No. 125091

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, Third District, No. 3-15-0556.
Plaintiff-Appellant,	)	
	)	There on Appeal from the Circuit Court of the Twenty-first Judicial
v.	)	Circuit, Kankakee County, Illinois, No. 09 CF 630
	)	
JOSEPH A. HOLLAHAN,	)	The Honorable Susan S. Tungate,
Defendant-Appellee.	)	Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE CASE

A jury found defendant guilty of aggravated driving under the influence of alcohol, CL2 at 78; RP4 at 93,[1] and the Circuit Court of Kankakee County sentenced him to one year in prison, CL2 at 61; RP4 at 272. On appeal, defendant argued that the trial court erred, following a request from the deliberating jury to review a video that had been admitted into evidence, by permitting the jury to view the video in the courtroom and in the presence of the judge, the parties and their counsel, and the alternate jurors. A6. The Illinois Appellate Court, Third District, reversed the trial court's judgment and remanded for a new trial, holding that the presence of non-jurors during the video replay amounted to second prong plain error. A16-18. The People appeal that judgment. No question is raised on the pleadings.

ISSUE PRESENTED

Whether replaying a video for the deliberating jury in the courtroom and in the presence of non-jurors amounted to second prong plain error.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612(b)(2). On September 25, 2019, this Court granted the People's petition for leave to appeal. *People v. Hollahan*, No. 125091 (Sept. 25, 2019).

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[1] Citations to the common law record, report of proceedings, and this brief's appendix appear as "CL1 at__," "RP1 at __," and "A__," respectively.

STATEMENT OF FACTS

In 2009, defendant was charged with aggravated driving under the influence of alcohol. CL1 at 3.

Trial Proceedings

At defendant's trial,[2] the People presented the testimony of Illinois State Police officer Timothy Davis. RP4 at 124. Davis stopped defendant's car in August 2009 after he observed defendant "jerk[]" from a left-turn lane into the center lane, drive onto a double yellow line, straddle a lane divider line, and fail to yield to an oncoming firetruck. RP4 at 125-27. During the stop, Davis noted that defendant had "glassy, bloodshot eyes," slurred speech, and "a strong odor of alcoholic beverage" on his breath." RP4 at 129. Defendant admitted to Davis that he had drunk four beers. RP4 at 130. Davis had defendant perform three field sobriety tests, and a twelve-minute video recording of the traffic stop — including the sobriety tests — was admitted into evidence. RP4 at 130-31, 141; *see also* People's DVD Exh. 1.[3] Defendant failed each of the field sobriety tests. RP4 at 135-40. Davis arrested defendant and transported him to the Kankakee jail, where

[2] Defendant's initial trial ended in a mistrial after the jury inadvertently viewed inadmissible portions of a video of defendant's traffic stop during deliberations. RP3 at 323.

[3] The record also contains a VHS tape labelled "People's Exhibit 1," which was the video of the traffic stop played at defendant's initial trial, resulting in a mistrial, but was not admitted into evidence at defendant's second trial.

defendant became "belligerent" and refused to take a breathalyzer test. RP4 at 143-45.

Defendant testified that he had been at a bar for two to three hours on the night of his arrest. RP4 at 170. While driving a fellow bar patron home, defendant quickly moved out of a left-turn lane due to confusing directions from his passenger. RP4 at 172. Soon after, a firetruck turned onto the street and passed defendant before he had time to react. *Id.*

Shortly after the jury began deliberations, jurors asked to review the video of the traffic stop. RP4 at 211. Because the jury room was not equipped to play the video, the trial court had the jury return to the courtroom to watch the recording in the presence of the parties, the court, and the alternate jurors. RP4 at 211-12. Before the jury entered, the court admonished the parties and alternate jurors that "[n]o one will have any conversation." RP4 at 211. Defendant did not object. After the jury entered the courtroom, the court instructed the jurors:

> [W]e will not be talking to you other than to get the video, period. . . . The jury has requested to see the video again. We do not have an arrangement to show it to you in your deliberation room. I have instructed everyone not to say a word and we will play the video for you. If you need to have the sound adjusted or anything that we can do, all right?

RP4 at 212. The video was played once, and the jury returned to the jury room. RP4 at 212-13. The jury subsequently found defendant guilty. RP4 at 214.

Direct Appeal

On appeal, defendant argued that the trial court committed reversible error by having the jury review the video in the presence of the judge, the parties, and the alternate jurors. *People v. Hollahan*, 2019 IL App (3d) 150556, ¶ 16; *see also* A4. The appellate court majority held that the trial court had improperly intruded upon the jury's deliberations by allowing non-jurors to be present while the video was replayed. A5. The majority reasoned that the non-jurors' presence inhibited the jury's ability to discuss the video during the replay. A5. The majority also determined that the trial court had improperly restricted the jury from reviewing the video more than once and from pausing and reviewing the tape. A5-6. It concluded that the error was a structural error that required reversal of defendant's conviction under the second prong of the plain error doctrine because the non-jurors' presence was "inherently intimidating and necessarily impeded or inhibited the jurors' free discussion and deliberation as the video was being shown to them." A9. Accordingly, the majority reversed and remanded for a new trial. A10.

ARGUMENT

I. Defendant Forfeited His Claim.

As defendant conceded below, he forfeited his claim that the presence of non-jurors during the jury's review of the video intruded upon deliberations. Defendant raised no contemporaneous objection, RP4 at 211,

and he omitted the issue from his post-trial motion, CL2 at 59. Therefore, defendant failed to preserve this claim for review. *See People v. Enoch*, 122 Ill. 2d 176, 186-87 (1988).

The appellate majority excused defendant's forfeiture as second prong plain error. A9. But plain error is not a general saving clause meant to preserve for review all errors affecting substantial rights despite a defendant's failure to raise a claim at the proper time. *People v. Allen*, 222 Ill. 2d 340, 353 (2006). Instead, it is "a narrow and limited exception to the typical forfeiture rule applicable to unpreserved claims." *People v. Johnson*, 238 Ill. 2d 478, 484 (2010).

A defendant seeking to establish second prong plain error has the burden of proving a "clear or obvious" error, *People v. Givens*, 237 Ill. 2d 311, 329 (2010), and "'that the error was so serious that it affected the fairness of [his] trial and challenged the integrity of the judicial process,'" *Allen*, 222 Ill. 2d at 352 (quoting *People v. Herron*, 215 Ill. 2d 167, 187 (2006)). Where a defendant fails to establish that a clear or obvious error was "of such a magnitude that it deprive[d] [him] of a fair trial," his forfeiture will be enforced. *Id.* at 352-54. This Court should enforce defendant's forfeiture because he has not established that a clear or obvious error occurred, let alone an error so grave that it deprived him of a fair trial.

II. Defendant Cannot Excuse His Forfeiture Because He Cannot Establish that the Presence of Non-jurors While the Jury Reviewed the Video Was Clear or Obvious Error.

A. The trial court appropriately used its discretion to suspend deliberations to allow the jury to review the video evidence.

The first step of plain error analysis is to determine whether any error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). The trial court's decision to replay the video in the courtroom in the presence of non-jurors was a reasonable exercise of the court's authority to manage the proceedings before it and, therefore, was not clear or obvious error.

