that entered the judgment lacked personal or subject matter jurisdiction. Second, a judgment is void when it is based on a facially unconstitutional statute that is void *ab initio*. (A third type of voidness claim, where a sentence does not conform to statutory requirements, was recently abolished in **People v. Castleberry, 2015 IL 116916**.)

Defendant did not rely on either of the two situations where a voidness challenge could be made. He did not argue that the court lacked jurisdiction or that the sentence mandating natural life was facially unconstitutional. Defendant's claim was thus subject to the typical procedural bars of section 2-1401 and could not be raised for the first time on appeal from the dismissal of an untimely 2-1401 petition.

The court specifically rejected defendant's argument that an as-applied constitutional challenge should be treated the same as a facial challenge and be equally exempt from ordinary forfeiture rules. A facial challenge requires a showing that the statute is unconstitutional under any set of facts. An as-applied challenge, by contrast, only applies to the facts and circumstances of the particular case. In the latter case, it is paramount that the record be sufficiently developed in the trial court to establish the necessary facts for appellate review.

People v. Davis, 156 Ill.2d 149, 619 N.E.2d 750 (1993) The Court reiterated prior holdings that the plain error doctrine cannot be applied to procedurally defaulted errors first raised in post-conviction proceedings.

Illinois Appellate Court

People v. Matthews, 2022 IL App (4th) 210752 The court vacated as void *ab initio* defendant's 1990 and 1992 convictions for unlawful use of a weapon because they were identical to the version of that offense held facially unconstitutional in **People v. Gamez, 2017 IL App (1st) 151630**. Likewise, the court vacated defendant's 1994 convictions of unlawful use of a weapon by a felon as void because they were predicated on defendant's aforementioned UUWF convictions. Finally, the court vacated defendant's armed habitual criminal conviction because one of the predicate offenses on which it was based was defendant's 1994 UUWF conviction. Since the UUWF conviction was being vacated, it could no longer serve as a predicate offense, and thus defendant's AHC conviction could not stand.

The court reached each of these issues despite defendant's failure to raise them in his post-conviction petition because the unconstitutionality of the underlying UUWF convictions

rendered those convictions, and each of the subsequent offenses based on those convictions, void. While a defendant generally forfeits any issue not included in his post-conviction petition, a voidness challenge may be raised at any time and in any court and is not subject to forfeiture.

On appeal, defendant also challenged his sentence for aggravated discharge of a firearm, arguing that he should be resentenced because the trial court erroneously considered his void UUV convictions in aggravation at sentencing. The appellate court declined to reach that issue, however, because it was not raised in defendant's petition. While a void prior conviction is incompetent evidence at sentencing, it does not render the sentence itself void.

People v. Cortez, 2012 IL App (1st) 102184 Defendant's plea agreement was void where it included an essential element that was prohibited by Illinois law - the awarding of sentence credit for time which defendant served on an unrelated, consecutive sentence. Defendant did not forfeit the issue although he first raised it some 11 years after the guilty plea when he appealed the denial of a §2-1401 petition which sought to force the Department of Corrections to implement the trial court's order granting the credit. A void sentence can be challenged at any time.

The court also rejected the argument that defendant was estopped from challenging the plea because he received the benefit of the bargain when he obtained the minimum possible sentence. The court found the argument to be "disingenuous" because Illinois law prohibits defendant from receiving the benefit of his bargain - sentence credit for time previously served on an unrelated, consecutive sentence.

§54-1(b)(10)(b)

Issue Not Forfeited

Illinois Appellate Court

People v. Wells, 2023 IL App (3d) 210292 On appeal from the dismissal of a post-conviction petition, defendant challenged section 5-4.5-115 of the Code of Corrections on equal protection grounds. The statute created a new right to parole review for those who commit offenses while under the age of 21 and who are sentenced after June 1, 2019. Defendant claimed it violated equal protection because it does not apply retroactively to under-21-year-olds who were sentenced prior to June 1, 2019.

Defendant did not forfeit his claim, even though it was not included in his post-conviction petition and was raised for the first time on appeal. A defendant may attack a statute's constitutionality on appeal even if he did not raise the issue in the post-conviction petition.

The claim lacked merit, however, because amending a sentencing statute prospectively does not violate equal protection. **People v. Grant**, 71 Ill. 2d 551 (1978).

When an equal protection challenge to a sentencing statute does not involve a suspect class or a fundamental right, courts apply the rational basis test. Courts will generally defer to the legislature, which has broad discretion in setting criminal penalties. There is no equal protection right to receive the same sentence as other offenders who commit the same offense. The legislature may choose to set a penalty that applies prospectively without violating equal protection, because "the ability to elect to be sentenced under a law enacted after the date of the commission of a crime is not a constitutional right but a benefit conferred solely by statute." **Grant**, 71 Ill. 2d at 651. The same rationale applies to prospective parole laws.

While defendant argued that the legislature lacked a rational basis to make parole eligibility prospective, the appellate court found that the legislature has an interest in improving sentencing laws, and to do so efficiently and with minimal risk, it must have the right to make its improvements prospective-only. Prospective laws are also a reasonable means of protecting the State's interest in the finality of sentences.

People v. Johnson, 2020 IL App (2d) 170646 The circuit court properly denied defendant's motion for leave to file successive post-conviction petition. While the petition raised both a **Miller** challenge and a proportionate penalties challenge to his 27-year sentence for first degree murder, on appeal defendant argued that the truth-in-sentencing statute – requiring him to serve 100% of his sentence – was unconstitutional on its face and as applied to him.

The Appellate Court rejected the State's argument that defendant's truth-in-sentencing claim was both waived and forfeited. A sentence which violates the constitution can be challenged at any time, and defendant's claim on appeal was that his sentence was unconstitutional based on the reasoning in **Miller**. The court also concluded that the record here was sufficient to review defendant's as-applied challenge even though such challenges generally should be presented in the trial court first.

Ultimately, though, the Appellate Court rejected defendant's claim on the merits. Defendant's 27-year sentence did not bring him under the protections of **Miller** because it was not a *de facto* life term. Further, the record established that the sentencing judge considered defendant's youth and its attendant characteristics, as well as the fact that he was an accomplice and not the principal offender. Finally, the court noted that **People v. Othman**, 2019 IL App (1st) 150823, on which defendant's truth-in-sentencing challenge was based, had since been vacated.

People v. Cathey, 2019 IL App (1st) 153118 The trial court cannot *sua sponte* dismiss a section 2-1401 petition based on untimeliness. Here, defendant filed a petition alleging a one-act/one-crime violation 20 years after the end of the limitations period. The State did not answer the petition and therefore did not raise the affirmative defense of untimeliness. The State's failure to respond constitutes an admission of all well-pleaded facts and that no triable issue of fact exists. Thus, the trial court can *sua sponte* dismiss a section 2-1401 petition where the only issue before the court is whether defendant is entitled to relief as a matter of law. Application of the limitations period, however, requires a court to make fact determinations because exceptions are allowed for delays attributable to disability, duress, or fraudulent concealment.

While the Appellate Court found the defendant's petition set forth a meritorious one-act/one-crime claim under **Crespo** (convictions for both attempt murder and aggravated discharge where State did not apportion gun shots in the indictment), it could not determine whether the claim was forfeited and/or untimely. Defendant alleged that he did not know of the one-act/one-crime rule until just before filing his petition. Because the State did not answer the petition, the trial court made no finding on whether this explanation showed due diligence. The Appellate Court remanded for an evidentiary hearing on the issue of defendant's diligence.

People v. Cowart, 2015 IL App (1st) 131073 Defendant filed a post-conviction petition attacking his guilty plea by arguing that the trial court failed to properly admonish him that he would have to register as a sex offender. The State argued that defendant forfeited this issue by failing to raise it on direct appeal.

The Appellate Court rejected the State's argument. Post-conviction claims that could

have been raised on direct appeal are forfeited, but the failure to file any appeal at all does not forfeit such issues. For purposes of post-conviction forfeiture, a summary remand on direct appeal for non-compliance with Rule 604(d) is treated as if defendant filed no appeal at all. Here, on direct appeal, defendant's case was remanded for compliance with Rule 604(d) and thus his direct appeal was the equivalent of filing no appeal at all. Defendant therefore did not forfeit his post-conviction claim.

People v. Weathers, 2015 IL App (1st) 133264 Defendant filed a *pro se* motion for leave to file a successive post-conviction petition arguing that newly discovered evidence supported his claim of ineffective assistance of trial counsel. Defendant argued that his trial counsel was ineffective for withdrawing a motion to suppress his statements since the new evidence supported his claim that his confession had been coerced and that he was deprived of due process. The circuit court denied his motion.

On appeal, defendant argued that the trial court erred in denying his motion since the new evidence supported his claim that the State violated his due process rights by using a physically coerced confession. The State argued that defendant forfeited his appellate claim because in his post-conviction petition he framed the issue as ineffective assistance, not a due process violation.

The Appellate Court rejected the State's argument. Although the petition was framed as an ineffective assistance claim, it also consistently contended that defendant was subjected to physical coercion and that due process of law requires the suppression of a coerced confession. Under a liberal construction of the petition, the court found that defendant alleged a due process violation. Accordingly, the claims on appeal were substantially the same as the claims in the petition and were not forfeited.

§54-1(b)(11)

Forfeiture by the State

§54-1(b)(11)(a)

Issue Forfeited

Illinois Supreme Court

People v. Carter, 208 Ill.2d 309, 802 N.E.2d 1185 (2003) The State forfeited its argument that the evidence was insufficient to support an involuntary manslaughter instruction where the State failed to respond in the appellate court to defendant's argument that the evidence justified the instruction, and failed to raise the issue in its petition for leave to appeal or at any point until its opening brief in the Supreme Court.

People v. Wells, 182 Ill.2d 471, 696 N.E.2d 303 (1998) The State forfeited argument regarding the applicability of the "laches" doctrine where it did not assert the argument in the lower courts.

People v. Whitehead, 35 Ill.2d 501, 221 N.E.2d 256 (1966) The requirement that a motion for new trial be in writing and list the specific grounds relied upon is forfeited if defendant makes a non-specific oral motion and the State fails to object. Defendant then is not precluded on appeal from raising any error that might appear in the record, though not specified in the oral post-trial motion for new trial. See also, **People v. Caballero**, 102 Ill.2d 23, 464 N.E.2d 223 (1984) (defense counsel "has an obligation to this court to comply with the statute

[requiring a written motion for new trial], and the [prosecutor] has an obligation to object to general oral statements made by defense counsel that may be viewed as an oral motion for a new trial"); **People v. Porter**, 111 Ill.2d 386, 489 N.E.2d 1329 (1986); **People v. Sanders**, 143 Ill.App.3d 402, 493 N.E.2d 1 (1st Dist. 1986).

Illinois Appellate Court

People v. Smith, 2023 IL App (3d) 230060 A vehicle in which defendant was a passenger fled from an attempted traffic stop, disregarding a traffic light and stop sign along the way. The police did not pursue the vehicle, but instead went to the residence of one of the other passengers (Coffie) and waited for the vehicle to arrive there. When it did, the officers told the vehicle's owner that they were going to tow the vehicle for an "Article 36 seizure" because it had been used to commit the offense of aggravated fleeing and eluding. An officer then searched the vehicle before a tow truck arrived, finding a loaded handgun on the rear driver's side seat, under a large bag. Defendant was subsequently charged with aggravated unlawful use of a weapon.

Defendant filed a motion to suppress, arguing that the warrantless search violated the fourth amendment because the police lacked consent or probable cause, and the search was not justified as a search incident to arrest or an inventory search. The circuit court granted defendant's motion, finding that the seizure was a pretext where the initial decision to stop the vehicle for an equipment violation (no front license plate) was actually based on the officer's observation that defendant and Coffie were in the vehicle and were suspected of having been involved in a shooting a month prior. The court also noted that the officer's tow report did not indicate that the vehicle was being towed for aggravated fleeing and eluding, but rather that it was towed due to the weapons arrest.

On appeal, defendant conceded that the seizure of the vehicle at Coffie's residence was lawful because the police had probable cause to believe it had been used to commit aggravated fleeing and eluding based upon their personal observations. But, defendant argued that the subsequent search of the vehicle was not a valid inventory search, and the appellate court agreed. The officer's invocation of an "Article 36 seizure" was pretext for an investigatory search where the record demonstrated that the police never intended to seize the vehicle for asset forfeiture under that policy and instead used the procedure "as a ruse to conduct a search for contraband." There was no evidence that the officer followed departmental inventory procedure where no inventory log or seizure forms were introduced and where the tow report referenced only the weapons offense.

Additionally, the appellate court found that the State had forfeited any argument that the search should be sustained under the automobile exception to the warrant requirement. While the court concluded that the State had preserved that argument in the trial court, it found the argument forfeited on appeal under Supreme Court Rule 341(h)(7). The State's argument on this point consisted of a single paragraph in its brief and was not supported by pertinent legal authority.

People v. Rouse, 2022 IL App (1st) 210761 Defendant's post-conviction petition made a substantial showing of ineffective assistance of trial counsel by alleging that counsel interfered with his right to a jury trial and right to testify, and failed to call an exculpatory witness.

Defendant's petition contained his own notarized affidavit stating that he asked to testify at his robbery trial, but that his attorney warned him that doing so would "make her look bad" because they hadn't discussed his testimony. Counsel told him he had to "go along

with her on this.” Defendant also alleged that his attorney threatened to withdraw if he chose a jury trial. Finally, defendant alleged that his attorney failed to call to the stand his sister, who would have explained why he had a large amount of cash on him at the time of arrest.

The majority first held that the State forfeited two arguments raised for the first time during oral argument: (1) that defendant could not show **Strickland** deficiency and prejudice on the right-to-testify and right-to-jury-trial claims; and (2) that the record rebutted the right-to-testify claim. Neither argument was contained in the State’s brief, and although the defendant has the burden of making a substantial showing at the second stage, defendant’s opening briefs argued he had under the **Strickland** standard. At that point, the State had to rebut the argument, but instead, the State simply failed to respond. As such, any counter-arguments to these points were forfeited.

Regarding the right to a jury trial, the State argued that the record rebuts defendant’s claim because he was admonished and he executed a valid jury waiver. The majority disagreed. The admonishments did not inform him that the right to a jury trial was his alone to make. Thus, the admonishments did not specifically rebut the claim.

As to defendant’s right to testify, defendant adequately alleged that his attorney’s statements urging him not to testify interfered with his right. And the record supported the claim – after receiving admonishments about his right to testify, defendant informed the court that he would testify, but after an off-the-record discussion with his attorney, defendant stated that he would not be testifying. Taken as true, and in light of the State’s failure to raise a counter-argument to the **Strickland** prongs, defendant made a substantial showing.

Finally, defendant made a substantial showing of ineffectiveness for failing to call his sister. Even though defendant did not allege that his sister would testify, this is not an essential allegation if it can be inferred that she would. Although the dissent would have found no prejudice in light of the fact that defendant was identified in a show-up shortly after robbing two people, and had the proceeds of the robbery, and was seen throwing a gun, which was recovered, while being chased by police, defendant challenged all of this evidence at trial and therefore the value of his sister’s testimony is a question of fact to be resolved at an evidentiary hearing.

People v. Guerrero, 2021 IL App (2d) 190364 The trial court erred in admitting the prior inconsistent statement of a State witness at defendant’s aggravated battery trial. The State alleged that defendant threw a rock at the victim, Perez, and that Perez’s companion, Beltran, witnessed the crime. On the stand, Beltran denied any knowledge of the crime. The State sought to introduce his prior statement under section 115-10.1. Because the statement was not recorded, it was admissible only if the State could prove, inter alia, that the statement was based on Beltran’s personal knowledge of the events described, and that Beltran acknowledged under oath the making of the statement.

Although defendant did not contemporaneously object to the introduction of this evidence, the State did not raise forfeiture on appeal. Thus, the Appellate Court reviewed defendant’s argument on the merits.

To prove the personal knowledge requirement, Beltran did not have to testify that he witnessed the events. Rather, the question is resolved by looking at the face of the prior statement. Here, the State adequately proved the personal knowledge requirement, because the prior statement contained Beltran’s assertion that he personally observed the aggravated battery.

The State did not prove the acknowledgment requirement. Beltran testified he spoke with the police, but under section 115-10.1, the witness must acknowledge making the specific statement the State seeks to admit. Here, Beltran denied making the statements at

issue. The trial court abused its discretion in finding Beltran's general acknowledgment of a conversation with police satisfied section 115-10.1.

Defendant also challenged the admission of Beltran's prior identification of defendant in a photo array. Defendant alleged that Beltran did not "perceive" defendant as required by section 115-12, because, although he admitted to making the identification, he denied witnessing the crime. The Appellate Court rejected the argument. Section 115-12 does not require the witness to admit he perceived the defendant committing the crime, only that he had personally perceived him in the past.

However, the trial court did err when it allowed the detective to testify that Beltran identified defendant as the person he saw committing an aggravated battery. This allowed the State to admit under section 115-12 what it could not properly admit under section 115-10.1. The detective should only have been allowed to testify that Beltran identified the person in the photo as defendant.

These errors were not harmless. Although the State had properly admitted Perez's prior inconsistent statement identifying defendant as his attacker, Perez was a convicted felon with a "drug problem" who denied making the statement at trial. And while defendant conceded that Beltran's prior inconsistent statement could have been admitted as impeachment even if not admitted substantively, the Appellate Court rejected this concession where Beltran was the State's witness and did not affirmatively damage the State's case, meaning the State could not impeach him. Finally, Beltran's statement corroborated Perez's prior statement, amplifying and providing credibility to that evidence. Thus, there was a reasonable likelihood of a different result at trial had Beltran's prior statement been properly excluded.

People v. Crawford, 2021 IL App (5th) 170496 At defendant's trial for aggravated battery for striking another individual in the back of the head with a beer bottle while inside a bar, it was error to allow the State to question the bar's bouncer about a subsequent shooting outside the bar which also involved defendant and the purported battery victim. Prior to trial, the judge had ruled the shooting incident inadmissible. But, when the bouncer brought up the shooting in response to a defense question on cross-examination, the State argued that it required admission of the details of the shooting as part of a continuing narrative, and the trial court agreed.

On appeal, the State cited "continuing narrative" case law, but made no argument regarding the continuing narrative exception to the general ban on other crimes evidence. Accordingly, the Appellate Court found that argument forfeited under [Illinois Supreme Court Rule 341\(h\)\(7\)](#). The court went on to note that the exception would not apply, regardless, because admission of the shooting evidence was unnecessary to explain conduct which might otherwise be implausible or inexplicable.

The court also rejected the argument that defendant had "opened the door" to the other crimes evidence, entitling the State to introduce details of the shooting under the doctrine of "curative admissibility." The bouncer's initial testimony about the shooting was limited and not prejudicial to the State's case. Accordingly, it was improper to admit additional evidence of the shooting and to argue the shooting as substantive evidence of defendant's guilt of the earlier battery incident.

The evidence was closely balanced where both defendant and the State presented plausible versions of the events in question, and neither version was corroborated by physical evidence. Under those circumstances, the outcome depended on which witnesses the jury found more credible. Accordingly, the improper admission of other-crimes evidence

threatened to tip the scales of justice against defendant and amounted to plain error requiring a new trial.

People v. Anderson, 2021 IL App (2d) 190128 Defendant forfeited issue regarding propriety of his underlying conviction used to enhance class of offense by not timely objecting or including the issue in a written post-trial motion, but rather raising it for the first time in a motion to reconsider sentence. Defendant argued plain error in his brief, but the State did not argue forfeiture. Accordingly, the Appellate Court found that the State had forfeited any objection to defendant's forfeiture. The Appellate Court considered the issue on the merits.

People v. Bahena, 2020 IL App (1st) 180197 Defendant filed a pretrial motion challenging his warrantless arrest, which was denied. He did not renew the warrantless-arrest issue in his post-trial motion. The Appellate Court declined to find forfeiture, however, because the State did not raise a forfeiture concern. The rules of forfeiture apply equally to the State.

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. Bass, 2019 IL App (1st) 160640 Once the Appellate Court found an illegal arrest, suppressed a statement, and remanded for a new trial, the State could not argue for a good-faith exception for the first time in its petition for rehearing. The State had an opportunity to raise the good-faith exception in its original brief, and its failure to do so constitutes forfeiture.

People v. Alexander, 2019 IL App (3d) 160709 Although defendant's motion for new trial was filed more than 30 days after the guilty verdict, defendant did not forfeit his claim of error. The motion was filed prior to sentencing, at a time when the trial court still had jurisdiction over the matter. The State failed to challenge the motion's timeliness, thereby waiving any objection, and the trial court considered and ruled on the motion.

People v. Bowden, 2019 IL App (3d) 170654 In a State interlocutory appeal following the suppression of evidence, the State alleged the trial court improperly relied on personal knowledge when ruling on the motion to suppress. The State did not object below, but sought plain error review. The Appellate Court refused to apply the plain error doctrine because Rule 651(a) refers to "substantial rights," and the State does not have "substantial rights." The State's claim that it has a substantial right to prosecute its case was not supported by authority.

People v. Cowart, 2015 IL App (1st) 131073 Defendant filed a post-conviction petition attacking his guilty plea by arguing that the trial court failed to properly admonish him that

he would have to register as a sex offender. The State argued that defendant forfeited this issue by failing to raise it on direct appeal.

The Appellate Court rejected the State's argument. Post-conviction claims that could have been raised on direct appeal are forfeited, but the failure to file any appeal at all does not forfeit such issues. For purposes of post-conviction forfeiture, a summary remand on direct appeal for non-compliance with Rule 604(d) is treated as if defendant filed no appeal at all. Here, on direct appeal, defendant's case was remanded for compliance with Rule 604(d) and thus his direct appeal was the equivalent of filing no appeal at all. Defendant therefore did not forfeit his post-conviction claim.

The court also rejected the State's argument that defendant's second-stage post-conviction petition was properly dismissed because he provided no affidavits or other support for his claims. The State forfeits a non-jurisdictional procedural challenge to a post-conviction petition by failing to raise that challenge in its motion to dismiss.

Here the State made no argument in its motion to dismiss about the lack of affidavits or other support for defendant's claim. The court noted that had the State raised this issue in the circuit court, defendant could have supplied the affidavits. By failing to raise this issue, the State forfeited its argument on appeal.

People v. Daniel, 2013 IL App (1st) 111876 Issues not raised before the trial court are generally considered forfeited on appeal, a principle that applies to the State when it appeals a trial court's grant of a defendant's motion to suppress.

Where the State argued in the trial court that **Terry** allowed officers to handcuff the defendant during a traffic stop, it could not argue for the first time on appeal that the officers had probable cause to make an arrest and defendant was searched incident to that arrest. Because the State forfeited this argument, the Appellate Court refused to consider it as a basis to reverse the trial court's ruling on the motion to suppress.

People v. Coleman, 2013 IL App (1st) 130030 The State forfeited an alternative argument which it made in the Supreme Court where it failed to raise the argument in the trial court and expressly stated in that court that it was taking a more limited position.

People v. Hall, 2011 IL App (2d) 100262 Under 625 ILCS 5/11-501.2(a)(1), blood alcohol test results are admissible in DUI prosecutions only if the tests were performed according to standards promulgated by the State Police. The court noted that the standards promulgated under §11-51.2 apply only to DUI offenses; at trials for other offenses, blood alcohol test results are to be received in evidence under the usual standards governing the admission of evidence.

However, the court refused to overrule the trial court's order excluding the evidence on the non-DUI counts against the defendant. The court concluded that the issue was forfeited because the State failed to raise it until appeal.

People v. Haywood, 407 Ill.App.3d 540, 944 N.E.2d 846 (2d Dist. 2011) The State waived its argument, which it raised for the first time on appeal, that a traffic stop was justified by the possibility that the officer believed defendant was committing a violation by operating a vehicle with a malfunctioning turn signal. Generally, a party may not raise an issue on appeal which was not raised in the trial court. This rule applies to the State where it appeals the trial court's decision in favor of the defendant.

Allowing the State to present an argument for the first time on appeal prevents the defendant from presenting evidence which could have a bearing on the disposition. Here, had

the State raised its “malfunction” theory in the trial court, defendant could have presented evidence and argument that a reasonable officer would not have believed that the turn signal was malfunctioning.

People v. Duff, 374 Ill.App.3d 599, 872 N.E.2d 46 (1st Dist. 2007) Because defense counsel raised only a general objection, the Crawford objection could be deemed forfeited. But, the court reached the issue because the State did not contend that the general objection forfeited the confrontation issue.

People v. Rokita, 316 Ill.App.3d 292, 736 N.E.2d 205 (5th Dist. 2000) The court rejected the State's attempt to argue on appeal several matters it had conceded in the trial court. "The State cannot deny on appeal a fact it admitted in the trial court."

People v. Capuzi, 308 Ill.App.3d 425, 720 N.E.2d 662 (2d Dist. 1999) By failing to raise the issues in the trial court, the State forfeited arguments that the good faith exception applied and that defendants lacked standing to raise Fourth Amendment challenges. See also, **People v. Damian**, 299 Ill.App.3d 489, 701 N.E.2d 171 (1st Dist. 1998) (State forfeited any argument that the evidence was admissible under the "good-faith exception" where it failed to raise that argument during the hearing on the motion to suppress, in the motion to reconsider, during oral argument on the motion to reconsider, or in the notice of appeal; "[t]he failure of the prosecution to argue the good-faith exception before the trial judge deprived the judge of the opportunity to address such an argument or conduct any necessary hearing"); **People v. Thompson**, 337 Ill.App.3d 849, 787 N.E.2d 858 (4th Dist. 2003) (in appealing the trial court's ruling on a motion to suppress, the State forfeited its argument that officers had a sufficient basis to make a **Terry** stop where it failed to assert that basis at the suppression hearing; the trial judge had no opportunity to consider the argument and the defendants had no opportunity to rebut it).

§54-1(b)(11)(b)

Issue Not Forfeited

Illinois Supreme Court

People v. Sophanavong, 2020 IL 124337 Defendant forfeited his claim of noncompliance with section 5-3-1 by failing to raise the issue in his motion to withdraw the guilty plea. Under Rule 604(d), issues not raised in a motion to withdraw the plea may not be raised on appeal. While previous Supreme Court decisions held that section 5-3-1 imposes a requirement on the circuit court which may not be waived by a party, the majority here distinguished those cases by noting that waiver is different than forfeiture. The court held that the defendant's failure to raise the section 5-3-1 issue in a post-plea motion, in violation of Rule 604(d), went above and beyond the doctrine of waiver. It further held that defendant's agreement to a negotiated plea waived all non-jurisdictional errors, including the violation of section 5-3-1.

The State did not raise forfeiture in the Appellate Court. Nevertheless, the Supreme Court majority entertained and accepted the State's forfeiture argument, noting that forfeiture is a limitation on the parties, not the court.

Justice Burke, specially concurring, would have found that section 5-3-1 is not subject to forfeiture, being a requirement imposed on the court and not the parties, but would have

found the error harmless in a case where the parties agreed on a sentence and the judge was apprised of defendant's criminal history.

In dissent, Justice Karmeier noted the absurdity of the majority's holding that the legislature's mandatory requirement could somehow be ignored because a party unintentionally neglected to invoke the requirement, particularly where prior cases held that parties had no ability to intentionally waive that requirement.

In a second dissent, Justice Neville marveled that the majority was willing to overlook forfeiture in order to address the State's forfeiture argument, but did not even consider overlooking forfeiture to review the defendant's section 5-3-1 argument. This disparate treatment of the parties indicates that the majority put its thumb on the scale of justice in favor of the State. Justice Neville further suggested that a sentence, particularly a *de facto* life sentence, imposed without a PSI, violates [Article I, Section 11 of the Illinois Constitution](#).

People v. Gawlak, 2019 IL 123182 Defendant filed a 2-1401 petition, a post-conviction petition, and a section 116-3 motion for DNA testing. He hired a private attorney to represent him on the 2-1401, and a second attorney to represent him on the 116-3 motion. The latter attorney, clarifying to the court that he did not want to represent defendant on the 2-1401 or the PC, asked to enter a "limited appearance." The circuit court denied counsel's request because it preferred to have one attorney represent defendant on all pending matters. The court held a hearing on the 116-3 motion at which defendant appeared pro se, and denied defendant's request for DNA testing.

The Appellate Court held that Rule 13(c)(6), allowing for limited scope appearances in civil cases, applies to 116-3 motions, and the trial court's refusal to allow counsel's limited scope appearance was arbitrary, in violation of defendant's due process rights. The Supreme Court reversed, agreeing with the State that, although Rule 13(c)(6) applies, the rule requires attorneys to fill out a form, and here, the attorney failed to comply with this requirement. This gave the circuit court a non-arbitrary reason to deny the limited scope appearance. Although the State did not raise this argument below, or in its PLA, the court declined to find the issue forfeited, noting forfeiture is a limitation on the parties not the courts, and that here, the issue is "inextricably intertwined" with the question presented.

However, the court also reversed the circuit court's denial of the 116-3 motion, because the record did not establish that the attorney sought a true limited scope appearance. The proceeding on the 116-3 motion was distinct from the other collateral filings, and counsel did not indicate he intended limit his role within the 116-3 proceedings. At a minimum, counsel's request was unclear, and pursuant to its supervisory authority, the court remanded the case to give defendant an opportunity to retain counsel in accordance with its rules.

People v. Farmer, 165 Ill.2d 194, 650 N.E.2d 1006 (1995) The forfeiture rule is one of "administrative convenience rather than jurisdiction, and the goals of obtaining a just result and maintaining a sound body of precedent may sometimes override considerations of waiver." State did not forfeit argument though it failed to raise it in response to defendant's motion to dismiss the charges. See also, **People v. Bailey**, 159 Ill.2d 498, 639 N.E.2d 1278 (1994).

People v. Becker, 239 Ill.2d 215, 940 N.E.2d 1131 (2010) The failure to raise an issue in a petition for leave to appeal is not a jurisdictional bar to the court's ability to review a matter. When an issue is not specifically mentioned in a party's petition for leave to appeal, but is inextricably intertwined with other matters properly before the court, review is appropriate.

Although the issue of harmless error was not mentioned in the State's petition for leave to appeal, it did argue that the appellate court erred in finding that the evidence should have been excluded. The consequence of admitted evidence is inextricably intertwined with the propriety of its admission. Therefore, the Supreme Court could address whether admission of the evidence was harmless error.

People v. Keller, 93 Ill.2d 432, 444 N.E.2d 118 (1982) Where in the trial court the State prevailed on the merits of a motion to suppress evidence, it did not forfeit the issue of defendant's standing though it did not raise the issue. The Court distinguished the case from **People v. Holloway**, 86 Ill.2d 78, 426 N.E.2d 871 (1981), where the State forfeited the standing issue, on grounds that defendant in **Holloway** had prevailed on his motion to suppress in the trial court. Where defendant prevailed in the trial court, it would be unfair to require him to rebut a new theory raised for the first time on appeal. But, here "it would be unfair to hold that the State, as the prevailing party, had waived any reason it might conceivably have argued in support of the trial court's favorable ruling." Because the State "had not made any contrary assertion regarding standing," but had prevailed on the motion without addressing the standing question at all, the issue was not forfeited.

Illinois Appellate Court

People v. Shipp, 2020 IL App (2d) 190027 Defendant, who was walking in the snowy street near the reported location of a fight, ran from the police after they tried to stop him. He was arrested and searched. He filed a motion to suppress the gun found during the search, and while the State argued that defendant could have been arrested for walking in the street in violation of a city ordinance, the trial court instead found the arrest justified based on defendant's flight.

In a post-conviction petition, defendant alleged appellate counsel's ineffectiveness for failing to challenge the ruling on the motion to suppress. The circuit court summarily dismissed the petition, and the Appellate Court remanded, finding a gist of a constitutional claim. After further post-conviction proceedings, at which no further evidence was offered, the circuit court granted the petition and remanded for a new trial.

The State argued in the instant appeal that the arrest was justified by the ordinance violation. Defendant argued that the State's argument was precluded by the law-of-the-case doctrine, and that the State forfeited the argument when it failed to raise it in the first appeal. The Appellate Court disagreed, holding that in the post-conviction context, remanding a first-stage dismissal does not decide the issues for purposes of the law-of-the-case doctrine, it merely finds potential merit. Moreover, the State's failure to raise the ordinance issue in the first appeal did not forfeit the argument for the instant appeal, especially since the issue depended on factual determinations not available on a first-stage record.

However, the circuit court did not err in granting the petition. The State's ordinance-violation argument required a showing that walking on the sidewalk was practicable, such that walking on the street was unnecessary. Although the police testified the sidewalks were clear, video of the arrest shows mounds of snow along the sides of the street. Thus, resolution of the issue required a factual determination. Moreover, the State never provided legal arguments as to the definition of "practicable." The State bore the burden of establishing probable cause, and offered insufficient evidence or legal argument to meet its burden.

§54-1(b)(12)

Other Considerations

§54-1(b)(12)(a)

Issue Forfeited

Illinois Supreme Court

People v. Patrick, 233 Ill.2d 62, 908 N.E.2d 1 (2009) By choosing not to testify, defendant Phillips forfeited review of trial court's refusal to rule, until after defendant testified, on defendant's motion in limine on the admissibility of his prior convictions.

People v. Kuntu, 188 Ill.2d 157, 720 N.E.2d 1047 (1999) Post-conviction petitioner was entitled to an evidentiary hearing to determine whether he was denied a fair trial by a personal relationship between the State's Attorney and the jury foreman, despite defense counsel's failure to request an evidentiary hearing in the trial court, because this case was "an appropriate circumstance in which to relax the waiver rule and consider the issue on its merits." Also, the State failed to argue that defendant had forfeited his right to request an evidentiary hearing.

People v. Cloutier, 178 Ill.2d 141, 687 N.E.2d 930 (1997) Defendant's obligation to object to allegedly improper comments by the prosecutor was not excused on the ground that by overruling objections to unrelated remarks, the trial court had exhibited a "disinclination" to limit the closing arguments.

Illinois Appellate Court

People v. Shenault, 2014 IL App (2d) 130211 Ordinarily, an offer of proof is necessary to preserve a claim of error arising from the exclusion of evidence. An offer of proof informs the trial judge and opposing counsel of the nature of the offered evidence and provides the reviewing court with a record on which it can determine whether exclusion of the evidence was erroneous and prejudicial.

The court found that the failure to make an offer of proof cannot be evaluated under the plain error rule. The first step in applying the plain error doctrine is determining whether reversible error occurred. Where the issue is whether evidence was improperly excluded, the failure to make a proper offer of proof prevents the court from making such a determination.

People v. Washington, 182 Ill.App.3d 168, 537 N.E.2d 1354 (1st Dist. 1989) Defendant's failure to seek a continuance constituted a forfeiture of an alleged discovery error.

People v. Leamons, 127 Ill.App.3d 1056, 469 N.E.2d 1137 (4th Dist. 1984) Claim that trial court erred by prohibiting cross-examination about prior false claims of sexual assault was forfeited; defendant made no offer of proof as to the manner of proving the alleged false claims. But see, **People v. Morey**, 308 Ill.App.3d 722, 721 N.E.2d 200 (2d Dist. 1999).

§54-1(b)(12)(b)

Issue Not Forfeited

Illinois Supreme Court

People v. Coleman, 227 Ill.2d 426, 882 N.E.2d 1025 (2008) Defendant did not forfeit

argument urging the court to overrule precedent allowing the admission certain electronic surveillance evidence. That defendant did not ask the trial court to ignore appellate court precedent is "unsurprising" because appellate court cases are binding in the circuit court. Also, defendant did argue at both trial and in the post-trial motion that the recordings should be suppressed, which was sufficient to preserve the issue.

People v. Johnson, 191 Ill.2d 257, 730 N.E.2d 1107 (2000) Post-conviction petitioner did not forfeit an issue concerning the trial court's erroneous assignment of the burden of proof on fitness, though defendant failed to raise the issue in the trial court, because both parties before the court, as well as the trial judge, all proceeded under an erroneous view of the law.

People v. Hope, 184 Ill.2d 39, 702 N.E.2d 1282 (1998) Trial counsel did not forfeit an issue by mistakenly citing an inapplicable precedent as the only support for his argument.

People v. Toolles, 177 Ill.2d 462, 687 N.E.2d 48 (1997) The court reached a non-preserved issue (validity of oral jury waiver) due to the frequency with which it arises.

People v. Love, 177 Ill.2d 550, 687 N.E.2d 32 (1997) Because the trial court "wholly ignored the statutory procedures mandated for a reimbursement order" and ordered reimbursement sua sponte without any warning to defendant and as if "the imposition of a reimbursement order was a perfunctory exercise," "fairness dictates that waiver should not be applied."

People v. Brown, 169 Ill.2d 132, 661 N.E.2d 287 (1996) Defense preserved issue concerning voluntariness of statements by filing a motion to suppress in companion case on which litigation proceeded simultaneously. See also, **People v. Abadia**, 328 Ill.App.3d 669, 767 N.E.2d 341 (1st Dist. 2001) (the court reached closing argument issues on behalf of co-defendants although objections were raised at trial only by counsel for one defendant).

Illinois Appellate Court

People v. Curry, 2018 IL App (1st) 152616 The State conceded error in assessment of an electronic citation fee, as well as the failure to award presentence custody credit against fines, but argued that defendant had forfeited the errors. Noting that "forfeiture is a limitation on the parties, not the court," the Appellate Court exercised its discretion to review the assessments and ordered them corrected under Rule 615(b)(1).

People v. Lewis, 223 Ill.2d 393, 860 N.E.2d 299 (2006) A post-trial motion which identified the issue as the improper admission of hearsay was sufficient to avoid forfeiture where the trial court clearly understood the basis for the objection and only two hearsay objections had been raised at trial.

People v. Fulkerson, 326 Ill.App.3d 1124, 762 N.E.2d 1199 (4th Dist. 2002) Defendant did not forfeit his right to the return of his bail bond deposit by failing to request a stay of disbursement before the clerk made an unauthorized transfer of the deposit to the victims. "It is unclear how or why [defendant] could be required to seek a stay of a payment which was never authorized in the first instance and of which he had no judicial notice."

People v. Miller, 311 Ill.App.3d 772, 725 N.E.2d 48 (5th Dist. 2000) Although appellant had the duty to provide a record or bystander's report sufficient to decide the issues raised on

appeal, the court declined to apply the forfeiture rule though the record was insufficient, due to the magnitude of the constitutional deprivation at issue.

People v. Morey, 308 Ill.App.3d 722, 721 N.E.2d 200 (2d Dist. 1999) Defendant did not forfeit his argument that the trial court erred by denying a continuance, despite counsel's failure to make an offer of proof of an informant's testimony which she expected to be able to present if the continuance was granted. Requiring a defendant to present an offer of proof concerning the testimony of a confidential informant is unrealistic and would burden defendant with an insurmountable barrier. Also, the trial judge refused to allow counsel to present an offer of proof, and instead instructed her to rest her case. And, counsel told the trial court, as best she could, what she hoped to accomplish by calling the informant.