A trial court has the inherent authority to manage its courtroom and the proceedings before it. *See J.S.A. v. M.H.*, 224 Ill. 2d 182, 196 (2007). That authority extends to jury deliberations. The court has discretion to suspend deliberations, including to provide supplemental instructions, *see, e.g.*, *People v. Kimble*, 2019 IL 122830, ¶¶ 45-46, or to send the jury home for the night, *see* Ill. S. Ct. R. 436 (eff. July 1, 1997). The court also has discretion to order the jury to continue deliberating in spite of a deadlock or to terminate deliberations and declare a mistrial. *Kimble*, 2019 IL 122830, ¶¶ 36 & 44.

The court's authority also includes control over the manner and timing of the presentation of evidence. *See* Ill. R. Evid. 611 (eff. Jan. 1, 2011). And the decision of whether to send exhibits to the deliberating jury falls squarely within the trial court's discretion. *People v. Cloutier*, 178 Ill. 2d 141, 173 (1997). A reviewing court will not find an abuse of discretion unless "no

reasonable person would take the position adopted by the circuit court." *Peach v. McGovern*, 2019 IL 123156, ¶ 25.

Here, the trial court appropriately exercised its discretion when replaying the video for the jury. The trial court faced a dilemma. The jury asked to review the video, but the jury room was not equipped to play it. RP4 at 211-12. And defendant's first trial had resulted in a mistrial because the deliberating jury had reviewed inadmissible portions of the video evidence. RP3 at 323. Given these circumstances, the trial judge exercised discretion to craft a solution that balanced the jury's desire to review the video along with the technical limitations of the jury room. She briefly suspended deliberations to bring the jury back into the courtroom where the video could be replayed. She made sure that both parties were present and aware of the procedure, and instructed them to remain silent so as not to influence the jury. RP4 at 211-12. Once the jury was present, the court informed the jurors that the video would be played and no one would speak to them. RP4 at 212. The jurors watched the video, made no request to replay or adjust it, and then returned to the jury room to resume their deliberations. RP4 at 212-13. Viewed in context, the court's actions were not an intrusion on jury deliberations, but rather a carefully tailored solution — combining the court's authority to suspend deliberations and to control the presentation of evidence — to the problem presented by the jury's request to review the video.

The trial court's reasonable approach to replaying the video for the jurors avoided possible "problems with equipment and the skills necessary to operate the equipment" and prevented potentially inexperienced jurors from inadvertently destroying or compromising the evidence. *People v. Lewis*, 2019 IL App (4th) 150637-B, ¶ 97 (finding no error where trial court replayed an audio recording for the deliberating jury in the presence of parties). Moreover, by playing the evidence in the courtroom and in the presence of the parties, a court ensures that the jury reviewed only properly admitted evidence. Had inadmissible evidence been mistakenly played, as happened in defendant's initial trial, the court or the parties could promptly take the proper steps to rectify it.

Nevertheless, the appellate majority wrongly believed that the jury should have been left alone to view the evidence in the jury room. Left alone with a recording or, as the appellate majority suggested, with a laptop, A8, a jury might be exposed to and consider either unadmitted evidence, (i.e., portions of the recording not admitted into evidence), or inadmissible evidence, (i.e., information from outside sources on the internet). And because the viewing would take place outside the presence of the court and parties, they might never be aware of the breach. Given the technical limitations of the courtroom and the risks of unfettered jury access to a recording, the trial court reasonably exercised discretion to permit the jury to

review the video recording in the courtroom in the (silent) presence of the parties.

B. The presence of non-jurors did not improperly influence the jury.

Even if the court lacked discretion to suspend deliberations and replay the video in the courtroom, the presence of non-jurors during the video replay was not error, much less clear or obvious error, because their presence did not improperly influence the jury. It is well settled that the jury's deliberations should remain private and secret. *See*, *e.g.*, *People v. Williams*, 97 Ill. 2d 252, 307 (1983). Yet the secrecy requirement is not a right unto itself. Rather, the "primary, if not exclusive purpose" of this rule is to protect the jurors from improper influence. *United States v. Olano*, 507 U.S. 725, 737-738 (1993). Thus, this Court has recognized that "the key question in determining whether an 'intrusion' into the jury room constitutes error is whether the defendant was prejudiced by the intrusion." *People v. McLaurin*, 235 Ill. 2d 478, 497 (2009) (bailiff's communication with jury not error absent prejudice); *see also People v. Mitchell*, 152 Ill. 2d 274, 341 (1992) (potential contact between defendant's mother and juror not error absent prejudice).

The appellate court districts have split on the propriety of replaying recordings for the jury in the presence of the parties and the court. In *People v. Rouse*, 2014 IL App (1st) 121462, the First District confronted a situation substantially similar to this case: the deliberating jury asked to review surveillance footage that had been admitted into evidence, but was unable to

do so in the jury room. *Id.* ¶ 69. The trial court allowed the jury to watch the video in the courtroom in the presence of the parties and the court. *Id.* ¶ 71. The First District held this procedure fell within the trial court's discretion. *Id.* ¶ 78. Noting that no one had communicated with the jurors during the viewing, the appellate court found that there was no prejudice to the defendant, and concluded that no error had occurred. *Id.* ¶¶ 79-84. The Fourth District similarly found no error where a trial court replayed a 911 recording for the deliberating jury in the presence of parties.[4] *Lewis*, 2019 IL App (4th) 150637-B, ¶ 87.

In four cases that are factually indistinguishable from this one, panels of the Third District have split on whether error occurs when the parties and the court are merely present while the deliberating jury reviews recordings in evidence. Two Third District panels held that replaying a recording in the presence of the parties and the court is not plain error where the record reflects no prejudicial influence by a non-juror on the jury.[5] *People v. Johnson*, 2015 IL App (3d) 130610, ¶¶ 19-20; *People v. Jones*, 2019 IL App (3d) 160268, ¶ 27. In *People v. Pacheco*, 2019 IL App (3d) 150880, Justice McDade wrote a lead opinion holding that prejudice should be presumed

[4] In an earlier case with similar facts, the Fourth District held that the playing of a video for the jury in the presence of the parties was not structural error, declining to resolve whether it was clear or obvious error. *See People v. Matthews*, 2017 IL App (4th) 150911, ¶ 44.

[5] Both opinions were authored by Justice Lytton and joined by Justice Wright. Justice McDade dissented in *Johnson*, and Justice Holdridge dissented in *Jones*.

when a deliberating jury reviews recordings in the presence of the parties and the court, reasoning that non-jurors have a chilling effect on deliberations. *Id.* ¶ 42. Justice Wright concurred on two other issues that mandated retrial, but did not join Justice McDade's opinion on the jury deliberation issue. *Id.* ¶¶ 82-84 (Wright, J., specially concurring). Presiding Justice Schmidt dissented. *Id.* ¶ 85. Finally, in *People v. McKinley*, Justice Carter wrote a lead opinion reasoning that the trial court did not err in allowing the jury to review a video in the presence of the parties and the court where the record reflected no prejudice. 2017 IL App (3d) 140752, ¶ 23. Justice O'Brien specially concurred, reasoning that although the viewing had been error, it did not rise to the level of plain error. *Id.* ¶ 36 (O'Brien, J., specially concurring). Presiding Justice Holdridge dissented. *Id.* ¶ 37.

Unlike the appellate court in the decision below, courts in other States have declined to presume prejudice when a deliberating jury is shown a recording in the presence of the court and the parties; these courts have found that without a showing of prejudice, no reversible error occurred. *See State v. Davidson*, 509 S.W.3d 156, 203 (Tenn. 2016) (surveying cases from other jurisdictions, all of which "found no abuse of discretion by the trial court in allowing the jury to review or rehear recorded evidence in open court"); *State v. Hughes*, 691 S.E.2d 813, 826-27 (W. Va. 2010) (it is "universally accepted" that a trial court may allow the jury, during deliberations, to return to open court to review a tape recording admitted in

evidence); *State v. Anderson*, 717 N.W.2d 74, 84 (Wis. 2006), *overruled on other grounds by State v. Alexander*, 2013 WI 70, ¶ 30 ("The [deliberating] jury should return to the courtroom and the recording should be played for the jury in open court."); *see also State v. Jones*, 102 A.3d 694, 702 (Conn. 2014) (although it is "preferred" that the jury review evidence in the jury room, circumstances sometimes require other procedures).

Here, the appellate majority presumed prejudice, finding that the "chilling presence" of the court and the parties may have prevented the jury from making comments during the replay of the video. A5. Yet, the majority does not explain how the jury's alleged inability to discuss the video during its playback resulted in prejudice to defendant. The jury was not instructed that it could not speak during the video playback. And even if the jury was reluctant to discuss the video in the presence of the non-jurors, there is no indication that the jury felt constrained from discussing the video upon returning to the jury room, or that the twelve-minute pause in deliberations while the video was replayed would make the jury more likely to convict defendant. Indeed, because both parties were present, no basis exists to believe that jurors felt pressured to rule for or against either party.

The appellate majority also wrongly reasoned that defendant was prejudiced because "[t]he court did not give the jurors the opportunity to pause the video or replay any parts," A6, for this finding is belied by the record. The trial court told the jury, "If you need to have the sound adjusted

or anything that we can do, all right?" RP4 at 212. A reasonable juror would understand the court's "anything that we can do" statement to mean that the jury was free to make additional requests, including that the video be paused or replayed. At the very least, the court's statement did not discourage such requests, and the record reveals no indication that any juror wished to replay or pause the recording.

Not only was there no basis to find that the jury was prohibited, or even discouraged, from pausing or replaying the video, there is also no indication that repeated viewings of the video would have been beneficial to defendant because the tape corroborated Officer Davis's testimony that defendant had failed the field sobriety tests. *See, e.g.*, People's DVD Exh. 1 at 23:57:10-23:57:39 (showing defendant stumble during testing). Regardless, as discussed above, the trial court had discretion to deny the jury's request to review the video altogether. *See Cloutier*, 178 Ill. 2d at 17. Given the court's discretion to deny the jury any opportunity to review the video, logically it also had discretion to limit the jury's review to a single playing.

In short, there is no reason to believe that the jury was prejudiced by replaying the video in the courtroom in the presence of the court and the parties; therefore the alleged intrusion into deliberations was not error. *See McLaurin*, 235 Ill. 2d at 497. Accordingly, there was no plain error. *People v. Hillier*, 237 Ill. 2d 539, 549 (2010).

III. Even If Clear or Obvious Error Occurred, It Did Not Rise to the Level of Second Prong Plain Error.

Even if clear or obvious error occurred, defendant fails to satisfy his burden of showing that the error was second prong plain error.[6] A defendant seeking to establish second prong plain error has the burden of proving that a clear or obvious error "'was so serious that it affected the fairness of [his] trial and challenged the integrity of the judicial process.'" *Allen*, 222 Ill. 2d at 352 (quoting *Herron*, 215 Ill. 2d at 187). Second prong plain error presumes prejudice to the defendant based on the seriousness of the error. *Thompson*, 238 Ill. 2d at 613-14. Where a defendant fails to establish that a clear or obvious error was "of such a magnitude that it deprive[d] [him] of a fair trial," his forfeiture will be enforced. *Allen*, 222 Ill. 2d at 352-54.

In *Olano*, the United States Supreme Court considered the presence of non-jurors in the jury room during deliberations under the nearly identical federal plain error rule. 507 U.S. at 737. The Supreme Court noted that the presence of two alternate jurors during deliberations violated a federal procedural rule, but acknowledged that generally "outside intrusions upon the jury" are analyzed for "prejudicial impact." *Id*. The Court ultimately concluded that no reversible error occurred because the defendants could not show that the non-jurors had participated in the deliberations or had any chilling effect upon the jury. *Id*. at 739-41. The Court reasoned that because

[6] Below, defendant raised no first prong plain error argument; thus, he has forfeited any such argument on appeal. *Hillier*, 237 Ill. 2d at 545.

it had not presumed prejudice in cases in which a bailiff had made egregious comments to a juror or even in cases in which a juror had been bribed, it would not presume prejudice from "the mere presence" of non-jurors. *Id.* at 739. Accordingly, the Court concluded that the non-jurors' presence was not plain error. *Id.* at 741.

Similarly, under Illinois law, the mere presence of non-jurors during deliberations cannot be second prong plain error, for this Court has held that an intrusion upon the jury constitutes error only if the defendant establishes prejudice. *McLaurin*, 235 Ill. 2d at 497. It follows, then, that an intrusion upon the jury cannot be second prong plain error. *See Thompson*, 238 Ill. 2d at 613 (under second prong plain error prejudice is presumed). Indeed, were the rule otherwise, it would be easier to prevail on such a claim under plain error review than it would be if defendant had properly preserved the claim by timely objecting. This absurd result would create a perverse incentive for defendants to stand idly by at trial and purposefully forfeit their claims to take advantage of the presumption of prejudice on appeal.

Logical inconsistencies aside, defendant cannot demonstrate second prong plain error because the silent presence of the parties and the judge did not affect the fairness of his trial or challenge the integrity of the judicial process. The jury retired to deliberate in private. After the jury asked to review the video, the jurors were ushered into the courtroom, where they watched the twelve-minute video. They then returned to the jury room,

where they were able to freely and privately deliberate until they reached a verdict. During the jurors' brief presence in the courtroom, neither the parties nor the alternate jurors had any interaction with them. In short, the record contains no hint that anything influenced the jury's verdict or compromised its impartiality. Thus, any error here was not so serious that it affected the fairness of defendant's trial or challenged the integrity of the judicial process. *Allen*, 222 Ill. 2d at 352.

CONCLUSION

This Court should reverse the appellate court's judgment.

February 11, 2020

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 16 pages.