People v. Bradley, 406 Ill.App.3d 1030, 943 N.E.2d 759 (3d Dist. 2011) The court rejected the State's argument that defendant forfeited his objection to the admission of an audio recording of a drug transaction due to his failure to move pretrial to suppress the recording as provided by 725 ILCS 5/108A-9. The State did not complete its discovery obligation to turn over documents related to and the contents of the eavesdropping recording until 12 days prior to trial. This belated disclosure excused defendant's failure to move to suppress prior to trial.

§54-1(c)

Forfeiture Not Applicable – Voidness and Constitutional Claims

Illinois Supreme Court

People v. Almond, 2015 IL 113817 Defendant did not forfeit his Fourth Amendment issue by failing to include it in a post-trial motion. Constitutional issues that were previously raised at trial and could be raised later in a post-conviction petition are not subject to forfeiture on direct appeal simply because they were not included in a post-trial motion.

People v. Thompson, 2015 IL 118151 Defendant filed an untimely 2-1401 petition 17 years after his conviction and sentence. In his petition, defendant raised several issues challenging his representation at trial. The trial court denied the petition. On appeal, defendant abandoned the claims he raised in his petition and argued instead that the sentencing statute mandating natural life imprisonment (for murdering more than one person) was unconstitutional as applied to him since he was 19 years old at the time of the offense, had no criminal history, and impulsively committed the offense after years of abuse by his father.

Defendant argued that his as-applied constitutional challenge constituted a challenge to a void judgment. Since a voidness challenge can be raised at any time, defendant argued that his claim was excused from the two-year limitations period that ordinarily applies to 2-1401 petitions (735 ILCS 5/2-1401(a), (c)), and could be raised for the first time on appeal from the dismissal of his petition.

The Supreme Court disagreed. A voidness challenge to a final judgment under section 2-1401 is only available in two specific situations. First, a judgment is void where the court that entered the judgment lacked personal or subject matter jurisdiction. Second, a judgment is void when it based on a facially unconstitutional statute that is void ab initio. (A third type of voidness claim, where a sentence does not conform to statutory requirements, was recently abolished in **People v. Castleberry**, 2015 IL 116916.)

Defendant did not rely on either of the two situations where a voidness challenge could be made. He did not argue that the court lacked jurisdiction or that the sentence mandating

natural life was facially unconstitutional. Defendant's claim was thus subject to the typical procedural bars of section 2-1401 and could not be raised for the first time on appeal from the dismissal of an untimely 2-1401 petition.

The court specifically rejected defendant's argument that an as-applied constitutional challenge should be treated the same as a facial challenge and be equally exempt from ordinary forfeiture rules. A facial challenge requires a showing that the statute is unconstitutional under any set of facts. An as-applied challenge, by contrast, only applies to the facts and circumstances of the particular case. In the latter case, it is paramount that the record be sufficiently developed in the trial court to establish the necessary facts for appellate review.

Illinois Appellate Court

People v. Matthews, 2022 IL App (4th) 210752 The court vacated as void *ab initio* defendant's 1990 and 1992 convictions for unlawful use of a weapon because they were identical to the version of that offense held facially unconstitutional in **People v. Gamez**, 2017 IL App (1st) 151630. Likewise, the court vacated defendant's 1994 convictions of unlawful use of a weapon by a felon as void because they were predicated on defendant's aforementioned UUF convictions. Finally, the court vacated defendant's armed habitual criminal conviction because one of the predicate offenses on which it was based was defendant's 1994 UUF conviction. Since the UUF conviction was being vacated, it could no longer serve as a predicate offense, and thus defendant's AHC conviction could not stand.

The court reached each of these issues despite defendant's failure to raise them in his post-conviction petition because the unconstitutionality of the underlying UUF convictions rendered those convictions, and each of the subsequent offenses based on those convictions, void. While a defendant generally forfeits any issue not included in his post-conviction petition, a voidness challenge may be raised at any time and in any court and is not subject to forfeiture.

On appeal, defendant also challenged his sentence for aggravated discharge of a firearm, arguing that he should be resentenced because the trial court erroneously considered his void UUF convictions in aggravation at sentencing. The appellate court declined to reach that issue, however, because it was not raised in defendant's petition. While a void prior conviction is incompetent evidence at sentencing, it does not render the sentence itself void.

People v. Johnson, 2020 IL App (2d) 170646 The circuit court properly denied defendant's motion for leave to file successive post-conviction petition. While the petition raised both a **Miller** challenge and a proportionate penalties challenge to his 27-year sentence for first degree murder, on appeal defendant argued that the truth-in-sentencing statute – requiring him to serve 100% of his sentence – was unconstitutional on its face and as applied to him.

The Appellate Court rejected the State's argument that defendant's truth-in-sentencing claim was both waived and forfeited. A sentence which violates the constitution can be challenged at any time, and defendant's claim on appeal was that his sentence was unconstitutional based on the reasoning in **Miller**. The court also concluded that the record here was sufficient to review defendant's as-applied challenge even though such challenges generally should be presented in the trial court first.

Ultimately, though, the Appellate Court rejected defendant's claim on the merits. Defendant's 27-year sentence did not bring him under the protections of **Miller** because it was not a *de facto* life term. Further, the record established that the sentencing judge considered defendant's youth and its attendant characteristics, as well as the fact that he

was an accomplice and not the principal offender. Finally, the court noted that **People v. Othman**, 2019 IL App (1st) 150823, on which defendant's truth-in-sentencing challenge was based, had since been vacated.

People v. Smith, 2017 IL App (1st) 143728 On appeal from his murder and attempt murder convictions, defendant argued that several errors cumulatively denied him a fair trial, including two instances of prosecutorial misconduct and two evidentiary errors, all involving the inflammation of the jury's passions. Some of the errors had been preserved, others forfeited. The Appellate Court, citing **People v. Blue**, 189 Ill. 2d 99 (2000), agreed to consider the errors cumulatively and, to ensure that defendant received a fair trial, decided not to apply the forfeiture rule, which it deemed a limitation on the parties, not the court. It concluded that the errors constituted a pervasive pattern of unfair prejudice that denied defendant his right to a fair trial, and required a new trial regardless of the strength or weaknesses in the State's case.

People v. Carey, 2016 IL App (1st) 131944 Defendant argued for the first time in a petition for rehearing that the indictment for first degree felony murder was deficient because it failed to specify which of Illinois' two mutually exclusive types of armed robbery (firearm or dangerous weapon) formed the underlying predicate offense.

Generally, issues may not be raised for the first time in a petition for rehearing. The court nonetheless addressed defendant's argument since the failure to charge an offense is a defect that may be attacked at any time.

People v. Gray, 2016 IL App (1st) 134012 Defendant argued for the first time on appeal that the aggravated domestic battery statute (720 ILCS 5/12-3.3(a), (a-5)) was unconstitutional as applied to him. The court held that it could address this issue even though it was being raised for the first time on appeal.

In **Thompson**, 2015 IL 118151, the Illinois Supreme Court held that unlike a facial constitutional challenge to a statute, which may be raised at any time, the defendant could not raise an as-applied constitutional challenge to his sentence for the first time on appeal from the dismissal of his 2-1401 petition. While a facial challenge argues that the statute is unconstitutional under any set of facts, an as-applied challenge argues that the statute is unconstitutional only under the specific facts of the case. Because as-applied challenges are dependent on specific facts, the record must be sufficiently developed to allow appellate review.

Despite defendant's failure to raise this issue below, the court held that the record here was sufficiently developed to review the claim. At trial, the parties thoroughly explored defendant's relationship with the victim and provided a complete basis to analyze the as-applied constitutional attack.

People v. Cortez, 2012 IL App (1st) 102184 Defendant's plea agreement was void where it included an essential element that was prohibited by Illinois law - the awarding of sentence credit for time which defendant served on an unrelated, consecutive sentence. Defendant did not forfeit the issue although he first raised it some 11 years after the guilty plea when he appealed the denial of a §2-1401 petition which sought to force the Department of Corrections to implement the trial court's order granting the credit. A void sentence can be challenged at any time.

The court also rejected the argument that defendant was estopped from challenging

the plea because he received the benefit of the bargain when he obtained the minimum possible sentence. The court found the argument to be “disingenuous” because Illinois law prohibits defendant from receiving the benefit of his bargain - sentence credit for time previously served on an unrelated, consecutive sentence.

People v. Ward, 326 Ill.App.3d 897, 762 N.E.2d 685 (5th Dist. 2002) A case prosecuted by an attorney who is not properly acting as a prosecutor is void, and may be challenged on appeal even where no objection was raised in the trial court.

§54-2 **Plain Error**

§54-2(a) **Generally**

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. Eppinger, 2013 IL 114121 The plain error rule applies in either of two circumstances: (1) when a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error; or (2) when a clear or obvious error occurred and that error is so serious that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. Concerning the second prong, the defendant must demonstrate not only that a clear or obvious error occurred, but also that the error was structural.

People v. Hillier, 237 Ill.2d 539, 931 N.E.2d 1184 (2010) The plain error rule is a narrow exception to the forfeiture doctrine, and requires a defendant to show either that the evidence is closely balanced or the error is so egregious as to deny a fair proceeding. Under either test,

the defendant has the burden of persuasion.

Where the State asserts that the defendant has forfeited review of an issue, the reviewing court must first determine whether forfeiture occurred. If so, the court must hold the defendant to his burden of demonstrating plain error. Here, the Appellate Court erred by neglecting to deal with the merits of the forfeiture claim, and instead writing an opinion dealing with the merits of issues raised for the first time on appeal.

A defendant who fails to make any argument for plain error in the reviewing court “obviously cannot meet his burden of persuasion,” and therefore forfeits plain error review. Here, defendant forfeited any plain error argument where his only response to the State’s forfeiture argument was to argue that the State was guilty of forfeiture by failing to raise its argument in the Appellate Court.

People v. Naylor, 229 Ill.2d 584, 893 N.E.2d 653 (2008) Under the first prong of the plain-error rule, the seriousness of the error is not a factor. Under the second prong, the closeness of the evidence is not a factor. Under both prongs, the burden of persuasion remains with the defendant. Accord **People v. Walker**, 232 Ill.2d 113, 902 N.E.2d 691 (2009) (if defendant fails to carry that burden, the procedural default must be honored).

Here, although counsel waived a **Montgomery** issue by failing to include it in the post-trial motion, the court elected to reach issue as plain error.

People v. Herron, 215 Ill.2d 167, 830 N.E.2d 467 (2005) As to the first prong of the plain error rule, defendant must prove “prejudicial error,” i.e., defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. See also, **People v. Crespo**, 203 Ill.2d 335, 788 N.E.2d 1117 (2003). As to the second prong of the plain error rule, defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant’s trial and challenged the integrity of the judicial process. Prejudice to defendant is presumed because of the importance of the right involved.

Here, plain error occurred where the trial judge included the term “or” between factors listed in IPI Crim. 4th No. 3.15.

People v. Keene, 169 Ill.2d 1, 660 N.E.2d 901 (1995) Though the disjunctive approach to the plain error rule (procedural default may be excused either because the error affected “substantial rights” or because the evidence was “closely balanced”) has been the subject of much criticism, “absent a foundation for assessing directly the merits and shortcomings of the disjunctive approach,” that approach must be followed in Illinois cases.

People v. Williams, 165 Ill.2d 51, 649 N.E.2d 397 (1995) The appellate court erred by reaching issues as plain error where the evidence was not closely balanced and defendant was not deprived of a fundamentally fair trial.

People v. Davis, 156 Ill.2d 149, 619 N.E.2d 750 (1993) The Court reiterated prior holdings that the plain error doctrine cannot be applied to procedurally defaulted errors first raised in post-conviction proceedings.

People v. Herrett, 137 Ill.2d 195, 561 N.E.2d 1 (1990) The plain error rule (Supreme Court Rule 615(a)) allows consideration of non-preserved errors in two circumstances: (1) where the evidence is closely balanced, and (2) where the error is so fundamental and of such magnitude

that defendant was denied a fair trial. See also, **People v. Herron**, 215 Ill.2d 167, 830 N.E.2d 467 (2005); **People v. Naylor**, 229 Ill.2d 584, 893 N.E.2d 653 (2008); **People v. Walker**, 232 Ill.2d 113, 902 N.E.2d 691 (2009); **People v. Young**, 128 Ill.2d 1, 538 N.E.2d 461 (1989); **People v. Richmond**, 201 Ill.App.3d 130, 559 N.E.2d 104 (1st Dist. 1990).

Illinois Appellate Court

People v. Dunlap, 2013 IL App (4th) 110892 The plain error rule applies only to issues which were procedurally defaulted, and not to issues which were affirmatively waived.

People v. Watt, 2013 IL App (2d) 120183 The plain-error doctrine allows a reviewing court to reach a forfeited error in two instances: where the evidence is so closely balanced that the jury's guilty verdict might have resulted from the error and not the evidence; or (2) where the error is so serious that the defendant was denied a substantial right, and thus a fair trial. The second prong of the rule deals with presumptively prejudicial errors, which must be remedied although they might not have affected the outcome. A presumptively prejudicial error occurs only where the error is deemed structural. An instruction that either omits an element of the offense or misdescribes an element is not structural error.

It was error to instruct the jury that it could convict defendant of armed robbery based on a finding that he was armed with a dangerous weapon, where he was charged with committing armed robbery with a firearm. The Appellate Court declined to find plain error where the evidence was not closely balanced on the issue of guilt and the defect in the instructions was only a misdescription of an element that did not rise to the level of structural error.

People v. Oliver, 2012 IL App (1st) 102531 Where the defendant has made a timely objection and properly preserved an error for review, the reviewing court conducts a harmless-error analysis in which the State has the burden of proof. Where the defendant fails to make a timely objection and forfeits review, the reviewing court will examine the record only for plain error. In plain-error review, the burden of persuasion remains on defendant.

When a defendant who has not waived or forfeited his right to be present shows that the court conducted a critical stage of the proceedings in defendant's absence, the defendant has shown a violation of his constitutional rights. The burden is on the State to show that the error is harmless beyond a reasonable doubt. Where the defendant has not preserved the error for review, the burden is on the defendant to show that he was prejudiced by the violation of his right to be present.

Plain error did not occur due to defendant's absence from the conference on jury selection because his absence did not have the slightest effect on the impartiality of jury selection.

§54-2(b)

Clear and Obvious Error

Illinois Supreme Court

People v. Schoonover, 2021 IL 124832 During a trial for predatory criminal sexual assault, before the minor complainant's testimony, the trial court stated that it would be closing the courtroom to the public, except for the complainant's family members. Defense counsel stated that defendant's family was in the courtroom, and the trial court responded, "Out." The trial court then clarified that, pursuant to **725 ILCS 5/115-11**, it would order the courtroom cleared

of anyone other than media. The State asked if the complainant's grandmother could stay, and the court ruled she could stay. The defense did not object. As the courtroom was being cleared, the State obtained permission for two more family members to stay, while the defense stayed silent.

The Appellate Court found plain error, holding that the trial court failed to comply with section 115-11's requirement that it determine whether any excluded spectators have a direct interest in the case. This infringed on defendant's right to a public trial, and amounted to second-prong plain error. The Supreme Court, with one justice dissenting, reversed the Appellate Court and affirmed defendant's conviction.

Section 115-11 states that, during a minor's testimony in certain sexual assault cases, the trial court may exclude from the courtroom any spectators "who, in the opinion of the court, do not have a direct interest in the case, except the media." The record here did not reflect that the trial court violated the statute. Although the defense mentioned family members, it never established those family members had a direct interest in the case.

The defendant argued that the statute imposes an obligation on the trial court to determine whether any excluded spectator has a direct interest in the case, which the trial court violated when it summarily excluded the family members mentioned by defense counsel. The Supreme Court majority rejected this argument. The statute requires the trial court to form an opinion as to who should be excluded, but it does not require an express exercise of discretion. The statute did not require the court to inquire into the identities of the ousted spectators, particularly where the record does not show that those cleared from court were the family members mentioned by the defense.

Nor did the closure violate defendant's sixth amendment right to a public trial. According to United States Supreme Court precedent, the constitution places no restrictions on courtroom closures as long as the media is not excluded. Here, the trial court allowed the media to stay, and therefore the defendant's sixth amendment rights were adequately preserved.

Justice Neville, in dissent, would have affirmed the Appellate Court because the burden should be on the trial court, not defendant, to protect the right to a public trial. The dissent also would have found that admission of the press did not adequately preserve community members' first amendment right to a public trial.

People v. Hudson, 228 Ill.2d 181, 886 N.E.2d 964 (2008) In addressing a plain error argument, the reviewing court first considers whether error occurred at all. Here, no substantive error occurred in admitting evidence of psychological harm or in instructing the jury that under the home invasion statute psychological harm could constitute "any injury."

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 charged (deceptive practices) was plain error. See also, **People v. Turner**, 178 Ill.App.3d 510, 534 N.E.2d 179 (2d Dist. 1989) (forgery instruction that failed to include essential element (that the document in question was "apparently capable of defrauding another") was plain error); **People v. Delgado**, 376 Ill.App.3d 307, 876 N.E.2d 189 (1st Dist. 2007) (where 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 evidence here was closely balanced, and because the instructional error "threatened to tip the scales of justice," defendant carried his burden to show that he was prejudiced).

Illinois Appellate Court

People v. Ortega, 2021 IL App (1st) 182396 The trial court did not err in admitting prior consistent statements at defendant's murder trial. Initially, the Appellate Court refused to consider the claim under the second-prong of the plain error test, rejecting the idea that the introduction of improper prior consistent statements equates to "structural error." In any event, the court found no improper testimony. While two eyewitnesses testified as to what they told each other about the murder and what they told the police, these statements qualified as statements of identification under section 115-12. The rule against prior consistent statements does not apply to statements of identification.

Regarding another allegedly improper prior consistent statement, the court found not just forfeiture but affirmative waiver, because defense counsel attempted to use the prior statement to impeach the witness. A co-defendant testified that he told the police the same version of events, prior to receiving a deal. Counsel cross-examined the witness to show how both his testimony and his statement to police were contradicted by a surveillance video. Any alternative claim that this constituted ineffective assistance of counsel would be foreclosed given that discrediting the witness was counsel's strategy at trial.

People v. Barnes, 2017 IL App (1st) 143902 The trial court's alleged "antagonism and bias" toward defense counsel in front of the jury did not warrant a new trial. Defendant alleged that the trial court's anger at defense counsel for failing to have a defense witness in court and forcing a continuance, carried over into the trial, and that the court repeatedly berated counsel for leaving the podium during examination of witnesses, failing to lay foundation for questions, leading witnesses, testifying during his questioning, and failing to say "please" before requesting a sidebar.

The Appellate Court found none of the complained-of comments improper. In each instance the court properly responded to events in the courtroom. Regardless, defendant could not establish plain error. Despite some minor inconsistencies, the evidence was not closely balanced. The complainant and the co-offender both testified that defendant planned and executed the home invasion and robbery and nothing about the court's comments would influence the jury's view of the evidence.

People v. Johnson, 379 Ill.App.3d 710, 885 N.E.2d 358 (2d Dist. 2008) The court declined to consider, as plain error, the State's argument that the suspicionless stop of a driver known to possess a restricted driving permit is proper under the "special needs" doctrine. Although a reviewing court may consider pure issues of law that the State may have forfeited, the plain error rule requires that the error be clear and obvious. Because application of the "special needs" doctrine depends on "subtle balancing tests" and implicates both the individual rights of citizens and important State interests, and because there is no controlling authority on this question, any error was not clear and obvious. The court affirmed the trial court's order quashing defendant's arrest and suppressing evidence.

People v. Faria, 402 Ill.App.3d 475, 931 N.E.2d 742 (1st Dist. 2010) Although the forfeiture rule may be relaxed where an unpreserved issue concerns actions taken by the trial court, forfeiture should be ignored only in the most compelling situations, such as where a judge makes inappropriate remarks to the jury or the case involves capital punishment. (**People v. McLaurin**, 235 Ill.2d 478, 922 N.E.2d 344 (2009)). Here, the forfeiture rule was not relaxed although the trial judge "took over" defense counsel's cross-examination and interrupted counsel repeatedly.

First, because defendant was convicted in a bench trial, there was no jury to be influenced. However, “[h]ad this been a jury trial, we may well have reached a different decision.”

Furthermore, the trial judge did not act in counsel’s absence or in any way prevent objections from being made.

The plain error rule applies to a forfeited issue which affects the substantial rights of a defendant, if the evidence is so closely balanced that the guilty verdict might have resulted from the error or the error is so serious that the defendant was denied a substantial right and a fair trial. To determine whether plain error occurred under the latter test, the court must first determine whether a clear or obvious error occurred.

Here, no clear or obvious error occurred. Thus, the plain error rule did not apply.

§54-2(c)

Closely Balanced Prong

Illinois Supreme Court

People v. Williams, 2022 IL 126918 After an Appellate Court majority reversed defendant’s convictions for predatory criminal sexual assault, finding the prosecutor committed misconduct during closing arguments, the Supreme Court reversed and affirmed defendant’s convictions.

The court first found that, while defendant did not file a cross-appeal, his brief challenged another comment made by the prosecution which the Appellate Court found proper. Specifically, defendant alleged the State committed prosecutorial misconduct when it told the jury in rebuttal closing argument that the defense has the same subpoena powers and ability to call witnesses as the State. The Supreme Court decided to reach the argument, but it ultimately rejected the defendant’s claim.

Because the error was preserved, the court’s role was to determine whether the decision to overrule the defense objection was improper, and if so, whether the improper comment was so prejudicial that real justice was denied or the verdict resulted from the error. A trial court’s decision to overrule an objection to a comment in prosecutorial closing argument will not be overturned absent an abuse of discretion.

Here, the comments about defense subpoena power were a permissible response to the defense closing argument, which highlighted the fact that several of the complaining witnesses’ claims about defendant’s sexual abuse were not corroborated by two third-party witnesses who would have had knowledge of the events but whom the State did not call. Moreover, the comment was not prejudicial where it comprised three lines out of 17 pages of transcript.

The Supreme Court then addressed the issue the Appellate Court majority found to be reversible error: defendant’s allegation that the State committed prosecutorial misconduct when it told the jury that it could not call the third-party witnesses to the stand because hearsay rules prevent it from presenting testimony about “something that’s said outside of court.” Defendant argued that this comment provided an incomplete definition of hearsay, and that some of the corroborating evidence that the defense claimed was missing could be admitted, if it existed, through hearsay exceptions or as non-hearsay.

The Supreme Court noted the defendant failed to preserve the issue, then found that defendant could not show clear or obvious error in order to satisfy the plain error standard. The comment “captured the core of the rule and the bar to prior consistent statements.” The

comment was invited by defense counsel's argument, and, after making the comment, the State immediately reminded the jury that it bore the burden of proof.

Regardless, defendant would not be able to show prejudice. Defendant argued, and the majority below held, that the evidence was closely balanced because the case involved a "credibility contest" between the victims and the defendant. But the Supreme Court disagreed. It distinguished [People v. Naylor, 229 Ill. 2d 584 \(2008\)](#), where the court found the evidence closely balanced because witnesses provided two competing but credible versions of events. Here, the defense did not present evidence. Only the complainants provided their version of events. Although defendant challenged their credibility by highlighting an initial failure to report the crimes when asked by DCFS, and the fact that they waited several years before making any allegations, they provided reasonable explanations for these decisions, and a State expert testified that these types of decisions were common in child sex abuse cases.

[People v. Belknap, 2014 IL 117094](#) 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. White, 2011 IL 109689](#) The court acknowledged that it typically undertakes plain-error review by first determining whether error occurred at all, but it declined to do so in this case.

Consistent with the principle of judicial restraint, courts of review should not consider issues that are not essential to the disposition of the case or where the result will not be affected regardless of how the issues are decided. Courts consider constitutional issues only where essential to the disposition of a case. Therefore, where the only basis for a claim of plain error is that the evidence is closely balanced, and it is clear that the alleged error would not have affected the outcome of the case, a court of review should not engage in the meaningless endeavor of determining whether error occurred.

The evidence in defendant's case was not closely balanced. Four unrelated individuals initially identified defendant as the offender. The lineup that was the subject of the alleged error did not figure prominently in the court's finding of guilt. Photo identifications that preceded the lineup would not be implicated by the alleged constitutional error. The in-court identifications by the witnesses had a basis independent of the lineup. The circumstances surrounding the conduct of the lineup and the events leading up to it were not developed in the record. Therefore, the court declined to decide as a matter of plain error whether

defendant's Sixth Amendment right to counsel had attached at the lineup and whether that right to counsel was violated when counsel was excluded from the room where the witnesses viewed the lineup.

People v. Mullen, 141 Ill.2d 394, 566 N.E.2d 222 (1990) Where the evidence is closely balanced, the main purpose of the plain error rule is to protect an innocent person from conviction. In such instances, "the probability that a defendant's conviction was caused by even a minor trial error is greatly enhanced." See also, **People v. Burns**, 144 Ill.App.3d 345, 494 N.E.2d 872 (4th Dist. 1986) (a significant purpose of the plain error rule is to correct any injustices done to a defendant; thus, the strength or weakness of the evidence is relevant, because if the evidence is close there is a possibility that an innocent person may have been convicted due to some error).

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. Duffie, 2021 IL App (1st) 171620 The trial court erred in denying defendant's motion to suppress evidence that was recovered from a search of his person. At the suppression hearing, police testified they executed a search warrant for Travis Roby and an apartment on South Laflin Avenue in Chicago. During the search, Duffie was found laying on a bed in the rear bedroom, wearing only shorts. Before handing defendant's jeans to him, an officer searched them and found cocaine. Defendant was convicted of possession of the cocaine as well as possession of another controlled substance found in the apartment freezer.

Defendant did not include the suppression issue in his post-trial motion, and he did not argue plain error or ineffective assistance of counsel on appeal. Despite defendant's forfeiture, the appellate court reviewed the issue under the constitutional-issue exception because defendant did raise the issue in the trial court and could later raise it in a post-conviction petition if not addressed on direct appeal.

Under **Ybarra v. Illinois**, 444 U.S. 85 (1979), police must have independent probable cause to conduct a search of a person on the premises whose search is not authorized by the warrant. Whether such probable cause exists is determined by looking at the totality of the circumstances.

Here, defendant was one of several people in the apartment when the warrant was executed. Defendant was not behaving in a suspicious manner when police encountered him in a bedroom; he did not make any furtive movement or attempt to flee. And, no contraband or weapons were visible in the room where he was found. While 735 ILCS 5/108-9 provides that when executing a search warrant police may detain and search any person on the premises in order to protect themselves from attack or prevent disposal or concealment of evidence, there was nothing to suggest that the police were threatened by defendant or that searching his pants was necessary to prevent destruction or concealment of evidence. Defendant's mere presence in the apartment was insufficient to justify the search.

The dissent would have affirmed on the basis that there was evidence defendant was a resident of the apartment, specifically his being found in bed partially clothed and at least one document in the apartment showing that defendant lived there. The dissent concluded this was sufficient evidence of a connection to the apartment to justify the search without a need for independent probable cause.

People v. Crawford, 2021 IL App (5th) 170496 At defendant's trial for aggravated battery for striking another individual in the back of the head with a beer bottle while inside a bar, it was error to allow the State to question the bar's bouncer about a subsequent shooting outside the bar which also involved defendant and the purported battery victim. Prior to trial, the judge had ruled the shooting incident inadmissible. But, when the bouncer brought up the shooting in response to a defense question on cross-examination, the State argued that it required admission of the details of the shooting as part of a continuing narrative, and the trial court agreed.

On appeal, the State cited "continuing narrative" case law, but made no argument regarding the continuing narrative exception to the general ban on other crimes evidence. Accordingly, the Appellate Court found that argument forfeited under **Illinois Supreme Court Rule 341(h)(7)**. The court went on to note that the exception would not apply, regardless, because admission of the shooting evidence was unnecessary to explain conduct which might otherwise be implausible or inexplicable.

The court also rejected the argument that defendant had "opened the door" to the other crimes evidence, entitling the State to introduce details of the shooting under the doctrine of "curative admissibility." The bouncer's initial testimony about the shooting was limited and not prejudicial to the State's case. Accordingly, it was improper to admit

additional evidence of the shooting and to argue the shooting as substantive evidence of defendant's guilt of the earlier battery incident.

The evidence was closely balanced where both defendant and the State presented plausible versions of the events in question, and neither version was corroborated by physical evidence. Under those circumstances, the outcome depended on which witnesses the jury found more credible. Accordingly, the improper admission of other-crimes evidence threatened to tip the scales of justice against defendant and amounted to plain error requiring a new trial.

People v. Kadow, 2021 IL App (4th) 190103 The trial court erred when it denied a motion to suppress statements given by an intellectually disabled defendant. While in custody, the defendant invoked his right to counsel. The detective responded: "You want a lawyer?" before adding, "I am going to call to see if the State's Attorney's Office wants you lodged in jail right now, okay? If you don't want to talk to me." Defendant then insisted on speaking with the detective, waived his rights, and gave inculpatory statements. An expert testified to defendant's "extremely low intellectual functioning," and found he was unfit for trial. The expert also believed that defendant could not understand **Miranda** warnings.

A majority of the Appellate Court held that under these circumstances, the statement should have been suppressed. The police elicited the statement in violation of defendant's right to counsel, without a knowing and understanding waiver of **Miranda** rights. Defendant's disability was readily apparent to the officers, as defendant could not read his **Miranda** rights, struggled to understand the officers when they issued verbal warnings, and had difficulty writing his own name. The officer's implicit threat of jail time following invocation of the right to counsel violated **Edwards** by re-initiating contact after a request for counsel. It also rendered the statement involuntary, because, although officers are allowed to explain procedures relating to custody post-invocation, this statement implied the request itself necessitated jail time.

People v. Stitts, 2020 IL App (1st) 171723 The trial committed plain error when it admitted police identification testimony without abiding by the rules set forth in **People v. Thompson, 2020 IL App (1st) 171723**. At trial, the State published a surveillance video while a detective was on the stand. The detective explained the video to the jury as they watched, identifying defendant as having the man shown on the screen with a handgun. Because the trial court did not allow the defense to conduct preliminary cross-examination on the officer's familiarity with the defendant, limit the testimony before the jury (rather than allow the detective to mention prior investigative alerts), and instruct the jury, it plainly violated **Thompson**.

The court also found the evidence closely balanced. No eyewitnesses identified defendant as the shooter, and although he was found nearby with a gun and residue on his hand, the State did not establish that he actually fired, rather than simply held, the gun.

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. 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. Carbajal, 2013 IL App (2d) 111018 The evidence against defendant in a burglary prosecution was closely balanced. The case boiled down to the issue of defendant's intent at the moment he entered the building. Defendant contended he had no intent to commit a theft and that his companion did not discuss committing a theft until after they entered the building. While defendant fled when the police arrived, this evidence of his consciousness of guilt could have led the jury to find him guilty of criminal trespass rather than burglary. Defendant's written statement could support the inference that he was aware of his companion's plan to commit a theft, but the statement did not indicate *when* the companion revealed his plan.

The conduct of the prosecutor in misstating the law of accountability and shifting the burden of proof to the defendant threatened to tip the scales of justice against the defendant. Even though, in response to the defense objection, the court admonished the jury that it would instruct the jury as to the law, the prejudicial effect of an improper argument cannot always be erased from the minds of the jurors by an admonition by the court. Therefore, the prosecutor's improper comments were noticed as plain error.

People v. Miller, 2013 IL App (1st) 110879 The court concluded that reversal of a conviction for aggravated possession of a stolen motor vehicle was required by the cumulative effect of two plain errors committed by the trial judge: (1) incorrectly remembering testimony when making credibility determinations, and (2) excluding evidence concerning the owner's belief that the car had been sold. Defendant was prejudiced by the cumulative effect of the errors because the evidence was closely balanced on whether the defendant was a *bona fide* purchaser, defendant rebutted the inference that he knew the vehicle was stolen by calling witnesses who testified that the vehicle had been purchased from the owner's husband, and defendant's explanation was reasonable and could have convinced a reasonable trier of fact.

People v. Richardson, 2013 IL App (1st) 111788 In a prosecution for aggravated battery of a child, plain error occurred where the trial court failed to ascertain that the prospective jurors both understood and accepted the principles specified in Supreme Court Rule 431(b). The defendant did not contest that the child was injured during the period of time that she

had responsibility for the child. The issue that the jury had to decide was whether the defendant acted with intent to injure the child or knowledge that her acts would injure the child.

An ER doctor testified that the injury, a spiral fracture of the tibia, resulted from child abuse. Defendant's statement only admitted to pulling the child out of his child seat "in an aggressive way," which caused the child's foot to twist as she pulled him. Defendant did not state that she intended to twist the foot or that she knew that the twisting could cause great bodily harm. The ER doctor admitted that only 3% of his practice involved children as young as the injured child and that a physician at Children's Memorial Hospital could not determine whether the injury resulted from child abuse. Defendant's failure to tell the child's mother about the injury could be explained by fear and hope that the injury would not prove to be severe, even if defendant had caused the injury accidentally. On this evidence, it was a very close question whether defendant knew, before she pulled the child out of his car seat, that by so doing she would cause him great bodily harm.

The error left open the possibility that a juror may have resolved this close question on an improper basis. Jurors may not have understood the counterintuitive principle that, even after prosecutors filed a charge, they must presume the defendant innocent, and they must not treat defendant's decision not to testify as evidence of guilt. The court reversed and remanded because the error in questioning the venire may have tipped the scales of justice against defendant in this closely-balanced case.

People v. Vesey, 2011 IL App (3d) 090570 Once the defendant proves error in a closely-balanced case, the error is presumptively prejudicial. Defendant is entitled to reversal without any further showing of prejudice. **People v. Herron**, 215 Ill.2d 167, 830 N.E.2d 467 (2005). Any statement in **People v. White**, 2011 IL 109689, indicating that defendant may obtain reversal of his conviction under the closely-balanced-evidence prong of the plain-error rule only if he can show that he was prejudiced by the error, was unnecessary to the court's holding and did not overrule the plain-error analysis of **Herron**.

People v. Maldonado, 398 Ill.App.3d 401, 922 N.E.2d 1211 (1st Dist. 2010) An issue is preserved for appeal by: (1) objecting at trial or raising the issue in a motion *in limine*, and (2) presenting the issue in a post-trial motion. The defendant preserved an issue concerning the admissibility of gang-related testimony where the State filed a motion *in limine* to admit the evidence for a limited purposes, defendant replied by objecting to the admission of gang evidence for any purpose, and the issue was raised in the post-trial motion.

Even had the defendant not preserved the issue, it would be reviewable as plain error because the evidence was closely balanced and the improper admission of gang related evidence could have affected the outcome of the case. (See **EVIDENCE**, §§19-2(b)(1), 19-5, 19-16).

§54-2(d)

Substantial Rights Prong

Illinois Supreme Court

People v. Johnson, 2024 IL 130191 Defendant was convicted of aggravated domestic battery. During sentencing, the State asked the court to apply several statutory aggravating factors, including 730 ILCS 5/5-5-3.2(a)(14). According to the State, this factor applies when the defendant holds a position of trust over the victim, such as a family or

household member. The sentencing court imposed a 10-year extended-term sentence. In doing so, it mentioned subsection 5-5-3.2(a)(14) in relation to the victim's child.

On appeal, defendant argued that the sentencing court committed plain error when it relied on subsection 5-5-3.2(a)(14) in aggravation, because that factor applies only to victims under 18 and only in certain sex cases. The appellate court found that defendant forfeited his argument, and that the error was neither first- nor second-prong plain error.

The supreme court held that the sentencing court committed clear and obvious error by relying subsection 5-5-3.2(a)(14) as an aggravating factor. But the error was not second-prong plain error. The second prong is limited to errors that erode the integrity of the judicial process and undermine the fairness of the defendant's trial. Such errors affect the framework within which the trial proceeds, rather than mere errors in the trial process itself.

Defendant argued that courts have repeatedly reached similar errors under the second prong. He relied on [People v. Martin](#), 119 Ill. 2d 453 (1988), where the court found the sentencing court's consideration of an improper factor "affected the defendant's fundamental right to liberty and impinged on her right not to be sentenced based on improper factors." But the supreme court clarified that **Martin** reached the issue under the first prong. The **Martin** court's reference to the "fundamental right to liberty" was not an invocation of the second prong but instead an acknowledgment of the principle that, before the plain error rule may be invoked, defendant must show that the clear error affected a substantial right. The court overruled several appellate court decisions that had cited **Martin** for the proposition that the second prong applies to sentencing errors because they affect the fundamental right to liberty, including [People v. Haley](#), 2011 IL App (1st) 093585, [People v. Sanders](#), 2016 IL App (3d) 130511 and [People v. Abdelhadi](#), 2012 IL App (2d) 111053.

Here, aside from his reliance on **Martin** and its progeny, defendant did not provide any support for his contention that the consideration of the improper sentencing factor rose to the level of second-prong plain error. Defendant was required to show that the error rendered the sentencing hearing itself unreliable. But the consideration of an improper factor in aggravation does not affect the framework within which the sentencing hearing proceeded. Rather, it's merely an error in the sentencing process itself. The error was also not structural nor the type of error that rendered the proceedings fundamentally unfair.

Finally, the court noted that the second prong is reserved for errors not amenable to harmless error analysis. The consideration of an improper sentencing factor may be considered harmless error. Accordingly, sentencing errors should be raised under the first prong. Defendant did not argue first-prong plain error before the supreme court, so the court did not decide whether this error met the first prong.

[People v. Ratliff](#), 2024 IL 129356 After waiving counsel and pleading guilty, defendant filed a motion to withdraw his guilty plea. He did not challenge his waiver of counsel in the motion, and, after appointment of post-plea counsel, he did not proceed on the motion, instead filing a motion to reconsider sentence, which was denied. On appeal, defendant argued the trial court failed to comply with Rule 401(a) because it did not admonish him of the charge and sentencing range at the time it accepted his waiver of counsel.

The court held that it lacked jurisdiction to reach the issue, where the notice of appeal was filed only from the motion to reconsider sentence. But the court decided to use its supervisory authority in order to provide guidance to the lower courts on "weighty issues." The court then held that, even if it had jurisdiction, defendant could not obtain review of the merits of this claim for three reasons.

First, the court held that defendant's guilty plea waived the claim. "[A] constitutional

right, like any other right of an accused, may be waived, and a voluntary plea of guilty waives all errors or irregularities that are not jurisdictional.” This “waiver” is distinct from forfeiture. While forfeited claims may be reached under the plain error doctrine, waived claims may not.

Second, although Rule 604(d) allows defendant to raise claims arising out of a guilty plea, and thereby preserve them for appeal, “offering an important outlet that allows the defendant to avoid waiver of any constitutional claims,” defendant did not raise his 401(a) claim in a post-plea 604(d) motion. Pursuant to Rule 604(d), the claim must be “deemed waived.” Notably, defendant did not argue below, or on appeal, that his guilty plea was less than knowing or voluntary (presumably an exception to these waiver rules). As with the waiver associated with guilty pleas, a waiver under Rule 604(d) is not a forfeiture and therefore not amenable to plain error analysis.