/s/ Nicholas Moeller
Nicholas Moeller
Assistant Attorney General

APPENDIX

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Illinois Official Reports

Appellate Court

People v. Hollahan, 2019 IL App (3d) 150556

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOSEPH A. HOLLAHAN, Defendant-Appellant.
District & No.	Third District Docket No. 3-15-0556
Filed	June 20, 2019
Decision Under Review	Appeal from the Circuit Court of Kankakee County, No. 09-CF-630; the Hon. Susan S. Tungate, Judge, presiding.
Judgment	Reversed; cause remanded.
Counsel on Appeal	Michael J. Pelletier, Peter A. Carusona, and Santiago A. Durango, of State Appellate Defender's Office, of Ottawa, for appellant. Jim Rowe, State's Attorney, of Kankakee (Patrick Delfino, Lawrence M. Bauer, and Mark A. Austill, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.
Panel	JUSTICE HOLDRIDGE delivered the judgment of the court, with opinion. Justice McDade concurred in the judgment and opinion. Justice Carter dissented, with opinion.

OPINION

¶ 1 After a jury trial, the defendant was convicted of aggravated driving while under the influence of alcohol (aggravated DUI) (625 ILCS 5/11-501(a)(2), (d)(1)(A), (d)(2)(A) (West 2008)) and sentenced to a one-year term of imprisonment. He appeals his conviction, arguing that the trial court committed reversible error when, in response to the jury's request during deliberations to view the videotape of the defendant's field sobriety tests for a second time, the trial court had the jury watch the video in the courtroom while the court, the defendant, the attorneys for the defendant and the State, and two alternate jurors were present. The defendant also argues that the trial court improperly assessed a $500 public defender fee under section 113-3.1 of the Code of Criminal Procedure of 1963 (Code of Criminal Procedure) (725 ILCS 5/113-3.1 (West 2008)) without conducting a hearing on the defendant's ability to pay, as required by the statute, and without giving the defendant proper notice and an opportunity to be heard on the issue.

¶ 2 FACTS

¶ 3 The defendant was charged by indictment with aggravated DUI, a Class 4 felony. The offense was alleged to have occurred in Kankakee on August 29, 2009. Private counsel entered an appearance for the defendant on January 19, 2010. However, on October 24, 2011, the trial court appointed a public defender to represent the defendant because the defendant claimed he had no money.

¶ 4 The defendant's first trial ended in a mistrial. His subsequent jury trial commenced on April 21, 2015. Illinois State Police Trooper Timothy Davis was the State's only witness. Davis testified that, at about midnight on August 29, 2009, he was in Kankakee traveling northbound on Washington Avenue near Hickory Street when he saw a vehicle ahead of him start to enter a left turn lane and then jerk back into its lane. The vehicle later stopped at a red light. At that time, Davis observed that the vehicle's rear license plate light was not operational and that the rear license plate had a plastic cover on it. When the stoplight turned green, the vehicle proceeded northbound, drove onto a double yellow line, then straddled a lane divider line, and then failed to yield to a fire truck that was traveling southbound with its emergency lights flashing.

¶ 5 At that time, Davis effected a traffic stop. Davis testified that the vehicle did not initially pull over even though there was a stretch along the street where the driver could have done so. After the vehicle stopped, Davis spoke to the defendant, who was the driver of the vehicle, and to a passenger who was in the front seat. When he spoke with the defendant, Davis detected a strong odor of an alcoholic beverage on the defendant's breath and noticed that the defendant had glassy, bloodshot eyes and slightly slurred speech. Davis testified that the defendant told him that he had drunk four beers.

¶ 6 Davis asked the defendant to perform three field sobriety tests: the horizontal gaze nystagmus test, the "walk and turn" test, and the "one leg stand" test. The defendant's performance of these tests were recorded on videotape. A redacted version of the recording was copied to a DVD and played to the jury during the defendant's trial without objection from the defendant. Based on his scoring of the defendant's performance on the three field sobriety tests and on his observations of the defendant's driving and conduct, Davis concluded that there was alcohol in the defendant's system and that the defendant was impaired. Davis

arrested the defendant for DUI. Davis stated that, after the defendant was taken to jail, he refused to take a Breathalyzer and became belligerent.

¶ 7 Following Davis's testimony, the State introduced an abstract of the defendant's driving record into evidence outside of the presence of the jury. The abstract showed numerous prior traffic violations by the defendant, including a suspension of the defendant's license in 1998 for DUI in violation of section 11-501(a)(2) of the Illinois Vehicle Code (625 ILCS 5/11-501(a)(2) (West 1998)) and another conviction for the same offense in 2000.

¶ 8 The defendant testified that, shortly before he was pulled over by Davis on August 29, 2009, he jerked his car back from the left turn lane because he was giving his passenger a ride to an unfamiliar address and he realized that he was about to make a wrong turn. He stated that he did not yield to the fire truck because it had just "whipped" around the corner, giving the defendant no time to react. The defendant claimed that he pulled over right away when he saw the police lights. He stated that he refused to take the Breathalyzer test at the jail because he was already under arrest.

¶ 9 After closing arguments, the trial court instructed the jury on the applicable law. The court admonished the jurors that "[l]awyers, parties, and witnesses are not permitted to speak with you about any subject, even if unrelated to the case, until after the case is over and you are discharged from your duties as jurors." After the jury instructions, but prior to the start of the jury's deliberations, the trial court informed the jury that the bailiff could not discuss the case with the jurors, offer his opinion as to the facts or the law, or demonstrate the use of any exhibit, and he admonished the jurors not to ask the bailiff to do any of these things.

¶ 10 The jury then retired to deliberate. Shortly thereafter, the jury asked to watch the videotape of the defendant's traffic stop again. The trial court decided to show the video to the jury in the courtroom because the court did not have the "arrangement" necessary to allow the jury to view the video in the jury room. The court also decided to allow the defendant, the attorneys for the defendant and the State, and two alternate jurors to remain in the courtroom while the jury watched the video. The defendant's counsel did not object to this procedure. Before the jury was brought back into the courtroom, the trial court admonished the defendant, the attorneys, and the alternate jurors that the jury would be watching the video and that "[n]o one will have any conversation." After the jury was brought back into the courtroom, the trial court addressed the jurors, stating:

> "Please come in and have a seat, we will not be talking to you other than to get the video, period. *** The jury has requested to see the video again. We do not have an arrangement to show it to you in your deliberation room. I have instructed everyone to not say a word and we will play the video for you. If you need to have the sound adjusted or anything that we can do, all right?"

¶ 11 After watching the video, the jury returned to the jury room to resume deliberations. Less than an hour later, the jury found the defendant guilty.

¶ 12 During the sentencing hearing, the State asked that the defendant be assessed a $500 public defender fee under section 113-3.1 of the Code of Criminal Procedure (725 ILCS 5/113-3.1 (West 2008)). The trial court imposed the fee requested by the State without conducting a hearing on the defendant's ability to pay such a fee. The trial court sentenced the defendant to a one-year term of imprisonment. The defendant filed a timely motion to reconsider his sentence, which the trial court denied.

¶ 13 This appeal followed.

¶ 14 ANALYSIS

¶ 15 1. The Jury's Viewing of the Video During Deliberations

¶ 16 The defendant argues that the trial court committed reversible error when, in response to the jury's request during deliberations to see the video a second time, the trial court had the jury watch the video in the courtroom while the court, the defendant, the attorneys for the defendant and the State, and two alternate jurors were present.

¶ 17 Because the defendant did not object to the procedure employed by the trial court or raise the issue in a posttrial motion, he asks us to review the issue under the plain error doctrine. The State argues that plain error review is unavailable here because the defendant "acquiesced to" the procedure chosen by the trial court, thereby inviting any error resulting from that procedure and forfeiting appellate review of any such error. As the State correctly notes, where a party acquiesces in proceeding in a given manner, " 'he is not in a position to claim he was prejudiced thereby." *People v. Villarreal*, 198 Ill. 2d 209, 227 (2001). However, plain error review is forfeited only if the defendant *invites* the error or *affirmatively agrees* to the procedure he later challenges on appeal. *People v. Harding*, 2012 IL App (2d) 101011, ¶ 17.[1] Merely failing to object to a procedure proposed by the trial court or by the opposing party does not amount to invited error. *People v. Coan*, 2016 IL App (2d) 151036, ¶ 24 (rejecting the State's invited error argument where the State tendered the jury instruction at issue and the defendant failed to object); *People v. Harvey*, 211 Ill. 2d at 384-87 (rejecting the State's argument that one of the defendants invited error by failing to object to the use of certain evidence at trial). If the mere failure to object amounted to invited error, plain error review would never be available and the plain error rule would be rendered a nullity.

¶ 18 In this case, although defense counsel failed to object when the video was shown to the jury in the presence of the trial court, the parties and their counsel, and the alternate jurors, he did not request or expressly agree to that procedure. Accordingly, we may review the procedure employed by the trial court for plain error.

¶ 19 In addressing claims of error under the plain error doctrine, we employ a two-part analysis. The first step in the analysis is to determine whether a "plain error" occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007). The word " 'plain' " here "is synonymous with 'clear' and is the equivalent of 'obvious.' " *Id.* at 565 n.2. If we determine that the trial court committed a clear or obvious (or "plain") error, we then proceed to a second step, which is to determine whether the error is reversible. Plain errors are reversible only when (1) "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against

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[1]See also *People v. Harvey*, 211 Ill. 2d 368, 385 (2004); *People v. Carter*, 208 Ill. 2d 309, 319 (2003) ("Under the doctrine of invited error, an accused may not *request to proceed* in one manner and then later contend on appeal that the course of action was in error." (Emphasis added.)); *People v. Smith*, 406 Ill. App. 3d 879, 886-87 (2010) ("The purpose of the invited error doctrine is to prevent a defendant from unfairly receiving a second trial based on an error which *he injected* into the proceedings." (Emphasis added.)); *Villarreal*, 198 Ill. 2d at 227-28 (holding that the defendant could not attack verdict forms he submitted at trial on appeal); *People v. Patrick*, 233 Ill. 2d 62, 77 (2009) (holding that the defendant invited the alleged error by tendering the jury instruction he later challenged on appeal).

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, regardless of the closeness of the evidence." *Id.* at 565; *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005).

¶ 20 In this case, the trial court plainly erred by having the jury watch the video in the courtroom in the presence of the trial court, the prosecutor, the defendant, and defense counsel. It is a basic principle of our justice system that jury deliberations shall remain private and secret. *People v. Johnson*, 2015 IL App (3d) 130610, ¶ 17. The primary purpose of this rule is to protect the jurors from improper influence. *United States v. Olano*, 507 U.S. 725, 737-39 (1993); *Johnson*, 2015 IL App (3d) 130610, ¶ 17. Accordingly, although the trial court has the discretion to determine whether to grant a jury's request to review evidence and the manner in which such evidence may be viewed by the jury (*People v. McKinley*, 2017 IL App (3d) 140752, ¶ 16 (opinion of Carter, J.)), a trial court abuses its discretion if it allows the jury to review evidence in a manner that results in an improper influence upon the jury's deliberations (see *Olano*, 507 U.S. at 737-38; *McKinley*, 2017 IL App (3d) 140752, ¶ 16 (opinion of Carter, J.)). Courts review an improper intrusion upon jury deliberations for its prejudicial impact (*Johnson*, 2015 IL App (3d) 130610, ¶¶ 17-19) and will reverse only if the intrusion "affect[ed] the jury's deliberations and thereby its verdict" (*Olano*, 507 U.S. at 739). An improper intrusion upon jury deliberations by a third party is prejudicial when it impedes or inhibits the jurors' deliberations. See, *e.g.*, *id.* (noting that the presence of alternate jurors in the jury room during juror deliberations could prejudice the defendant if the presence of the alternates "exert[s] a 'chilling' effect" on the jurors or " 'operate[s] as a restraint upon the regular jurors' freedom of expression and action' ").

¶ 21 The presence of the trial court, the defendant, the prosecutor, and defense counsel during jury deliberations in this case clearly inhibited the jurors' deliberations and restrained their freedom of expression and action. As Justice McDade correctly noted in her dissent in *Johnson*, "it is hard to imagine a more intrusive, more chilling presence in the deliberations than the opposing parties—the defendant with his attorney and the State in the person of the State's Attorney—and the trial judge." *Johnson*, 2015 IL App (3d) 130610, ¶ 49 (McDade, P.J., dissenting). The state's attorney, the defendant, and the defendant's counsel each have a direct interest in the outcome of the litigation. Moreover, the trial court serves as an authoritative figure who presides over the litigation. The presence of these parties during jury deliberations is inherently intimidating to jurors and would almost certainly have inhibited their deliberations while the video was being played. It is extremely unlikely that any juror would have felt free to discuss the details of the video and its possible impact on his or her decision in the presence of these parties. See *id.* ¶ 52 (noting that jurors would have felt inhibited from discussing a video played in the presence of the prosecutor, the defendant, and defense counsel for fear that any discussion of the video "may result in criticism or judgment from the[se] nonneutral parties and counsel"); see also *id.* ¶ 53 ("It is naïve *** to assume that a normal citizen/juror is not somewhat nervous when attempting to carry out [his or her] fact-finding function in the presence of the judge" during deliberations).

¶ 22 Any reasonable doubt on this question was removed by the trial court's statement to the jury in this case. After the jury was brought back into the courtroom to watch the video in the presence of the parties and their counsel, the judge made the following statement to the jury: "I have instructed everyone to not say a word and we will play the video for you. If you need

to have the sound adjusted or anything that we can do, all right?" This statement conveyed several things to the jury. First, it suggested that no one (including any juror) was to speak while the video was being played. Although the trial court did not explicitly bar the jurors from speaking, the court's statement to the jury created the impression that the video would be played in silence, and the court did not explicitly give the jurors permission to break that silence by discussing the video while it was being played. In addition, the trial court's statement informed the jurors that they would not have the ability to control the playing of the video. The trial court told the jury that "we will play the video for you" and suggested that "we" (not the jurors themselves) could adjust the sound if necessary. The court did not give the jurors the opportunity to pause the video or replay any parts they might have wanted to view or discuss in greater detail. This further inhibited the jury's deliberative process. In sum, the procedure employed by the trial court effectively precluded the jurors from engaging in any deliberations while the video was being shown and likely limited their ability to focus sufficiently on the particular portions of the video that gave them concern.