Finally, even if plain error did apply, defendant could not show second-prong plain error. Defendant established that the trial court failed to comply with Rule 401(a), where it admonished defendant at arraignment, but not at the time of the waiver 11 weeks later. But this error does not rise to the level of a structural error. Several appellate courts have found a 401(a) violation amounts to second-prong plain error because it affects the fundamental right to counsel, but these cases involved trials, which raise different concerns. The “uneasiness and uncertainty” that follows a *pro se* defendant’s trial “disappears when the defendant pleads guilty.” Moreover, these cases lacked any analysis as to why a 401(a) violation is structural. Looking to its recent second-prong jurisprudence, such as [People v. Moon, 2022 IL 125959](#), the court distinguished between structural errors, which render a trial fundamentally unfair and defy harmless error analysis, and those errors which may be reviewed for harmlessness. A 401(a) violation is not structural, but rather akin to a trial error, which may be measured for harmlessness. Rule 401(a) is a safeguard to help ensure defendant is afforded his right to counsel, but it is tangential to the right itself. A waiver could be valid absent 401(a) admonishments, and defendant here did not argue that because of the absence of the 401(a) admonishments, his waiver of counsel was not knowing and voluntary.

Two concurring justices believed the court should not have reached the merits due to lack of jurisdiction. One of these justices (J. Cunningham), believed that, despite the general rule that a guilty plea waives all claims, the court’s waiver analysis was incorrect in this case. Under “binding United States Supreme Court precedent,” a defendant can always challenge the waiver of counsel on appeal from a guilty plea, because a guilty plea entered without a knowing waiver of counsel is invalid. Justice Cunningham also noted that the majority’s discussion of Rule 604(d) is in direct conflict with [People v. Sophanavong, 2020 IL 124337](#), which held that 604(d) implicates “forfeiture” (failure to make timely assertion of a right), rather than “waiver” (intentional relinquishment of a known right). These two justices also believed, however, that the trial court complied with Rule 401(a).

Justices Neville and Overstreet believed that the notice of appeal conferred jurisdiction on the court to reach the 401(a) issue, but Overstreet otherwise agreed with the majority. Neville would have reversed, finding that the lack of 401(a) admonishments invalidated the waiver of counsel, which in turn invalidated the plea. This is exactly the type of egregious structural error that demands reversal irrespective of whether it was raised below.

[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. Clark, 2016 IL 118845 A defendant may not be convicted of an uncharged offense, unless it is a lesser-included offense of the charged offense and the trial evidence rationally supports conviction on the lesser offense and acquittal on the greater offense. Courts use the charging instrument approach in determining whether an uncharged offense is a lesser-included offense.

The State charged defendant with aggravated vehicular hijacking while armed with a firearm (720 ILCS 5/18-4(a)(4)) and armed robbery while armed with a firearm (720 ILCS 5/18-2(a)(2)). Following a bench trial, the court acknowledged that defendant committed the offenses while armed with a gun, but determined that the gun was used as a bludgeon "and will be treated as such." The court thus found defendant guilty of aggravated vehicular hijacking and armed robbery without a firearm. Defendant did not object to this finding.

Both the aggravated vehicular hijacking and armed robbery statutes make a clear distinction between committing these offenses while being armed with either (1) a firearm or

(2) a dangerous weapon other than a firearm. [720 ILCS 5/18-2\(a\)\(1\), \(2\); 720 ILCS 5/18-4\(a\)\(3\), \(4\)](#).

The Illinois Supreme Court held that it “would have to stretch plain meaning and common understanding beyond a semblance of reason” to find that charging defendant with committing these offenses while armed with a firearm gave him notice that he was also charged with committing these offenses while armed with a dangerous weapon other than a firearm. The plain language of these statutes shows that the different offenses are mutually exclusive of each other. The offenses of aggravated vehicular hijacking and armed robbery without a firearm are not lesser-included offenses of the charged offenses.

Although defendant did not object to this error, the Supreme Court found that it was cognizable and remedial under the second prong of plain error. Plain error is applicable when clear or obvious error occurs and: (1) 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 challenged the integrity of the judicial process, regardless of the closeness of the evidence.

The court first held that the error here was clear since the two offenses as defined in the relevant statutes are mutually exclusive of each other. The court also found that the error challenged the integrity of the judicial process. Although the trial court may have attempted to afford defendant some benefit by convicting him of using a weapon other than a firearm (when all of the evidence showed that he did in fact possess a firearm), the result of the trial court’s actions was that defendant was convicted of offenses that he was not charged with and did not commit. Permitting unauthorized convictions to stand challenges the integrity of the judicial process.

In reaching this decision, the court specifically declined to limit the second prong of plain error to the six types of structural error recognized by the United States Supreme Court.

The court affirmed the lower court’s judgment reducing defendant’s convictions to vehicular hijacking and robbery and remanding the case for resentencing.

People v. Johnson, [238 Ill.2d 478, 939 N.E.2d 475 \(2010\)](#). The second prong of the plain error rule was not satisfied where defendant failed to object when the trial court responded to a jury question without notifying the parties. Although criminal defendants have a general right to be present at every stage of the trial, the right to be present is not itself a substantial right under the Illinois or federal constitutions. Instead, it is a lesser right intended to secure substantial rights such as the right to confrontation, the right to present a defense, or the right to an impartial jury. Because the defendant failed to show that any of these underlying rights had been violated, responding to the note in the absence of defendant or his counsel was not such a serious error as to affect the fairness of the trial or the integrity of the judicial process.

The court acknowledged that historically, it granted a new trial whenever *ex parte* communication occurred between the trial judge and the jury. In recent years, however, it has moved away from that rule and requires a new trial only if the defendant suffered prejudice. Because the court’s response to continue deliberations was well within the court’s discretion and was not coercive, no prejudice occurred.

People v. Thompson, [238 Ill.2d 598, 939 N.E.2d 403 \(2010\)](#) A violation of Rule 431(b) does not constitute “structural” error which requires reversal in every case. An error is structural only if it necessarily makes the trial fundamentally unfair or unreliable as a means of determining guilt or innocence. Only a limited number of errors are considered structural;

examples include a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction.

The court noted that in **People v. Glasper**, 234 Ill.2d 173, 917 N.E.2d 401 (2009), it held that the failure to comply with an earlier version of Rule 431(b) was not structural error. The court concluded that the same reasoning applies to the amended version of the rule.

Although structural error would occur if a defendant was forced to stand trial before a biased jury, Rule 431(b) is but one method of insuring a fair jury. Thus, the failure to comply with Rule 431(b) does not necessarily result in a biased jury and unfair trial. Because the error does not in and of itself render the trial unreliable, the error is not structural.

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.

Because compliance with Rule 431(b) is not indispensable to a fair trial, 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. Thus, the plain error rule does not apply.

People v. Lewis, 234 Ill.2d 32, 912 N.E.2d 1220 (2009) Although defendant failed to object in the trial court, the Supreme Court concluded that imposition of a street value fine without a sufficient evidentiary basis satisfies the “fundamental fairness” prong of the plain error rule. The court rejected the Appellate Court’s finding that a \$100 fine is too insignificant to constitute plain error, finding that a *de minimus* exception to the plain error rule “would be difficult to implement because of the difficulty in determining when an error is significant,” and would be inconsistent with “the fundamental fairness concerns of the plain error doctrine.”

The court vacated the \$100 street value fine and remanded the cause for the trial court to impose a new fine based on evidence of the value of the substance seized from the defendant.

In re Samantha V., 234 Ill.2d 359, 917 N.E.2d 487 (2009) The plain error doctrine allows a reviewing court to consider unpreserved error where the evidence is closely balanced or the error so serious as to affect the fairness of the trial and the integrity of the judicial process. Under either test, the defendant has the burden of persuasion. Before considering whether the plain error exception applies, the court must first determine whether any error occurred.

Here, the minor carried her burden to show that plain error occurred based upon the second prong of the plain error rule – because a “one-act, one-crime” violation affects the integrity of the judicial process.

People v. Pickett, 54 Ill.2d 280, 296 N.E.2d 856 (1972) The plain error rule does not mandate that a reviewing court consider all errors involving substantial rights whether or not the same have been brought to the attention of the trial court. Instead, the rule is a means of meliorating the harshness of strictly applying the general forfeiture rule. Thus, as a matter of grace the reviewing court may take notice of errors that deprived the accused of substantial means of enjoying a fair and impartial trial, even if the issue was not preserved. Likewise, in criminal cases in which the evidence is closely balanced a reviewing court may consider errors that were not properly preserved.

Illinois Appellate Court

People v. Turner, 2024 IL App (1st) 211648 As a matter of plain error, the appellate court found that the trial court erred when it removed the *pro se* defendant from the courtroom during jury selection. Generally, a defendant has a constitutional right to be present at any critical stage of the proceedings against him. A defendant may relinquish that right, however, either by consent or by his or her own misconduct.

Here, the court found that defendant's removal was warranted by his "unrelenting argument and disrespect" during jury selection. But, because defendant was proceeding *pro se*, his removal left him without any representation during jury selection. This violated his constitutional right to due process because defendant was completely deprived of representation during a critical stage of the proceedings.

The State argued that defendant knowingly waived his right to be present where the trial court had warned him previously that he would be removed for misconduct and had, in fact, followed through on having defendant removed from prior proceedings. Thus, he was on notice of the possibility of removal for misconduct when he chose to disrupt the jury selection proceedings. The appellate court rejected that argument. A knowing waiver requires both knowledge that defendant would be removed from the courtroom and also knowledge that removal would leave him without any representation at all. Here, while defendant had been warned of the consequence of removal during prior court proceedings, he was not warned at the jury selection hearing that he could be removed for misconduct during that particular proceeding. And, defendant was never warned that his removal would leave him with no representation at all. Thus, defendant did not knowingly waive his right to legal representation during jury selection. This was structural error, not subject to harmless error analysis. Defendant's conviction was reversed and the matter remanded for a new trial.

People v. Ryan, 2024 IL App (2d) 220076 The trial court committed second-prong plain error when it held defendant's stipulated bench trial over Zoom without obtaining defendant's waiver. Defendant was charged with possessing a weapon without a FOID card, two counts of aggravated UUV, and violation of conditions of bail bond. At a Zoom hearing, the parties provided the court with a stipulation to the facts of the case, which defendant signed. The stipulation indicated that defendant possessed a loaded shotgun, that he did not have a FOID card, and that he was on bond with a condition that he not possess a firearm. The court continued the case, and at a subsequent Zoom hearing, found defendant guilty of all four counts.

The appellate court held that by conducting a stipulated bench trial and entering guilty verdicts remotely, without defendant's explicit consent, the trial court violated his right to be present. Although defendant did not object, the error was reviewable as plain error. First, the appellate court rejected the State's invited error argument, which was based on defendant's statement over Zoom that he agreed to "proceed in this fashion." This comment referred to the stipulated bench trial itself, not to the fact that it would be held remotely. Next, the appellate court found clear and obvious error because the Illinois Supreme Court's emergency order in place at the time of the trial – January of 2022 – allowed for stipulated bench trials to be held remotely only if the trial court made certain findings and obtained the written consent of the defendant. Moreover, a stipulated bench trial and the announcement of guilt are both critical stages, at which a defendant's presence is required.

The error could be reviewed under the substantial rights prong of the plain error doctrine. The court cited **People v. Stroud, 208 Ill. 2d 398 (2004)**, which held that physical presence during a guilty plea contributes to the fairness of the proceeding and therefore a remote guilty plea requires a waiver. Although the State sought to distinguish **Stroud** because the instant case involved a stipulated bench trial rather than a guilty plea, the

appellate court found no meaningful distinction. By agreeing to a stipulated bench trial, defendant's guilt became a foregone conclusion and he waived his right to cross-examine the witnesses against him, just as in a guilty plea. Therefore defendant's physical presence would have contributed to the fairness of the proceedings and his absence resulted in an error equivalent to structural error.

On remand, the court instructed that if defendant is re-convicted, only the first count – possession of a firearm without a FOID – can stand. The remaining three counts are based on the same act of possessing a firearm. While the State argued that the charge alleging violation of a bond condition includes an additional act, the court concluded that being on bond is a status, not an act.

People v. Chambliss, 2024 IL App (5th) 220492 At defendant's first appearance on felony battery charges, a fitness evaluation was ordered due to a pending fitness issue in an unrelated misdemeanor case, as well as ongoing concerns over his behavior in court, at the jail, and with counsel. Defendant was ultimately found fit and allowed to proceed *pro se*. He was convicted of two counts of battery at a jury trial six weeks later.

On appeal, defendant challenged the fact that he was never afforded a preliminary hearing or indicted by a grand jury, and thus there was no probable cause determination before trial. He had not raised this issue below, and thus it was forfeited. Defendant argued that it should be reviewed as a matter of plain error.

It is “without question” that a felony defendant in Illinois must be indicted or receive a preliminary hearing within 30 days of being taken into custody. See [Ill. Const. 1970, art. I, sec. 7](#); [725 ILCS 5/109-3\(a\)](#); [725 ILCS 5/109-3.1\(b\)](#). Here, where neither was done, the court found plain error. Second-prong plain error has often been equated to “structural” error, applicable only to a limited class of cases. Specifically, under federal law, structural error has been found in cases involving a complete denial of counsel, trial before a biased judge, racial discrimination in grand jury selection, denial of self-representation, denial of a public trial, and defective reasonable doubt instructions. The appellate court noted, however, that error can be classified as “structural” as a matter of state law, even where the error is not considered structural under federal law. The State's failure to establish probable cause before placing defendant on trial deprived him of a basic constitutional protection and resulted in an unfair process for determining guilt. Accordingly, it is “structural” and constitutes second-prong plain error.

As to remedy, the court rejected the notion of holding an after-the-fact probable cause hearing, stating that it would be “ludicrous” where defendant's rights had already been violated. Instead, defendant's convictions were reversed outright.

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. Owens, 2022 IL App (3d) 190151 At defendant’s jury trial, the trial court erred when it ordered defendant to be handcuffed during his cross-examination. Defendant had testified in his own defense, unrestrained, but then became defiant and refused to answer questions during the State’s cross-examination, telling the court to send him back to his cell. The court removed the jury and had a conference with the parties, warning defendant that if his conduct continued, he would waive his right to be present for the remainder of the trial. The judge also noted that during the break defendant had been handcuffed by the courtroom deputy, so the court instructed that defendant remain restrained when the trial resumed. Defendant’s cross-examination resumed with him seated at counsel table instead of on the witness stand, flanked by deputies, and handcuffed. Defendant refused to answer questions, the parties rested, and the jury ultimately found defendant guilty on some counts and not guilty on others.

On appeal, defendant argued that the trial court erred in failing to conduct a hearing to determine whether shackling was necessary, as required by [Illinois Supreme Court Rule 430](#) and **People v. Boose**, 66 Ill. 2d 261 (1977). The State argued that the record clearly showed the need for shackling. The Appellate Court disagreed, noting that the court simply accepted the deputy’s opinion that defendant’s attitude had “changed for the worse” and required shackling, rather than exercising its discretion to determine whether the factors enumerated in [Rule 430](#) warranted shackling. Further, there is no authority for the proposition that a hearing is not required simply because the record shows a need for shackling. The absence of a hearing denied defendant due process and was an abuse of the court’s discretion.

Because defendant failed to raise a timely objection to the court’s shackling decision, however, the issue was forfeited. Defendant asked for reversal because the error was structural or, alternatively, second-prong plain error. The Appellate Court disagreed. A **Boose** error is not structural error because it does not affect the framework of the trial process or render the verdict fundamentally unfair or unreliable. Nor did the error fall under the second prong where it did not affect the integrity of the judicial process. If the jury even knew defendant was handcuffed (he was told to keep his hands under the table, though he was admonished for raising them), they also knew that the shackling was related to his repeated outbursts and not to any presumption of guilt, as he was not shackled at the outset of the trial. Also, there was no indication that the shackling hindered his right to participate

in his own defense or consult with counsel. Thus, the error was forfeited and not reviewable as plain error.

In re M.G., 2022 IL App (4th) 210679 The trial court's failure to appoint a GAL, *sua sponte*, for the minor did not constitute second-prong plain error. The plain error doctrine is not "a general savings clause" for review of unpreserved errors, but rather a narrow exception to forfeiture. Second-prong plain error requires the minor to show a clear or obvious error that was so serious it affected the fairness of his trial and challenged the integrity of the judicial process.

The failure to appoint a GAL is reviewed for an abuse of discretion. Here, the record "raise[d] concern," but ultimately the Appellate Court concluded that there was no clear or obvious error. The minor had outstanding warrants in Iowa and Minnesota (where he had run away from home), had a history of depression, and was belligerent and uncooperative while in detention. The minor's parents failed to appear for any of his court proceedings, and the court noted that under the unique circumstances of this case, the best course would have been to appoint a GAL. But, the court ultimately concluded that there was no second-prong plain error. There was no suggestion of what a GAL could have done to make the proceedings more fair for the minor where appointed counsel vigorously defended the minor and obtained a lenient sentence that expedited the minor's return to his home state. The Appellate Court distinguished **In re Austin M.**, 2012 IL 111194, because there, the minor had the right to a defense attorney but instead got an attorney who acted as a GAL, while here there was no question that the minor had defense counsel who gave his undivided loyalty and zealously advocated on the minor's behalf. Thus, because there was no error, there was no plain error.

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. 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. 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. Jenkins, 2020 IL App (1st) 172422 The trial court erred when it denied defendant his attorney of choice before adequately weighing the necessary factors. Defendant was charged with retail theft and appointed a public defender. Private counsel moved to substitute in and file his appearance. The court asked new counsel if he was prepared to go to trial that day, and when private counsel stated he would not, the court denied the motion, citing a desire not to delay the proceedings.

The Appellate Court found a Sixth Amendment violation and second-prong plain error. A judge has discretion to deny the defendant's request to substitute counsel if it finds the request will interfere with the orderly administration of justice. But before doing so, the court must weigh several factors, including whether defendant has a valid reason for the request, how long new counsel would require to get ready for trial, and whether defendant had a functioning relationship with current counsel. Here, the judge asked a single question - whether counsel would be ready for trial that day. The court did not inquire into any of the other factors that it needed to consider before denying the request. Moreover, the case had only been pending for five months and had never been continued. And defendant had not previously sought to change attorneys, so there was no suggestion that the request was dilatory. Accordingly, the trial court abused its discretion by denying the motion without adequate consideration of the relevant factors.

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. Sandridge, 2020 IL App (1st) 173158 A detective's decision to destroy the notes from his investigation, including interview notes of eyewitnesses, despite the existence of a defense subpoena, amounted to a due process violation and second-prong plain error.

The police are required to preserve all notes in a homicide case. [725 ILCS 5/114-13\(b\)](#). And under the due process clause, destruction of evidence by the State is potentially unconstitutional. In this case, it's unknown if the notes were exculpatory, which would give rise to an automatic due process violation. But the notes were potentially useful, and in such cases a due process violation can be proven if the defense shows the State acted in bad faith.

While bad faith doesn't always flow from destruction of evidence, here, the officer knew the subpoena was pending but cavalierly testified that he intentionally destroyed them as a matter of departmental procedure. The Appellate Court found this testimony either ignorant or false, as there would not be a departmental procedure that explicitly violates

Illinois statute. It therefore found bad faith, and that the error was so egregious that it undermined the integrity of the judicial system. Under the second-prong, reversal was required. The court remanded for a hearing in the trial court as to the appropriate remedy.

People v. Matute, 2020 IL App (2d) 170786 The trial court can rely on defendant's lack of remorse in aggravation at sentencing, but it must base its findings on competent evidence. Defendant's invocation of his right to not allocate is not such a basis. A court may not draw a negative inference from a defendant's exercise of his constitutional right to assert his innocence. Here, because the trial court's determination that defendant lacked remorse stemmed from defendant's silence at allocution, the finding infringed on his fundamental right against self-incrimination. The court committed second-prong plain error and remand for a new sentencing hearing was required.

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. Gaines, 2019 IL App (3d) 160494 A double jeopardy violation is a structural error, which is properly considered as second-prong plain error and requires automatic reversal. While double jeopardy is not one of the six types of structural error recognized by the Supreme Court, second-prong plain error is not limited to those types of errors.

People v. Ross, 2019 IL App (3d) 170028 Where defendant's probation is revoked prior to the expiration of the term, it is second-prong plain error for the trial court to retain excess probation fees that were prepaid by defendant. Citing **People v. Lewis, 234 Ill. 2d 32 (2009)**,

the court noted that there is no *de minimis* exception to the plain error rule. Defendant is due a \$440 refund of his pre-paid probation fees.

People v. Bowden, 2019 IL App (3d) 170654 In a State interlocutory appeal following the suppression of evidence, the State alleged the trial court improperly relied on personal knowledge when ruling on the motion to suppress. The State did not object below, but sought plain error review. The Appellate Court refused to apply the plain error doctrine because Rule 651(a) refers to “substantial rights,” and the State does not have “substantial rights.” The State’s claim that it has a substantial right to prosecute its case was not supported by authority.

People v. Sanders, 2016 IL App (3d) 130511 The court concluded that the erroneous consideration of a factor inherent in the offense constitutes second prong plain error. Although some precedent has equated second prong plain error with structural error, the Illinois Supreme Court recently held that the second prong is not limited to structural error. **People v. Clark, 2016 IL 118845.**

The court concluded that consideration of a sentencing factor that is inherent in the offense affects the fundamental right to liberty because it impinges on the basic right not to be sentenced based on an improper factor. Therefore, where more than insignificant weight is given to an inherent factor, second prong plain error occurs.

People v. Booker, 2015 IL App (1st) 131872 As a matter of plain error under the second-prong of the plain error rule, the court found that a defendant who was charged with home invasion while armed with a firearm could not be convicted of home invasion while armed with a dangerous weapon other than a firearm. Second-prong plain error applies where an unpreserved error violates due process and implicates the integrity of the judicial process.

The court rejected the argument that in Illinois, second-prong plain error is equivalent to “structural error” under the federal constitution and is recognized only where there is a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of the grand jury, denial of the right to self-representation at trial, denial of a public trial, or defective reasonable doubt instructions. The court noted that Illinois case law does not restrict plain error to the six types of structural error listed above, and that the Illinois Supreme Court has found second-prong plain error concerning other issues.

People v. Campbell, 2015 IL App (3d) 130614 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.

People v. Getter, 2015 IL App (1st) 121307 The State argued that the error in this case, the failure to instruct the jury on self-defense, did not constitute second-prong plain error since the Illinois Supreme Court has limited second-prong plain error to structural error, in particular the six examples of structural error identified by the United States Supreme Court: complete denial of counsel, trial before a biased judge, racial discrimination in grand jury selection, denial of the right to self-representation, denial of a public trial, and defective reasonable doubt instructions.

The Appellate Court rejected the State’s argument, holding that while the Illinois Supreme Court has analogized second-prong plain error to structural error, it has never limited it to structural error, and has instead found second-prong plain error in situations

other than the six examples cited by the State. In **People v. Sargent**, 239 Ill. 2d 166 (2010), for example, the Supreme Court found that the failure to instruct the jury on hearsay statements made by a child sex-abuse victim rises to the level of second-prong plain error since it creates a serious risk that the jurors did not understand the applicable law, which would seriously threaten the fairness of trial. This test would be unnecessary if the only question was whether the error fit within one of the six categories of structural error.

The Appellate Court found that the failure to instruct the jury on self-defense constituted second-prong plain error. It reversed defendant's conviction and remanded for a new trial.

People v. Johnson, 2015 IL App (1st) 141216 Entry of a conviction on a crime which is not a lesser-included offense constitutes second-prong plain error in that the fundamental right to notice of the charges is violated and the fairness of the trial and integrity of the judicial process are affected. The court rejected the argument that second-stage plain error is limited to the six "structural" errors identified by the U.S. Supreme Court, including: (1) complete denial of counsel; (2) biased trial judge; (3) racial discrimination in selection of grand jury; (4) denial of self-representation at trial; (5) denial of public trial; and (6) defective reasonable-doubt instruction. The court noted that the Illinois Supreme Court has not limited second-stage plain error to these six areas and has held that an error may be reversible even if it "was not within the class of 'structural' errors recognized by the [U.S.] Supreme Court."

People v. Fillyaw and Parker, 409 Ill.App.3d 302, 948 N.E.2d 1116 (2d Dist. 2011) Supreme Court Rule 615(a) allows consideration of a non-preserved error as plain error where the error affects a defendant's substantial rights.

The admission of a nontestifying co-defendant's statement implicating Parker in the commission of the offense was plain error. Because the error implicated Parker's due process and confrontation clause rights, it necessarily affected his substantial rights. The seriousness of the error was compounded by the repeated references to the statement at trial and in the prosecutor's argument to the jury, the admission of the statement as substantive evidence, and the fact that a copy of the statement accompanied the jury during its deliberations.

People v. Jackson, 409 Ill.App.3d 631, 949 N.E.2d 215 (1st Dist. 2011) The plain error doctrine allows a court to review a forfeited claim of error that affects a substantial right in two instances: where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence, or where the error is so serious that the defendant was denied a substantial right, and thus a fair trial. Under the second prong of a plain error analysis, prejudice is presumed, but the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process.

Where the judge abandons his role as a neutral and impartial arbiter of fact, defendant's claim is reviewed under the second prong of the plain error doctrine because the trial court's conduct pertains to defendant's right to a fair trial. When a judge displays signs of bias against a defendant, the system ceases to function as it properly should, resulting in plain error and requiring reversal.

The trial judge abandoned his role as a neutral and impartial arbiter of fact in a bench trial when he adopted a prosecutorial role in questioning defendant's expert witness and relied on matters of prior private knowledge in rejecting defendant's insanity defense. Although not preserved for review, these errors were noticed under the second prong of the plain error analysis, requiring reversal of defendant's conviction.

People v. Turman, 2011 IL App (1st) 091019 The court committed plain error in instructing the jury that it could “collectively determine what reasonable doubt is.” 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.

The court also found that the 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.

People v. Hagler, 402 Ill.App.3d 149, 937 N.E.2d 204 (2d Dist. 2010) An error must be preserved by both an objection at trial and inclusion in a post-trial motion to avoid forfeiture. An exception exists under the second prong of the plain-error rule if the error is so serious that it affects the fairness of the trial and challenges the integrity of the judicial process.

The court held that defendant’s one-act, one-crime argument was properly reviewed as plain error because violations of the one-act, one-crime rule implicate the integrity of the judicial process.

§54-2(e)

Application of Plain Error Rule

§54-2(e)(1)

Jury Selection Error

§54-2(e)(1)(a)

Plain Error

Illinois Supreme Court

People v. Sebby, 2017 IL 119445 Defendant was convicted of resisting a peace officer following a jury trial. In a 4-3 decision, the Illinois Supreme Court held that the trial court’s failure to comply with Rule 431(b) constituted plain error under the first prong of the plain error analysis.

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 court also held that 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.

Illinois Appellate Court

[People v. Turner, 2024 IL App \(1st\) 211648](#) As a matter of plain error, the appellate court found that the trial court erred when it removed the *pro se* defendant from the courtroom during jury selection. Generally, a defendant has a constitutional right to be present at any critical stage of the proceedings against him. A defendant may relinquish that right, however, either by consent or by his or her own misconduct.

Here, the court found that defendant’s removal was warranted by his “unrelenting argument and disrespect” during jury selection. But, because defendant was proceeding *pro se*, his removal left him without any representation during jury selection. This violated his constitutional right to due process because defendant was completely deprived of representation during a critical stage of the proceedings.

The State argued that defendant knowingly waived his right to be present where the trial court had warned him previously that he would be removed for misconduct and had, in fact, followed through on having defendant removed from prior proceedings. Thus, he was on notice of the possibility of removal for misconduct when he chose to disrupt the jury selection proceedings. The appellate court rejected that argument. A knowing waiver requires both knowledge that defendant would be removed from the courtroom and also knowledge that removal would leave him without any representation at all. Here, while defendant had been warned of the consequence of removal during prior court proceedings, he was not warned at the jury selection hearing that he could be removed for misconduct during that particular proceeding. And, defendant was never warned that his removal would leave him with no representation at all. Thus, defendant did not knowingly waive his right to legal representation during jury selection. This was structural error, not subject to harmless error analysis. Defendant’s conviction was reversed and the matter remanded for a new trial.

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. 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. 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. 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. 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 In a prosecution for aggravated battery of a child, plain error occurred where the trial court failed to ascertain that the prospective jurors both understood and accepted the principles specified in Supreme Court **Rule 431(b)**. The defendant did not contest that the child was injured during the period of time that she had responsibility for the child. The issue that the jury had to decide was whether the defendant acted with intent to injure the child or knowledge that her acts would injure the child.

An ER doctor testified that the injury, a spiral fracture of the tibia, resulted from child abuse. Defendant's statement only admitted to pulling the child out of his child seat "in an aggressive way," which caused the child's foot to twist as she pulled him. Defendant did not state that she intended to twist the foot or that she knew that the twisting could cause great bodily harm. The ER doctor admitted that only 3% of his practice involved children as young as the injured child and that a physician at Children's Memorial Hospital could not determine whether the injury resulted from child abuse. Defendant's failure to tell the child's mother about the injury could be explained by fear and hope that the injury would not prove to be severe, even if defendant had caused the injury accidentally. On this evidence, it was a very close question whether defendant knew, before she pulled the child out of his car seat, that by so doing she would cause him great bodily harm.

The error left open the possibility that a juror may have resolved this close question on an improper basis. Jurors may not have understood the counterintuitive principle that, even after prosecutors filed a charge, they must presume the defendant innocent, and they must not treat defendant's decision not to testify as evidence of guilt. The court reversed and

remanded because the error in questioning the venire may have tipped the scales of justice against defendant in this closely-balanced case.

People v. Johnson, 2012 IL App (1st) 091730 A court's non-compliance with Supreme Court Rule 431(b), which requires that the court ask prospective jurors whether they understand and accept certain basic criminal justice principles, is noticeable as plain error under the closely-balanced prong of the plain-error rule.

The evidence in this case was closely balanced such that the trial court's error threatened to tip the scales of justice against the defendant. The jury's verdict hinged on whether the State's eyewitnesses or the defendant's alibi witnesses were more credible. Neither side offered any physical evidence of defendant's whereabouts on the date of the offense. The State's eyewitnesses could reasonably have had a motive to fabricate evidence against defendant as their branch of a gang was at war with a branch of the gang of which defendant was a member. One of the eyewitnesses initially failed to identify defendant as one of the offenders. The defense witnesses all had a positive connection to the defendant and might have had a motive to fabricate testimony in his favor. It was not until four years after the date of the offense that a defense investigator asked the witnesses about defendant's alibi, but all gave reasons for finding that particular date memorable. Thus the relative credibility of the State's witnesses over the reliability of the defense witnesses was by no means obvious or apparent.

§54-2(e)(1)(b) **No Plain Error**

Illinois Supreme Court

People v. Belknap, 2014 IL 117094 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.

In a concurring opinion, Justice Burke found that **Thompson** was wrongly decided. Justice Burke would have held that Rule 431(b) errors should be considered under the fundamental fairness prong of the plain error rule and not under the closely balanced evidence prong. Thus, plain error occurs where the unasked question creates a likelihood of bias that would prevent the jury from returning a verdict according to the facts and the law.

People v. Thompson, 238 Ill.2d 598, 939 N.E.2d 403 (2010) A violation of Rule 431(b) does

not constitute “structural” error which requires reversal in every case. An error is structural only if it necessarily makes the trial fundamentally unfair or unreliable as a means of determining guilt or innocence. Only a limited number of errors are considered structural; examples include a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction.

The court noted that in [People v. Glasper, 234 Ill.2d 173, 917 N.E.2d 401 \(2009\)](#), it held that the failure to comply with an earlier version of Rule 431(b) was not structural error. The court concluded that the same reasoning applies to the amended version of the rule.

Although structural error would occur if a defendant was forced to stand trial before a biased jury, Rule 431(b) is but one method of insuring a fair jury. Thus, the failure to comply with Rule 431(b) does not necessarily result in a biased jury and unfair trial. Because the error does not in and of itself render the trial unreliable, the error is not structural.

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.

Because compliance with Rule 431(b) is not indispensable to a fair trial, 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. Thus, the plain error rule does not apply.

Illinois Appellate Court

[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. 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.

§54-2(e)(2)
Prosecutorial Misconduct

§54-2(e)(2)(a)
Plain Error

Illinois Supreme Court

People v. Blue, 189 Ill.2d 99, 724 N.E.2d 920 (2000) Due process was violated by the cumulative effect of several errors; reversal was required despite the existence of "overwhelming" evidence of guilt. The court concluded that because the errors "created a pervasive pattern of unfair prejudice" and left it unable to "confidently state that defendant's trial was fundamentally fair," reversal was necessary to "preserve the integrity of the judicial process." See also, **People v. Johnson**, 208 Ill.2d 53, 803 N.E.2d 405 (2003) (a pattern of intentional prosecutorial misconduct may so seriously undermine the integrity of judicial proceedings as to constitute plain error; prosecutorial misconduct intended to encourage a verdict based on emotion adversely affects a defendant's substantial right to a fair trial and undermines the trustworthiness and reputation of the judicial process; remanding for a new trial due to prosecutorial misconduct); **People v. Young**, 347 Ill.App.3d 909, 807 N.E.2d 1125 (1st Dist. 2004) (because the prosecutor's actions endangered the integrity of the judicial process, the conviction was reversed and the cause remanded for a new trial); **People v. Liner**, 356 Ill.App.3d 284, 826 N.E.2d 1274 (5th Dist. 2005) (pattern of prosecutorial misconduct constituted plain error).

People v. Nelson, 193 Ill.2d 216, 737 N.E.2d 632 (2000) Prosecutor committed plain error under both prongs of the rule by presenting mug shot evidence and by making improper closing argument. Compare, **People v. Killebrew**, 55 Ill.2d 337, 303 N.E.2d 377 (1973).

People v. Mullen, 141 Ill.2d 394, 566 N.E.2d 222 (1990) Prosecutor's unsubstantiated closing remarks (that witnesses were reluctant to testify out of fear) at defendant's jury trial for murder constituted plain error because the evidence was closely balanced and littered with discrepancies. Further, even if the evidence was not closely balanced, the second prong of the plain error would have applied because the remarks were based on evidence that the judge specifically excluded (the judge specifically admonished the attorneys not to reference one witness's initial fear to testify). See also, **People v. Porter**, 372 Ill.App.3d 973, 866 N.E.2d 1249 (3d Dist. 2007) (prosecutor's unsubstantiated remarks were reviewed as a matter of plain error under the first prong of the rule).

People v. Sullivan, 72 Ill.2d 36, 377 N.E.2d 17 (1978) Prosecutor committed plain error by disclosing that defendant's accomplices had pleaded guilty.

People v. Dukett, 56 Ill.2d 432, 308 N.E.2d 590 (1974) Prosecutor's comments in closing argument (appealing to racial prejudice) were considered as plain error, but held to be harmless.

People v. Weinstein 35 Ill.2d 467, 220 N.E.2d 432 (1966) The prosecutor's repeated comments in closing argument (that the defendant had the burden of introducing evidence to create a reasonable doubt) was plain error.

People v. Fort, 14 Ill.2d 491, 153 N.E.2d 26 (1958) Prosecutor's closing argument was plain error; where the argument is so prejudicial as to prevent defendant from receiving a fair trial, a reviewing court may consider the error though no objection was interposed in the trial court.

Illinois Appellate Court

People v. Williams, 2020 IL App (3d) 170848 Where defendant has preserved a claim of error in a State's closing argument, the reviewing court first determines whether the argument was proper under an abuse of discretion standard. If the argument is deemed improper, the court then determines whether it substantially prejudiced defendant's right to a fair trial – a legal question which is reviewed *de novo*.

Here, the trial court did not abuse its discretion in overruling defendant's objection to the State's argument that defendant also had subpoena powers and could have presented the testimony of witnesses whom defendant criticized the State for not calling. The State's argument was made in rebuttal, in response to a defense argument questioning why the State did not call those witnesses. The State's argument was not improper burden shifting.

The State did commit error in closing argument by misstating the law, however. The State told the jury that hearsay was "something that's said outside of court." The Appellate Court held that the State's hearsay definition was "at best, incomplete." And, the State compounded that error when it suggested that evidence of guilt existed but was not presented because of the hearsay rule. This error was not preserved with a timely objection or inclusion in the post-trial motion. But, it was plain error where there was no physical evidence and the case came down to a credibility contest between defendant and the State's complaining witnesses. The Appellate Court reversed and remanded for a new trial.

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. Carbajal, 2013 IL App (2d) 111018 The evidence against defendant in a burglary prosecution was closely balanced. The case boiled down to the issue of defendant's intent at the moment he entered the building. Defendant contended he had no intent to commit a theft and that his companion did not discuss committing a theft until after they entered the building. While defendant fled when the police arrived, this evidence of his consciousness of guilt could have led the jury to find him guilty of criminal trespass rather than burglary. Defendant's written statement could support the inference that he was aware of his companion's plan to commit a theft, but the statement did not indicate *when* the companion revealed his plan.

The conduct of the prosecutor in misstating the law of accountability and shifting the burden of proof to the defendant threatened to tip the scales of justice against the defendant. Even though, in response to the defense objection, the court admonished the jury that it would instruct the jury as to the law, the prejudicial effect of an improper argument cannot always be erased from the minds of the jurors by an admonition by the court. Therefore, the prosecutor's improper comments were noticed as plain error.

People v. Marshall, 2013 IL App (5th) 110430 Where race was a consistent theme in the presentation of the State's theory of the case to the jury, the error could be noticed under the second prong of the plain error rule.

People v. Jackson, 2012 IL App (1st) 102035 A prosecutor's misstatement of the evidence may be reviewed as plain error where the evidence is close regardless of the seriousness of the error, or where the error is serious regardless of the closeness of the evidence. The evidence is closely balanced where it rests solely on the credibility of witnesses at trial.

Defendant was charged with aggravated unlawful use of a weapon when the police recovered a gun from his car. Defendant denied knowledge of the gun and testified that other people had been in the car that day. A passenger was also in the car when it was stopped. In closing argument, the prosecutor misstated the evidence when he remarked that defendant told the officers he found a gun in his car.

The prosecutor's misstatement of the evidence was plain error. The determinative issue at trial was defendant's knowledge that a gun was in his car when he was pulled over by the police. The jury's judgment rested solely on the credibility of witnesses at trial. Defendant had no opportunity to respond to the prosecutor's misstatement because it was made during rebuttal. Given the closeness of the evidence and the fact that the erroneous argument spoke directly to the issue of defendant's knowledge of the gun, the error substantially prejudiced defendant and was a material factor in his conviction. The court's instruction to the jury that closing argument is not evidence was insufficient to cure the error.