¶ 23 We acknowledge that our appellate court has declined to find reversible error under similar circumstances in three prior decisions. See, *e.g.*, *People v. Lewis*, 2019 IL App (4th) 150637-B, ¶¶ 97-100 (finding no error where the trial court allowed a 911 recording to be replayed for the jury in the courtroom in the presence of the parties during deliberations); *Johnson*, 2015 IL App (3d) 130610, ¶¶ 20-21 (finding no prejudicial error where the trial court refused to allow the jury to take a surveillance videotape into the jury room and instead had the jury review the video in the courtroom during deliberations in the presence of the judge, the defendant, the state's attorney, and defense counsel); *People v. Rouse*, 2014 IL App (1st) 121462, ¶¶ 78-79 (finding no error where the trial court allowed the jury to view surveillance footage in the presence of both parties and the trial judge during deliberations).[2] We find those decisions to be wrongly decided, and we decline to follow them. In finding no error in *Johnson* and *Rouse*, our appellate court relied principally upon the facts that (1) the third parties who were present when the video was replayed for the jury were instructed not to communicate with the jurors while the video was being played (*Johnson*, 2015 IL App (3d) 130610, ¶ 20), and they made no attempt to do so (*id.*; see also *Rouse*, 2014 IL App (1st) 121462, ¶ 79), and (2) after reviewing the video in the courtroom, the jurors returned to the jury room where they resumed private and unfettered deliberations (*Johnson*, 2015 IL App (3d) 130610, ¶ 20; *Rouse*, 2014 IL App (1st) 121462, ¶ 79). However, neither of those facts eliminated or mitigated the prejudicial impact upon deliberations that occurred *while the jurors were viewing the video.* In each case, the jurors had no opportunity to discuss the video as they were viewing it or to pause or replay any portions of the video that they found of particular importance. (Indeed, in *Rouse*, the trial court instructed the jury that they could not engage in any deliberations or have any discussions about what they were watching while the recording was played.) Accordingly, in each case,

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[2]In *McKinley*, a majority of the court found that the trial court erred by allowing the prosecutor, the defendant, defense counsel, and the bailiff to be present while the jury viewed a videotape during its deliberations. *McKinley*, 2017 IL App (3d) 140752, ¶¶ 32-36 (O'Brien, J., specially concurring); *id.* ¶¶ 38-44 (Holdridge, P.J., dissenting). However, the defendant failed to raise the issue before the trial court, and Justice O'Brien found that the trial court's error did not rise to the level of reversible plain error. *Id.* ¶ 36 (O'Brien, J., specially concurring). Justice Carter found no error (*id.* ¶¶ 22-23 (opinion of Carter, J.)) and no reversible plain error (*id.* ¶¶ 25-27). Accordingly, the majority affirmed the defendant's conviction in *McKinley*.

the procedure employed by the trial court directly impeded the jury's deliberations. The mere fact that the jury could have discussed the video later in the jury room is immaterial. In each case, the jury was prevented from controlling the video, from freely discussing it, and from debating any issues relating to the video while they were watching it.

¶ 24 Moreover, our appellate courts' decisions in *Lewis*, *Rouse*, and *Johnson* fail to acknowledge that the mere presence of the trial judge, the parties, and their attorneys during jury deliberations improperly intrudes upon the privacy of jury deliberations and has an inherently intimidating and inhibiting effect upon such deliberations. See *Johnson*, 2015 IL App (3d) 130610, ¶ 52 (McDade, P.J., dissenting); *McKinley*, 2017 IL App (3d) 140752, ¶¶ 32-35 (O'Brien, J., specially concurring). Such intrusions on the jurors' ability to freely discuss and debate the evidence should be deemed presumptively prejudicial. See *Olano*, 507 U.S. at 739 (acknowledging that "[t]here may be cases" where an intrusion upon jury deliberations by third parties "should be presumed prejudicial," and ruling that such intrusions are prejudicial when they "exert[ ] a 'chilling' effect" on the jurors or "operate as a restraint upon the regular jurors' freedom of expression and action." (Internal quotation marks omitted.)); see also *Johnson*, 2015 IL App (3d) 130610, ¶ 52 (McDade, P.J., dissenting).[3]

¶ 25 In *Johnson* and *Lewis*, our appellate court suggested that replaying a video or audio recording for the jury during deliberations in the presence of the parties, their counsel, and the trial court was not prejudicial error because the jury had already reviewed the recording under identical circumstances during the trial. *Johnson*, 2015 IL App (3d) 130610, ¶ 20 (majority opinion); *Lewis*, 2019 IL App (4th) 150637-B, ¶ 98. In *Lewis*, our appellate court went so far as to state that "[w]hen a deliberating jury returns to the courtroom and, in the presence of the judge, the parties, the lawyers, and court personnel listens again, in silence, to an audio recording, *the jury does nothing different from what it did before, when the recording originally was played.*" (Emphasis added.) *Lewis*, 2019 IL App (4th) 150637-B, ¶ 98. However, a jury's viewing of a video recording during trial is critically different from its viewing of that same recording *during deliberations*. Unlike public trials, jury deliberations must occur in privacy and secrecy. *Johnson*, 2015 IL App (3d) 130610, ¶ 17. Once deliberations begin, the jurors must be shielded from any outside influences that improperly impede or inhibit their deliberations. *Olano*, 507 U.S. at 737-38; *Johnson*, 2015 IL App (3d) 130610, ¶ 17. If a trial court fails to protect the jurors from such influences (as in this case), it commits reversible error. See *Olano*, 507 U.S. at 738; *Johnson*, 2015 IL App (3d) 130610, ¶¶ 17-19.

¶ 26 Our appellate court has also suggested that the trial court's authority to allow a deliberating jury to review audio or video evidence in the presence of the parties, their attorneys, and the

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[3]In *Olano*, the United States Supreme Court declined to presume prejudice where two alternate jurors were present throughout the jury's deliberations but there was no showing that the alternate jurors either participated in or "chilled" the jury's deliberations. *Olano*, 507 U.S. at 739. However, *Olano* is distinguishable. The alternate jurors in *Olano* were neutral, disinterested parties who were "indistinguishable from the 12 regular jurors" until the close of trial. *Id.* at 740. The third parties who were present during the jury deliberations in this case were very different. The parties and their counsel had a direct interest in the outcome of the case, and the trial court was an authoritative, intimidating figure who was not a finder of fact and did not share the same standing as the jurors. See *Johnson*, 2015 IL App (3d) 130610, ¶ 50 (McDade, P.J., dissenting). Accordingly, the argument for presuming prejudice in this case is far more compelling than it was in *Olano*.

trial judge flows directly from the trial court's discretion to manage its courtroom. *McKinley*, 2017 IL App (3d) 140752, ¶ 22 (opinion of Carter, J.) ("the mode and manner in which a circuit court allows a jury to review a piece of evidence *** [such as a video recording] falls directly within the scope of the court's inherent authority to manage its courtroom"); see also *Lewis*, 2019 IL App (4th) 150637-B, ¶ 99. We disagree. Although a trial court generally has discretion to determine whether to grant a jury's request to review evidence and the mode and manner in which such evidence may be viewed by the jury, the court abuses its discretion and commits reversible error if it allows the jury to review evidence in a manner that improperly inhibits the jury's deliberations. *Olano*, 507 U.S. at 739; see also *McKinley*, 2017 IL App (3d) 140752, ¶ 41 (Holdridge, J., dissenting); see generally *id.* ¶ 16 (opinion of Carter, J.).

¶ 27 In *Lewis*, our appellate court also ruled that "[a]llowing a deliberating jury to listen to a recording again in the courtroom instead of in the jury room avoids problems with equipment and the skills necessary to operate the equipment [citation] and also minimizes the risk of breakage or erasure of the recording." (Internal quotation marks omitted.) *Lewis*, 2019 IL App (4th) 150637-B, ¶ 97. For this reason, among the other reasons discussed above, the *Lewis* court ruled categorically that allowing the jury to hear a recording again in the courtroom during deliberations in the presence of the parties, their counsel, and the trial judge is not prejudicial error (provided that the jury has been instructed not to deliberate during the playing of the recording and the third parties are instructed not to communicate with the jurors or otherwise influence them). *Id.* ("we now reject outright the argument that this procedure is *** erroneous, let alone structurally erroneous"); see also *id.* ¶ 99 ("we conclude that if a jury, during its deliberations, requests to see or hear a recording again, the trial court need not send the recording and equipment into the jury room but instead may, in its discretion, have the jury brought back into the courtroom for a replaying of the recording"). The *Lewis* court further ruled that, "if the court chooses to have the recording replayed in the courtroom, the court, parties, and counsel must be present to view or hear the evidence, and the court should instruct the jury not to discuss the evidence while in the courtroom." *Id.* We find these rulings in *Lewis* to be both erroneous and troubling. As an initial matter, we find it difficult to believe that, with all of the digital and other "user-friendly" technology currently available (such as laptop computers and tablets, to name only a few), a trial court cannot arrange for the jury to view video or audio evidence in the jury room without risking the destruction of evidence or other technical difficulties. The fact that this problem recurs so often in this State is inexplicable. In our view, if a trial court decides to grant a jury's request to review audio or video evidence during deliberations, the only acceptable practice is to arrange for the jury to view the evidence at issue in private, preferably by bringing a laptop, tablet, or some similar device into the jury room. The *Lewis* court's ruling will make that less likely to occur.

¶ 28 But even if, for some reason, a video or audio recording must be played for a deliberating jury in the courtroom, the jury should view the video in private, not in the presence of the parties, their attorneys, or the trial judge. In ruling otherwise, the *Lewis* court appeared to assume that anything that occurs in the courtroom, even jury deliberations, is a "court proceeding" requiring the presence of the judge and the parties. See *id.* We disagree. As noted above, jury deliberations must be conducted privately and in secret so as to insulate the jury from improper influence. *Olano*, 507 U.S. at 737-38. The parties have no right to be present for such deliberations, regardless of where they occur. The mere fact that a portion of jury deliberations occurs in the courtroom does not transform those deliberations into a public trial

proceeding. See generally *People v. Gore*, 2018 IL App (3d) 150627, ¶¶ 33-35 (ruling that a criminal defendant's right to a public trial does not apply to a portion of the proceedings wherein the trial court answers questions posed by the jury during deliberations); see also *State v. Magnano*, 326 P.3d 845, 851 (Wash. Ct. App. 2014) (trial court did not violate the defendant's public trial right when it closed the courtroom while a 911 recording was replayed to the jury during jury deliberations in order to protect the secrecy of the jury's deliberations). Nor does it entitle the defendant or any other third party to be present during those deliberations. The defendant has the right to be present and to participate in any communication between the trial judge and the jury that occurs after deliberations have begun. *People v. Coleman*, 391 Ill. App. 3d 963 (2009). This includes the right to be present for any arguments as to whether the trial court should grant a deliberating jury's request to review video or audio evidence. However, once a trial court decides to grant the jury's request, the jury should be allowed to view any such evidence in private because the viewing constitutes a part of the jury's deliberations. The defendant has no right to be present at that time.

¶ 29 Moreover, we find that the procedure employed by the trial court in this case amounted to structural error and is therefore reversible under the plain error doctrine. A structural error is "a systemic error," which serves to "erode the integrity of the judicial process and undermine the fairness of the defendant's trial." (Internal quotation marks omitted.) *People v. Thompson*, 238 Ill. 2d 598, 613-14 (2010). "An error is typically designated as structural only if it necessarily renders a criminal trial fundamentally unfair or an unreliable means of determining guilt or innocence." *Id.* at 609; see also *People v. Henderson*, 2017 IL App (3d) 150550, ¶ 47; *People v. Matthews*, 2017 IL App (4th) 150911, ¶ 43. As noted above, the presence of the parties, their attorneys, and trial judge during jury deliberations was inherently intimidating and necessarily impeded or inhibited the jurors' free discussion and deliberation as the video was being shown to them. This inhibiting effect upon the jurors' deliberations was exacerbated by the trial court's assertion of control over the playing of the video and by its statement to the jury, which suggested that the jurors were not free to talk as the video was being played. Anything that intrudes upon the privacy of jury deliberations and impedes or inhibits the jurors' freedom of expression and action during deliberations in this manner renders the trial an unreliable means of determining guilt or innocence. We decline to follow prior decisions of our appellate court that hold or suggest otherwise.[4]

¶ 30 The dissent correctly notes that an intrusion into a jury's deliberations constitutes reversible error only if the defendant is prejudiced by the intrusion. *Infra* ¶¶ 39-40. However, the dissent assumes that a defendant may establish such prejudice under the circumstances presented in this case only by showing either that (1) one of the nonjurors that was present during the jury's deliberations "engaged in a prejudicial communication with [a] juror about a matter pending before the jury" or that (2) "improper extraneous information reached the jury." *Infra* ¶ 41. We disagree. As shown above, the mere presence of the trial judge, the parties, and their attorneys during jury deliberations improperly intrudes upon the privacy of jury deliberations and has an

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[4]In finding no structural error under circumstances similar to those presented here, our appellate court cited *Thompson* for the proposition that structural errors have been found "only in a limited class of cases" and suggested that only the six types of errors expressly referenced in *Thompson* may be considered structural. *Matthews*, 2017 IL App (4th) 150911, ¶¶ 43-44. However, in *People v. Clark*, 2016 IL 118845, ¶ 46, our supreme court noted that it has not restricted structural plain error in this manner. See also *People v. Sanders*, 2016 IL App (3d) 130511, ¶¶ 16-17.

inherently intimidating and inhibiting effect upon such deliberations. Such intrusions on the jurors' ability to freely discuss and debate the evidence should be deemed presumptively prejudicial (see *Olano*, 507 U.S. at 739), regardless of whether they involve any express communications or the transmission of "extraneous information." Moreover, the prejudice created by the presence of the trial judge, the parties, and their attorneys during jury deliberations was compounded in this case by the trial judge's comments to the jurors and the procedure subsequently employed by the court, both of which effectively denied the jury the ability to control the video, to comment on any portion of the video, or to deliberate about what they were watching as the video was being shown. This impeded the jury's deliberations on a matter of obvious concern to the jury, thereby prejudicing the defendant. Accordingly, the trial court committed reversible error.