People v. Williams, 333 Ill.App.3d 204, 775 N.E.2d 104 (1st Dist. 2002) The court reviewed as a matter of plain error the prosecutor's improper cross-examination of defendant (prosecutor made unsupported insinuations concerning defendant's motives and repeated such assertions in closing argument). Although the evidence was not closely balanced, the misconduct "created a situation so fundamentally unfair and of such magnitude as to deny defendant a fair trial."

People v. Maounis, 309 Ill.App.3d 155, 722 N.E.2d 749 (1st Dist. 1999) The prosecutor

committed plain error in closing argument by commenting on defendant's absence from home at Christmas and urging the jury to find defendant guilty of armed robbery based on his failure to spend the holidays with his family.

People v. Wilson, 199 Ill.App.3d 792, 557 N.E.2d 571 (1st Dist. 1990) Plain error occurred where the prosecutor, during closing argument, expressed personal beliefs regarding the credibility of witnesses. The conviction rested primarily on the complainant's testimony, and a defense witness testified that the complainant had a motive to lie.

People v. Ridley, 199 Ill.App.3d 487, 557 N.E.2d 378 (1st Dist. 1990) Plain error occurred where the prosecutor, during closing argument, claimed that in order to believe defense witnesses the jury must find that the State witnesses were lying. The evidence was closely balanced; further, the defense witnesses did not directly contradict the State witnesses, who could have simply been mistaken. See also, **People v. Miller**, 302 Ill.App.3d 487, 706 N.E.2d 947 (1st Dist. 1998).

People v. Thomas, 146 Ill.App.3d 1087, 497 N.E.2d 803 (5th Dist. 1986) The prosecutor's comments in closing argument (that "there's nobody here for the People, just [the jurors]") was plain error.

People v. Littlejohn, 144 Ill.App.3d 813, 494 N.E.2d 677 (1st Dist. 1986) The prosecutor's closing argument (which aroused the sympathy and passion of the jury toward the victim) was plain error.

People v. Burton, 63 Ill.App.3d 915, 380 N.E.2d 929 (1st Dist. 1978) Prosecutor committed plain error by disclosing that defendant had testified at prior trial (but not at this trial) and suggesting that there was evidence favorable to the State that the jury could not hear.

People v. Monaghan, 40 Ill.App.3d 322, 352 N.E.2d 295 (1st Dist. 1976) The prosecutor's comment upon defendant's exercise of his right to silence was considered as plain error. See also, **People v. Wanke**, 311 Ill.App.3d 801, 726 N.E.2d 142 (2d Dist. 2000) (the State committed plain error by using defendant's silence at the time of his arrest to disprove an insanity defense).

People v. Vasquez, 8 Ill.App.3d 679, 291 N.E.2d 5 (1st Dist. 1972) State's closing argument, which included facts outside the record and said that the prosecutor was the 13th juror, entitled defendant to a new trial despite the absence of an objection. Errors deprived defendant of a fair trial.

People v. McMillan, 130 Ill.App.2d 633, 264 N.E.2d 554 (2d Dist. 1970) Evidence and argument concerning defendant's other crimes were plain error.

§54-2(e)(2)(b) **No Plain Error**

Illinois Supreme Court

People v. Williams, 2022 IL 126918 After an Appellate Court majority reversed defendant's convictions for predatory criminal sexual assault, finding the prosecutor committed

misconduct during closing arguments, the Supreme Court reversed and affirmed defendant's convictions.

The court first found that, while defendant did not file a cross-appeal, his brief challenged another comment made by the prosecution which the Appellate Court found proper. Specifically, defendant alleged the State committed prosecutorial misconduct when it told the jury in rebuttal closing argument that the defense has the same subpoena powers and ability to call witnesses as the State. The Supreme Court decided to reach the argument, but it ultimately rejected the defendant's claim.

Because the error was preserved, the court's role was to determine whether the decision to overrule the defense objection was improper, and if so, whether the improper comment was so prejudicial that real justice was denied or the verdict resulted from the error. A trial court's decision to overrule an objection to a comment in prosecutorial closing argument will not be overturned absent an abuse of discretion.

Here, the comments about defense subpoena power were a permissible response to the defense closing argument, which highlighted the fact that several of the complaining witnesses' claims about defendant's sexual abuse were not corroborated by two third-party witnesses who would have had knowledge of the events but whom the State did not call. Moreover, the comment was not prejudicial where it comprised three lines out of 17 pages of transcript.

The Supreme Court then addressed the issue the Appellate Court majority found to be reversible error: defendant's allegation that the State committed prosecutorial misconduct when it told the jury that it could not call the third-party witnesses to the stand because hearsay rules prevent it from presenting testimony about "something that's said outside of court." Defendant argued that this comment provided an incomplete definition of hearsay, and that some of the corroborating evidence that the defense claimed was missing could be admitted, if it existed, through hearsay exceptions or as non-hearsay.

The Supreme Court noted the defendant failed to preserve the issue, then found that defendant could not show clear or obvious error in order to satisfy the plain error standard. The comment "captured the core of the rule and the bar to prior consistent statements." The comment was invited by defense counsel's argument, and, after making the comment, the State immediately reminded the jury that it bore the burden of proof.

Regardless, defendant would not be able to show prejudice. Defendant argued, and the majority below held, that the evidence was closely balanced because the case involved a "credibility contest" between the victims and the defendant. But the Supreme Court disagreed. It distinguished [People v. Naylor](#), 229 Ill. 2d 584 (2008), where the court found the evidence closely balanced because witnesses provided two competing but credible versions of events. Here, the defense did not present evidence. Only the complainants provided their version of events. Although defendant challenged their credibility by highlighting an initial failure to report the crimes when asked by DCFS, and the fact that they waited several years before making any allegations, they provided reasonable explanations for these decisions, and a State expert testified that these types of decisions were common in child sex abuse cases.

[People v. Adams](#), 2012 IL 111168 The prosecutor erred in closing argument by stating, in the absence of any evidence concerning the consequences of a police officer lying in court, that police officers would not risk their "credibility," "jobs," and "freedom" by lying in court.

In determining whether the closely balanced evidence prong has been met, the reviewing court makes a "common sense assessment" of the evidence within the context of

the individual case. The court concluded that where defendant's explanation of events was highly improbable, the jury was properly instructed that counsel's arguments were not evidence and that the jury was to judge credibility, and the improper comments were not likely to inflame the passions of the jury, the statements did not tip the scales of justice against the defendant.

Furthermore, the improper comments did not amount to plain error under the fundamental fairness prong where they did not affect the fairness of the trial to the extent that the integrity of the judicial process was threatened.

People v. Moss, 205 Ill.2d 139, 792 N.E.2d 1217 (2001) Prosecutor's improper cross-examinations of defense experts and improper closing arguments did not amount to plain error.

In a partially concurring and partially dissenting opinion, Justices Freeman and Kilbride found that the court's previous attempts to send a "message" about prosecutorial misconduct have been unsuccessful, predicted that improper prosecutorial tactics will likely be repeated "because there are simply no adverse consequences for those prosecutors whose behavior crosses the line," and concluded that the frequency with which the court sees improper prosecutorial arguments "is not only alarming, but causes legitimate public concerns regarding the fairness and integrity of these proceedings."

People v. Herrett, 137 Ill.2d 195, 561 N.E.2d 1 (1990) Prosecutor's comments on defendant's post-arrest silence and failure to testify were not plain error. The evidence was not closely balanced, and the comments were not of such magnitude as to clearly deprive defendant of a fair trial or require invocation of the plain error rule to preserve the integrity and reputation of the judicial process. See also, **People v. Stewart**, 104 Ill.2d 463, 473 N.E.2d 1227 (1984) (comment on post-arrest silence); **People v. Lucas**, 88 Ill.2d 245, 430 N.E.2d 1091 (1981) (comment on post-arrest silence); **People v. Whitehead**, 116 Ill.2d 425, 508 N.E.2d 687 (1987) (comment on defendant's failure to testify); **People v. Phillips**, 127 Ill.2d 499, 538 N.E.2d 500 (1989); **People v. Henderson**, 142 Ill.2d 258, 568 N.E.2d 1234 (1990); **People v. Soloman**, 116 Ill.App.3d 481, 451 N.E.2d 953 (5th Dist. 1983).

People v. Lucas, 88 Ill.2d 245, 430 N.E.2d 1091 (1981) Prosecutor's closing remark on defendant's silence after arrest did not constitute plain error because the evidence was not closely balanced. See also, **People v. Herrett**, 137 Ill.2d 195, 561 N.E.2d 1 (1990) (comments on defendant's post-arrest silence and his failure to testify).

Illinois Appellate Court

People v. Johnson, 2023 IL App (5th) 190426-B Defendant was convicted of unlawful possession of a firearm by a felon and possession of cannabis. On appeal, defendant challenged the State's closing rebuttal argument. The convictions stemmed from a surveillance, pretextual traffic stop, and ultimately a search of defendant's home. The defense closing portrayed this police work as an invasion of privacy. In response, the ASA made several comments about "blame-shifting," praised the judge who granted the search warrant and the good police work which removed a loaded gun from the street, and suggested defendant had committed and would commit other criminal activity in the future. The prosecutor also stated: "It's your county. You go to church here. Your kids are here. You work here. Your house may be next door to these houses where all this is going on. Do you feel

safe?” The prosecutor implored the jury to “send a message” that “this is not acceptable in Williamson County.”

The court found two of the comments improper. First, by implying, without evidence, that a judge correctly authorized a search warrant, thereby assuring the jury that a stamp of approval was placed on the conduct of the officers that day, the prosecutor improperly vouched for the credibility of the police witnesses. Second, by praising the police for taking a gun off the street and invoking the safety of the community, the prosecutor resorted to an improper “us-versus-them” theme.

No remand was required, however. Because the defendant failed to preserve these errors in a post-trial motion, he sought plain error review. The appellate court found no plain error. The supreme court has recently held that “comments in prosecutorial closing arguments will rarely constitute second-prong plain error because the vast majority of such comments generally do not undermine basic protections afforded to criminal defendants.” [People v. Williams, 2022 IL 126918, ¶ 56](#). The appellate court found that to be the case here, as the remarks were not so egregious as to threaten the fairness of the trial or the framework of the trial process itself, and no rational jury would have arrived at a different outcome had the remarks not been made.

[People v. Williams, 2020 IL App \(1st\) 163417](#) The parties agreed that the prosecutor’s comments regarding defendant’s refusal to take responsibility for his actions amounted to prosecutorial misconduct and constituted clear and obvious error. Such remarks are an improper comment on defendant’s choice to exercise his right to plead not guilty and take his case to trial.

However, defendant failed to preserve the error by timely objecting or including it in a post-trial motion. The improper remarks did not amount to first-prong plain error where the evidence was not closely balanced. While there were some discrepancies in witness testimony, the eyewitnesses were largely in agreement on the key facts and the discrepancies were not critical. And, the remarks were not so pervasive as to have deprived defendant of a fundamentally fair trial, and therefore did not constitute second-prong plain error.

[People v. Holt, 2019 IL App \(3d\) 160504-B](#) Prosecutor committed misconduct by noting in closing argument that defendant had not offered the police an explanation for why he had stolen goods and arguing that “if I didn’t commit a crime, I would say something to the officers.” This invited the jurors to use defendant’s post-arrest silence as evidence against him. Defense counsel did not object, however, and the error did not rise to the level of first prong plain error where the evidence was not closely balanced. Similarly, because the ineffective-assistance-of-counsel prejudice analysis is similar to the first-prong plain-error analysis, defense counsel did not render ineffective assistance by failing to object.

[People v. Euell, 2012 IL App \(2d\) 101130](#) Comments by the prosecutor misstating the burden of proof are plain error only when they are either so inflammatory that the defendant could not have received a fair trial or so flagrant as to threaten a deterioration of the judicial process.

The court rejected cases finding plain error on the basis that misstating the burden of proof to any extent compromises the fairness of the judicial process and cannot be tolerated. That analysis is inconsistent with cases holding that where such an error is preserved for review, reversal is appropriate only where the improper remarks result in substantial prejudice to the defendant’s right to a fair trial.

The prosecutor’s argument improperly shifted to defendant the burden of proof and to

elicit exculpatory evidence. The comments were not plain error because they were not so inflammatory or flagrant as to deny defendant a fair trial. The comments were tied to the lack of evidence supporting defendant's theory that someone other than defendant delivered the drugs. This theory was flatly refuted by the evidence presented. Although the prosecutor erred in stating that the defendant had not supported his theory, he did not directly state that defendant had a burden to do so. "[T]he clear upshot of the State's comments was that all the evidence pointed one way, and in that regard they were unassailably accurate."

§54-2(e)(3)

Evidentiary Issues

§54-2(e)(3)(a)

Plain Error

Illinois Supreme Court

People v. Smith, 141 Ill.2d 40, 565 N.E.2d 900 (1990) Improper motive evidence relating to gang-related activity, and the prosecutor's comments thereon in closing argument, constituted plain error because the evidence was closely balanced.

People v. Harrison, 25 Ill.2d 407, 185 N.E.2d 244 (1962) The Court reached an issue concerning policeman's hearsay testimony (that witness had made pre-trial identification of defendant) despite lack of objection in trial court. "[The] probative value [of inadmissible evidence] is not enhanced by the fact that it was received without objection." See also, **People v. Flournoy**, 336 Ill.App.3d 739, 784 N.E.2d 353 (1st Dist. 2002) (the plain error rule applied to defendant's contention that the trial court erred in permitting the State's eyewitness and a detective to testify to hearsay identification evidence implicating defendant because the evidence was closely balanced (only a single witness identified defendant at trial, there was no physical evidence implicating him, and defendant presented alibi testimony by three witnesses)).

Illinois Appellate Court

People v. Crawford, 2021 IL App (5th) 170496 At defendant's trial for aggravated battery for striking another individual in the back of the head with a beer bottle while inside a bar, it was error to allow the State to question the bar's bouncer about a subsequent shooting outside the bar which also involved defendant and the purported battery victim. Prior to trial, the judge had ruled the shooting incident inadmissible. But, when the bouncer brought up the shooting in response to a defense question on cross-examination, the State argued that it required admission of the details of the shooting as part of a continuing narrative, and the trial court agreed.

On appeal, the State cited "continuing narrative" case law, but made no argument regarding the continuing narrative exception to the general ban on other crimes evidence. Accordingly, the Appellate Court found that argument forfeited under **Illinois Supreme Court Rule 341(h)(7)**. The court went on to note that the exception would not apply, regardless, because admission of the shooting evidence was unnecessary to explain conduct which might otherwise be implausible or inexplicable.

The court also rejected the argument that defendant had "opened the door" to the other crimes evidence, entitling the State to introduce details of the shooting under the doctrine of "curative admissibility." The bouncer's initial testimony about the shooting was

limited and not prejudicial to the State's case. Accordingly, it was improper to admit additional evidence of the shooting and to argue the shooting as substantive evidence of defendant's guilt of the earlier battery incident.

The evidence was closely balanced where both defendant and the State presented plausible versions of the events in question, and neither version was corroborated by physical evidence. Under those circumstances, the outcome depended on which witnesses the jury found more credible. Accordingly, the improper admission of other-crimes evidence threatened to tip the scales of justice against defendant and amounted to plain error requiring a new trial.

People v. Stitts, 2020 IL App (1st) 171723 The trial court committed plain error when it admitted police identification testimony without abiding by the rules set forth in **People v. Thompson, 2020 IL App (1st) 171723**. At trial, the State published a surveillance video while a detective was on the stand. The detective explained the video to the jury as they watched, identifying defendant as being the man shown on the screen with a handgun. Because the trial court did not allow the defense to conduct preliminary cross-examination on the officer's familiarity with the defendant, limit the testimony before the jury (rather than allow the detective to mention prior investigative alerts), and instruct the jury, it plainly violated **Thompson**.

The court also found the evidence closely balanced. No eyewitnesses identified defendant as the shooter, and although he was found nearby with a gun and residue on his hand, the State did not establish that he actually fired, rather than simply held, the gun.

People v. Smith, 2019 IL App (4th) 160641 In a prosecution for threatening a public official based upon a voicemail message left on a judge's office phone, the trial court abused its discretion in allowing State to introduce evidence of two inmate request slips that defendant sent from the jail to the judge while awaiting trial. The State asserted that the slips were admissible on the questions of identity, intent, and state of mind. The slips contained multiple citations to bible verses and indicated a desire to see the judge prosecuted for corruption. Defendant's original voicemail message also stated that the judge was corrupt.

The Appellate Court held that identity was not really at issue where other evidence established that it was defendant who left the voicemail message, so the prejudicial impact of the inmate slips outweighed their probative value on the question of identity. Further, the slips were not indicative of state of mind or intent where they were written after defendant had been charged based on the voicemail message and did not demonstrate defendant's intent or state of mind when he left the voicemail message.

Admission of the inmate slips constituted first-prong plain error where the evidence on the question of intent was closely balanced. The voicemail message in question was ambiguous, and the erroneously admitted slips threatened to tip the scales against defendant.

People v. Lee, 2019 IL App (1st) 162563 Plain error occurred at defendant's trial for AUUW and possession a defaced firearm, where the State elicited irrelevant, prejudicial testimony about the nature of the ammunition found in the guns -- hollow-point bullets that cause more damage than full metal jacket bullets. This was not proper evidence of motive to deface the firearm, because the State failed to show defendant knew the gun was loaded with these bullets. The court also found the evidence closely balanced where multiple police officers testified that they saw defendant retrieve a gun from a car before running away and dropping the gun, while defendant testified he did not possess a gun and ran because he was not from

the area and wanted to stay near his fleeing companions. Where both accounts were plausible, and the jury deliberated for over nine hours, sending multiple notes indicating it was deadlocked, the evidence was closely balanced.

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. Anderson, 2018 IL App (1st) 150931 Defendant was prosecuted under an accountability theory for various offenses, including murder, arising out of a shooting between two groups of individuals. To prove defendant's accountability, the State relied on evidence that the gun belonged to defendant, that defendant made a threat to the intended victim's (Qualls') mother earlier that day, and that defendant reached for his gun before the shooter grabbed it when they thought they saw the intended victim's car.

When a State witness (Darden) testified at defendant's trial that he did not recall defendant making a threat to Qualls' mother, the State sought to impeach him with testimony he had given at the shooter's trial that such threat was made. The prosecutor quoted a question and answer from the shooter's trial, but only asked Darden if he remembered "being asked that question." While Darden answered yes, this was not an admission to having given the *answer* at the prior trial, and the State failed to otherwise prove up the impeachment. The Appellate Court found that this error was compounded by the prosecutor's unsupported closing argument claim that Darden previously told the police and grand jury that defendant made the alleged threat.

Although the error was not fully preserved, it amounted to first-prong plain error in this closely balanced case. There was conflicting evidence of defendant's role in the shooting, and the State's key witness (Carter) had credibility problems. "It would not have been

irrational for the jury to conclude that the State failed to prove” defendant’s intent, and thus there was a substantial probability that the State’s reliance on the unproved threat influenced the outcome. The Appellate Court reversed and remanded for a new trial.

The Appellate Court also concluded that Carter’s out-of-court statements accompanying his pretrial identifications of defendant and the shooter were properly admitted under Section 115-12 of the Code of Criminal Procedure. While those statements went beyond mere identification and provided some detail about what Carter claimed to have seen, a description of the offense may be admitted under 115-12 to the extent necessary to make the identification understandable to the jury. Although resolution of this issue was unnecessary to the outcome of the appeal because the Court had already remanded for a new trial, the Appellate Court opted to address it because it is likely to recur.

In re T.Z., 2017 IL App (4th) 170545 T.Z. was charged with aggravated criminal sexual assault and criminal sexual assault against another minor, T.W. At T.Z.’s adjudicatory hearing, T.W. gave audible answers to preliminary questions on direct examination but then whispered his answers to the trial judge when asked about the specific conduct alleged as the basis for the charges against T.Z. The judge then repeated those answers aloud. T.Z.’s counsel unsuccessfully attempted to request a sidebar during this procedure, but did not state the reason for the sidebar and did not object to the “whisper” testimony. T.Z. was adjudicated delinquent based upon the court’s finding that T.W. was credible.

On appeal, T.Z. alleged that the whispered answers violated his right to confrontation. The Appellate Court first found that trial counsel’s failure to specifically object to the manner of testimony meant that the confrontation issue had been forfeited. The Appellate Court refused to speculate that the requested sidebar was for the purpose of objecting to the whisper procedure. Thus, the issue was analyzed for plain error.

While the confrontation clause reflects a preference for face-to-face confrontation, exceptions may exist. In **Michigan v Craig, 497 U.S. 836 (1990)**, the United States Supreme Court approved of a state statutory procedure permitting a child witness to testify via close circuit television because the procedure: (1) preserved the ability of the parties and the court to observe the witness while testifying, (2) furthered the State’s interest in the well-being of the child, and (3) was used only after a case-specific showing of necessity. In **People v Lofton, 194 Ill. 2d 40 (2000)**, on the other hand, the defendant’s confrontation right was violated by the trial court’s *Assistant Defender hoc* procedure of allowing the child witness to testify from behind a barrier of podiums preventing the defendant from viewing the child witness while testifying.

The *Assistant Defender hoc* whisper method used here violated T.Z.’s confrontation right and amounted to clear and obvious error. While T.Z. was able to see T.W., the whispered testimony precluded T.Z. and his attorney from listening to T.W.’s specific answers and manner of testimony. Spoken language contains more communicative information than the mere words that are uttered. Listening to a witness’s manner of testimony is as vital as observing the witness’s demeanor.

The evidence was closely balanced where T.Z. and T.W. provided opposing versions of events and there was no extrinsic corroboration of either. The outcome of the case turned on credibility, and the error here directly impacted T.Z.’s ability to contest T.W.’s credibility. The error was particularly prejudicial here because the trial judge made clear that he relied on T.W.’s whispered testimony in finding T.W. credible. Also, the judge was not sworn, as an interpreter would be, and a trial judge “cannot serve as a witness as well as a fact finder.” The delinquency adjudication was reversed and the matter remanded for a new adjudicatory hearing before a different judge.

People v. Salem, 2016 IL App (3d) 120390 The State improperly impeached defendant with proof of his guilty plea because the plea had not yet resulted in a sentence and final judgment of conviction. While a guilty plea is an admission of guilt, it does not become a final judgment of conviction until the court imposes a sentence.

Although defendant did not object to the error, the improper admission of this evidence along with other prior convictions that were inadmissible because they were over 10 years old constituted second prong plain error since it “was so egregious that it eroded the integrity of the judicial process and rendered defendant’s trial fundamentally unfair.”

People v. Feazell, 386 Ill.App.3d 55, 898 N.E.2d 1077 (1st Dist. 2007) The court reached a Crawford issue as a matter of plain error, although defendant failed to preserve the issue in a post-trial motion.

People v. Fillyaw and Parker, 409 Ill.App.3d 302, 948 N.E.2d 1116 (2d Dist. 2011) The admission of a nontestifying co-defendant’s statement implicating Parker in the commission of the offense was plain error. Because the error implicated Parker’s due process and confrontation clause rights, it necessarily affected his substantial rights. The seriousness of the error was compounded by the repeated references to the statement at trial and in the prosecutor’s argument to the jury, the admission of the statement as substantive evidence, and the fact that a copy of the statement accompanied the jury during its deliberations.

People v. Gray, 406 Ill.App.3d 466, 941 N.E.2d 338 (1st Dist. 2010) The court found the improper impeachment of a defense witness to be plain error because the evidence at trial was closely balanced. Two witnesses testified for the prosecution that defendant was the shooter. Three defense witnesses identified one of the prosecution witnesses as the shooter. The physical evidence showed that all of the shots were fired from a single gun, but did not tend to prove the identity of the shooter. The testimony of the witnesses was not inherently incredible or severely self-contradictory. The case came down to a question of credibility. The lengthy jury deliberations, coupled with the jury’s note informing the court that the jury could not reach a consensus, also show that the jury considered the evidence to be closely balanced. The improperly-admitted evidence could have swayed the jury to credit the testimony of the prosecution witnesses and therefore its admission was plain error.

People v. Jackson, 399 Ill.App.3d 314, 926 N.E.2d 786 (1st Dist. 2010) The trial court erred by admitting evidence of defendant’s drug use to prove motive to commit murder. (See **EVIDENCE**, §19-24(b)(5)).

Although at trial defendant objected on hearsay grounds to the admission of his statements about his drug use, he did not argue that the evidence was improper because it revealed the commission of other crimes. The court concluded that the plain error rule applied, however, because the evidence was closely balanced and because the error was of sufficient magnitude to deny a fair trial.

People v. Johnson, 376 Ill.App.3d 175, 875 N.E.2d 1256 (1st Dist. 2007) The plain error rule applied to the issue of the adequacy of the foundation for computer-generated transcripts. The failure to require an adequate foundation prejudiced the right to fair trial - “[g]iven the ambiguity of the court’s ruling about what evidence was suppressed and the uncertainty about what evidence the trial court relied on to convict, we can only conclude that defendant was unfairly prejudiced.”

People v. Strong, 316 Ill.App.3d 807, 737 N.E.2d 687 (3d Dist. 2000) Plain-error rule applied to issue concerning the erroneous denial of defendant's motion to suppress where the evidence was closely balanced. The court rejected the argument that the evidence was not closely balanced in light of defendant's admission that he purchased the drugs - it was "precisely" defendant's statement that was the subject of the motion to suppress.

People v. Carter, 297 Ill.App.3d 1028, 697 N.E.2d 895 (1st Dist. 1998) Improper testimony of other crimes and prosecutorial remarks designed to inflame the jury were plain error where the errors might have affected the jury's deliberations.

People v. Jackson, 299 Ill.App.3d 323, 702 N.E.2d 590 (5th Dist. 1998) As a matter of plain error, the judge erroneously admitted a handgun that was not shown to be suitable for committing the offense. A "serious injustice" to defendant would occur if the court did not consider the issue.

People v. Stack, 261 Ill.App.3d 191, 633 N.E.2d 42 (4th Dist. 1994) Plain error occurred where the trial court erroneously believed that it was required to exclude evidence of self-defense due to a discovery violation.

People v. Valko, 201 Ill.App.3d 462, 559 N.E.2d 104 (1st Dist. 1990) The improper introduction of hearsay details of the complaint (by the victim of a sex offense) was plain error because the evidence was closely balanced. Although a portion of the improper evidence was harmless, other portions were prejudicial. See also, **People v. Andino**, 99 Ill.App.3d 952, 425 N.E.2d 1333 (2d Dist. 1981) (the court considered issue regarding the admission of hearsay testimony (a prior out-of-court statement by the complainant) as "plain error" because the hearsay tended to enhance the credibility of the complainant, whose testimony was the sole evidence of guilt); **People v. McMurtry**, 279 Ill.App.3d 865, 665 N.E.2d 450 (1st Dist. 1996) (plain error doctrine applied where State's improper impeachment of its own witnesses involved most of State's evidence on crucial issue).

People v. Wheeler, 186 Ill.App.3d 422, 542 N.E.2d 524 (4th Dist. 1989) The State's improper introduction of a prior consistent statement of its witness (and the prosecutor's comments thereon) constituted plain error; evidence improperly bolstered the testimony of a witness on whose testimony the State's case depended "almost entirely." Compare, **People v. Henderson**, 142 Ill.2d 258, 568 N.E.2d 1234 (1990).

People v. Parham, 141 Ill.App.3d 149, 490 N.E.2d 65 (1st Dist. 1986) Use of statement obtained after defendant requested counsel was plain error.

People v. Roberts, 133 Ill.App.3d 731, 479 N.E.2d 386 (5th Dist. 1985) State's cross-examination of several defense character witnesses (i.e., asking them if they were aware of defendant's prior arrests for burglary and unlawful possession of a firearm) was plain error. The evidence was closely balanced, and there is "prejudice inherent in presenting evidence of a defendant's prior offenses to the jury."

People v. Niebes, 69 Ill.App.3d 381, 387 N.E.2d 800 (1st Dist. 1977) Use at trial of victim's preliminary hearing testimony was considered as plain error.

§54-2(e)(3)(b)
No Plain Error

Illinois Supreme Court

People v. Henderson, 142 Ill.2d 258, 568 N.E.2d 1234 (1990) The introduction of a State's witness's prior consistent statement was not plain error where the outcome of trial could not have been affected. See also, **People v. White**, 181 Ill.App.3d 798, 537 N.E.2d 1315 (1st Dist. 1989) (prior inconsistent statement); **People v. Burns**, 144 Ill.App.3d 345, 494 N.E.2d 872 (4th Dist. 1986) (use of prior consistent statement was not plain error where the evidence was not factually close). Compare, **People v. Wheeler**, 186 Ill.App.3d 422, 542 N.E.2d 524 (4th Dist. 1989).

People v. Sanders, 99 Ill.2d 262, 457 N.E.2d 1241 (1983) The introduction of privileged communications was not plain error because the improper evidence "did no more than duplicate the incriminating content of [another] conversation which was properly admitted."

People v. Killebrew, 55 Ill.2d 337, 303 N.E.2d 377 (1973) The State's use of "mug shots" was not plain error; conviction could not have been affected. Compare, **People v. Nelson**, 193 Ill.2d 216, 737 N.E.2d 632 (2000).

Illinois Appellate Court

People v. Lewis, 2019 IL App (1st) 160864 At defendant's trial for aggravated discharge of a firearm, the defendant's right to confrontation was violated when a firearm identification expert testified in lieu of the expert who actually tested the firearm and wrote the report indicating that a recovered casing was fired from the gun found near the defendant. Under the standard enunciated in **Williams v. Illinois**, 567 U.S. 50 (2012), the firearm identification expert's report was testimonial. It was prepared after defendant's arrest and created for the primary purpose of obtaining evidence to prove his guilt at trial. The expert who appeared in court did not participate in the testing or the creation of the original report. Moreover, the evidence was hearsay and violated rules of evidence.

However, defendant forfeited the error by failing to object below, and the Appellate Court refused to find plain error or ineffective assistance of counsel. The evidence was not close because two police officers testified that they saw defendant fire the gun shortly before arresting him. The court also found that **Crawford** errors do not amount to second-prong plain error as a general rule.

People v. Mandarino, 2013 IL App (1st) 111772 Defendant, a former police officer, was prosecuted for aggravated battery after he beat a motorist with a collapsible baton during a traffic stop. On appeal, defendant argued that the trial erred by admitting lay opinion that defendant's use of force against the motorist was unreasonable and unnecessary. The Appellate Court concluded that defendant forfeited the issue where he did not argue at trial or in the post-trial motion that the testimony was inadmissible lay opinion. Although trial counsel raised other objections, appellate arguments that do not correspond to objections raised at trial are forfeited.

Even if the lay opinion was improperly introduced, the plain error rule did not apply. The court found that the evidence was not closely balanced where a video recording of the incident supported the trial court's finding that defendant's conduct was "unprovoked,

unnecessary, and totally unacceptable.” The video showed that the complainant did not threaten or move toward defendant or make any movement suggesting he was attempting to escape. At most, the only “aggressive behavior” displayed by the complainant was swearing at the defendant during a traffic stop, “something that police officers deal with often in their careers.”

People v. Price, 404 Ill.App.3d 324, 935 N.E.2d 552 (1st Dist. 2010) The factors enunciated in **Neil v. Biggers**, 409 U.S. 188 (1972), for evaluating the reliability of an eyewitness identification despite the suggestiveness of an identification procedure, may be utilized to determine whether the evidence overwhelmingly favors the State or is sufficiently closely balanced to require a new trial under the plain-error doctrine.

The State’s case consisted of a police officer’s testimony that he observed defendant engage in three apparent drug transactions, and then observed defendant hand off the drugs to a woman when the police approached. Defendant testified that the woman was a known drug dealer and that he was an innocent bystander who happened to be visiting in the area.

Applying the **Neil v. Biggers** factors, the court determined that the evidence was sufficiently closely balanced that plain error resulted from the trial court’s failure to require disclosure of the surveillance location. The opportunity of the officer to observe did not weigh heavily in favor of the State because the officer observed from a distance of 60 feet, at night time, without binoculars, for ten minutes. The factors of the level of certainty of the witness and the length of time between the crime and confrontation favored the State. The remaining factors weighed against the State. There was no indication what degree of attention the officer paid during the surveillance, but he was unable to explain when the woman first appeared on the scene. The officer provided no description of the offender to his fellow officers and at trial was unable to provide any description other than race of the suspect or the persons with whom he engaged in transactions.

People v. Richmond, 201 Ill.App.3d 130, 559 N.E.2d 202 (4th Dist. 1990) Admission of officer's testimony that defendant requested attorney upon learning of the victim's death did not amount to plain error.

People v. Conley, 118 Ill.App.3d 122, 454 N.E.2d 1107 (1st Dist. 1983) State's introduction of allegedly involuntary, inculpatory statements was not plain error. Defendant did not file a motion to suppress, and did not raise the issue at trial or in post-trial motions. Also, "the record is such that we cannot ascertain what would have been the result of a motion to suppress."

§54-2(e)(4)

Trial Judge’s Remarks

§54-2(e)(4)(a)

Plain Error

Illinois Supreme Court

People v. Finn, 17 Ill.2d 614, 162 N.E.2d 354 (1959) Plain error occurred where the judge remarked to the jury that defendant's insanity claim was a sham.

Illinois Appellate Court

People v. Fisher, 2023 IL App (4th) 220717 As in **People v. Montgomery**, 2023 IL App (3d) 200389, Judge Kevin Lyons exhibited judicial bias at sentencing. Defendant was found guilty of aggravated criminal sexual abuse for having sex with (and impregnating) a 15 year-old while he was 29. The PSI revealed that defendant had several altercations with staff and inmates while in jail, stopped school at 8th grade, self-reported a history of sexual abuse and mental health issues, and fathered 16 children by several women, though he only knew the names of seven of the children.

Lyons made several “derogatory and sarcastic” comments about defendant before imposing a 12.5-year sentence. The remarks primarily concerned defendant’s children. Lyons belittled defendant for calling the complainant’s baby a “blessing” when he failed to father his previous children. He mocked defendant’s inability to name some of his children and his intellectual capacity. Other comments suggested the term of imprisonment was improperly inflated so as to prevent defendant from fathering more children. Lyons also ridiculed the doctor who conducted the sex offender evaluation for recommending treatment rather than punishment. He also appeared to hold defendant’s choice of a jury trial against him, stating “everybody did what the defendant wanted.”

Even though Lyons granted the motion to reconsider, acknowledging he made improper remarks, he continued to mock the doctor and harp on defendant’s children. It was clear that the same improper attitude and considerations drove the judge at the second hearing. The remarks “constitute a *tour de force* of sarcasm and scorn” and “the court utterly failed to adhere to the high standards expected of judges, which require the court to be dignified and to treat litigants fairly.” The error was reviewable as second prong plain error and required a new sentencing hearing before a different judge.

People v. Jackson, 409 Ill.App.3d 631, 949 N.E.2d 215 (1st Dist. 2011) Where the judge abandons his role as a neutral and impartial arbiter of fact, defendant’s claim is reviewed under the second prong of the plain error doctrine because the trial court’s conduct pertains to defendant’s right to a fair trial. When a judge displays signs of bias against a defendant, the system ceases to function as it properly should, resulting in plain error and requiring reversal.

The trial judge abandoned his role as a neutral and impartial arbiter of fact in a bench trial when he adopted a prosecutorial role in questioning defendant’s expert witness and relied on matters of prior private knowledge in rejecting defendant’s insanity defense. Although not preserved for review, these errors were noticed under the second prong of the plain error analysis, requiring reversal of defendant’s conviction.

People v. McDaniels, 144 Ill.App.3d 459, 494 N.E.2d 1275 (5th Dist. 1986) The trial judge at a bench trial committed plain error when it stated that it “seems to be pretty ridiculous to claim self-defense.” The judge cannot evaluate the merits of the defense before it has been presented.

People v. Kelley, 113 Ill.App.3d 761, 447 N.E.2d 973 (1st Dist. 1983) The trial judge committed plain error where, before voir dire began, he expressed to the prospective jurors his belief that the evidence would establish defendant’s guilt. The judge’s remark “impinges upon the integrity of our judicial system. . . .”

§54-2(e)(4)(b)

No Plain Error

Illinois Appellate Court

People v. Barnes, 2017 IL App (1st) 143902 The trial court's alleged "antagonism and bias" toward defense counsel in front of the jury did not warrant a new trial. Defendant alleged that the trial court's anger at defense counsel for failing to have a defense witness in court and forcing a continuance, carried over into the trial, and that the court repeatedly berated counsel for leaving the podium during examination of witnesses, failing to lay foundation for questions, leading witnesses, testifying during his questioning, and failing to say "please" before requesting a sidebar.

The Appellate Court found none of the complained-of comments improper. In each instance the court properly responded to events in the courtroom. Regardless, defendant could not establish plain error. Despite some minor inconsistencies, the evidence was not closely balanced. The complainant and the co-offender both testified that defendant planned and executed the home invasion and robbery and nothing about the court's comments would influence the jury's view of the evidence.

People v. Faria, 402 Ill.App.3d 475, 931 N.E.2d 742 (1st Dist. 2010) Although the forfeiture rule may be relaxed where an unpreserved issue concerns actions taken by the trial court, forfeiture should be ignored only in the most compelling situations, such as where a judge makes inappropriate remarks to the jury or the case involves capital punishment. (**People v. McLaurin**, 235 Ill.2d 478, 922 N.E.2d 344 (2009)). Here, the forfeiture rule was not relaxed although the trial judge "took over" defense counsel's cross-examination and interrupted counsel repeatedly.

First, because defendant was convicted in a bench trial, there was no jury to be influenced. However, "[h]ad this been a jury trial, we may well have reached a different decision."

Furthermore, the trial judge did not act in counsel's absence or in any way prevent objections from being made.

The plain error rule applies to a forfeited issue which affects the substantial rights of a defendant, if the evidence is so closely balanced that the guilty verdict might have resulted from the error or the error is so serious that the defendant was denied a substantial right and a fair trial. To determine whether plain error occurred under the latter test, the court must first determine whether a clear or obvious error occurred.

Here, no clear or obvious error occurred. Thus, the plain error rule did not apply.

§54-2(e)(5)

Jury Instruction Error

§54-2(e)(5)(a)

Plain Error

Illinois Supreme Court

People v. Reddick, 123 Ill.2d 184, 526 N.E.2d 141 (1988) Substantial defects in jury instructions, such as "burden of proof and elements of the offense," may be considered as plain error. Here, erroneous burden of proof and elements instructions were plain error. See also, **People v. Parks**, 65 Ill.2d 132, 357 N.E.2d 487 (1976); **People v. Layhew**, 139 Ill.2d 476, 564 N.E.2d 1232 (1990) (but harmless).

People v. Fierer, 124 Ill.2d 176, 529 N.E.2d 972 (1988) An instruction that misstated the

burden of proof for guilty but mentally ill verdict was plain error.

People v. Jenkins, 69 Ill.2d 61, 370 N.E.2d 532 (1977) Conflicting issues instructions constituted plain error.

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 charged (deceptive practices) was plain error. See also, **People v. Turner**, 178 Ill.App.3d 510, 534 N.E.2d 179 (2d Dist. 1989) (forgery instruction that failed to include essential element (that the document in question was "apparently capable of defrauding another") was plain error); **People v. Delgado**, 376 Ill.App.3d 307, 876 N.E.2d 189 (1st Dist. 2007) (where 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 evidence here was closely balanced, and because the instructional error "threatened to tip the scales of justice," defendant carried his burden to show that he was prejudiced).

People v. Thurman, 104 Ill.2d 326, 472 N.E.2d 414 (1984) Plain error where "lawful justification" language was omitted from issues instruction for involuntary manslaughter. See also, **People v. Berry**, 99 Ill.2d 499, 460 N.E.2d 742 (1984).

People v. Williams, 120 Ill.App.3d 900, 458 N.E.2d 1312 (1st Dist. 1983) Plain error occurred where the trial court failed to give IPI 2.03 (presumption of innocence and burden of proof) sua sponte.

People v. Herron, 215 Ill.2d 167, 830 N.E.2d 467 (2005) Plain error occurred where the trial judge included the term "or" between factors listed in IPI Crim. 4th No. 3.15. Accord, **People v. Piatkowski**, 225 Ill.2d 551, 870 N.E.2d 403 (2007) (evidence was closely balanced); **People v. Sareceno**, 341 Ill.App.3d 108, 791 N.E.2d 1239 (1st Dist. 2003).

Illinois Appellate Court

People v. Patterson, 2024 IL App (1st) 221619 The trial court committed plain error when it failed to share a deliberating jury's question with the parties, and failed to answer their substantive legal question. Defendant was charged with aggravated assault for pointing a gun at complainant. The complainant testified that defendant, a taxi driver, cut him off while driving, and that he exited his car to confront defendant. He was standing in front of defendant's car, asking why he cut him off, when defendant pulled the gun.

The jury sent several notes during deliberations. One note contained three questions about whether defendant was legally permitted to carry the firearm given that he was a taxi driver. The trial court did not inform the attorneys of the note's existence, and it provided no answers to the jury. The appellate court held that courts must share jury notes with the parties, and that the failure to share this note was grounds for reversal. See **People v. Childs**, 230 Ill. App. 3d 993, 997 (1992).

A fourth question asking the same question was shared with the parties, but the court offered no substantive response, instead telling the jury to continue deliberating. This too was clear and obvious error. While the circuit court may decline to provide a substantive answer under certain circumstances, none of those circumstances were present here. The jury received no instructions regarding defendant's right to possess a firearm and its question suggests that the jury may have decided the case on an improper basis. Though defendant

did not preserve this issue, the evidence was closely balanced, as evidenced by the jury's 10 questions during deliberations and its suggestion that it was having difficulty arriving at a unanimous verdict.

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. 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. 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. 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. 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. 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. 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. Ulloa, 2015 IL App (1st) 131632 To prove the offense of conspiracy to deliver cocaine, the State must prove that defendant himself agreed to the delivery. 720 ILCS 570/405.1. The State cannot prove conspiracy to deliver by showing that defendant was accountable for the actions of another person who agreed to the delivery. The trial court thus committed plain error under both the closely balanced evidence and serious error prongs by instructing the jury that they could find defendant guilty of conspiracy under a theory of accountability.

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.

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.

People v. Getter, 2015 IL App (1st) 121307 The State argued that the error in this case, the failure to instruct the jury on self-defense, did not constitute second-prong plain error since the Illinois Supreme Court has limited second-prong plain error to structural error, in particular the six examples of structural error identified by the United States Supreme Court: complete denial of counsel, trial before a biased judge, racial discrimination in grand jury selection, denial of the right to self-representation, denial of a public trial, and defective reasonable doubt instructions.

The Appellate Court rejected the State's argument, holding that while the Illinois Supreme Court has analogized second-prong plain error to structural error, it has never limited it to structural error, and has instead found second-prong plain error in situations other than the six examples cited by the State. In **People v. Sargent**, 239 Ill. 2d 166 (2010), for example, the Supreme Court found that the failure to instruct the jury on hearsay statements made by a child sex-abuse victim rises to the level of second-prong plain error since it creates a serious risk that the jurors did not understand the applicable law, which would seriously threaten the fairness of trial. This test would be unnecessary if the only question was whether the error fit within one of the six categories of structural error.

The Appellate Court found that the failure to instruct the jury on self-defense constituted second-prong plain error. It reversed defendant's conviction and remanded for a new trial.

People v. Downs, 2014 IL App (2d) 121156 The trial court erroneously instructed the jury that it was their duty to define reasonable doubt. Although defendant failed to properly preserve this error, and indeed only raised it for the first time on the appeal of an earlier remand to the trial court for a **Krankel** hearing, the Appellate Court addressed the issue under the second prong of the plain-error doctrine.

The second prong of plain error is equated with structural error. Structural error is a systemic error that erodes the integrity of the judicial process and undermines the fairness of trial. Structural error requires automatic reversal. Structural error is tightly circumscribed, and has only been recognized in a limited number of cases, such as the complete denial of counsel, trial before a biased judge, denial of self-representation, denial of a public trial, and a defective reasonable-doubt instruction.

Because an erroneous reasonable doubt instruction has long been held to constitute structural error and to satisfy the second prong of the plain-error analysis, defendant's conviction was reversed.

People v. Johnson, 2013 IL App (2d) 110535 Defendant was tried in a joint trial for UUC

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 UUW 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 plain error because they undermined the integrity of the judicial process. 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 UUW 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.

The defense did not invite the error in the other-crimes instruction by agreeing that the instruction should not be modified. The prosecution tendered the flawed instruction and offered no suggestion to cure the defect when it was pointed out by the trial court. Defense counsel was not duplicitous, but was attempting to mitigate any confusion that could result from a convoluted instruction. At the point at which defense counsel agreed to the flawed instruction, it was too late to untangle the evidence to make it understandable to the jury and the only viable option was to grant a mistrial.

People v. Fonder, 2013 IL App (3d) 120178 The Appellate Court concluded that the trial judge committed plain error by failing to instruct the jury on a critical element of felony resisting arrest - 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. 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 An omitted jury instruction constitutes plain error only when the omission creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial. This rule does not require that defendant prove beyond doubt that her trial was unfair because the omitted instruction misled the jury to convict her. It does require that she show that the error caused a severe threat to the fairness of her trial.

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 demonstrated that the omission of an element of the offense from the

instructions caused a severe threat to the fairness of her trial. Defendant was convicted of threatening a public official who was a law enforcement officer, but the jury was not instructed in accord with the statute that because the threat was to a law enforcement officer, the jury had to find that the threat contained specific facts of a unique threat and not a generalized threat of harm. [720 ILCS 5/12-9\(a-5\)](#).

This omission deprived the jury of the guidance needed to decide whether the State proved that 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. Anderson, 2012 IL App (1st) 103288 Defendant was charged with first-degree murder of one person and attempt murder of another person. The attempt-murder instruction did not name the victim. It informed the jury that it could find defendant guilty of attempting to murder "an individual." The Appellate Court found that it was probable that the ordinary juror would not understand that the subject of the attempt-murder instruction was only the alleged victim of the attempt murder, rather than the murder victim.

The defective instruction was plain error because the evidence on the attempt-murder charge was closely balanced. The alleged victim of the attempt murder testified that he saw defendant commit the murder and that he heard more shots fired after that shooting, but he did not know in which direction they were fired as he ran to his car and fled from the scene. There were no bullet holes in his car. Defendant's companion made a statement that defendant shot at "another person," but he did not identify that person as the alleged attempt-murder victim, and he recanted this statement at trial. Therefore, the defendant may have been convicted of attempt murder based on the error in the instruction rather than the evidence.

The Appellate Court reversed defendant's conviction for attempt murder and remanded for a new trial.

People v. Franklin, 2012 IL App (3d) 100618 A defective reasonable-doubt instruction is structural error that may be noticed as plain error under the second prong of the plain-error rule.

People v. Turman, 2011 IL App (1st) 091019 The court committed plain error in instructing the jury that it could "collectively determine what reasonable doubt is." 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.

The court also found that the 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.

People v. Velasco, 184 Ill.App.3d 618, 540 N.E.2d 521 (1st Dist. 1989) The court considered defective attempt murder instructions, which allowed the jury to convict without finding intent to kill, to be plain error (but the error was harmless).

People v. McDaniel, 125 Ill.App.3d 694, 466 N.E.2d 662 (4th Dist. 1984) Plain error occurred where an erroneous issues instruction for attempt murder was given. Because "defendant's mental state was at issue, . . . the incorrect instructions could have led the jury to convict the defendant of attempted murder for less than intent to kill." See also, **People v. Sanders**, 129 Ill.App.3d 552, 472 N.E.2d 1156 (1st Dist. 1984).

§54-2(e)(5)(b) **No Plain Error**

Illinois Supreme Court

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 defendant because they did not understand the applicable law; plain error did not occur where the instructions and trial court's remarks gave the jury the option of a general acquittal as to all conduct charged.

People v. Huckstead, 91 Ill.2d 536, 440 N.E.2d 1248 (1982) Plain error did not occur where judge failed to instruct jury on State's burden to prove lack of justification to use force. Compare, **People v. Berry**, 99 Ill.2d 499, 460 N.E.2d 742 (1984) (same instruction defect was plain error where the evidence was close).

People v. Roberts, 75 Ill.2d 1, 387 N.E.2d 331 (1979) Erroneous instruction (incorrect mental state) for attempt murder was not plain error.

Illinois Appellate Court

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. 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. Watt, 2013 IL App (2d) 120183 The plain-error doctrine allows a reviewing court to reach a forfeited error in two instances: where the evidence is so closely balanced that the jury's guilty verdict might have resulted from the error and not the evidence; or (2) where the error is so serious that the defendant was denied a substantial right, and thus a fair trial. The second prong of the rule deals with presumptively prejudicial errors, which must be remedied although they might not have affected the outcome. A presumptively prejudicial error occurs only where the error is deemed structural. An instruction that either omits an element of the offense or misdescribes an element is not structural error.

It was error to instruct the jury that it could convict defendant of armed robbery based on a finding that he was armed with a dangerous weapon, where he was charged with committing armed robbery with a firearm. The Appellate Court declined to find plain error where the evidence was not closely balanced on the issue of guilt and the defect in the instructions was only a misdescription of an element that did not rise to the level of structural error.

People v. Marcos, 2013 IL App (1st) 111040 **People v. Sargent**, 239 Ill. 2d 166, 940 N.E.2d 1045 (2010), held that the failure to give IPI Criminal 4th No. 11.66, is clear and obvious error when out-of-court statements of a child are admitted pursuant to 725 ILCS 5/115-10. No. 11.66 informs the jury that it is for the jury to decide if the statements were made and what weight to give to them, and in making that determination, the jury should consider the age and maturity of the child, the nature of the statements, and the circumstances under which they were made. The error in failing to give No. 11.66 rises to the level of plain error if the evidence at trial is closely balanced.

The out-of-court statements of the child may be considered on the prosecution side of the scale in judging whether the evidence is closely balanced where the jury is instructed in accordance with IPI Criminal 4th No. 1.02. No. 1.02 informs the jury that it is the judge of the credibility of the witnesses and the weight to be given their testimony and that in making that determination the jury may consider various factors, including the age of the witness. This instruction is not identical to No. 11.66, but conveys similar principles regarding the

jury's role and the factors it may consider in assessing credibility.

The Appellate Court concluded that the evidence was not closely balanced where the sexual assault was proved by the testimony of the child at trial, her out-of-court statements to her mother and a social worker, defendant's admission to the child's mother, and defendant's statement to the police. The error, though clear and obvious, did not rise to the level of plain error.

People v. Carter, 405 Ill.App.3d 246, 939 N.E.2d 46 (1st Dist. 2010) The jury was given instructions for indecent solicitation of a child that omitted two of the elements of the offense – that defendant had the intent to commit the offense of aggravated criminal sexual abuse, and that defendant knew that the person he solicited was under 17 years of age. These elements were added by a 1999 amendment to the statute, but were not included in the jury instructions. The court found that the defective instructions were not plain error.

First, the court found that the evidence on the omitted elements was not closely balanced. On the issue of defendant's knowledge of the age of the minor, the minor testified that he told defendant he was 13, the minor appeared to be under the age of 17, and defendant admitted that he knew he was a minor. With respect to the issue of defendant's intent to commit aggravated criminal sexual abuse, the court found the evidence overwhelming. Defendant testified that he went to an upstairs room to retrieve his marijuana after the minor shortchanged him on a sale. The minor testified that defendant talked about sex when they spoke on the telephone, told the minor that he wanted him to see his "dick," drove to the minor's house where he pulled down his pants and told the minor to suck his penis, and the minor's grandmother testified that she found defendant in an upstairs room of her house with the door closed, his pants down, and his penis erect. The jury found the minor's version credible.

The court attributed no significance to the jury's acquittal of aggravated criminal sexual abuse. Although the minor testified that he performed fellatio on defendant, his grandmother saw no act of penetration. The acquittal reflected only the jury's finding that penetration was not proved beyond a reasonable doubt.

With respect to the second prong of the plain error rule, the court found that the defective instructions were not a threat to the fairness of the trial. The essential disputed issue in the case was the credibility of the defendant versus the credibility of the minor and his grandmother. Because the overwhelming evidence persuaded the jury to believe the prosecution's version of the facts, the omitted elements were not disputed issues essential to the jury's determination of defendant's guilt or innocence.

People v. McNeal, 405 Ill.App.3d 647, 955 N.E.2d 32 (1st Dist. 2010) Instructing the jury that sexual penetration involving a body part requires only contact, not an intrusion, was error, but not plain error, given that the evidence was not closely balanced or the error so fundamental as to affect the fairness of the trial.

The dissent (Gordon, R., J.) would find plain error based on the erroneous penetration instruction. Complainant, a non-native English speaker, testified that she put her finger in her own vagina. Defendant's statements to the police were only that he told her to touch herself or touch her clitoris. Therefore the evidence on this issue was closely balanced and the issue should be noticed as plain error.

People v. Burns, 144 Ill.App.3d 345, 494 N.E.2d 872 (4th Dist. 1986) Where the evidence was not factually close, neither the failure to instruct on the State's burden to disprove an affirmative defense nor the improper use of a prior consistent statement was plain error.

§54-2(e)(6) **Sentencing Errors**

§54-2(e)(6)(a) **Plain Error**

Illinois Supreme Court

People v. Birge, 2021 IL 125644 The sentencing court committed plain error when it assessed over \$100,000 in restitution without any explanation as to how it arrived at that number. Under 730 ILCS 5/5-5-6(a), a court may impose restitution after assessing the actual losses suffered by the victim of a crime. Here, there was no numerical evidence presented of the victim's losses, only general testimony about the damage to his property. This was insufficient to assist in calculating the cost of his actual losses as required by the statute.

As in **People v. Lewis**, 234 Ill. 2d 32 (2009), which found the imposition of a street-value drug fine without evidence affected the integrity of the judicial process and the fairness of the proceeding, the error here was similarly reviewable under the second-prong of the plain error rule.

People v. Lewis, 234 Ill.2d 32, 912 N.E.2d 1220 (2009) Although defendant failed to object in the trial court, the Supreme Court concluded that imposition of a street value fine without a sufficient evidentiary basis satisfies the “fundamental fairness” prong of the plain error rule. The court rejected the Appellate Court’s finding that a \$100 fine is too insignificant to constitute plain error, finding that a *de minimus* exception to the plain error rule “would be difficult to implement because of the difficulty in determining when an error is significant,” and would be inconsistent with “the fundamental fairness concerns of the plain error doctrine.”

The court vacated the \$100 street value fine and remanded the cause for the trial court to impose a new fine based on evidence of the value of the substance seized from the defendant.

People v. Kuntu, 196 Ill.2d 105, 752 N.E.2d 380 (2001) The prosecutor erred at a death hearing by: (1) describing a statutory mitigating factor as an aggravating factor, and (2) arguing that a natural life sentence would give five “free” murders to a defendant convicted of killing seven people. The court applied the plain error rule, finding that the evidence at the penalty phase of the sentencing hearing was closely balanced because the State relied only on the facts and circumstances of the crime and the defense introduced substantial mitigation.

Illinois Appellate Court

People v. Young, 2022 IL App (3d) 190015 While sentencing defendant to 10 years in prison for predatory criminal sexual assault, the sentencing court stated, “I would note also that the defendant has not accepted responsibility. He has not even offered a statement in allocution. Now, he doesn’t have to accept that, but there is a difference between a defendant who continues to deny any responsibility and a defendant who says, [y]ou know what, what I did was very wrong.”

The Appellate Court found second-prong plain error. A sentencing court may consider a defendant’s lack of remorse, but it may not draw a negative inference from the defendant’s

exercise of his right to remain silent. Thus, the court's reference to the lack of allocution was clear error.

When a circuit court considers an improper factor in sentencing a defendant, the sentence must be vacated and the case remanded for resentencing unless it is clear from the record that the improper factor was so insignificant that its consideration did not result in a greater sentence. The Appellate Court could not conclude that the sentencing court's consideration of a lack of allocution was insignificant, so it remanded for resentencing.

People v. Larson, 2022 IL App (3d) 190482 A new sentencing hearing was required where the sentencing court considered a factor inherent in the offense, and the hearing included inappropriate victim impact statements.

Defendant collided with another car while driving intoxicated, killing the other car's passenger and harming the driver. She was convicted of aggravated DUI for each victim, though the court merged the counts and sentenced her only for the aggravated DUI resulting in death.

During sentencing, the State introduced 16 victim impact statements from the victim and various family members of the deceased. Five of these statements asked the court to impose jail time, including some that asked for a maximum sentence. The sentencing court found several factors in mitigation. In aggravation, the court found only that defendant caused serious harm. The court sentenced defendant to six years in prison.

The Appellate Court held that the causation of serious harm was a fact inherent in the offense. Aggravated DUI as charged here required the death of a victim. Because the death is implicit in the offense, it may not be considered as a factor in aggravation. Although defendant did cause serious harm to the second victim, the record showed that this was not the harm referenced by the court in aggravation. The entire focus of the sentencing hearing was the victim's death. The Appellate Court remanded for a new sentencing hearing, finding plain error under both prongs.

The Appellate Court also agreed that the sentencing court erred in considering all 16 of the victim impact statements. Under the Rights of Crime Victims and Witnesses Act, where a defendant is convicted of a motor vehicle offense resulting in great bodily harm or death, a representative of the deceased person has a right to address the court regarding the impact of the offense. The court has discretion to allow multiple representatives to present an oral impact statement, but a "representative" is defined as an immediate family member. Here, the court erred where 11 of the 16 witnesses did not meet the definition of "representative," those who asked for jail time went beyond the scope of a permissible statements, and the court did not exercise discretion. On remand, the sentencing court should bar any victim statements by non-representatives, exercise discretion with respect to any additional victim impact statements beyond those specifically provided as a right under the Act, and limit any statements made to the impact of the offense upon the author of the statement.

People v. Richards, 2021 IL App (1st) 192154 The trial court erred in applying an enhanced sentencing range for unlawful use of a weapon by a felon under 730 ILCS 5/5-4.5-110 because defendant's prior conviction of second degree murder is not a qualifying predicate offense under that provision. This constituted second-prong plain error because it affects the defendant's fundamental right to liberty. Even though defendant's 8-year sentence was also within the proper sentencing range, remand for resentencing was required because the trial court misapprehended the appropriate range when fashioning defendant's sentence.

UUWF is generally a Class 3 felony, carrying a sentencing range of 2 to 10 years of imprisonment. For a person who has previously been convicted of a forcible felony, UUWF is a Class 2 felony with a range of 3 to 14 years of imprisonment. And, under 730 ILCS 5/5-4.5-110, the range becomes 7 to 14 years where the weapon involved is a firearm and the person has previously been convicted of a qualifying predicate. The statute defines “qualifying predicate offense” as any of 26 specifically listed offenses in sections 5-4.5-110(a)(A)-(Z). Second degree murder is not among those listed.

The State argued that second degree murder was a qualifying predicate where the subsection listing first degree murder as a qualifying predicate states, “first degree murder under Section 9-1 or similar offense under the Criminal Code of 1961.” The Appellate Court disagreed and held that rather than expanding the list of qualifying predicate offenses, this language was meant to clarify that the elevated sentencing range applied even if the prior offense was committed before the effective date of the current criminal code. The court noted that the “or similar offense” language is included in each of the 26 enumerated qualifying predicate offenses in order to account for any differences between the Criminal Code of 2012 and the Criminal Code of 1961.

People v. Burns, 2020 IL App (3d) 170103 Where there was no great bodily harm, the trial court erroneously ordered that defendant serve 85% of his sentence for armed violence. This is second-prong plain error because it affects defendant’s fundamental right to liberty.

People v. Matute, 2020 IL App (2d) 170786 The trial court can rely on defendant’s lack of remorse in aggravation at sentencing, but it must base its findings on competent evidence. Defendant’s invocation of his right to not allocate is not such a basis. A court may not draw a negative inference from a defendant’s exercise of his constitutional right to assert his innocence. Here, because the trial court’s determination that defendant lacked remorse stemmed from defendant’s silence at allocution, the finding infringed on his fundamental right against self-incrimination. The court committed second-prong plain error and remand for a new sentencing hearing was required.

People v. Miles, 2020 IL App (1st) 180736 Defendant, convicted of Class 2 burglary, was not eligible for Class X sentencing based on prior convictions for aggravated vehicular hijacking with a firearm and armed robbery, committed when defendant was 15 years old. Pursuant to 730 ILCS 5-4.5-95(b), Class X sentencing is mandatory if defendant commits a Class 1 or 2 offense and has twice been convicted “of an offense that contains the same elements as an offense now (the date the Class 1 or Class 2 felony was committed) classified in Illinois as a Class 2 or greater Class felony.” Here, defendant committed a Class 2 burglary, and had another qualifying offense, but argued that the crimes committed at age 15 no longer contain the same elements as a Class 2 or greater felony, because the statutes requiring automatic transfer of those cases to adult court have since been amended.

The Appellate Court agreed with defendant. The prior convictions for aggravated vehicular hijacking and armed robbery would not have resulted in a Class 2 or greater felony conviction under current law, because the offenses no longer trigger automatic transfer to adult court. The offenses would have been resolved with delinquency proceedings in juvenile court if committed under current law. Thus, second-prong plain error occurred and the case was remanded for resentencing as a Class 2 offense.

People v. Mullen, 2018 IL App (1st) 152306 The trial judge’s inquiry of the public defender as to how many times he had appeared in court on defendant’s case was inadequate to form

the basis for assessment of a public defender fee, consistent with [People v. Hardman, 2017 IL 121453](#). The inquiry was sufficient to constitute “some sort of hearing,” however, such that remand for a new public defender fee hearing was permitted.

Defendant also challenged the trial court’s failure to award \$5 per day credit against certain assessments. While the issue was not preserved below, the question of whether an assessment is properly categorized as a fine or a fee is reviewable as plain error, and there is no *de minimus* exception to plain error review. Likewise, claims for pre-sentence custody credit are not subject to forfeiture because defendants are permitted to seek the statutory credit “at any time.”

[People v. Williams, 2018 IL App \(4th\) 150759](#) The sentencing court improperly considered a written report of defendant's fitness examination, in violation of section 104-14 of the Code of Criminal Procedure. Section 104-14 makes such reports admissible only when defendant raises an insanity or intoxication defense. Here, defendant committed disorderly conduct for pulling a fire alarm and, while he requested a fitness examination before trial, he did not raise an insanity or intoxication defense. He received a 68-month prison sentence, four months below the maximum extended term. In imposing the sentence, the court explicitly referenced findings from the fitness report before concluding that defendant required extended periods of incarceration. This denial of the right to a fair sentencing hearing constituted second-prong plain error and required a new sentencing hearing.

[People v. Young, 2018 IL App \(3d\) 160003](#) Where a prior conviction is the basis for finding defendant eligible for extended-term sentencing, the record must affirmatively show that the prior conviction was within 10 years, excluding time spent in custody. Here, the relevant prior conviction was 10 years, 7 months, and 14 days prior. Defendant received a 6-year sentence on that prior conviction, and also received a 6.5-year sentence for another lower class felony during the years between the relevant prior conviction and the instant conviction. Because the record was devoid of any evidence about the amount of time defendant actually spent in custody for either of those convictions, however, the Appellate Court found second-prong plain error in the trial court’s imposition of an extended-term sentence. The sentence was vacated and the matter was remanded for a new sentencing hearing.

[In re J’Lavon T., 2018 IL App \(1st\) 180228](#) Following adjudication of delinquency for armed robbery, probation conditions that the minor have no gang contact and make no social media posts on anything related to a gang were held to be overbroad. As a general matter, restrictions on gang contact and social media were related to rehabilitation and were valid conditions where the minor’s mother said he was hanging with the “wrong crowd” and noted negative peer influences as a reason for his criminal conduct. However, the conditions were overbroad where there was no exception for contact or social media posts with a legitimate purpose, following [In re Omar F., 2017 IL App \(1st\) 171073](#). The court distinguished [In re R.H., 2017 IL App \(1st\) 171332](#), where the court upheld a similar social media restriction because there the minor was in a gang, used social media to taunt rival gang members, and posted pictures of himself displaying gang signs and smoking cannabis.

The minor signed the probation order detailing the gang conditions at the dispositional hearing and did not object to the gang conditions in the trial court. The Appellate Court found second-prong plain error review was warranted. The gang conditions were so vague as to affect the integrity of the dispositional hearing, and the trial court failed to provide a fair process for determining what gang-related restrictions were reasonable.

People v. Mitok, 2018 IL App (3d) 160743 An improper double enhancement constituted second-prong plain error. A prior DUI was used to elevate the class of the offense under section 11-501(a)(2),(d)(2)(C), then the same offense was used at sentencing to impose a Class X sentence. Because the sentencing court stated it was imposing the minimum of six years only because it couldn't impose something lower, the record made clear that the error actually affected the fairness of defendant's sentencing hearing.

People v. Lashley, 2016 IL App (1st) 133401 The trial court's mistaken belief that consecutive sentences were required constituted second prong plain error because the right to be lawfully sentenced is a substantial right.

People v. Sanders, 2016 IL App (3d) 130511 The erroneous consideration of a factor inherent in the offense constitutes second prong plain error. Although some precedent has equated second prong plain error with structural error, the Illinois Supreme Court recently held that the second prong is not limited to structural error. **People v. Clark, 2016 IL 118845.**

The court concluded that consideration of a sentencing factor that is inherent in the offense affects the fundamental right to liberty because it impinges on the basic right not to be sentenced based on an improper factor. Therefore, where more than insignificant weight is given to an inherent factor, second prong plain error occurs.

People v. Sumler, 2015 IL App (1st) 123381 It was plain error under the second prong for the trial court to mistakenly believe that defendant was entitled to day-for-day good conduct credit when actually defendant was required to serve 85% of his sentence. Remanded for a new sentencing hearing.

People v. Hanson, 2014 IL App (4th) 130330 Defendant argued that although he was eligible for an extended-term sentence for domestic battery based upon prior felony convictions for retail theft and aggravated robbery (as listed in the pre-sentence investigation report), the trial court improperly imposed an extended-term sentence based upon a mistaken belief that defendant had a prior Class 4 felony conviction for domestic battery (as argued by the State).

The Appellate Court declined to address the merits of defendant's claim. His claim was based entirely on the trial court misunderstanding his criminal history, but defendant made no effort to point this error out at trial and create a clear record of the trial court's actual basis for imposing the sentence. By raising the issue for the first time on appeal, defendant was essentially asking the Appellate Court to "use the transcript of the sentencing hearing as a crystal ball" to understand the trial court's thinking. The Appellate Court refused to engage in "mind-reading" and thus would not review the issue.

The court also held that the plain-error rule did not apply. The court rejected other Appellate Court decisions holding that sentencing errors involving a misapplication of law are reviewable as plain error since the right to be sentenced lawfully affects a defendant's fundamental right to liberty. If all matters involving misapplication of law at sentencing were reviewable as plain error, it would render the forfeiture rule meaningless.

The court also declined to review as plain error, despite the State's agreement, defendant's claim that the trial court imposed a restitution order without an evidentiary basis for the correct amount of restitution. It rejected the idea that all sentencing errors are reviewable simply because defendant asserts "a few ten-dollar phrases" such as "substantial rights," "grave error," and the "fundamental right to liberty." Since all sentencing errors

arguably involve the fundamental right to liberty, applying plain-error requires a more in-depth analysis, requiring a defendant to explain why the sentencing error in his particular case merits plain-error review.

Here, neither defendant nor the State attempted to explain why the trial court's error was more substantial relative to other types of sentencing errors. The sentence and restitution order were affirmed.

People v. Owens, 377 Ill.App.3d 302, 878 N.E.2d 1189 (1st Dist. 2007) The court reviewed as a matter of plain error sentencing judge's impermissible double enhancement. Because the issue concerned the sentence which defendant was eligible to receive, it affected his substantial rights.

People v. Zapata, 347 Ill.App.3d 956, 808 N.E.2d 1064 (1st Dist. 2004) As a matter of plain error, the trial court erred by relying on its "distaste for gang violence" in sentencing defendant for a non-gang related murder. Due to the fundamental importance of a fair trial and the practical difficulties of objecting to the actions of the trial judge, the forfeiture rule is relaxed where the conduct of the judge is at issue.

People v. Alvarez, 344 Ill.App.3d 179, 799 N.E.2d 694 (1st Dist. 2003) Apprendi violation constituted plain error. Because the evidence was less than overwhelming here, a properly instructed jury might have concluded that the offense was not brutal and heinous and that an extended term was therefore not authorized.

People v. McCormick, 332 Ill.App.3d 491, 774 N.E.2d 392 (4th Dist. 2002) The trial court committed plain error by ordering defendant, who had been convicted of making telephone calls "with the intent to abuse, threaten[,] or harass" the complainant, to pay \$270 in restitution for parking tickets which the complainant received because she was afraid to park in public garages after receiving the calls.

People v. Kopczyk, 312 Ill.App.3d 843, 728 N.E.2d 107 (3d Dist. 2000) A trial judge's reliance on an improper aggravating factor impinges upon the fundamental right to liberty, and constitutes plain error.

People v. Whitney, 297 Ill.App.3d 965, 697 N.E.2d 815 (1st Dist. 1998) Plain error occurs where the trial court imposes a consecutive sentence that is not authorized by law or relies on a non-existent prior conviction in imposing sentence. See also, **People v. Dover**, 312 Ill.App.3d 790, 728 N.E.2d 90 (2d Dist. 2000) (as a matter of plain error, resentencing was required where the trial court erroneously interpreted the law to require consecutive sentences).

§54-2(e)(6)(b) **No Plain Error**

Illinois Supreme Court

People v. Nitz, 219 Ill.2d 400, 848 N.E.2d 982 (2006) The plain error rule applies to **Apprendi** violations. The **Apprendi** violation was not plain error.

People v. Crespo, 203 Ill.2d 335, 788 N.E.2d 1117 (2003) A 75-year extended term based on

the "exceptionally brutal and heinous" extended-term factor did not constitute plain error.

People v. Armstrong, 183 Ill.2d 130, 700 N.E.2d 960 (1998) No plain error where the instructions at a death hearing omitted the mental state requirement of a statutory aggravating factor; the evidence of guilt was overwhelming, and the sentencing jury had been instructed on the missing element at the guilt phase of the trial.

Illinois Appellate Court

People v. Campos, 2024 IL App (2d) 230056 Defendant argued that his 48-year sentence for a homicide committed at age 20 was excessive because it failed to account for his youth, his supportive family, his mental health and substance abuse issues, and his rehabilitative potential. The appellate court affirmed.

First, the appellate court found the error forfeited because defendant did not file a motion to reconsider his sentence. Defendant countered that sentencing errors affect the right to liberty and are therefore reviewable as second-prong plain error. The appellate court disagreed that a defendant can avoid forfeiture of sentencing errors merely by invoking the right to liberty, as this would make every sentencing error reviewable as plain error. Rather, defendant must provide some rationale beyond “sentencing error” before invoking the second prong. Here, defendant failed to do so and the appellate court therefore found the second prong inapplicable.

Similarly, defendant could not establish first-prong plain error because his argument that the evidence was “closely balanced” was a mere recitation of his claim that the court failed to consider substantial mitigating evidence. But when a sentencing court imposes a term within the sentencing range, as it did here, the appellate court will not find error absent an abuse of discretion – the sentence either varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. As with his second prong argument, defendant’s argument with regard to the first prong is too broad. It cannot be true that anytime the defendant presents substantial mitigating evidence, the evidence at sentencing is closely balanced.

Moreover, the court stated that it considered the PSI, evidence from trial, the statutory factors in aggravation and mitigation, and the evidence presented at the sentencing hearing. Although defendant pointed to several aspects of this evidence which may have warranted a lower sentence, including defendant’s age and his rehabilitative potential, the fact that a different court may have given differing weight to some of these factors does not mean that the court below “erred.” Absent an abuse of discretion, there was no clear error, and the sentencing claim was forfeited.

People v. Presley, 2023 IL App (5th) 230970 The appellate court rejected the State’s motion to dismiss defendant’s appeal from a pre-trial detention order. The State argued that the appellate court lacked jurisdiction because defendant’s notice of appeal failed to specify the relief requested and grounds for relief, as required by Rule 604(h)(2). The court held that despite these deficiencies, the notice of appeal clearly identified the trial court’s pre-trial detention order as the basis of the appeal. Rules 604(a)(1) and (h)(1) confer jurisdiction in the appellate court when an appeal is taken from such an order. Rule 606(a) states that, “Appeals shall be perfected by filing a notice of appeal with the clerk of the trial court. *** No step in the perfection of the appeal other than the filing of the notice of the appeal is jurisdictional.” Thus, the failure to include relief requested or grounds for relief in a notice of appeal is not a jurisdictional defect.

A majority of the court held, however, that defendant's claim was forfeited. Defendant argued that the State's detention petition was untimely because the Pre-Trial Fairness Act requires the State to file a petition to deny release at the defendant's first appearance or shortly thereafter, and here defendant was arrested months before the PFA went into effect. Though this was clear and obvious error under the plain language of the statute, it was not second-prong plain error. Defendant attempted to compare the issue to one of sentencing error, but while both involve the "fundamental right to liberty," the comparison fell short. In the pre-trial context, a probable cause hearing protects the federal constitutional right to liberty. Absent a finding of no probable cause, defendant's detention could not be a constitutional violation. For purposes of the Illinois Constitution, a detention hearing sufficiently protects the right to liberty. The hearing in this case established that defendant had several prior convictions, some while on bond, and that he planned and attempted to escape the jurisdiction. Thus, his pre-trial detention comported with due process despite the fact that the State's petition was untimely, and no plain error occurred.

A dissenting justice would have found the error sufficiently impacted the right to liberty so as to be reached under the second prong of the plain error rule.

People v. Belmont, 2018 IL App (2d) 150886 On appeal following his open plea of guilty to murder and aggravated criminal sexual assault with a dangerous weapon, defendant challenged for the first time his 12-year sentence for the sexual assault offense because it was improperly low. Aggravated criminal sexual assault with a dangerous weapon is a Class X felony which also requires the addition of 10 years to the sentence because of the use of the dangerous weapon, making the minimum term 16 years of imprisonment.

The Appellate Court declined to find plain error, and thus denied resentencing, because defendant was not prejudiced by the too-low sentence and he was not denied a fair sentencing hearing. The Court noted that the outcome of the sentencing hearing was only unfair to the State. In response to defendant's argument that his sentence remained uncertain because the State might seek to increase his sentence via *mandamus* at some future date closer to his release, the Appellate Court noted that any such action by the State would be subject to a valid *laches* argument. The Appellate Court also accepted a concession from the State that it would be estopped from seeking an increased sentence in the future based on the State's opposition to defendant's arguments in the instant appeal.

People v. Frazier, 2017 IL App (5th) 140493 Defendant argued for the first time in his direct appeal that the trial court improperly imposed certain fees. The Appellate Court held that defendant forfeited this issue by failing to raise it in the trial court and that the incorrect imposition of fees in this case did not amount to plain error.

When defendant fails to preserve an issue for appeal it is forfeited and cannot be considered unless it amounts to plain error under Supreme Court Rule 615(a), which states that errors which do not "affect substantial rights shall be disregarded." Here the trial court incorrectly imposed \$25 in extra fees on defendant. But the trial court also stated that it would assess certain fees worth \$700 but find that they were uncollectible. The Appellate Court held that by finding these fees to be uncollectible the trial court actually reduced the amount defendant would have to pay.

Under these circumstances, the Appellate Court held that "if there was ever a time to invoke the forfeiture rule, this is it." The court lamented that in this case, as well as many others, the "time expended on accurate calculation" of assessments was phenomenal. "To remand this case would be nothing short of a complete waste of judicial resources."

People v. Hanson, 2014 IL App (4th) 130330 Defendant argued that although he was eligible for an extended-term sentence for domestic battery based upon prior felony convictions for retail theft and aggravated robbery (as listed in the pre-sentence investigation report), the trial court improperly imposed an extended-term sentence based upon a mistaken belief that defendant had a prior Class 4 felony conviction for domestic battery (as argued by the State).

The Appellate Court declined to address the merits of defendant's claim. His claim was based entirely on the trial court misunderstanding his criminal history, but defendant made no effort to point this error out at trial and create a clear record of the trial court's actual basis for imposing the sentence. By raising the issue for the first time on appeal, defendant was essentially asking the Appellate Court to "use the transcript of the sentencing hearing as a crystal ball" to understand the trial court's thinking. The Appellate Court refused to engage in "mind-reading" and thus would not review the issue.

The court also held that the plain-error rule did not apply. The court rejected other Appellate Court decisions holding that sentencing errors involving a misapplication of law are reviewable as plain error since the right to be sentenced lawfully affects a defendant's fundamental right to liberty. If all matters involving misapplication of law at sentencing were reviewable as plain error, it would render the forfeiture rule meaningless.

The court also declined to review as plain error, despite the State's agreement, defendant's claim that the trial court imposed a restitution order without an evidentiary basis for the correct amount of restitution. It rejected the idea that all sentencing errors are reviewable simply because defendant asserts "a few ten-dollar phrases" such as "substantial rights," "grave error," and the "fundamental right to liberty." Since all sentencing errors arguably involve the fundamental right to liberty, applying plain-error requires a more in-depth analysis, requiring a defendant to explain why the sentencing error in his particular case merits plain-error review.

Here, neither defendant nor the State attempted to explain why the trial court's error was more substantial relative to other types of sentencing errors. The sentence and restitution order were affirmed.