¶ 31 2. The Public Defender Fee

¶ 32 The defendant also argues that the trial court erred by assessing a $500 public defender fee under section 113-3.1 of the Code of Criminal Procedure (725 ILCS 5/113-3.1 (West 2008)) without conducting a hearing on the defendant's ability to pay that fee, as required by the statute, and without providing him with adequate notice that it planned to assess such a fee. The defendant contends that, if this court affirms his conviction, it should vacate the public defender fee outright. The State confesses error on this issue but argues that we should remand for a hearing on the defendant's ability to pay the public defender fee rather than vacate the fee outright. Because we are reversing defendant's conviction and remanding for a new trial, we need not address whether the public defender fee imposed as a part of defendant's sentence should be vacated, with or without a hearing on remand.

¶ 33 CONCLUSION

¶ 34 For the reasons set forth above, we reverse the judgment of the circuit court of Kankakee County and remand for a new trial.

¶ 35 Reversed; cause remanded.

¶ 36 JUSTICE CARTER, dissenting:

¶ 37 I respectfully dissent from the ruling and analysis expressed in the majority opinion in the present case. I would find that defendant has failed to establish that either error or plain error occurred here. See *People v. McLaurin*, 235 Ill. 2d 478, 497 (2009) ("[T]he key question in determining whether an 'intrusion' into the jury room constitutes error is whether the defendant was prejudiced by the intrusion."); *Johnson*, 2015 IL App (3d) 130610, ¶ 19 ("[W]e review outside jury intrusions for prejudicial impact.").

¶ 38 The issue of whether evidentiary items should be taken to jury room during deliberations is a matter within the discretion of the trial court, and the trial court's decision on the matter is not reversed absent an abuse of discretion to the prejudice of the defendant. *People v. Williams*, 97 Ill. 2d 252, 292 (1983). Similarly, the mode and manner in which a trial court allows a jury to review a piece of evidence during jury deliberations falls within the scope of the court's inherent authority to manage its courtroom and is a matter of the court's discretion. *McKinley*, 2017 IL App (3d) 140752, ¶ 22 (opinion of Carter, J.); see also *Lewis*, 2019 IL App (4th)

150637-B, ¶ 97 (holding that where a deliberating jury requests to have an audio or video recording played again, the trial court has discretion to either send the evidence to the jury room or bring the jury into the courtroom to play the recording); *Rouse*, 2014 IL App (1st) 121462, ¶ 78 (holding that it was within the trial court's discretion to allow the jury to view a video recording in the presence of both parties and the judge).

¶ 39 Here, defendant essentially argues that the mode and manner in which the trial court allowed the jury to view the video constituted error because the presence of the judge, the attorneys, the defendant, and the two alternate jurors had a chilling effect on jury deliberations. Defendant's claim that the jury was exposed to improper information or influence is comparable to the body of law regarding impeachment of a jury verdict. A jury verdict may not be impeached by an affidavit or testimony from a juror regarding the motive, method, or process by which the jury reached its verdict. See, *e.g.*, *People v. Hobley*, 182 Ill. 2d 404, 457 (1998). However, a jury verdict may be impeached based on evidence of improper extraneous influences on the jury. *Id.* at 458. Where a defendant seeks to impeach a jury verdict based on an outside influence or communication, reversal is not warranted unless the defendant was prejudiced. See *id.*; *People v. Harris*, 123 Ill. 2d 113, 132 (1988); *People v. Holmes*, 69 Ill. 2d 507, 514-19 (1978); *People v. Willmer*, 396 Ill. App. 3d 175, 181 (2009); *People v. Collins*, 351 Ill. App. 3d 175, 179 (2004); see also *People v. Kuntu*, 188 Ill. 2d 157, 161-62 (1999) (holding that a letter sent from a juror to a state's attorney after the trial indicating that the juror had a personal relationship with the state's attorney was not conclusive evidence that the defendant's right to a fair trial had been prejudiced); *Parker v. Gladden*, 385 U.S. 363, 364-65 (1966) (*per curiam*) (holding that reversal was warranted where a bailiff told jurors that the defendant was guilty because the bailiff's statements were prejudicial and violated the defendant's constitutional rights).

¶ 40 Generally, a rebuttable presumption of prejudice arises when a defendant shows that a third party has communicated with a juror about a matter pending before the jury or that the jury has been exposed to improper extraneous information that relates directly to something at issue in the case that may have influenced the verdict. *Harris*, 123 Ill. 2d at 132; *Collins*, 351 Ill. App. 3d at 179-80; *Willmer*, 396 Ill. App. 3d at 181. While allegations of prejudicial outside influences are sufficient to raise a presumption of prejudice and shift the burden to the State, allegations that a juror "may have been exposed to extraneous information of an unknown nature" are not sufficient to raise a presumption of prejudice. *People v. Williams*, 209 Ill. 2d 227, 242 (2004). When a defendant has made a showing sufficient to raise a presumption of prejudice, the State may rebut the presumption by showing that the improper communication or extraneous information was harmless. *Harris*, 123 Ill. 2d at 132; *Hobley*, 182 Ill. 2d at 462; *Collins*, 351 Ill. App. 3d at 179-80. However, when the issue is unpreserved—as in the instant case—the burden of establishing prejudice remains on the defendant and does not shift to the State. *McLaurin*, 235 Ill. 2d at 497-98; see also *Olano*, 507 U.S. at 740-41.

¶ 41 Applying the above principles to the instant case, the defendant has not shown that either the trial judge, the attorneys, the defendant, or the alternate jurors engaged in a prejudicial communication with any juror about a matter pending before the jury or that improper extraneous information reached the jury. At most, defendant has shown that the procedure the court employed to play the video during jury deliberations created a situation where it was possible for one of those persons to have an improper communication with the jury. The mere possibility of an improper communication, however, is insufficient to show that defendant was

prejudiced. As such, I would find that defendant has not shown that the court abused its discretion by using the procedure, which it followed in the present case. With all due respect, I believe the majority's position on this issue is a radical departure from the traditional way reviewing courts have treated questions involving the integrity of jury deliberations.

¶ 42 I recognize that I concurred in the judgment and opinion in *Henderson*, 2017 IL App (3d) 150550, ¶ 46, in which we held that error occurred where the trial court allowed the jury to review evidence in the presence of an employee of the state's attorney's office and a court bailiff. Upon further consideration of this issue, I do not believe that the presence of the employee of the state's attorney's office and the bailiff, without more, showed that defendant was prejudiced. However, I would still find that error occurred in *Henderson* because the trial court failed to consult the parties regarding the jury's request to review the evidence or the mode and manner in which the court would allow the evidence to be reviewed.

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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 11, 2020 the foregoing **Plaintiff-Appellant's Brief and Appendix** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided notice to the following registered e-mail addresses:

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