§54-2(e)(7)

Other

§54-2(e)(7)(a)

Plain Error

Illinois Supreme Court

In re Samantha V., 234 Ill.2d 359, 917 N.E.2d 487 (2009) The plain error doctrine allows a reviewing court to consider unpreserved error where the evidence is closely balanced or the error so serious as to affect the fairness of the trial and the integrity of the judicial process. Under either test, the defendant has the burden of persuasion. Before considering whether the plain error exception applies, the court must first determine whether any error occurred.

Here, the minor carried her burden to show that plain error occurred based upon the second prong of the plain error rule – because a "one-act, one-crime" violation affects the integrity of the judicial process.

People v. Walker, 232 Ill.2d 113, 902 N.E.2d 691 (2009) As a matter of plain error under

the second prong, the court held that the trial court failed to exercise its discretion concerning defense counsel's request for a continuance.

People v. Harvey 211 Ill.2d 368, 813 N.E.2d 181 (2004) A "one-act, one-crime" violation constituted plain error.

In re R.A.B., 191 Ill.2d 358, 757 N.E.2d 887 (2001) Minor's adjudication as a violent juvenile offender reversed for lack of valid jury waiver; issue constituted plain error because it concerned fundamental procedure necessary to preserve the integrity of the judicial process.

People v. Lofton, 194 Ill.2d 40, 740 N.E.2d 782 (2000) Because a substantial right is involved, the plain error rule applies where the issue involves defendant's right to personally attend a critical hearing.

People v. Smith, 183 Ill.2d 425, 701 N.E.2d 1097 (1998) Because entry of judgment on both felony murder and its predicate felony affected substantial rights, the plain error rule applies. See also, **People v. Boyd**, 307 Ill.App.3d 991, 719 N.E.2d 306 (3d Dist. 1999) (the erroneous entry of an improper conviction affects substantial rights and therefore constitutes plain error); **People v. Ousley**, 297 Ill.App.3d 758, 697 N.E.2d 926 (3d Dist. 1998) (plain error rule applies to legally inconsistent verdicts); **People v. Barraza**, 253 Ill.App.3d 850, 626 N.E.2d 275 (4th Dist. 1993) (entering judgment on both lesser and greater offenses constitutes plain error).

People v. Smith, 106 Ill.2d 327, 478 N.E.2d 357 (1985) Despite the absence of an objection in the trial court, the Court considered the merits of whether defendants effectively waived jury trials. "Without determining that in every case the sufficiency of a jury waiver will warrant review, we shall consider the issue as it is presented in the two causes here, given its importance and the frequency with which it arises." See also, **People v. Collins**, 9 Ill.App.3d 185, 292 N.E.2d 115 (1st Dist. 1972).

People v. Bradley, 30 Ill.2d 597, 198 N.E.2d 809 (1964) Improper severance was plain error; the evidence was closely balanced.

People v. McKinstry, 30 Ill.2d 611, 198 N.E.2d 829 (1964) Where prejudicial error occurs in a competency hearing, the adjudication of competency and subsequent conviction will be set aside despite the absence of an objection.

Illinois Appellate Court

People v. Stroud, 2023 IL App (2d) 220306 As a matter of plain error, guilty verdicts for both child endangerment and involuntary manslaughter were legally inconsistent. The mental state for child endangerment is knowledge, and the mental state for involuntary manslaughter is recklessness. Here, both charges were predicated on the same conduct, specifically defendant's failure to administer necessary medication to her son, a heart transplant recipient, and to bring the child to necessary medical appointments, thereby proximately causing his death.

By convicting defendant of both offenses, the jury necessarily found that defendant acted with both recklessness and knowledge, mental states which are mutually inconsistent. The court rejected the State's argument that defendant's mental state changed over time

where, at trial, its theory was that the entirety of defendant's conduct formed the basis for both counts. And, while that conduct occurred over the course of more than a year, the jury could not have apportioned various instances among the two mental states where the allegations in the indictment failed to apportion the conduct accordingly. The inconsistent verdicts could not stand. Defendant's convictions were reversed, and the matter was remanded for a new trial.

People v. Harris, 2023 IL App (1st) 210754 The trial court erred when it conducted sentencing via Zoom without counsel being in the same location as defendant and without obtaining a waiver from defendant. The State conceded error but argued that it did not rise to the level of plain error and thus asserted that no relief was warranted because defendant failed to preserve the issue in the trial court.

The appellate court agreed that it was error for the court to hold defendant's sentencing hearing remotely without obtaining a waiver from defendant. Sentencing is a critical stage requiring a defendant's presence, with counsel, because the outcome affects a substantial right – defendant's freedom. While remote sentencing proceedings were permissible under the Illinois Supreme Court's Covid-19 rule, M.R. 30370, that rule requires a knowing and voluntary written waiver. No waiver was entered here. Further, defendant requested to speak with counsel during the remote sentencing hearing, but the record failed to show that he was provided with a means to privately communicate with his attorney. The remote proceeding violated M.R. 30370 and defendant's constitutional right to due process. Accordingly, it was plain error, and the court remanded for a new sentencing hearing.

However, there was no error in hearing defendant's motion for new trial via Zoom without defendant's waiver. The original version of M.R. 30370 did not require a written waiver, and the amendment adding the waiver requirement was not entered until after the date of the hearing on defendant's motion. Thus, the amended rule did not apply. And, while a criminal defendant has a general right to be present at every stage of his trial, that right does not encompass pre-trial and post-trial motion hearings. In fact, the court was not even required to hear argument from the parties on the motion for new trial. It could have decided the motion without it. The dissenting justice would have found, as a matter of plain error, that the remote procedure deprived defendant of his sixth amendment right to counsel because he did not have the ability to confer privately with counsel during the motion hearing where defendant and counsel were not in the same physical location and not provided a breakout room or other means to communicate with each other.

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. Gaines, 2019 IL App (3d) 160494 A double jeopardy violation is a structural error, which is properly considered as second-prong plain error and requires automatic reversal. While double jeopardy is not one of the six types of structural error recognized by the Supreme Court, second-prong plain error is not limited to those types of errors.

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. Schoonover, 2019 IL App (4th) 160882 The trial court erred when it removed defendant's family from the courtroom. Under section 115-11 of the Code of Criminal Procedure, the court has discretion to exclude all persons from the courtroom when the minor victim of a sex crime is testifying, except the court may not exclude the media or those with a direct interest in the case. The Appellate Court held that, before excluding defendant's family members, a trial court must make an express finding that they do not have a direct interest in the outcome of the case.

Here, even though defendant didn't explain which family members were excluded by the court's order, or establish that the family members had a direct interest in the case, the trial court failed to exercise discretion by seeking the answers to these questions once defendant objected to the exclusion of his family. The Appellate Court further found that despite defendant's failure to include the issue in a post-trial motion, second-prong plain error applied. Violations of section 115-11 are presumptively prejudicial because errors affecting defendant's right to a public trial are structural.

People v. Curry, 2018 IL App (1st) 152616 A defendant is "armed" for purposes of armed violence where he is in possession of a weapon at a time when there is "immediate potential

for violence” such as during a drug sale or at the time he encounters police. Defendant need not be armed at the moment of arrest. The Appellate Court found the evidence sufficient to sustain defendant’s armed violence conviction where he discarded a loaded gun, as well as a bag of drugs, as he fled from the police. The predicate offense of unlawful possession of a controlled substance (heroin) with intent to deliver was vacated as a matter of second-prong plain error, however, because it was based on the same act as the armed violence conviction.

The State conceded error in assessment of an electronic citation fee, as well as the failure to award presentence custody credit against fines, but argued that defendant had forfeited the errors. Noting that “forfeiture is a limitation on the parties, not the court,” the Appellate Court exercised its discretion to review the assessments and ordered them corrected under Rule 615(b)(1).

People v. Ely, 2018 IL App (4th) 150906 Although the trial court erred when it shackled defendant at his bench trial without considering the **Boose** factors outlined in Rule 430, defendant forfeited the error. Defendant alleged first-prong plain error, because the State had to prove that his aggravated battery occurred on or about a public way, and the testimony established that he was about 10 to 15 feet from an alley at the time of the battery.

The Appellate Court agreed that the evidence of this element was closely balanced but refused to find plain error because the first prong requires a showing that the error affected the outcome. The first prong of plain-error review is made up of two parts, both of them essential: (a) the closeness of the evidence and (b) the resulting possibility that the error might have contributed to the unfavorable outcome. The shackling of defendant had no possible effect on the trial court’s determination of whether a spot 10 to 15 feet from the alley was “on or about a public way.”

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. Booker, 2015 IL App (1st) 131872 As a matter of plain error under the second-prong of the plain error rule, the court found that a defendant who was charged with home invasion while armed with a firearm could not be convicted of home invasion while armed with a dangerous weapon other than a firearm. Second-prong plain error applies where an unpreserved error violates due process and implicates the integrity of the judicial process.

The court rejected the argument that in Illinois, second-prong plain error is equivalent to “structural error” under the federal constitution and is recognized only where there is a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of the grand jury, denial of the right to self-representation at trial, denial of a public trial, or defective reasonable doubt instructions. The court noted that Illinois case law does not restrict plain error to the six types of structural error listed above, and that the Illinois Supreme Court has found second-prong plain error concerning other issues.

People v. Campbell, 2015 IL App (3d) 130614 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.

People v. Salgado, 2012 IL App (2d) 100945 The Appellate Court concluded that defendant was denied his right to confront a witness against him when at the State’s request, the court allowed a minor child to testify in chambers outside the presence of the defendant. Defendant did not validly waive his right to confront as nothing in the record showed that defendant understood that he had the right to be present, and knowingly and voluntarily waived that right. The record showed only that counsel asked for a moment with his client, and then indicated his client would remain in the courtroom when the court asked defense counsel his position regarding the State’s request.

This plain error results in reversal of the defendant’s conviction and remand for a new trial.

People v. Rippatoe, 408 Ill.App.3d 1061, 945 N.E.2d 132 (3d Dist. 2011) The trial court committed plain error by failing to conduct a **Boose** inquiry before conducting a post-trial proceeding while the defendant was shackled. The court concluded that the failure to conduct a **Boose** hearing constitutes fundamental error which threatens the fairness of the proceeding.

People v. Hagler, 402 Ill.App.3d 149, 937 N.E.2d 204 (2d Dist. 2010) An error must be preserved by both an objection at trial and inclusion in a post-trial motion to avoid forfeiture. An exception exists under the second prong of the plain-error rule if the error is so serious that it affects the fairness of the trial and challenges the integrity of the judicial process.

The court held that defendant’s one-act, one-crime argument was properly reviewed as plain error because violations of the one-act, one-crime rule implicate the integrity of the judicial process.

People v. Schoreck, 384 Ill.App.3d 904, 894 N.E.2d 428 (2d Dist. 2008) Defendant’s fitness to stand trial is a fundamental right which is reviewed under the plain error doctrine - regardless whether a pretrial fitness hearing was held but the issue was left out of the post-trial motion or the defense failed to raise the issue after a bona fide doubt of fitness arose.

People v. Lang, 346 Ill.App.3d 677, 805 N.E.2d 1249 (2d Dist. 2004) The court considered as plain error the trial court’s denial of defendant’s motion for appointment of a special prosecutor because the ruling affected defendant’s substantial right to a fair trial.

People v. Herring, 327 Ill.App.3d 259, 762 N.E.2d 1186 (4th Dist. 2002) A claim that there was no effective waiver of counsel is reviewed as plain error. Here, the court found violation of Supreme Court Rule 401 where no verbatim transcripts of purported waiver were

prepared.

People v. Williams, 331 Ill.App.3d 662, 771 N.E.2d 1095 (1st Dist. 2002) The plain error rule applied to issue concerning trial court's failure to determine the extent of defendant's hearing impairment due to the fundamental nature of the issue.

People v. Taylor, 244 Ill.App.3d 460, 612 N.E.2d 543 (2d Dist. 1993) Trial court committed plain error by excluding defendant's siblings from voir dire.

People v. Mitchell, 238 Ill.App.3d 1055, 605 N.E.2d 1055 (2d Dist. 1992) Legally inconsistent verdicts are plain error and may be considered on review even if not preserved.

§54-2(e)(7)(b)

No Plain Error

Illinois Supreme Court

People v. Allen, 222 Ill.2d 340, 856 N.E.2d 349 (2006) The trial judge's error in requiring defendant to wear an electronic stun belt at his trial without conducting a hearing to determine that use of the belt was manifestly necessary was not plain error.

People v. Harvey 211 Ill.2d 368, 813 N.E.2d 181 (2004) Mere-fact method of impeachment did not amount to plain error. The evidence was not closely balanced, and the mere-fact method is not an issue that must be reached to preserve the integrity and reputation of the judicial process.

Illinois Appellate Court

People v. McGhee, 2012 IL App (1st) 093404 Addressing the issue as a matter of first impression, the Appellate Court concluded that no structural error occurs 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. Oliver, 2012 IL App (1st) 102531 Where the defendant has made a timely objection and properly preserved an error for review, the reviewing court conducts a harmless-error analysis in which the State has the burden of proof. Where the defendant fails to make a timely objection and forfeits review, the reviewing court will examine the record only for plain error. In plain-error review, the burden of persuasion remains on defendant.

When a defendant who has not waived or forfeited his right to be present shows that the court conducted a critical stage of the proceedings in defendant's absence, the defendant has shown a violation of his constitutional rights. The burden is on the State to show that the error is harmless beyond a reasonable doubt. Where the defendant has not preserved the

error for review, the burden is on the defendant to show that he was prejudiced by the violation of his right to be present.

Plain error did not occur due to defendant's absence from the conference on jury selection because his absence did not have the slightest effect on the impartiality of jury selection.

§54-3

Harmless Error and Structural Error

§54-3(a)

Generally

United States Supreme Court

Weaver v. Massachusetts, 137 S. Ct. 1899, 198 L. Ed. 2d 420 (2017) Generally, if the government can show beyond a reasonable doubt that a constitutional error did not contribute to the verdict, the error is deemed harmless and the defendant is not entitled to reversal. However, "structural" errors are not subject to the "harmless beyond a reasonable doubt" rule.

Structural errors are errors which define the framework of a criminal trial. The determination that an error is structural may be based on one of three rationales. First, an error may be deemed structural because the right at issue is not designed to protect the defendant from erroneous conviction, but to protect some other interest such as the right to conduct one's own defense. Second, an error may be deemed structural when the effects of the error are too difficult to measure, such as the denial of the right to choose one's attorney. Third, errors which always result in fundamental unfairness, such as denial of counsel or the failure to give a reasonable doubt instruction, may be deemed structural error.

Under Supreme Court precedent, a violation of the right to a public trial is structural error. In addition, the right to a public trial includes an open hearing for jury selection. Because the courtroom may be closed where certain findings are made, however, the mere denial of a public hearing does not necessarily require a new trial. Furthermore, the right to a public trial may be violated due to the trial court's failure to make the findings required for closure rather than because the resulting hearing is unfair.

The fact that an error is structural means that the harmless error rule does not apply, but does not necessarily mean that reversal is required. Where an objection is made and the issue is raised on direct appeal, the "automatic reversal" rule usually applies whether or not the error had any effect on the outcome of the trial.

Where no objection is made at trial and the issue is raised on collateral review by way of ineffective assistance of counsel, the defendant must satisfy **Strickland** by showing both deficient performance by counsel and prejudice. In most **Strickland** cases, prejudice means a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. But the prejudice inquiry is not meant to be applied mechanically, and the concept of prejudice is defined differently depending on the context. The court assumed without deciding that defendant could satisfy the prejudice requirement by showing that counsel's failure to object to a violation of the public trial requirement rendered the trial fundamentally unfair.

Where due to a lack of space the trial court closed the courtroom to everyone but the prospective jurors, defendant could not establish that he was prejudiced by counsel's failure to object. Although it is possible that potential jurors might have behaved differently had

defendants' family been present, there was no evidence or legal argument establishing prejudice in the sense of a reasonable probability of a different outcome had counsel objected to the closure. Similarly, there was no reason to believe that the failure to object to the closing of the courtroom resulted in a fundamentally unfair proceeding. Under these circumstances, defendant failed to satisfy the prejudice requirement of **Strickland**.

Rivera v. Illinois, 556 U.S. 148, 129 S.Ct. 1446, 173 L.Ed.2d 320 (2009) A state trial judge's erroneous denial of a peremptory challenge does not require automatic reversal as a matter of federal law where the selected jurors were qualified and unbiased.

Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) **Apprendi** error is subject to harmless error analysis. See also, **People v. Thurrow**, 203 Ill.2d 352, 786 N.E.2d 1019 (2003); **People v. Nitz**, 219 Ill.2d 400, 848 N.E.2d 982 (2006).

Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) In most cases, constitutional "trial error" is subject to harmless error analysis because the effect of the error can be "quantitatively assessed." But, where the constitutional error involves "structural defects" that affect "the framework within which the trial proceeds," rather than merely "an error in the trial process itself," the result of the trial is unreliable and harmless error analysis applies.

Illinois Supreme Court

People v. Pinkett, 2023 IL 127223 Defendant was charged with aggravated fleeing from a peace officer after the police attempted to pull over defendant and two companions' speeding motorcycles for 13 miles. Defendant ultimately pulled into a Walmart and was arrested inside. The question at defendant's trial was whether defendant knowingly fled the police, or whether, because of the loudness of the motorcycles, his earplugs, and his lack of rear view mirrors, he was unaware of their presence.

In its opening statement, the State argued that defendant knew he was being pursued because he did not ask why a plain-clothes officer was detaining him in the Walmart. The defense objected and moved for a mistrial. The trial court denied the motion based on **People v. Givens**, 135 Ill. App. 3d 810 (1985), which held that postarrest, pre-**Miranda** silence is not constitutionally protected.

At trial, evidence showed a plain-clothes officer responded to a call stating that one of the fleeing motorcyclists was inside the Walmart. The officer described going into the Walmart bathroom and finding defendant in "biker attire." The officer said "Hey, what's up," and defendant, appearing "somewhat nervous," left. The officer followed him, identified himself as a deputy sheriff, grabbed a knife hanging from defendant's belt, and said "We need to walk out of here without making a scene."

The State asked the testifying officer if defendant asked why he was being detained. The officer responded no, and that he found it odd that the defendant didn't object to a person in plain clothes grabbing his knife and detaining him. In closing, the State argued that defendant's failure to ask why he was being detained undermined his defense, because, despite defendant's right to silence, a "normal person" who was unaware he was being chased by police would have asked why he was being detained.

Defendant was found guilty, but the appellate court reversed, finding evidentiary error where postarrest, pre-**Miranda** silence was used for substantive purposes rather than impeachment. A dissent found the error harmless.

The supreme court agreed that the trial court erred when it denied the motion for a mistrial. Under [Illinois Rule of Evidence 401](#), evidence must be relevant to be admissible, and even before **Miranda**, Illinois courts have held postarrest silence is irrelevant. **People v. Rothe**, 358 Ill. 52 (1934); **People v. Lewerenz**, 24 Ill. 2d 295, 299 (1962). Postarrest silence is “insolubly ambiguous” because it can never be known if it represents a defendant exercising his right to silence, or betraying a lack of surprise and consciousness of guilt.

Where a motion for a mistrial has been denied, an appellant must demonstrate both prejudice, and that admonishments and curative instructions from the circuit court could not remedy the error. Here, defendant was prejudiced when the State suggested that defendant’s silence was tantamount to a tacit admission. But tacit admissions require accusations, and defendant wasn’t informed of the charges at the time of his silence. Further, the error was not cured by instructions, where the trial court provided only a general admonishment that opening statements do not constitute evidence, and no curative instruction was provided at the time of the statement.

Finally, the error was not harmless. Evidentiary errors are harmless where there is “no reasonable probability” of acquittal absent the error. The appellate court correctly applied the factors used in **Doyle v. Ohio**, 426 U.S. 610, 617-18 (1976), and they weighed in favor of retrial: the error was introduced by the State, it impacted defendant’s right to a fair trial, the trial court passed on its opportunity to grant a mistrial, and the evidence was used to imply guilt. Finally, the remaining evidence was not overwhelming. Despite the fact that the motorcyclists led police on a 13-mile police chase involving speeds over 21 miles per hour over the limit, the evidence suggested defendant may have not been aware of the police given the loud bikes, earplugs, lack of mirrors, the lack of evasive maneuvers, and defendant’s decision to stop at a stop sign during the chase. Also, defendant’s statement that he entered Walmart to buy zip ties was corroborated by the officer, who noticed something dragging from the motorcycle.

People v. Pingelton, 2022 IL 127680 The supreme court found the circuit court violated due process when it granted the State’s motion to dismiss a post-conviction petition at the second stage without adequate notice. However, any error was harmless due to the frivolousness of the underlying claims.

Defendant filed a post-conviction petition and was appointed counsel. The State moved to dismiss. Two years later, counsel moved to withdraw after concluding that the petition was frivolous. Defendant filed written responses to the motion to withdraw, and counsel filed a reply. The circuit court set the case for a status hearing. On the day of the status hearing, with the attorneys present and defendant participating over telephone, the State argued its motion to dismiss, and “adopted” the arguments in the motion to withdraw. Post-conviction counsel did not respond to the arguments. The court then heard defendant’s and his attorney’s arguments on the motion to withdraw. The circuit court granted the motion to withdraw, and the motion to dismiss.

The supreme court found this procedure violated due process. A circuit court may not “convert a status call to a hearing on the merits without notice to the parties.” Here, the circuit court, on a status date, heard arguments and ruled on both a motion to dismiss and a motion to withdraw. While defendant had already filed written responses to the motion to withdraw, and was able to argue the motion to withdraw at the hearing, he did not argue against the motion to dismiss. Nor could he, as he was still represented by counsel at the time. The lack of a meaningful opportunity to be heard on the motion to dismiss violated procedural due process.

However, due process errors in collateral proceedings are subject to harmless error analysis. The court analogized [People v. Stoecker](#), 2020 IL 124807, a 2-1401 appeal involving the same type of error, in which the court found harmless error. The court distinguished [People v. Suarez](#), 224 Ill. 2d 37 (2007), which found *per se* reversible error in a case involving post-conviction counsel's failure to comply with Rule 651(c). Because this case involved the same type of error as in [Stoecker](#), harmless error analysis applied.

The error was harmless because the petition lacked merit. The petition claimed counsel was ineffective for failing to challenge the admissibility of testimony from two doctor witnesses, who examined and described the complainants' injuries. Defendant argued their expert testimony lacked foundation because they were not board-certified gynecologists. The supreme court found adequate support for their expertise in the record, noting they were board-certified in emergency medicine, had personal experience in the subject matter at issue, and were familiar with scientific literature on sexual assault.

[People v. Washington](#), 2012 IL 110283 An error in refusing a second-degree instruction does not result in automatic reversal. Automatic reversal is required only where an error is deemed "structural," i.e., a systemic error that serves to erode the integrity of the judicial process and undermine the fairness of the trial. An instructional error such as the denial of a second-degree murder instruction is harmless only if it is demonstrated that the result of the trial could not have been different had the jury been properly instructed.

Refusing defendant's request for a second-degree murder instruction was not harmless error. The court rejected the argument that because the jury rejected defendant's claim of self-defense, it would not have believed that he had an unreasonable belief in the need for use of force in self-defense. The evidence in the case was conflicting and diametrically opposed as to what transpired before and after the shooting. By refusing the second-degree murder instruction, the trial court took the determination of whether defendant's belief in self-defense was reasonable or unreasonable from the jury. The court could not say that the result of the trial would not have been different had the jury received a second-degree murder instruction.

[People v. Glasper](#), 234 Ill.2d 173, 917 N.E.2d 401 (2009) The court concluded that the failure to comply with Rule 431(b) during *voir dire* was harmless, finding that the error was not structural and that the evidence of guilt was overwhelming. (See also **JURY**, §32-4(a)).

[People v. Nitz](#), 219 Ill.2d 400, 848 N.E.2d 982 (2006) When applying the harmless error rule, the appropriate standard is whether a rational jury would have convicted defendant absent the error. Thus, even had harmless error analysis been warranted, the appellate court erred by basing its analysis on speculation whether the jury would have found the factor which authorized an enhanced sentence.

[People v. Patterson](#), 217 Ill.2d 407, 841 N.E.2d 889 (2005) Violations of **Crawford v. Washington** are subject to the harmless error rule.

[People v. Sullivan](#), 72 Ill.2d 36, 377 N.E.2d 17 (1978) Error will be held harmless when it could not reasonably have affected the result or contributed to the conviction. See also, [People v. Carlson](#), 92 Ill.2d 440, 442 N.E.2d 504 (1982).

Illinois Appellate Court

[People v. King](#), 248 Ill.App.3d 253, 618 N.E.2d 709 (1st Dist. 1993) The court held that

Sullivan v. Louisiana should be limited to situations in which the trial court gives a jury instruction which affirmatively misdefines reasonable doubt. **King** applied harmless error analysis to a case in which the judge neglected to give a general reasonable doubt instruction (IPI Crim.2d. No. 2.03), but the jury received other instructions that embodied the reasonable doubt standard.

§54-3(b)

Structural Error

United States Supreme Court

Weaver v. Massachusetts, 137 S. Ct. 1899, 198 L. Ed. 2d 420 (2017) Generally, if the government can show beyond a reasonable doubt that a constitutional error did not contribute to the verdict, the error is deemed harmless and the defendant is not entitled to reversal. However, “structural” errors are not subject to the “harmless beyond a reasonable doubt” rule.

Structural errors are errors which define the framework of a criminal trial. The determination that an error is structural may be based on one of three rationales. First, an error may be deemed structural because the right at issue is not designed to protect the defendant from erroneous conviction, but to protect some other interest such as the right to conduct one’s own defense. Second, an error may be deemed structural when the effects of the error are too difficult to measure, such as the denial of the right to choose one’s attorney. Third, errors which always result in fundamental unfairness, such as denial of counsel or the failure to give a reasonable doubt instruction, may be deemed structural error.

Under Supreme Court precedent, a violation of the right to a public trial is structural error. In addition, the right to a public trial includes an open hearing for jury selection. Because the courtroom may be closed where certain findings are made, however, the mere denial of a public hearing does not necessarily require a new trial. Furthermore, the right to a public trial may be violated due to the trial court’s failure to make the findings required for closure rather than because the resulting hearing is unfair.

The fact that an error is structural means that the harmless error rule does not apply, but does not necessarily mean that reversal is required. Where an objection is made and the issue is raised on direct appeal, the “automatic reversal” rule usually applies whether or not the error had any effect on the outcome of the trial.

Where no objection is made at trial and the issue is raised on collateral review by way of ineffective assistance of counsel, the defendant must satisfy **Strickland** by showing both deficient performance by counsel and prejudice. In most **Strickland** cases, prejudice means a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. But the prejudice inquiry is not meant to be applied mechanically, and the concept of prejudice is defined differently depending on the context. The court assumed without deciding that defendant could satisfy the prejudice requirement by showing that counsel’s failure to object to a violation of the public trial requirement rendered the trial fundamentally unfair.

Where due to a lack of space the trial court closed the courtroom to everyone but the prospective jurors, defendant could not establish that he was prejudiced by counsel’s failure to object. Although it is possible that potential jurors might have behaved differently had defendants’ family been present, there was no evidence or legal argument establishing prejudice in the sense of a reasonable probability of a different outcome had counsel objected to the closure. Similarly, there was no reason to believe that the failure to object to the closing

of the courtroom resulted in a fundamentally unfair proceeding. Under these circumstances, defendant failed to satisfy the prejudice requirement of **Strickland**.

U.S. v. Gonzalez-Lopez, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) A violation of the Sixth Amendment right to counsel of choice constitutes "structural" error which is not subject to the harmless error rule. See also, **People v. Bingham**, 364 Ill.App.3d 642, 847 N.E.2d 903 (4th Dist. 2006).

Neder v. U.S., 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) Only a limited class of constitutional errors are immune to harmless error analysis; such errors involve fundamental defects in the "structure" of the trial which render it unreliable "as a vehicle for determination of guilt or innocence." Such fundamental errors include: 1) the complete denial of counsel (**Gideon v. Wainwright**, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); **Holloway v. Arkansas**, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)); 2) bias on the part of the trial judge (**Tumey v. Ohio**, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed.2d 749 (1927); **People v. Cole**, 54 Ill.2d 401, 298 N.E.2d 705 (1973) (impartial jury); **People v. Oliver**, 50 Ill.App.3d 665, 365 N.E.2d 618 (1st Dist. 1977)); 3) racial discrimination in the selection of the grand jury (**Vasquez v. Hillery**, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986)); 4) denial of the right to self-representation (**McKaskle v. Wiggins**, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984)); 5) denial of right to a public trial (**Waller v. Georgia**, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed. 2d 31 (1984)); and 6) a defective reasonable doubt instruction (**Sullivan v. Louisiana**, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)).

An instruction that omits an element of the offense is subject to the harmless error rule.

Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) In most cases, constitutional "trial error" is subject to harmless error analysis because the effect of the error can be "quantitatively assessed." But, where the constitutional error involves "structural defects" that affect "the framework within which the trial proceeds," rather than merely "an error in the trial process itself," the result of the trial is unreliable and harmless error analysis applies.

Perry v. Leeke, 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989) A showing of prejudice is not an essential component of a violation of **Geders v. United States**, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976), which held that the trial court's order directing defendant not to consult with his attorney during an overnight recess violated defendant's right to counsel.

Illinois Supreme Court

People v. Wrice, 2012 IL 111860 Under **People v. Wilson**, 116 Ill.2d 29, 506 N.E.2d 571 (1987), use of a coerced confession as substantive evidence of guilt cannot be harmless error. Here, the court noted that **Wilson** was based on United States Supreme Court precedent, and that in **Arizona v. Fulminante**, 499 U.S. 279 (1991), a plurality of the court concluded that admission of a coerced confession was subject to the harmless error rule.

In view of the factual situation and divided opinion in **Fulminante**, the court declined to abandon **Wilson** entirely. Instead, the court modified the rule to hold that use of a *physically* coerced confession as substantive evidence of guilt cannot be harmless error. The court noted that it was not required to decide whether the **Wilson** rule could stand as a matter of State constitutional law, because defendant claimed only that his rights had been

violated under the federal constitution.

People v. Reedy, 186 Ill.2d 1, 708 N.E.2d 1114 (1999) Harmless error analysis is improper where the issue involves whether a legislative enactment was constitutionally passed. "[W]hen the procedure by which the General Assembly enacts legislation contravenes a constitutional mandate, a harmless error standard is inappropriate."

People v. Woods, 184 Ill.2d 130, 703 N.E.2d 35 (1998) The use of a coerced confession as substantive evidence of guilt can never be harmless error (citing **People v. Wilson**, 116 Ill.2d 29, 506 N.E.2d 571 (1987)). See also, **People v. Traylor**, 331 Ill.App.3d 464, 771 N.E.2d 629 (3d Dist. 2002) (same). But see, **Arizona v. Fulminante**, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (the admission of an involuntary confession is a "trial error" that is subject to the Chapman harmless error rule; however, reviewing courts must "exercise extreme caution" before determining that the State's use of an involuntary confession was harmless).

People v. Mack, 167 Ill.2d 525, 658 N.E.2d 437 (1995) Where the jury's verdict was void because it set out some (but not all) of the elements of death penalty eligibility, it would be inappropriate to apply the harmless error rule.

People v. Stromblad, 74 Ill.2d 35, 383 N.E.2d 969 (1978) The failure to accurately instruct the jury on an essential element of the State's case was such a fundamental error that the Court reversed defendant's conviction without evaluating the evidence.

Illinois Appellate Court

People v. Henry, 2025 IL App (3d) 230137 Defendant was charged with attempt vehicular hijacking, aggravated vehicular carjacking, UUV/felon, and armed robbery. The crimes were initiated in Cook County, where defendant held up a man, tried to take his car but left with only his phone. He then hijacked another man's car before leading police on a high-speed chase into Will County, where he was eventually arrested and charged. Defendant moved to dismiss the charges for improper venue under [article I, section 8 of the Illinois Constitution](#) and [720 ILCS 5/1-6\(a\)](#), arguing his trial must take place in Cook County where the crimes occurred.

The State conceded that the attempted vehicular hijacking took place entirely within Cook County, but insisted the remaining counts, while initiated in Cook County, were not "over" until defendant was apprehended in Will County. The State also argued that, because defendant kept the stolen cell phone until his arrest, he committed theft, an "element" of armed robbery, while in Will County. The State relied on **People v. Eggerman**, 292 Ill. App. 3d 644, 650-51 (1997), in support of this latter theory.

The appellate court found the reasoning of **Eggerman** contradicted the plain language of the Illinois Constitution and [720 ILCS 5/1-6\(a\)](#) (venue is proper in the county "where the offense was committed"). Regardless, theft is not an element of armed robbery. While "taking" is an element, this act is defined differently than "theft", which requires an intent to permanently deprive. Nor did the police chase extend the crime. See **People v. Dennis**, 181 Ill. 2d 87, 103 (1998) (flight and escape are not elements of armed robbery, thus the offense is complete when force or threat of force causes the victim to part with property). Thus, Cook County was the only correct venue for armed robbery and vehicular hijacking.

As for UUV/felon, the defendant established a *prima facie* case that venue was improper in Will County because police did not discover a firearm at the time of his arrest.

Thus, it became the State's burden to prove venue was proper by a preponderance of the evidence. As the State did not present evidence showing defendant possessed a gun in Will County, the venue was improper.

Finally, the court rejected the State's harmless error argument, which it labeled an issue of first impression. The appellate court held that trial in the wrong venue is akin to structural error, which defies harmless error analysis because it affects the framework in which the trial is held.

People v. Turner, 2024 IL App (1st) 211648 As a matter of plain error, the appellate court found that the trial court erred when it removed the *pro se* defendant from the courtroom during jury selection. Generally, a defendant has a constitutional right to be present at any critical stage of the proceedings against him. A defendant may relinquish that right, however, either by consent or by his or her own misconduct.

Here, the court found that defendant's removal was warranted by his "unrelenting argument and disrespect" during jury selection. But, because defendant was proceeding *pro se*, his removal left him without any representation during jury selection. This violated his constitutional right to due process because defendant was completely deprived of representation during a critical stage of the proceedings.

The State argued that defendant knowingly waived his right to be present where the trial court had warned him previously that he would be removed for misconduct and had, in fact, followed through on having defendant removed from prior proceedings. Thus, he was on notice of the possibility of removal for misconduct when he chose to disrupt the jury selection proceedings. The appellate court rejected that argument. A knowing waiver requires both knowledge that defendant would be removed from the courtroom and also knowledge that removal would leave him without any representation at all. Here, while defendant had been warned of the consequence of removal during prior court proceedings, he was not warned at the jury selection hearing that he could be removed for misconduct during that particular proceeding. And, defendant was never warned that his removal would leave him with no representation at all. Thus, defendant did not knowingly waive his right to legal representation during jury selection. This was structural error, not subject to harmless error analysis. Defendant's conviction was reversed and the matter remanded for a new trial.

People v. Brown, 2013 IL App (2d) 111228 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.

People v. Franklin, 2012 IL App (3d) 100618 A defective reasonable-doubt instruction is structural error that may be noticed as structural plain error under the second prong of the plain-error rule.

§54-3(c)

Non-Structural Constitutional Error – Harmless Beyond a Reasonable Doubt Standard

United States Supreme Court

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) Constitutional error must be found to be harmless beyond a reasonable doubt, **Delaware v. Van Arsdall**,

106 S.Ct. 1431, 89 L.Ed.2d 674 (1986), **People v. Smith**, 38 Ill.2d 13, 230 N.E.2d 188 (1967), and the State bears the burden of proving that such an error is harmless beyond a reasonable doubt. "[T]he beneficiary of a constitutional error [must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." See also, **Fontaine v. California**, 390 U.S. 593, 88 S.Ct. 1229, 20 L.Ed.2d 154 (1968) (State failed to meet its burden of proving beyond a reasonable doubt that comment on defendant's failure to testify did not contribute to conviction); **Anderson v. Nelson**, 390 U.S. 523, 88 S.Ct. 1133, 20 L.Ed.2d 81 (1968); **People v. Chavez**, 338 Ill.App.3d 835, 789 N.E.2d 354 (1st Dist. 2003) (because the State failed to make a harmless error argument, it failed to satisfy its burden of showing that the constitutional error did not contribute to the verdict).

Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) On direct appeal, the **Chapman** standard applies to constitutional error that is subject to harmless error analysis.

But, the Chapman harmless error standard (harmless beyond a reasonable doubt) does not apply in federal habeas corpus proceedings. Rather, in federal habeas corpus actions, errors that are subject to harmless error analysis are to be judged under **Kotteakos v. United States**, 328 U.S. 750 (1946), which holds that constitutional error is harmless unless it had a "substantial and injurious effect on the jury's verdict." Here, although the State violated due process by commenting on defendant's pretrial silence, the error was harmless because it had no substantial effect on the verdict. See also, **Fry v. Pliler**, 551 U.S. 112, 127 S.Ct. 2321, 168 L.Ed.2d 16 (2007) (on federal habeas review, the federal court must apply the Brecht test without regard to whether the state court recognized the error and applied the Chapman standard).

Illinois Supreme Court

People v. Lerma, 2016 IL 118496 The erroneous exclusion of expert testimony concerning the reliability of the eyewitness identification was not harmless. The Illinois Supreme Court has recognized three approaches to determine whether an error is harmless beyond a reasonable doubt: (1) whether the error contributed to the defendant's conviction; (2) whether the other evidence overwhelmingly supported the conviction; and (3) whether the excluded evidence would have been duplicative or cumulative.

Under each of these approaches, the exclusion of the testimony was not harmless beyond a reasonable doubt. First, there is no question that the error contributed to the defendant's conviction, as the exclusion of the testimony prevented the jury from hearing relevant and probative expert testimony relating to the State's sole testifying eyewitness in a case lacking any physical evidence linking defendant to the crime. Second, it cannot be said that the other evidence in the case overwhelmingly supported the defendant's conviction, as the only other evidence of guilt was a hearsay excited utterance from a non-testifying witness. Third, the excluded testimony was neither duplicative nor cumulative of other evidence, as the jury heard nothing the reliability of expert eyewitness testimony.

People v. Leach, 2012 IL 111534 Even if the admission of an autopsy report was error, it was harmless beyond a reasonable doubt. The defendant did not dispute the cause and manner of the death of the deceased, only his mental state. The State presented expert testimony independent of the autopsy report regarding death by strangulation in general. Defendant was tried in a bench trial and the court relied entirely on defendant's own statement and the expert's testimony regarding the time necessary to cause death by

strangulation to find defendant guilty of first degree murder. The autopsy report had a negligible effect on the court's finding.

People v. Stechly, 225 Ill.2d 246, 870 N.E.2d 333 (2007) There are three different approaches to measure error under the harmless error test: 1) determine whether the improperly-admitted evidence is merely cumulative or duplicative of the properly-admitted evidence; 2) focus on the error to determine whether it might have contributed to the conviction; or 3) examine the other evidence in the case to see if the overwhelming evidence supports the conviction. Here, the Court applied all three tests to find that the constitutional error was not harmless beyond a reasonable doubt. See also, **People v. Averhart**, 311 Ill.App.3d 492, 724 N.E.2d 154 (1st Dist. 1999) (the denial of cross-examination to show bias or motive was not harmless under any of the three tests); **People v. Brown**, 363 Ill.App.3d 838, 842 N.E.2d 1141 (1st Dist. 2005) (applying all three tests and concluding that the erroneously-admitted evidence was not harmless); **People v. Richee**, 355 Ill.App.3d 43, 823 N.E.2d 142 (1st Dist. 2005) (recognizing all three tests, and concluding that the erroneous other-crimes evidence was not harmless because the evidence undoubtedly contributed to defendant's conviction where there was no physical evidence linking defendant to the crime and the evidence of guilt was circumstantial); **People v. Purcell**, 364 Ill.App.3d 283, 846 N.E.2d 203 (2d Dist. 2006) (applying the guilt-based approach and affirming defendant's conviction); **People v. Thompson**, 349 Ill.App.3d 587, 812 N.E.2d 516 (1st Dist. 2004) (applying the second test and finding that the error was not harmless).

People v. Woodrum, 223 Ill.2d 286, 860 N.E.2d 259 (2006) There is a two-part test for determining whether application of an unlawful presumption is harmless error: 1) determine what evidence the trier of fact actually considered in reaching the verdict; and 2) weigh the probative force of the evidence actually considered by the trier of fact against the probative force of the presumption standing alone. Here, the use of an unconstitutional presumption was harmless error. See also, **People v. Pomykala**, 203 Ill.2d 198, 784 N.E.2d 784 (2003) (an instruction based on 720 ILCS 5/9-3(b), which created an unconstitutional presumption by providing that in reckless homicide cases "being under the influence of alcohol or any other drug or drugs at the time of the alleged violation shall be presumed to be evidence of a reckless act unless disproved by evidence to the contrary," was not harmless because, although there was evidence in the record by which the jury could have convicted defendant of reckless homicide without the presumption, it could not be concluded beyond a reasonable doubt that the erroneous instruction had no effect on the verdict).

Illinois Appellate Court

People v. Kent, 2020 IL App (2d) 180887 The trial court erred when it found a State witness "unavailable" under Rule of Evidence 804(a)(5) (declarant absent and proponent unable to procure presence by process or other reasonable means), and admitted a transcript of the witnesses' prior testimony at defendant's retrial under 804(b)(1). The State admitted that they had spoken to the witnesses' family, but averred that his father was hostile and the witness avoided service. The State informed the court that it attempted to serve the witness at times the family was home, but that he and his family refused to open the door.

The Appellate Court held the trial court abused its discretion when it found the State made a reasonable attempt to obtain the witnesses' presence. The State described only two attempts to serve the witness, and never represented to the court that further attempts would be futile. On the contrary, the State had admitted it would continue to attempt to serve the

witness. But it never asked for a continuance to do so. And it failed to clarify whether it had tried to find the witness anywhere other than his home. Furthermore, the State's representations to the court about its efforts were not in the form of affidavit or sworn testimony, as is required by common law.

The error was of constitutional magnitude as it resulted in a violation of defendant's right to confrontation. The State therefore had the burden of proving the error harmless beyond a reasonable doubt. Because the witness in question provided the sole eyewitness identification of the offense, and without it the State had only a circumstantial case against defendant, the error was not harmless.

People v. Nelson, 2020 IL App (1st) 151960 Defendant admitted to shaking his seven month-old baby and was convicted of aggravated battery. The shaking led to cerebral palsy, resulting in a lack of mobility and motor control. As of five years after the event, the child could still not crawl, sit up, or walk on his own. One night her mother put the child to sleep on his back in his bed. Sixteen hours later, she discovered the child he had fallen off the bed, face-first, into a body pillow, and had died. An expert testified the cause of death was suffocation from being unable to move off the pillow, which in turn was caused by the brain trauma suffered five years earlier. Defendant was thus found guilty of first-degree murder, 14 years after the incident, and received a 25-year sentence.

The Appellate Court remanded for a new trial. It agreed with the defendant's argument that the trial court misunderstood or simply failed to decide the issue of supervening causation. The causation element of any offense is composed of both cause-in-fact and proximate cause. To establish cause-in-fact in a murder case, the State must prove defendant's conduct contributed to the death, even if it was not the sole or immediate cause. As for proximate cause, the issue is fairness: the causal link between the conduct and the death must be sufficiently close "that the defendant may *fairly* be held responsible for the actual result." As such, a defendant is culpable for the foreseeable results of his conduct. On the other hand, if a superceding factor "completely unrelated to" or, as [IPI Criminal No. 7.15](#) puts it, "unconnected with the defendant," intervenes and brings about the victim's death, that new factor will "relieve the defendant of criminal responsibility" for the death, notwithstanding the defendant's original infliction of potentially fatal injuries. An example of one such factor is gross negligence.

The State retains the burden of proof in establishing proximate cause, including the burden to prove beyond a reasonable doubt that a supervening cause did not cause the death.

Here, the defense argued that a supervening cause caused the child's death, implying the possibility of foul play, and specifically mentioning gross negligence in his care. The defense had support in the evidence: the child was placed on his back and could not roll over, he was left unattended for 16 hours, his mother used a body pillow instead of a bed rail, and the child no longer suffered from the type of intense seizures that may have propelled him onto his front. Yet neither the State's rebuttal nor the trial court's findings of fact grappled with or even acknowledged these facts, let alone the legal theory of superceding causation.

The court's misunderstanding of an element of the offense violated due process by depriving defendant of a fair trial. Because constitutional error occurred, reversal is required unless the State can establish the error to be harmless beyond a reasonable doubt. The State in this case cannot show there was overwhelming evidence of guilt such that the error did not affect the verdict. Notably, the State offered no evidence to support the inference that the child rolled over on his own.

A new trial was ordered. On retrial, the State must prove that the cause of death was sufficiently foreseeable in the natural sequence of events put into motion by defendant's conduct, such that it would not be unfair to hold the defendant criminally liable for the death.

People v. Edwards, 2020 IL App (1st) 170843 The State charged defendant with unlawful use of a weapon by a felon after he was seen in a car with a gun, and the gun was tossed from the car during police pursuit. During deliberations, the jury asked for a definition of "possession." The trial court decided to give the jury the definitional instructions for both actual and constructive possession. Defense counsel objected, arguing that the case had never been about constructive possession and therefore the defense did not have the opportunity to rebut the claim in closing argument. The objection was overruled, defendant was convicted, and defense counsel did not include the issue in a post-trial motion.

Citing **People v. Alexander**, 2019 IL App (3d) 160709, the Appellate Court held that the trial court erred by instructing the jury on a theory of guilt not advanced at trial. The court held that this error violated defendant's constitutional right to closing argument. The error was not forfeited despite it not being raised in a post-trial motion, because under **People v. Cregin**, 2014 IL 113600, a reviewing court should review constitutional errors raised at trial even if not included in a post-trial motion. The error was harmless, however, because there was sufficient evidence of actual possession, such that the jury did not need to consider constructive possession.

People v. Diggins, 2016 IL App (1st) 142088 Defendant was convicted of aggravated unlawful use of a weapon based on his failure to have a firearm owner's identification (FOID) card. To prove the lack of a FOID card, the State introduced a certified letter from the Illinois State Police stating that defendant's application for a FOID card had been denied. The document was signed and notarized.

The court held that the admission of the certified letter violated defendant's right of confrontation. Although defendant testified at trial that he did not have a FOID card, the court held that the error was not harmless. If the affidavit had been properly excluded, the State would not have been able to prove an essential element of the offense and defendant may have decided not to testify. The court reversed the conviction and remanded the case for a new trial.

People v. Wilson, 2012 IL App (1st) 092910 The trial court's erroneous denial of evidence to show bias and motive of the State's witnesses was not harmless beyond a reasonable doubt. The court rejected the State's argument that the jury was made aware of the evidence through cross-examination; defendant was only allowed to use isolated statements as impeachment, and was not allowed to explain that the statements were made as part of a separate investigation of the propriety of the witnesses' conduct. The court also noted that there was a lack of physical evidence in the case and that the jury elected to acquit defendant of a third charge.

§54-3(d)

Factors in Harmless Error Analysis

§54-3(d)(1)

Whether the Evidence Is Overwhelming or Closely Balanced

§54-3(d)(1)(a) **Harmless Error**

United States Supreme Court

Milton v. Wainwright, 407 U.S. 513, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972) The use of defendant's post-indictment statements to policeman posing as a jail inmate was harmless error; there were three unchallenged confessions and strong corroborative evidence of guilt. See also, **People v. Bridges**, 198 Ill.App.3d 534, 555 N.E.2d 1191 (3d Dist. 1990) (erroneous denial of defendant's motion to suppress confession was harmless); **People v. Kaprelian**, 6 Ill.App.3d 1066, 286 N.E.2d 613 (1st Dist. 1972) (use of confession obtained in violation of Miranda was harmless error).

Schneble v. Florida, 405 U.S. 428, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972) The erroneous use of a co-defendant's statement implicating defendant was harmless in light of overwhelming evidence of guilt. See also, **Brown v. U.S.**, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973); **People v. Moman**, 201 Ill.App.3d 293, 558 N.E.2d 1231 (1st Dist. 1990).

Federal Circuit Court

Griffin v. Pierce, 622 F.3d 831, 2010 WL 3655899 (7th Cir. 2010) A conviction is obtained in violation of the Fourteenth Amendment where: (1) the prosecution presents false testimony or fails to disclose that false testimony was used to convict; (2) the prosecution knows or should know that the testimony is false; and (3) there is a reasonable likelihood that the testimony could affect the jury's verdict.

There was no reasonable likelihood that the false testimony of a prosecution witness denying receiving any money from the prosecution could have affected the jury's judgment. Even discounting the testimony of the prosecution witness who testified falsely regarding the consideration for his testimony, defendant's conviction was secure. Defendant made a court-reported confession testified to by both the court reporter and an Assistant State's Attorney, who also testified to a consistent oral confession made to him by the defendant. Defendant's refusal to sign the court-reported statement was of little consequence. There was an audiotape of a conversation between the witness and the defendant in which the defendant confessed. The Assistant State's Attorney testified that he overheard that conversation. Although the tape recording was unintelligible at the time of the habeas proceeding, there was no evidence that it was unintelligible at the time of the state court proceedings.

Illinois Supreme Court

In re Brandon P., 2014 IL 116653 Whether a violation of the confrontation clause constitutes harmless error depends on whether it appears beyond a reasonable doubt that the error did not contribute to the verdict. In deciding if an error is harmless, a reviewing court may: (1) focus on the error to decide if it might have contributed to the conviction; (2) examine the other evidence to see if it overwhelmingly supports the conviction; or (3) determine if the improper evidence is merely cumulative or duplicates the properly admitted evidence.

The court held that the improper admission of statements made to a police officer by the three-year-old complainant, and which described the offense, was harmless beyond a reasonable doubt. The properly admitted evidence in this case overwhelmingly established respondent's guilt for aggravated criminal sexual abuse. Shortly after the offense occurred, the complainant spontaneously told her mother that respondent committed an act of sexual

conduct by touching her “pee-pee” with his finger. The complainant’s actions, including holding herself and complaining that it hurt when she went to the bathroom, corroborated the account of the offense she gave to her mother.

Additionally the complainant’s seven-year-old brother testified that something happened to the complainant when the brother was in the bedroom with the complainant and the respondent, and that the complainant was lying on the floor not wearing pants. The respondent admitted to the police that he was in the bedroom with the complainant and her brother and sister, and that he showed the children pictures of naked women. There were no conflicts or inconsistencies in this evidence, especially concerning the offender’s identity.

The State also introduced forensic DNA evidence that connected respondent to the offense. Respondent could not be excluded from seven loci of the DNA evidence found on the complainant’s underwear. While this did not constitute a “match,” such a correlation would be expected to occur randomly in the population only once in every 7,400 Caucasian individuals.

Because the properly admitted evidence overwhelmingly supported respondent’s conviction, the improper admission of the complainant’s statement was cumulative to the properly admitted evidence and did not contribute to the adjudication of guilt. Under these circumstances, the improper evidence was harmless beyond a reasonable doubt.

People v. Leach, 2012 IL 111534 Even if the admission of an autopsy report was error, it was harmless beyond a reasonable doubt. The defendant did not dispute the cause and manner of the death of the deceased, only his mental state. The State presented expert testimony independent of the autopsy report regarding death by strangulation in general. Defendant was tried in a bench trial and the court relied entirely on defendant’s own statement and the expert’s testimony regarding the time necessary to cause death by strangulation to find defendant guilty of first degree murder. The autopsy report had a negligible effect on the court’s finding.

People v. Johnson, 114 Ill.2d 170, 499 N.E.2d 1355 (1986) Prosecutor’s comments in closing argument were harmless error in light of the overwhelming evidence of guilt. See also, **People v. Caballero**, 126 Ill.2d 248, 533 N.E.2d 1089 (1989); **People v. Tiller**, 94 Ill.2d 303, 447 N.E.2d 174 (1982); **People v. Carlson**, 92 Ill.2d 440, 442 N.E.2d 504 (1982).

People v. Moore, 95 Ill.2d 404, 447 N.E.2d 1327 (1983) Trial court’s refusal to give instruction on voluntary manslaughter was harmless. Because the overwhelming weight of evidence established that defendant was guilty of felony murder, it made no difference whether the killing was done in the unreasonable belief of self-defense. See also, **People v. Jones**, 81 Ill.2d 1, 405 N.E.2d 343 (1979) (failure to instruct jury on correct mental state for attempt murder was harmless error where intent to kill was “blatantly evident”).

People v. Carlson, 92 Ill.2d 440, 442 N.E.2d 504 (1982) Introduction of evidence of another crime was harmless error where the properly-admitted evidence was so overwhelming that no fair-minded jury would reasonably have voted to acquit. See also, **People v. Pittman**, 93 Ill.2d 169, 442 N.E.2d 836 (1982); **People v. Foster**, 103 Ill.App.3d 372, 431 N.E.2d 430 (2d Dist. 1982); **People v. Adams**, 106 Ill.App.3d 467, 435 N.E.2d 1203 (1st Dist. 1982) (harmless error to cross-examine defendant concerning prior conviction; evidence of guilt was overwhelming).

Illinois Appellate Court

People v. Brakes, 2021 IL App (1st) 181737 Photograph of defendant holding a gun, along with a co-defendant flashing a gang sign, was irrelevant and therefore erroneously introduced at defendant's trial on charges of armed robbery, attempt armed robbery, and murder. The photo was taken two months before the charged offenses, and the State provided no link between the photograph and the offenses. Defendant's possession of a gun in the photograph did not corroborate the identification of him as the gunman. His prior gun possession says little about whether he would use a gun to commit a robbery or murder.

But, the error in admitting the photograph was harmless. A single witness identified the photograph and provided the foundation for its admission. The State never mentioned the photograph again, either through other witnesses or in closing arguments. Although the evidence against defendant was not overwhelming, the photograph did not contribute to defendant's conviction where it was a minor part of the State's case.

People v. McBride, 2020 IL App (2d) 170873 Defendant was convicted of three weapons offenses. The State sought to prove defendant's control over the bedroom in which the guns were found by introducing various personal affects of defendant found in the room. Along with various items linking defendant to the room, the State also introduced \$184 in a "bank pouch" and \$1907 found in various pockets of men's jeans.

The Appellate Court held that the introduction of a large amount of cash was irrelevant to the question of constructive possession. The cash had no bearing on whether or not defendant exercised control over the items in the room. And it was prejudicial given that the jury heard about defendant's prior drug conviction and large sums of cash could imply that defendant was a drug dealer.

Despite the prejudicial effect, the error was harmless. The court refused to apply the "harmless beyond a reasonable doubt" standard applicable to constitutional errors. The court acknowledged that this standard applies when there is an "other crimes" error, but unlike an other crimes error, the instant evidentiary error was not an explicit accusation of criminality. Defendant even proffered an innocent explanation for the cash. Applying the harmless error standard applicable to evidentiary errors, no reasonable juror would have acquitted given the remaining evidence of possession.

People v. Brand, 2020 IL App (1st) 171728 The trial court erred when it admitted a photograph of complainant's car keys and allowed a police officer to testify that he took the photograph after the keys were recovered from defendant. The officer had no firsthand knowledge of the recovery of the keys, and his testimony that they were recovered during a custodial search was not corroborated by anyone actually present for the search. Thus, the chain of custody was deficient. However, the error was harmless because the complainant's testimony was sufficient to convict the defendant, and the keys were not necessary to corroborate her claim that defendant took the keys from her person, stole her car, and later contacted her to let her know where he left the car.

People v. Holloway, 2019 IL App (2d) 170551 In a prosecution for violation of bail bond, attorney-client privilege was not violated by allowing State to ask defendant's prior counsel about a phone conversation he had with defendant on the date defendant failed to appear for trial. The call did not involve legal advice or strategy, and it was made by counsel from the courtroom when others were present, so defendant could not reasonably expect it would remain secret. Further, defendant both forfeited and invited the error by not objecting to use

of the specific statement in question and by attempting to use the statement to discredit his prior counsel and advance his theory of defense that counsel deliberately did not remind him about upcoming court dates. Finally, even if there was error, it was harmless because there was no reason to think the statement had any impact on the sole contested question at trial, that being whether defendant's absence from the proceedings was willful.

People v. Sandifer, 2017 IL App (1st) 142740 The trial court erred in denying defendant's motion to suppress his confession as involuntary. At the time of his interrogation, the defendant was in the hospital in significant pain from a broken ankle, on morphine and another opiate. Although not all confessions given under the influence of drugs are involuntary, in this case the Appellate Court reviewed defendant's videotaped statement and found that he appeared barely conscious and in enormous pain during the interview. Under these circumstances, his waiver of **Miranda** warnings could not be deemed voluntary.

Although defendant failed to include this issue in his post-trial motion, the Appellate Court rejected the State's forfeiture argument, citing **People v. Cregan**, 2014 IL 113600, which holds that a constitutional issue raised in the trial court is preserved for review regardless of its absence from a post-trial motion. However, the court also found the improper admission of defendant's custodial statement to be harmless error in light of overwhelming evidence that defendant killed his son.

People v. Lindsey, 2016 IL App (1st) 141067 Theft of property not exceeding \$500 is a Class A misdemeanor. 720 ILCS 5/16-1(b)(1). Theft is elevated to a Class 4 felony if it is committed in a place of worship. 720 ILCS 5/16-1(a)(1)(A). A place of worship is a "church, synagogue, mosque, temple, or other building...used primarily for religious worship and includes the grounds of a place of worship." 720 ILCS 5/2-15b.

Any enhancement factor, other than a prior conviction, which increases the range of penalties must be submitted to the jury and proved beyond a reasonable doubt. **Apprendi v. New Jersey**, 530 U.S. 466 (2000). Although **Apprendi** errors are subject to harmless-error review, the State bears the burden of proving beyond a reasonable doubt that the outcome of trial would have been the same without the error.

A jury convicted defendant of Class 4 felony theft from a place of worship. But the jury was never instructed that the theft had to be committed in a place of worship. The court found that the failure to properly instruct the jury was reversible error since under the facts of this case the omitted instruction was not harmless beyond a reasonable doubt.

The theft took place in the parish office building located near the church. Defendant argued that the office building was entirely distinct from the church while the State argued that the office building was on the grounds of the church. The court noted that **Apprendi** errors have been found harmless only where the evidence was "uncontested and overwhelming," but here the issue was hotly contested and involved complex facts applied to a statutory definition subject to conflicting interpretations. In these circumstances, the error could not be deemed harmless.

The court reduced defendant's conviction to a Class A misdemeanor.

People v. Shorty, 403 Ill.App.3d 625, 934 N.E.2d 647 (3d Dist. 2010) The admission of hearsay evidence that an informant told the police that defendant was taking a trip to Chicago to pick up a large quantity of heroin and that defendant had in fact obtained the heroin was harmless. There was no reasonable probability that the jury would have acquitted defendant absent the hearsay evidence as the defendant was literally holding the bag of

heroin when he was arrested.

People v. Blackwell, 325 Ill.App.3d 354, 757 N.E.2d 589 (1st Dist. 2001) Apprendi error concerning the "victim over 60" extended term eligibility factor was harmless where the parties did not dispute testimony that the victim was 71, and "the finding by the trial court did not involve a weighing of evidence or an examination of defendant's mental state."

People v. Cooper, 188 Ill.App.3d 971, 544 N.E.2d 1273 (5th Dist. 1989) Improper introduction of a witness's prior inconsistent statement as substantive evidence was harmless in light of defendant's confession.

People v. Austin, 123 Ill.App.3d 788, 463 N.E.2d 444 (2d Dist. 1984) Improper limitation on cross-examination was harmless error in view of overwhelming evidence.

People v. Bryant, 94 Ill.2d 514, 447 N.E.2d 301 (1983) Error in admitting inculpatory statement of State's hostile witness was harmless in view of the overwhelming evidence of guilt.

§54-3(d)(1)(b)

Not Harmless Error

Illinois Supreme Court

People v. King, 2020 IL 123926 It was error to allow a State's witness to testify as an expert in crime scene analysis. The witness's testimony went far beyond the field of crime scene analysis where he offered opinions on the cause and manner of death, whether lividity was consistent with where the victim's body was found, whether injuries were inflicted before or after death, and whether leaves found at the scene were consistent with leaves from the victim's home. This testimony was especially problematic given that the State and defense presented competing experts as to cause of death, such that the crime scene analyst's testimony essentially broke the tie and given that laboratories at the University of Illinois and the Morton Arboretum had not been able to determine whether the leaves at the scene came from the victim's home. The remainder of the expert's testimony went to matters within the knowledge and understanding of the average juror and was therefore an improper subject for expert testimony.

The Court stated, "we wish to stress that we will not condone the calling of experts solely for the purpose of shoring up one party's theory of the case." The crime scene analysis testimony gave "expert" credence to the State's theory, and the evidence was not overwhelming where there were competing medical experts, no eyewitnesses, no confession, and no forensics connecting defendant to the offense. Accordingly, the improper expert testimony was not harmless error, and the matter was reversed and remanded for a new trial.

People v. Washington, 2012 IL 110283 Refusing defendant's request for a second-degree murder instruction was not harmless error. The court rejected the argument that because the jury rejected defendant's claim of self-defense, it would not have believed that he had an unreasonable belief in the need for use of force in self-defense. The evidence in the case was conflicting and diametrically opposed as to what transpired before and after the shooting. By refusing the second-degree murder instruction, the trial court took the determination of

whether defendant's belief in self-defense was reasonable or unreasonable from the jury. The court could not say that the result of the trial would not have been different had the jury received a second-degree murder instruction.

The court affirmed the judgment of the Appellate Court reversing and remanding for a new trial.

People v. Mullen, 141 Ill.2d 394, 566 N.E.2d 222 (1990) Prosecutor's unsubstantiated closing remarks (that a certain State witness was initially afraid to testify and that defendant had threatened the witness) were not harmless where the evidence against defendant was "closely balanced and littered with discrepancies" and the trial judge specifically admonished the attorneys not to refer to these matters. See also, **People v. Wills**, 151 Ill.App.3d 418, 502 N.E.2d 775 (2d Dist. 1986).

People v. Enis, 139 Ill.2d 264, 564 N.E.2d 1155 (1990) Improper cross-examination of defendant, which brought out hearsay facts regarding alleged prior crime, was not harmless where the evidence of guilt was less than overwhelming.

People v. R.C., 108 Ill.2d 349, 483 N.E.2d 1241 (1985) Introduction of a statement obtained in violation of **Miranda** was not harmless. The evidence against defendant was not overwhelming, and a "confession is the most powerful piece of evidence the State can offer, and its effect on a jury is incalculable."

People v. Emerson, 97 Ill.2d 487, 455 N.E.2d 41 (1983) Reversible error occurred from the combination of improper closing arguments (mentioning facts not in evidence and commenting about defense counsel) and the improper introduction of a prior consistent statement.

People v. Cline, 60 Ill.2d 561, 328 N.E.2d 534 (1975) Error in refusing to allow alibi witness to testify was not harmless; case against defendant rested solely on accomplice testimony, State argued that alibi was only partially corroborated, and the testimony of the missing witness was not cumulative.

Illinois Appellate Court

People v. Ward, 2023 IL App (1st) 190364 Defendant was convicted of first degree murder and two counts of aggravated battery with a firearm arising from a 2013 shooting which resulted in the death of 15-year-old Hadiya Pendleton and injuries to two other teens, Lawrence Sellers and Sabastian Moore. The appellate court reversed and remanded for a new trial, concluding that the trial court erred in failing to suppress defendant's custodial statements because they were taken in violation of his right to remain silent.

Defendant's interrogation began shortly after midnight, with the giving of **Miranda** warnings. After a little more than an hour of questioning, defendant stated, "I ain't got nothin' else to say." Questioning stopped, and detectives left the room. Approximately 90 minutes later, the detectives returned and questioned defendant again. That questioning lasted about 45 minutes, at which time defendant said, "[I] [g]ot nothin' to say." The detectives again left the room. Approximately three hours later, after defendant was fingerprinted, the same two detectives attempted to initiate additional questioning, and defendant indicated he did not want to say anything else. Up to this point, defendant had not made any incriminating statements. Approximately five hours later, and twelve hours after

the interrogation first began, a second pair of detectives questioned defendant. They did not provide defendant fresh **Miranda** warnings, and defendant ultimately made the inculpatory statements at issue here.

On these facts, the court concluded that defendant had repeatedly invoked his right to remain silent. Although defendant's invocations did not come immediately after he was given **Miranda** warnings, the court relied on [People v. Cox, 2023 IL App \(1st\) 170761](#), in holding that a delay between warnings and invocation is not the determinative factor. More telling here was the response of defendant's interrogators. After each invocation, the detectives halted their questioning and left the room for some time, indicating that they plainly understood defendant's comments to be an invocation of his right to remain silent.

Once a defendant has invoked his right to silence, interrogation may be resumed and subsequent statements may be admissible only if the defendant's right to remain silent was "scrupulously honored." Here, the State argued only that defendant had not invoked his right to silence and did not even suggest that his invocation had been scrupulously honored. Accordingly, the court held that defendant's statements should have been suppressed.

Additionally, the court rejected the State's harmless error argument. While defendant's confession was not the focus of the State's closing argument at trial, closing arguments are not evidence. And, more importantly, the question was not whether the State believed at trial that the evidence was sufficient to convict without defendant's confession, but rather whether the State could "prove beyond a reasonable doubt that the jury verdict would have been the same absent the error." Given that confessions carry significant weight, and that the trial evidence here was sufficient but not overwhelming, the court held that this was not "one of those rare cases" where it was beyond reasonable doubt that the jury would have found defendant guilty absent his confession.

[People v. Guerrero, 2021 IL App \(2d\) 190364](#) The trial court erred in admitting the prior inconsistent statement of a State witness at defendant's aggravated battery trial. The State alleged that defendant threw a rock at the victim, Perez, and that Perez's companion, Beltran, witnessed the crime. On the stand, Beltran denied any knowledge of the crime. The State sought to introduce his prior statement under section 115-10.1. Because the statement was not recorded, it was admissible only if the State could prove, inter alia, that the statement was based on Beltran's personal knowledge of the events described, and that Beltran acknowledged under oath the making of the statement.

Although defendant did not contemporaneously object to the introduction of this evidence, the State did not raise forfeiture on appeal. Thus, the Appellate Court reviewed defendant's argument on the merits.

To prove the personal knowledge requirement, Beltran did not have to testify that he witnessed the events. Rather, the question is resolved by looking at the face of the prior statement. Here, the State adequately proved the personal knowledge requirement, because the prior statement contained Beltran's assertion that he personally observed the aggravated battery.

The State did not prove the acknowledgment requirement. Beltran testified he spoke with the police, but under section 115-10.1, the witness must acknowledge making the specific statement the State seeks to admit. Here, Beltran denied making the statements at issue. The trial court abused its discretion in finding Beltran's general acknowledgment of a conversation with police satisfied section 115-10.1.

Defendant also challenged the admission of Beltran's prior identification of defendant in a photo array. Defendant alleged that Beltran did not "perceive" defendant as required by section 115-12, because, although he admitted to making the identification, he denied

witnessing the crime. The Appellate Court rejected the argument. Section 115-12 does not require the witness to admit he perceived the defendant committing the crime, only that he had personally perceived him in the past.

However, the trial court did err when it allowed the detective to testify that Beltran identified defendant as the person he saw committing an aggravated battery. This allowed the State to admit under section 115-12 what it could not properly admit under section 115-10.1. The detective should only have been allowed to testify that Beltran identified the person in the photo as defendant.

These errors were not harmless. Although the State had properly admitted Perez's prior inconsistent statement identifying defendant as his attacker, Perez was a convicted felon with a "drug problem" who denied making the statement at trial. And while defendant conceded that Beltran's prior inconsistent statement could have been admitted as impeachment even if not admitted substantively, the Appellate Court rejected this concession where Beltran was the State's witness and did not affirmatively damage the State's case, meaning the State could not impeach him. Finally, Beltran's statement corroborated Perez's prior statement, amplifying and providing credibility to that evidence. Thus, there was a reasonable likelihood of a different result at trial had Beltran's prior statement been properly excluded.

People v. Kent, 2020 IL App (2d) 180887 The trial court erred when it found a State witness "unavailable" under Rule of Evidence 804(a)(5) (declarant absent and proponent unable to procure presence by process or other reasonable means), and admitted a transcript of the witnesses' prior testimony at defendant's retrial under 804(b)(1). The State admitted that they had spoken to the witnesses' family, but averred that his father was hostile and the witness avoided service. The State informed the court that it attempted to serve the witness at times the family was home, but that he and his family refused to open the door.

The Appellate Court held the trial court abused its discretion when it found the State made a reasonable attempt to obtain the witnesses' presence. The State described only two attempts to serve the witness, and never represented to the court that further attempts would be futile. On the contrary, the State had admitted it would continue to attempt to serve the witness. But it never asked for a continuance to do so. And it failed to clarify whether it had tried to find the witness anywhere other than his home. Furthermore, the State's representations to the court about its efforts were not in the form of affidavit or sworn testimony, as is required by common law.

The error was of constitutional magnitude as it resulted in a violation of defendant's right to confrontation. The State therefore had the burden of proving the error harmless beyond a reasonable doubt. Because the witness in question provided the sole eyewitness identification of the offense, and without it the State had only a circumstantial case against defendant, the error was not harmless.

People v. Wilson, 2020 IL App (1st) 162430 The 16-year-old, intellectually-disabled defendant lacked the ability to understand his **Miranda** warnings, and therefore did not knowingly and intelligently waive his rights before giving his custodial statement. The trial court should have suppressed his statements to the police. The remaining evidence was insufficient to convict him of being accountable for the murder, so the Appellate Court reversed defendant's conviction outright.

The suppression hearing revealed that defendant had an IQ around 70, and learning disabilities, but that he responded in the affirmative after a detective asked if he understood each **Miranda** warning. When told of his right to free counsel, defendant indicated he did

not understand, but after the detective repeated the warning, defendant agreed. After each sides' expert provided contradictory opinions on whether defendant could understand the warnings, the trial court based its ruling on its own interpretation of the videotaped statement. The court concluded that because defendant expressed confusion over one warning, he was willing to seek clarification if he did not understand his rights. Thus, the trial court found the statement admissible.

In finding the trial court's ruling was against the manifest weight of the evidence, the Appellate Court considered the "double whammy" of defendant's youth and intellectual disability. In such cases, courts must review the circumstances of the waiver with the "utmost scrutiny." Here, a review of the relevant factors showed the ruling could not survive this scrutiny. For example, although defendant had prior contact with the police, there was no specific evidence that he heard **Miranda** warnings before. And while defendant indicated he understood each warning, the Appellate Court deemed his answers perfunctory and mechanical. Defendant indicated that he did not understand one right until clarified by the officer, but contrary to the trial court's finding, this equivocation was insufficient to establish full understanding. The court noted that subsequent to this interrogation, the legislature altered the **Miranda** procedure for juveniles to simplify the warnings, precisely because juveniles frequently waive their rights without understanding them. Based on these factors, the court could not find evidence of defendant's understanding, and thus it held there was not a knowing and voluntary waiver.

The Court then rejected the State's argument that the error was harmless. Defendant was convicted for participating in the principal's plan to rob the driver of a car. A witness placed defendant in the car, but this witness also said defendant appeared to be "shocked" when he exited the car. Defendant's statement indicated that he knew the third-party wanted to rob the victim. But no other evidence supported the notion that he aided and abetted with the intent to promote the crime. Nor was there sufficient evidence of a common design, even taking into consideration the fact that defendant fled the scene and did not tell the police.

People v. Torres, 2019 IL App (1st) 151276 In a shooting case where the question was whether defendant had the intent to kill, and should be convicted of attempt murder, or whether he merely had the intent to frighten, and should be convicted of a lesser offense, the State elicited false testimony from defendant's accomplice that he had pled guilty to attempt murder for his role in the incident. The accomplice did not plead guilty to attempt murder, as that charge had been reduced to a lesser offense. Defendant alleged this false testimony violated his right to due process.

The Appellate Court first rejected the State's forfeiture argument, finding that a party does not forfeit an error involving the false, uncorrected testimony elicited by the opponent. Also, whether the prosecutor actually knew the statement to be false does not matter, as the prosecutor's office knew the accomplice did not plead to attempted murder, and that knowledge is imputed to the prosecutor at trial. Finally, the Court held that if there is any reasonable likelihood that the false testimony could have affected the jury's verdict, the defendant is entitled to a new trial, regardless of the lack of an objection. Because the jury was falsely told that the accomplice pled guilty to attempted murder, the jury could have concluded that defendant must also be guilty of this offense. While the dissent would have found the error harmless, the majority pointed out that even if evidence of defendant's participation in the offense was overwhelming, evidence of his state of mind at the time of the shooting was close. As such, the false statement was material and required a new trial.

People v. Middleton, 2018 IL App (1st) 152040 The State improperly introduced a

demonstrative exhibit in its rebuttal closing argument. The State's eyewitness testified that he could identify defendant despite the fact that the offender wore a ski mask which covered the lower half of his face. In its rebuttal, the State showed the jury defendant's mugshot with a black circle over the lower half of defendant's face and argued that defendant was still recognizable.

The Appellate Court found the trial court should have granted the defense motion for a mistrial. The State did not show the exhibit to the defense and it did not lay a foundation. To use the demonstrative exhibit, the State should have sought to introduce it at trial and by presenting the photograph to the eyewitness to determine whether it accurately reflected his view of the offender. The idea that the exhibit could be "invited" comment is "palpably offensive" because the State obviously expected a mistaken-identification defense given that it was announced in the defense opening statement, and the State had prepared this exhibit ahead of time. In a single-eyewitness-identification case, the evidence was close and the error could not be considered harmless.

People v. Wilson, 2012 IL App (1st) 092910 The trial court's erroneous denial of evidence to show bias and motive of the State's witnesses was not harmless beyond a reasonable doubt. The court rejected the State's argument that the jury was made aware of the evidence through cross-examination; defendant was only allowed to use isolated statements as impeachment, and was not allowed to explain that the statements were made as part of a separate investigation of the propriety of the witnesses' conduct. The court also noted that there was a lack of physical evidence in the case and that the jury elected to acquit defendant of a third charge.

People v. Johnson, 2012 IL App (1st) 091730 The improper admission of evidence is harmless error if no reasonable probability exists that the verdict would have been different if the evidence at issue had been excluded.

Because the evidence was closely balanced, the court concluded that the admission of the prior consistent statement of a prosecution eyewitness was not harmless error. That eyewitness was the only witness who identified defendant as the offender on the date of the offense. By improperly bolstering the credibility of the eyewitness, the State may well have influenced the verdict in its favor.

People v. Limon, 405 Ill.App.3d 770, 940 N.E.2d 737 (2d Dist. 2010) The erroneous admission of evidence that defendant possessed a gun 11 days after the date of the offense was not harmless. The court found that the evidence was not overwhelming because the jury found the defendant not guilty of aggravated battery charges that arose from the same act as the robbery charge for which defendant was convicted. Moreover, the error impinged on the integrity of the judicial system, requiring reversal regardless of the weight of the other evidence.

People v. Richee, 355 Ill.App.3d 43, 823 N.E.2d 142 (1st Dist. 2005) Erroneous other-crimes evidence was not harmless error because the evidence "undoubtedly contributed to defendant's conviction" where there was no physical evidence linking defendant to the crime and the evidence of guilt was circumstantial. "In purely circumstantial cases . . . , other crimes evidence, if improperly admitted, can never be harmless error."

People v. Thompson, 349 Ill.App.3d 587, 812 N.E.2d 516 (1st Dist. 2004) At a jury trial for aggravated domestic battery, aggravated battery and lawful restraint, the trial court

erroneously admitted written statements which the complainant made in the course of obtaining an order of protection against defendant. The error was not harmless beyond a reasonable doubt; the evidence was not overwhelming, and there was a reasonable probability that the error contributed to the conviction.

People v. Elliott, 308 Ill.App.3d 735, 721 N.E.2d 715 (2d Dist. 1999) In a DUI trial, the court's erroneous admission of evidence regarding the civil penalties imposed on a motorist who refuses to take a breath test was not harmless error. The issue here is not whether defendant could have been convicted without evidence concerning the civil penalties for refusing a breath test, but whether the conviction resulted from the improper evidence. The court noted the trial judge's observation that the case "could have gone either way," and concluded that the verdict would not necessarily have been the same had the improper evidence been excluded.

People v. VanScyoc, 108 Ill.App.3d 339, 439 N.E.2d 95 (4th Dist. 1982) The introduction of hearsay testimony was reversible error; without the hearsay, the evidence was insufficient to prove guilt.

People v. Kilzer, 59 Ill.App.3d 669, 375 N.E.2d 1011 (5th Dist. 1978) It was improper for the prosecutor to argue the contents of defendant's written statement where that statement had not been introduced into evidence. The prosecutor's remarks may have created the impression that an incriminating statement had been suppressed, and the evidence in the case was conflicting.

§54-3(d)(2)

Whether the Error Could Have Affected The Witness's Credibility in a Case in Which Credibility is Crucial to the Verdict

§54-3(d)(2)(a)

Harmless Error

Illinois Appellate Court

People v. Davis and **People v. Graham**, 2018 IL App (1st) 152413 (6/29/18) The trial court erred when it allowed the State to introduce prior consistent statements of one recanting witness along with prior inconsistent statements. Where prior statements are consistent in some ways and inconsistent in others, courts should not use an "all or nothing" approach and introduce the entire prior statement. Trial courts must determine whether the statement is inconsistent and admit only those portions which were actually inconsistent. However, because the improperly admitted statements were not material, any error was harmless.

People v. Woollums, 143 Ill.App.3d 814, 493 N.E.2d 696 (4th Dist. 1986) Harmless error to impeach defendant with conviction that was subsequently reversed; credibility was not a major issue, and defendant's guilt was established by eyewitness testimony.

§54-3(d)(2)(b)

Not Harmless Error

Illinois Supreme Court

People v. Zayas, 131 Ill.2d 284, 546 N.E.2d 513 (1989) The use of hypnotically-enhanced testimony was not harmless error; evidence tended to corroborate the "State's most damaging witness," whose veracity "was otherwise somewhat suspect."

People v. Schuning, 106 Ill.2d 41, 476 N.E.2d 423 (1985) Improper impeachment of defendant's credibility with his prior convictions constituted reversible error. See also, **People v. Lindgren**, 79 Ill.2d 129, 402 N.E.2d 238 (1980) (extensive testimony regarding defendant's alleged commission of a crime was reversible error).

People v. Gonzalez, 104 Ill.2d 332, 472 N.E.2d 417 (1984) Improper limitation on defense cross-examination was reversible error where the questions, which concerned the gang activities and threats by the witness, were clearly relevant. See also, **People v. Stout**, 110 Ill.App.3d 830, 443 N.E.2d 19 (2d Dist. 1982) (trial court's refusal to allow defendant to cross-examine State witness as to his pending criminal charges was not harmless; the witness was the State's key witness, and his credibility was a crucial question); **People v. Paisley**, 149 Ill.App.3d 556, 500 N.E.2d 96 (2d Dist. 1986).

People v. Cobb, 97 Ill.2d 465, 455 N.E.2d 31 (1983) Errors in failing to give accomplice instruction, limitation of proffered witness's testimony, and denial of other proffered testimony constituted reversible error.

Illinois Appellate Court

People v. Smart, 2023 IL App (1st) 220427 At defendant's trial for aggravated criminal sexual abuse, the State was allowed to introduce other-crimes evidence as proof of defendant's intent. Defendant argued such evidence was inadmissible, because intent was not at issue. Rather, he admitted that he slept in the same bed with the minor, but denied that he had any physical contact with him and did not otherwise suggest that there may have been accidental or incidental physical contact.

The appellate court agreed that defendant did not put his intent at issue, so the trial court erred in admitting other crimes evidence as proof of defendant's intent. When a defendant has denied the charge and does not claim accident or mistake, other crimes evidence is unnecessary for purposes of proving intent. See e.g. **People v. Cardamone**, 381 Ill. App. 3d 462, 490 (2008).

The error warranted a new trial because the case was a credibility contest between defendant and the complainant. The fact that the trial court acquitted defendant of one of three counts underscored the closeness of the case. The complainant's account was not corroborated with physical evidence, there were no eyewitnesses, and the complainant did not make an immediate outcry. The other crimes evidence was referenced multiple times in the State's questioning of witnesses and in closing. Therefore, the State could not prove beyond a reasonable doubt that the result would have been the same without the error, and a new trial was required.

People v. Wilson, 2012 IL App (1st) 092910 The trial court's erroneous denial of evidence to show bias and motive of the State's witnesses was not harmless beyond a reasonable doubt. The court rejected the State's argument that the jury was made aware of the evidence through cross-examination; defendant was only allowed to use isolated statements as impeachment, and was not allowed to explain that the statements were made as part of a separate investigation of the propriety of the witnesses' conduct. The court also noted that

there was a lack of physical evidence in the case and that the jury elected to acquit defendant of a third charge.

People v. Williams, 205 Ill.App.3d 1001, 564 N.E.2d 168 (1st Dist. 1990) Improper cross-examination of defendant was not harmless; the determination of guilt depended on the jury's assessment of the witnesses' credibility.

People v. Robertson, 198 Ill.App.3d 98, 555 N.E.2d 778 (2d Dist. 1990) The prosecutor's improper cross-examination of defense witness (unsubstantiated assertions) was not harmless where the credibility of witnesses was a crucial issue.

People v. Lane, 106 Ill.App.3d 793, 436 N.E.2d 704 (2d Dist. 1982) Use of confession obtained after defendant requested counsel was not harmless beyond a reasonable doubt; jury was required to resolve a credibility question as to defendant's and complainant's testimony.

People v. Popely, 36 Ill.App.3d 828, 345 N.E.2d 125 (1st Dist. 1976) Prosecutor's lengthy comments on defendant's failure to call a witness who may have been at the scene was reversible error where the central issue was the credibility of defendant and the complaining witness.

§54-3(d)(3)

Whether the Error Is of a Substantial or Insubstantial Nature

§54-3(d)(3)(a)

Harmless Error

Illinois Appellate Court

People v. Fox, 2022 IL App (4th) 210262 The trial court erred when it admitted cell phone records as self-authenticating business records pursuant to [Illinois Rules of Evidence 806\(b\) and 902\(11\)](#). Rule 902(11)'s self-authentication standard requires a custodian to attest the evidence qualifies as business records via certification, defined as “a written declaration under oath subject to the penalty of perjury.”

Here, the certification did not state that it was written under oath. Although the State asked the appellate court to infer that it was written under oath because it stated that it was written “under penalty of perjury,” the appellate court refused to make such an inference give the plain language of the rule.

The error was harmless, however. The cell phone evidence merely corroborated the testimony of defendant's girlfriend, whose credible testimony about defendant's actions after the shooting was also corroborated by other uncontested evidence. Additionally, the defense mitigated the impact of the cell phone evidence by establishing through cross-examination that tracking phones to cell towers can only provide an approximation of the phone's location and it can't determine who is actually carrying the phone.

People v. Kerans, 103 Ill.App.3d 522, 431 N.E.2d 726 (3d Dist. 1982) Prosecutor's improper comment (that defendant talked with his attorney during trial) was harmless because it merely called attention to the obvious (i.e., it is common with all attorneys and clients to confer during the course of a trial). See also, **People v. Smylie**, 103 Ill.App.3d 679, 431

N.E.2d 1130 (1st Dist. 1982).

§54-3(d)(3)(b)

Not Harmless Error

United States Supreme Court

Fahy v. Connecticut, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963) Use of illegally obtained evidence was not harmless where it significantly enhanced the State's case.

Illinois Supreme Court

People v. Oguniola, 87 Ill.2d 216, 429 N.E.2d 861 (1981) The failure to instruct the jury that "intent to defraud" was an essential element of deceptive practices was not harmless.

People v. Weinstein, 35 Ill.2d 467, 220 N.E.2d 432 (1966) Prosecutor's misstatements of law, which destroyed the presumption of innocence and was tantamount to telling the jury that defendant had the burden of proving her innocence, was reversible error.

Illinois Appellate Court

People v. Ward, 2023 IL App (1st) 190364 Defendant was convicted of first degree murder and two counts of aggravated battery with a firearm arising from a 2013 shooting which resulted in the death of 15-year-old Hadiya Pendleton and injuries to two other teens, Lawrence Sellers and Sabastian Moore. The appellate court reversed and remanded for a new trial, concluding that the trial court erred in failing to suppress defendant's custodial statements because they were taken in violation of his right to remain silent.

Defendant's interrogation began shortly after midnight, with the giving of **Miranda** warnings. After a little more than an hour of questioning, defendant stated, "I ain't got nothin' else to say." Questioning stopped, and detectives left the room. Approximately 90 minutes later, the detectives returned and questioned defendant again. That questioning lasted about 45 minutes, at which time defendant said, "[I] [g]ot nothin' to say." The detectives again left the room. Approximately three hours later, after defendant was fingerprinted, the same two detectives attempted to initiate additional questioning, and defendant indicated he did not want to say anything else. Up to this point, defendant had not made any incriminating statements. Approximately five hours later, and twelve hours after the interrogation first began, a second pair of detectives questioned defendant. They did not provide defendant fresh **Miranda** warnings, and defendant ultimately made the inculpatory statements at issue here.

On these facts, the court concluded that defendant had repeatedly invoked his right to remain silent. Although defendant's invocations did not come immediately after he was given **Miranda** warnings, the court relied on **People v. Cox**, 2023 IL App (1st) 170761, in holding that a delay between warnings and invocation is not the determinative factor. More telling here was the response of defendant's interrogators. After each invocation, the detectives halted their questioning and left the room for some time, indicating that they plainly understood defendant's comments to be an invocation of his right to remain silent.

Once a defendant has invoked his right to silence, interrogation may be resumed and subsequent statements may be admissible only if the defendant's right to remain silent was "scrupulously honored." Here, the State argued only that defendant had not invoked his right

to silence and did not even suggest that his invocation had been scrupulously honored. Accordingly, the court held that defendant's statements should have been suppressed.

Additionally, the court rejected the State's harmless error argument. While defendant's confession was not the focus of the State's closing argument at trial, closing arguments are not evidence. And, more importantly, the question was not whether the State believed at trial that the evidence was sufficient to convict without defendant's confession, but rather whether the State could "prove beyond a reasonable doubt that the jury verdict would have been the same absent the error." Given that confessions carry significant weight, and that the trial evidence here was sufficient but not overwhelming, the court held that this was not "one of those rare cases" where it was beyond reasonable doubt that the jury would have found defendant guilty absent his confession.

People v. Limon, 405 Ill.App.3d 770, 940 N.E.2d 737 (2d Dist. 2010) The erroneous admission of evidence that defendant possessed a gun 11 days after the date of the offense was not harmless. The court found that the evidence was not overwhelming because the jury found the defendant not guilty of aggravated battery charges that arose from the same act as the robbery charge for which defendant was convicted. Moreover, the error impinged on the integrity of the judicial system, requiring reversal regardless of the weight of the other evidence.

§54-3(d)(4)

Whether the Properly-Admitted Evidence Is Similar to or Cumulative of the Erroneously-Admitted or Erroneously-Excluded Evidence

§54-3(d)(4)(a)

Harmless Error

Illinois Supreme Court

In re Brandon P., 2014 IL 116653 Whether a violation of the confrontation clause constitutes harmless error depends on whether it appears beyond a reasonable doubt that the error did not contribute to the verdict. In deciding if an error is harmless, a reviewing court may: (1) focus on the error to decide if it might have contributed to the conviction; (2) examine the other evidence to see if it overwhelmingly supports the conviction; or (3) determine if the improper evidence is merely cumulative or duplicates the properly admitted evidence.

The court held that the improper admission of statements made to a police officer by the three-year-old complainant, and which described the offense, was harmless beyond a reasonable doubt. The properly admitted evidence in this case overwhelmingly established respondent's guilt for aggravated criminal sexual abuse. Shortly after the offense occurred, the complainant spontaneously told her mother that respondent committed an act of sexual conduct by touching her "pee-pee" with his finger. The complainant's actions, including holding herself and complaining that it hurt when she went to the bathroom, corroborated the account of the offense she gave to her mother.

Additionally the complainant's seven-year-old brother testified that something happened to the complainant when the brother was in the bedroom with the complainant and the respondent, and that the complainant was lying on the floor not wearing pants. The respondent admitted to the police that he was in the bedroom with the complainant and her brother and sister, and that he showed the children pictures of naked women. There were no

conflicts or inconsistencies in this evidence, especially concerning the offender's identity.

The State also introduced forensic DNA evidence that connected respondent to the offense. Respondent could not be excluded from seven loci of the DNA evidence found on the complainant's underwear. While this did not constitute a "match," such a correlation would be expected to occur randomly in the population only once in every 7,400 Caucasian individuals.

Because the properly admitted evidence overwhelmingly supported respondent's conviction, the improper admission of the complainant's statement was cumulative to the properly admitted evidence and did not contribute to the adjudication of guilt. Under these circumstances, the improper evidence was harmless beyond a reasonable doubt.

People v. Leach, 2012 IL 111534 Even if the admission of an autopsy report was error, it was harmless beyond a reasonable doubt. The defendant did not dispute the cause and manner of the death of the deceased, only his mental state. The State presented expert testimony independent of the autopsy report regarding death by strangulation in general. Defendant was tried in a bench trial and the court relied entirely on defendant's own statement and the expert's testimony regarding the time necessary to cause death by strangulation to find defendant guilty of first degree murder. The autopsy report had a negligible effect on the court's finding.

People v. Becker, 239 Ill.2d 215, 940 N.E.2d 1131 (2010) Although the issue of harmless error was not mentioned in the State's petition for leave to appeal, it did argue that the appellate court erred in finding that the evidence should have been excluded. The consequence of admitted evidence is inextricably intertwined with the propriety of its admission. Therefore, the Supreme Court could address whether admission of the evidence was harmless error.

When deciding whether an error is harmless, a reviewing court may: (1) focus on the error to determine whether it might have contributed to the conviction; (2) examine the other properly-admitted evidence to determine whether it overwhelmingly supports the conviction; or (3) determine whether the improperly-admitted evidence is merely cumulative or duplicates properly-admitted evidence.

Admission of an out-of-court statement made by a child-complainant five months after the date of the offense was harmless error because it was cumulative and duplicative of properly-admitted evidence. The jury heard evidence of a statement that the child made to her mother immediately after returning from defendant's house that was more detailed than the statement asserted to be improperly admitted, as well as a videotaped interview by a detective that contained more detail than the subsequent statement. While the child expressed fear of her father that was not contained in the earlier statements, the only basis for her fear could be the conduct of defendant, which she did mention in her earlier statements.

People v. Chevalier, 131 Ill.2d 66, 544 N.E.2d 942 (1989) Improper hearsay regarding threats made by defendant was harmless in view of properly-admitted testimony regarding such threats. See also, **People v. Cihlar**, 106 Ill.App.3d 824, 436 N.E.2d 1041 (1st Dist. 1982).

Illinois Appellate Court

People v. Rios, 145 Ill.App.3d 571, 495 N.E.2d 1103 (1st Dist. 1986) State's failure to

disclose a certain tape recording violated discovery rules but did not deprive defendant of a fair trial; the tape recording was not material and was in part cumulative, and there was substantial evidence of defendant's guilt. See also, [People v. Pearson](#), 102 Ill.App.3d 732, 430 N.E.2d 304 (1st Dist. 1981) (State's failure to disclose prior conviction of its witness was harmless error where the testimony of that witness was cumulative).

[People v. Bartall](#), 98 Ill.2d 294, 456 N.E.2d 59 (1983) Exclusion of testimony was harmless where such testimony was merely cumulative of other defense evidence.

[People v. Felton](#), 108 Ill.App.3d 763, 439 N.E.2d 1107 (2d Dist. 1982) Unconstitutional use of statement obtained after defendant had requested counsel was harmless; the statement merely substantiated the compulsion defense and did not contribute to the finding of guilt.

[People v. Stokes](#), 102 Ill.App.3d 909, 430 N.E.2d 370 (1st Dist. 1981) State's introduction of illegally seized evidence was harmless error where victim's and defendant's testimony established existence of the items (and where defendant was tried by a judge, not a jury).

§54-3(d)(4)(b)

Not Harmless Error

Illinois Supreme Court

[People v. King](#), 2020 IL 123926 It was error to allow a State's witness to testify as an expert in crime scene analysis. The witness's testimony went far beyond the field of crime scene analysis where he offered opinions on the cause and manner of death, whether lividity was consistent with where the victim's body was found, whether injuries were inflicted before or after death, and whether leaves found at the scene were consistent with leaves from the victim's home. This testimony was especially problematic given that the State and defense presented competing experts as to cause of death, such that the crime scene analyst's testimony essentially broke the tie and given that laboratories at the University of Illinois and the Morton Arboretum had not been able to determine whether the leaves at the scene came from the victim's home. The remainder of the expert's testimony went to matters within the knowledge and understanding of the average juror and was therefore an improper subject for expert testimony.

The Court stated, "we wish to stress that we will not condone the calling of experts solely for the purpose of shoring up one party's theory of the case." The crime scene analysis testimony gave "expert" credence to the State's theory, and the evidence was not overwhelming where there were competing medical experts, no eyewitnesses, no confession, and no forensics connecting defendant to the offense. Accordingly, the improper expert testimony was not harmless error, and the matter was reversed and remanded for a new trial.

[People v. Adkins](#), 239 Ill.2d 1, 940 N.E.2d 11 (2010) A police officer volunteered on examination by the State that he told the defendant he had not seen him in a long time, implying to the jury that defendant was a prior offender because he was known to the police. This error was harmless because the defense had already made the jury aware that defendant was a prior offender, consistent with its theory of defense that defendant was an experienced burglar who was careful to make sure that no one was at home before he entered the burglarized premises. The effect of the officer's testimony was minuscule and it was not a

material factor in the conviction.

People v. Cline, 60 Ill.2d 561, 328 N.E.2d 534 (1975) Error in refusing to allow alibi witness to testify was not harmless; case against defendant rested solely on accomplice testimony, State argued that alibi was only partially corroborated, and the testimony of the missing witness was not cumulative.

Illinois Appellate Court

People v. Guerrero, 2021 IL App (2d) 190364 The trial court erred in admitting the prior inconsistent statement of a State witness at defendant's aggravated battery trial. The State alleged that defendant threw a rock at the victim, Perez, and that Perez's companion, Beltran, witnessed the crime. On the stand, Beltran denied any knowledge of the crime. The State sought to introduce his prior statement under section 115-10.1. Because the statement was not recorded, it was admissible only if the State could prove, inter alia, that the statement was based on Beltran's personal knowledge of the events described, and that Beltran acknowledged under oath the making of the statement.

Although defendant did not contemporaneously object to the introduction of this evidence, the State did not raise forfeiture on appeal. Thus, the Appellate Court reviewed defendant's argument on the merits.

To prove the personal knowledge requirement, Beltran did not have to testify that he witnessed the events. Rather, the question is resolved by looking at the face of the prior statement. Here, the State adequately proved the personal knowledge requirement, because the prior statement contained Beltran's assertion that he personally observed the aggravated battery.

The State did not prove the acknowledgment requirement. Beltran testified he spoke with the police, but under section 115-10.1, the witness must acknowledge making the specific statement the State seeks to admit. Here, Beltran denied making the statements at issue. The trial court abused its discretion in finding Beltran's general acknowledgment of a conversation with police satisfied section 115-10.1.

Defendant also challenged the admission of Beltran's prior identification of defendant in a photo array. Defendant alleged that Beltran did not "perceive" defendant as required by section 115-12, because, although he admitted to making the identification, he denied witnessing the crime. The Appellate Court rejected the argument. Section 115-12 does not require the witness to admit he perceived the defendant committing the crime, only that he had personally perceived him in the past.

However, the trial court did err when it allowed the detective to testify that Beltran identified defendant as the person he saw committing an aggravated battery. This allowed the State to admit under section 115-12 what it could not properly admit under section 115-10.1. The detective should only have been allowed to testify that Beltran identified the person in the photo as defendant.

These errors were not harmless. Although the State had properly admitted Perez's prior inconsistent statement identifying defendant as his attacker, Perez was a convicted felon with a "drug problem" who denied making the statement at trial. And while defendant conceded that Beltran's prior inconsistent statement could have been admitted as impeachment even if not admitted substantively, the Appellate Court rejected this concession where Beltran was the State's witness and did not affirmatively damage the State's case, meaning the State could not impeach him. Finally, Beltran's statement corroborated Perez's

prior statement, amplifying and providing credibility to that evidence. Thus, there was a reasonable likelihood of a different result at trial had Beltran's prior statement been properly excluded.

§54-3(d)(5)

Whether Corrective Action Occurred

§54-3(d)(5)(a)

Harmless Error

Illinois Supreme Court

People v. Layhew, 139 Ill.2d 476, 564 N.E.2d 1232 (1990) Failing to give the jury a written instruction on the presumption of innocence and burden of proof (IPI 2.03) was harmless error. The trial judge explained these principles before trial, and the concepts were repeated during the trial. But see **People v. Williams**, 120 Ill.App.3d 900, 458 N.E.2d 1312 (1st Dist. 1983).

People v. Lucas, 132 Ill.2d 399, 548 N.E.2d 1003 (1989) Prosecutor's improper comments in closing argument were harmless; the trial court sustained a defense objection and instructed the jury that closing arguments were not evidence and should be disregarded if not based on the evidence, and the evidence of guilt was substantial.

People v. Olinger, 112 Ill.2d 324, 493 N.E.2d 579 (1986) Harmless error where prosecutor cross-examined witness about an alleged prior statement that was never introduced; the prosecutor admitted having made a mistake, and the jury was admonished that no prior statement had been made.

People v. Heflin, 71 Ill.2d 525, 376 N.E.2d 1367 (1978) The prosecutor's clearly improper and misleading argument, which misstated the law of accountability, was harmless where the trial judge sustained a defense objection and admonished the jury to disregard the comment. See also, **People v. Cagle**, 113 Ill.App.3d 1024, 448 N.E.2d 893 (1st Dist. 1983).

§54-3(d)(5)(b)

Not Harmless Error

Illinois Supreme Court

People v. Hope, 116 Ill.2d 265, 508 N.E.2d 202 (1986) Testimony concerning the victim's family and prosecutorial comments about the family were reversible error. The testimony "was not brought to the jury's attention incidentally," the error was not invited by the defense, and "the prejudicial effect was amplified" because defense objections were overruled.

People v. Sullivan, 72 Ill.2d 36, 377 N.E.2d 17 (1978) The prosecutor committed reversible error by disclosing that defendant's alleged accomplices had pleaded guilty to the charges, and in relying on that fact in closing argument. Even in the absence of defense objections, the trial court should have taken "prompt corrective action in the form of a cautionary instruction or admonishment."

Illinois Appellate Court

People v. Jackson, 2012 IL App (1st) 102035 A prosecutor's misstatement of the evidence may be reviewed as plain error where the evidence is close regardless of the seriousness of the error, or where the error is serious regardless of the closeness of the evidence. The evidence is closely balanced where it rests solely on the credibility of witnesses at trial.

Defendant was charged with aggravated unlawful use of a weapon when the police recovered a gun from his car. Defendant denied knowledge of the gun and testified that other people had been in the car that day. A passenger was also in the car when it was stopped. In closing argument, the prosecutor misstated the evidence when he remarked that defendant told the officers he found a gun in his car.

The prosecutor's misstatement of the evidence was plain error. The determinative issue at trial was defendant's knowledge that a gun was in his car when he was pulled over by the police. The jury's judgment rested solely on the credibility of witnesses at trial. Defendant had no opportunity to respond to the prosecutor's misstatement because it was made during rebuttal. Given the closeness of the evidence and the fact that the erroneous argument spoke directly to the issue of defendant's knowledge of the gun, the error substantially prejudiced defendant and was a material factor in his conviction. The court's instruction to the jury that closing argument is not evidence was insufficient to cure the error.

The Appellate Court reversed and remanded for a new trial.

People v. Brown, 113 Ill.App.3d 625, 447 N.E.2d 1011 (1st Dist. 1983) The prosecutor's closing argument constituted reversible error though defense objections were sustained; the prosecutor called defense counsel a "slickster," "mouthpiece," and "liar," and made other remarks that were not supported by the evidence. The evidence of defendant's guilt was not so overwhelming as to outweigh the prejudicial impact of the prosecutor's remarks. See also, **People v. Wilson**, 123 Ill.App.3d 798, 463 N.E.2d 890 (1st Dist. 1984); **People v. Holloway**, 119 Ill.App.3d 1014, 457 N.E.2d 466 (1st Dist. 1983).

People v. Williams, 120 Ill.App.3d 900, 458 N.E.2d 1312 (1st Dist. 1983) The failure to instruct the jury on the presumption of innocence and burden of proof (IPI 2.03) was not harmless. The judge's oral statement at the beginning of trial is not the equivalent of a jury instruction and does not cure the failure to give an essential instruction. The minimal mention of the burden of proof during an issues instruction did not adequately apprise the jury of the substance of the omitted instruction. Compare, **People v. Ayala**, 142 Ill.App.3d 93, 491 N.E.2d 154 (1st Dist. 1986).

People v. McCray, 60 Ill.App.3d 487, 377 N.E.2d 46 (1st Dist. 1978) The prosecutor's rhetorical question (whether defendant had "any occupation other than robbing people") was "inexcusable" and constituted reversible error. That the judge sustained defense counsel's objection and instructed the jury to disregard the remark was not sufficient to erase the prejudice, and the jury was required to evaluate the credibility of defendant and a State witness. See also, **People v. Rivera**, 277 Ill.App.3d 811, 661 N.E.2d 429 (1st Dist. 1996) (substantial prejudice does not vanish from the human mind simply because the judge instructs the jurors to disregard the incompetent evidence).

§54-3(d)(6)

Whether the Error was Repeated or Was Merely a Single, Isolated Incident

§54-3(d)(6)(a)
Harmless Error

Illinois Supreme Court

People v. Lucas, 132 Ill.2d 399, 548 N.E.2d 1003 (1989) New trial not required where comment on victim's family was made only in passing and evidence of guilt was overwhelming.

Illinois Appellate Court

People v. Brakes, 2021 IL App (1st) 181737 Photograph of defendant holding a gun, along with a co-defendant flashing a gang sign, was irrelevant and therefore erroneously introduced at defendant's trial on charges of armed robbery, attempt armed robbery, and murder. The photo was taken two months before the charged offenses, and the State provided no link between the photograph and the offenses. Defendant's possession of a gun in the photograph did not corroborate the identification of him as the gunman. His prior gun possession says little about whether he would use a gun to commit a robbery or murder.

But, the error in admitting the photograph was harmless. A single witness identified the photograph and provided the foundation for its admission. The State never mentioned the photograph again, either through other witnesses or in closing arguments. Although the evidence against defendant was not overwhelming, the photograph did not contribute to defendant's conviction where it was a minor part of the State's case.

§54-3(d)(6)(b)
Not Harmless Error

Illinois Supreme Court

People v. Hope, 116 Ill.2d 265, 508 N.E.2d 202 (1986) Prosecutor's reference to victim's family in opening statement, testimony of two witnesses, and closing argument required new trial.

People v. Sullivan, 72 Ill.2d 36, 377 N.E.2d 17 (1978) New trial was required where improper evidence was injected on three occasions.

People v. Weinstein, 35 Ill.2d 467, 220 N.E.2d 432 (1966) Prosecutor's repeated statements that defendant had the burden to introduce evidence creating reasonable doubt were prejudicial; error was not harmless because other parts of closing argument and instructions accurately described the burden of proof.

§54-3(d)(7)
Whether the Error Was Emphasized or Highlighted

§54-3(d)(7)(a)
Harmless Error

§54-3(d)(7)(b)

Not Harmless Error

Illinois Supreme Court

People v. Anderson, 113 Ill.2d 1, 495 N.E.2d 485 (1986) The State's introduction of evidence concerning defendant's responses to **Miranda** warnings, to disprove a claim of insanity, was reversible error where the prosecutor:

"explicitly told the jury that the evidence established the defendant's sanity under both prongs of the insanity defense, and this argument was consistent with the judge's admonitions. The State cannot now maintain that the jury ignored the advice and disregarded the evidence."

Further, the evidence of sanity was not overwhelming where there was sharp disagreement between the expert witnesses.

People v. Lampkin, 98 Ill.2d 418, 457 N.E.2d 50 (1983) In murder prosecution of police officers, the erroneous admission of threats defendant made to a police officer six years prior to the incident in question was prejudicial where the prosecution emphasized the evidence during its opening statement and closing argument and where the evidence against defendant was merely circumstantial. See also, **People v. Sullivan**, 72 Ill.2d 36, 377 N.E.2d 17 (1978) (prosecutor relied on inadmissible evidence during closing argument); **People v. Emerson**, 97 Ill.2d 487, 455 N.E.2d 41 (1983) (improper evidence emphasized in closing argument); **People v. Smith**, 141 Ill.2d 40, 565 N.E.2d 900 (1990) (prosecutor's comments about improperly introduced gang activity exacerbated the error); **People v. Mullen**, 141 Ill.2d 394, 566 N.E.2d 222 (1990) (prosecutor emphasized evidence which had been excluded).

§54-3(d)(8)

Whether the Cumulative Errors Were Prejudicial

§54-3(d)(8)(a)

Harmless Error

§54-3(d)(8)(b)

Not Harmless Error

Illinois Supreme Court

People v. Quezada, 2024 IL 128805 The appellate court reversed defendant's convictions for attempt murder of a peace officer and aggravated discharge of a firearm, finding that two forfeited errors cumulatively deprived defendant of a fair trial. The supreme court reversed the judgment of the appellate court.

The State alleged that defendant shot at police officers who were responding to a domestic disturbance in an apartment complex. On appeal, defendant alleged two trial errors. First, the trial court committed plain error when it allowed the State to introduce the full recording of a custodial interrogation of a key eyewitness. Defendant acknowledged that his trial attorney had "no objection" to the evidence, but argued on appeal that its admission was second-prong plain error because it contained prior consistent statements, hearsay, gang references, and the officers' opinions about the offense. Second, defendant argued the trial

court committed plain error when it allowed the State to introduce prejudicial gang evidence without sufficient foundation. The appellate court found neither error on its own amounted to plain error, but that the cumulative effect of these errors prejudiced defendant and warranted a new trial.

Before the supreme court, the State argued that the cumulative error doctrine should not apply to forfeited errors. The supreme court rejected this argument, finding it inconsistent with the rule that forfeiture is an admonition to the parties, not a limitation on the jurisdiction of the reviewing court. The reviewing court should be free to find cumulative errors – even forfeited errors – worked in conjunction to deprive a defendant of a fair trial. This does not mean that forfeiture is irrelevant to the analysis. Rather, a claim that cumulative, forfeited errors requires reversal must be analyzed in the context of the plain error doctrine. Thus, a court should consider whether the alleged errors are “clear and obvious,” and, if multiple errors meet this test, determine whether the cumulative impact of those errors affected the fairness of the trial and challenged the integrity of the judicial process.

The appellate court erred because its cumulative error analysis did not apply the plain error framework. The supreme court found defendant could not meet the plain error standard. First, trial counsel “affirmatively acquiesced” to the admission of the interrogation video by informing the trial court that the defense had “no objection.” When a defendant actively invites or acquiesces to the admission of evidence, he cannot challenge the ruling as plain error on appeal. Because only one other alleged error remained, and because this error alone did not warrant reversal, the supreme court reversed the appellate court’s reversal of defendant’s convictions.

People v. Blue, 189 Ill.2d 99, 724 N.E.2d 920 (2000) The cumulative effect of several errors violated due process and required reversal despite the existence of “overwhelming” evidence of guilt. Because the errors “created a pervasive pattern of unfair prejudice” and left the court unable to “confidently state that defendant’s trial was fundamentally fair,” reversal was necessary to “preserve the integrity of the judicial process.”

Illinois Appellate Court

People v. Quezada, 2022 IL App (2d) 200195 Multiple evidentiary errors at defendant’s trial served to deny him a fair trial. While none of these errors, individually, was reversible, their cumulative effect was such that a new trial was required.

Specifically, it was error to admit the video interrogations of a witness. The witness testified for the State at trial and, while there were minor inconsistencies between his testimony and his prior statements to the police, the witness did not affirmatively damage the State’s case, so the videos were not admissible for impeachment purposes. Similarly, the videos could not be admitted substantively under [725 ILCS 5/115-10.1](#) because they were not inconsistent with the witness’s testimony. By showing the jury the entire interrogation, the State was able to improperly bolster the witness’s testimony with prior consistent statements. This error was not preserved in the trial court, and it did not rise to the level of plain error under either the first or second prong.

It also was error to admit gang evidence at defendant’s trial. The State’s gang expert’s testimony lacked adequate foundation; the expert did not testify that the factors he considered when assessing defendant’s status as a gang member were of the sort reasonably relied upon by experts in the field. The fact that the witness had testified as a gang expert in prior cases did not necessarily mean that he relied on appropriate factors in this case. The

Appellate Court agreed that the gang evidence was weak, and defense counsel should have moved to sever the charge of unlawful possession of a firearm by a street gang member from the charges of attempt murder of a police officer, aggravated discharge of a firearm, and possession of a defaced firearm. There was no evidence that those charges had a gang-related motive, and the gang evidence should not have been admitted with regard to those charges. (The court also reversed outright the unlawful possession of a firearm by a street gang member conviction on the basis that the State had failed to prove the gang member element beyond a reasonable doubt.)

Based on the cumulative effect of these two errors, the Appellate Court reversed defendant's convictions and remanded for a new trial.

People v. Redmon, 2022 IL App (3d) 190167 One of defendant's convictions of predatory criminal sexual assault of a child was reversed outright based on speedy trial and compulsory joinder principles. While certain pretrial delays were attributable to defendant on the original charges, those delays did not toll the speedy trial term as to the subsequently-added PCSA charge. The subsequent PCSA charge was based upon the same act as was charged in one of the original counts and thus was subject to compulsory joinder. Because compulsory joinder applied, it could not be assumed that the delays agreed to by defendant before the charge was filed would have been agreed to by defendant had the additional charge been pending at the time of those delays.

Defendant's conviction for permitting the sexual abuse of a child also was reversed outright where the State failed to comply with the charging requirements of the statute. 720 ILCS 5/11-9.1A(f) provides that "[a] person may not be charged with the offense of permitting sexual abuse of a child...until the person who committed the offense is charged with" one of the enumerated sexual offenses. The plain language of the statute requires that the individual who allegedly committed the sexual abuse must be charged in order for the defendant to be charged with permitting the abuse. And, here, the State did not charge the person who committed the alleged abuse at issue.

Finally, defendant's remaining conviction of predatory criminal sexual assault of a child was reversed and remanded for a new trial. The Appellate Court agreed with defendant that she was deprived of a fair trial by the inclusion of the aforementioned charges, both of which should have been dismissed prior to trial. Certain evidence, including 115-10 statements, would not have been admissible had those charges been dismissed. Without that evidence, the State's case on the remaining charge would have been significantly weakened. Accordingly, due process and fundamental fairness required reversal and remand for a new trial.

People v. Smith, 2017 IL App (1st) 143728 On appeal from his murder and attempt murder convictions, defendant argued that several errors cumulatively denied him a fair trial, including two instances of prosecutorial misconduct and two evidentiary errors, all involving the inflammation of the jury's passions. Some of the errors had been preserved, others forfeited. The Appellate Court, citing **People v. Blue**, 189 Ill. 2d 99 (2000), agreed to consider the errors cumulatively and, to ensure that defendant received a fair trial, decided not to apply the forfeiture rule, which it deemed a limitation on the parties, not the court. It concluded that the errors constituted a pervasive pattern of unfair prejudice that denied defendant his right to a fair trial, and required a new trial regardless of the strength or weaknesses in the State's case.

People v. Fultz, 2012 IL App (2d) 101101 The cumulative effect of two errors resulted in reversal of defendant's conviction and remand for a new trial: restricting cross-examination of a police officer-complainant regarding his bias or motive, and, over defendant's objection, instructing the jury that it could consider defendant's prior conviction in assessing his credibility.

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.

People v. Ray, 126 Ill.App.3d 656, 467 N.E.2d 1078 (1st Dist. 1984) Although "eyewitness testimony strongly established defendant's guilt," the cumulative impact of the prosecutor's improper remarks was reversible error. The prosecutor "repeatedly attacked the professional integrity of defense counsel," misstated the law on the presumption of innocence, commented on defendant's failure to testify, suggested that evidence favorable to the State was excluded due to defense objections, and suggested that defendant "was manipulating his constitutional rights to escape conviction." See also, **People v. Lee**, 128 Ill.App.3d 774, 471 N.E.2d 567 (1st Dist. 1984); **People v. Starks**, 116 Ill.App.3d 384, 451 N.E.2d 1298 (1st Dist. 1983); **People v. McGee**, 286 Ill.App.3d 786, 676 N.E.2d 1341 (1st Dist. 1997); **People v. Clark**, 335 Ill.App.3d 758, 781 N.E.2d 1126 (3d Dist. 2002).

§54-3(d)(9)

Other

§54-3(d)(9)(a)

Harmless Error

§54-3(d)(9)(b)

Not Harmless Error

Illinois Supreme Court

People v. Woods, 139 Ill.2d 369, 565 N.E.2d 643 (1990) The State's discovery violation (failure to produce the name and address of informant) was not harmless error; informant's testimony would have been relevant to the entrapment defense.

People v. Weaver, 92 Ill.2d 545, 442 N.E.2d 255 (1982) State's introduction of defendant's undisclosed statement, which showed a possible motive for the crime, was reversible error.

Illinois Appellate Court

People v. Jackson, 2020 IL 124112 The trial court erred in allowing the State's adversarial participation at the **Krankel** hearing. Such error is not structural, however, and therefore automatic reversal is not required. Instead, the error can be found harmless. Here, despite the State's participation, the **Krankel** hearing still produced a neutral and objective record which demonstrated that defendant's ineffective assistance claim lacked merit. Thus, the error was harmless, and remand for the appointment of new counsel was not required.

People v. Lindsey, 2016 IL App (1st) 141067 Theft of property not exceeding \$500 is a Class A misdemeanor. 720 ILCS 5/16-1(b)(1). Theft is elevated to a Class 4 felony if it is committed in a place of worship. 720 ILCS 5/16-1(a)(1)(A). A place of worship is a “church, synagogue, mosque, temple, or other building...used primarily for religious worship and includes the grounds of a place of worship.” 720 ILCS 5/2-15b.

Any enhancement factor, other than a prior conviction, which increases the range of penalties must be submitted to the jury and proved beyond a reasonable doubt. **Apprendi v. New Jersey**, 530 U.S. 466 (2000). Although **Apprendi** errors are subject to harmless-error review, the State bears the burden of proving beyond a reasonable doubt that the outcome of trial would have been the same without the error.

A jury convicted defendant of Class 4 felony theft from a place of worship. But the jury was never instructed that the theft had to be committed in a place of worship. The court found that the failure to properly instruct the jury was reversible error since under the facts of this case the omitted instruction was not harmless beyond a reasonable doubt.

The theft took place in the parish office building located near the church. Defendant argued that the office building was entirely distinct from the church while the State argued that the office building was on the grounds of the church. The court noted that **Apprendi** errors have been found harmless only where the evidence was “uncontested and overwhelming,” but here the issue was hotly contested and involved complex facts applied to a statutory definition subject to conflicting interpretations. In these circumstances, the error could not be deemed harmless.

The court reduced defendant’s conviction to a Class A misdemeanor.

People v. Nuno, 206 Ill.App.3d 160, 563 N.E.2d 1165 (1st Dist. 1990) Erroneous attempt murder instruction, which allowed the jury to convict without proof of an intent to kill, was not harmless where the jury’s questions during deliberations showed confusion about the instruction.

People v. Alford, 111 Ill.App.3d 741, 444 N.E.2d 576 (1st Dist. 1982) Improper use of evidence of other crimes was not harmless error; though error occurred at bench trial, the judge admitted the evidence over objection and indicated he was considering it.

People v. Santiago, 108 Ill.App.3d 787, 439 N.E.2d 984 (1st Dist. 1982) Reversible error occurred where trial court called deliberating jury into court, asked the numerical division, and upon learning that the majority favored conviction, ordered continued deliberations. The jury may well have believed that the judge concurred with the majority and that deliberations would continue until a guilty verdict was returned.

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