No. 126729

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal from the Appellate Court
	)	of Illinois, Fourth Judicial District,
Plaintiff-Appellant,	)	No. 4-17-0787
	)	
	)	There on Appeal from the Circuit
v.	)	Court of the Sixth Judicial Circuit,
	)	Champaign County, Illinois,
	)	No. 16 CF 1055
	)	
KELVIN T. HARTFIELD,	)	The Honorable
	)	Thomas J. Difanis,
Defendant-Appellee.	)	Judge Presiding.

PLAINTIFF-APPELLANT'S REPLY BRIEF AND RESPONSE TO REQUEST FOR CROSS-RELIEF

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ARGUMENT

I. The Aggravated Discharge of a Firearm Statute Permits One Conviction of Aggravated Discharge of a Firearm for Each Officer in the Line of Fire.

The People's opening brief demonstrated that under the plain language of 720 ILCS 5/24-1.2(a)(3), defendant's discharge of a firearm in the direction of four officers constituted four violations of the aggravated discharge of a firearm statute, each requiring proof of separate facts and thereby permitting multiple convictions. Peo. Br. 9-10. This plain language construction conforms with the clear intent of subsection (a)(3), which defendant does not dispute is to protect officers from being shot at while on duty. *See* Def. Br. 35-36; Peo. Br. 9-10. And reading the statute as a whole reinforces the conclusion that each officer in the line of fire represents an allowable unit of prosecution, independent of the number of shots. Peo. Br. 11-12. Finally, that plain language reading is bolstered by the well-settled rule in Illinois that separate victims require separate convictions. Peo. Br. 12-14.

In response, defendant appeals to the rule of lenity, but that rule is inapplicable where, as here, the statute is unambiguous. And defendant is incorrect that, to permit multiple convictions, the statute needed to expressly provide that a separate violation occurs for each officer fired upon.

A. The rule of lenity does not apply because the Court need not guess as to the legislative intent.

Defendant appeals to the "lenity-based analysis" this Court applied in *People v. Carter*, 213 Ill. 2d 295 (2004). Def. Br. 32. But the Court has made

clear that the rule of lenity "is subordinate to our obligation to determine legislative intent" and should not be applied "so rigidly as to defeat legislative intent." *People v. Gutman*, 2011 IL 110338, ¶ 12. Thus, "'[t]he rule of lenity applies only if, after seizing everything from which aid can be derived,'" the Court "'can make no more than a guess as to what [the legislature] intended'" because of "'a grievous ambiguity or uncertainty in the statute.'" *Id.* ¶ 43 (quoting *Muscarello v. United States*, 524 U.S. 125, 138-39 (1998) (further internal quotation marks omitted)). Defendant fails to establish such ambiguity.

Particularly relevant here, the rule of lenity is inapplicable when there is a "clear pattern" in "statutes that serve a similar purpose." *Gutman*, 2011 IL 110338, ¶ 38. A clear pattern exists for statutes designed to protect people from harm: "In Illinois it is well settled that separate victims require separate convictions and sentences." *People v. Shum*, 117 Ill. 2d 317, 363 (1987); *see also People v. Thomas*, 67 Ill. 2d 388, 389-90 (1977) (multiple convictions proper with multiple victims); *People v. Butler*, 64 Ill. 2d 485, 489 (1976) (same); Peo. Br. 12-14. Applying this settled principle to subsection (a)(3), when a shot is fired in the direction of multiple officers, there are separate victims, thus requiring separate convictions.

Defendant does not contest that separate victims require separate convictions, at least for one-act, one-crime purposes. *See* Def. Br. 40. He also concedes that in *Butler*, this Court applied the rule that multiple victims

require multiple convictions in construing the armed robbery statute. *See* *Butler*, 64 Ill. 2d at 489 (because threat of defendant's knife applied to two robbery victims, threat of force element of statute applied to both victims, justifying two convictions). Defendant asserts, however, that *Butler* "seems to have had less to do with multiple victims than with multiple perpetrators." Def. Br. 40. Defendant is incorrect. In *Butler*, two assailants robbed two victims, with each assailant "devot[ing] his primary attention during the robbery to a different victim." 64 Ill. 2d at 489. *Butler* was clear, however, that multiple convictions were appropriate because the "threat posed by the defendant's knife" was not "confined to a single person" and the threat for force was "against both victims." *Id.* Thus, contrary to defendant's suggestion, *Butler*'s focus was the number of victims, not the number of perpetrators. Indeed, that there were two assailants and that each robber focused on a different victim would, if anything, have made multiple convictions for each robber less appropriate. Each perpetrator would, arguably, not be responsible for the victim that was the focus of the other perpetrator. Yet this Court held that multiple convictions were appropriate. Thus, *Butler* establishes that the rule that separate victims require separate convictions applies when interpreting statutes.

Defendant next asserts that a police officer is not "categorized as a victim" of the crime of aggravated discharge of a firearm in the direction of a peace officer. Def. Br. 41. Defendant reasons that because aggravated

discharge of a firearm is in part D of Title III of the Criminal Code, which is titled "Offense Affecting Public Health, Safety and Decency," as opposed to part B, which is titled "Offenses Directed Against the Person," the only victim is "'public order, not the person fired at.'" Def. Br. 41 (citing A30). But this Court has already held otherwise — that is, that the person shot at during an offense of aggravated discharge of a firearm is the "victim of that felony." *People v. Whitney*, 188 Ill. 2d 91, 100 (1999). Further, the Court has applied the rule that multiple victims require multiple convictions to offenses outside of part B — for instance, the armed robbery statute construed in *Butler* is in part C, "Offenses Directed Against Property." Moreover, part D includes offenses in addition to aggravated discharge of a firearm of which people are assuredly victims. A person harassed by telephone is a victim of that offense, 720 ILCS 5/26.5-2, and the same applies to harassment via electronic communications, 720 ILCS 5/26.5-3. And the law generally defines "victim" as "any natural person determined by the prosecutor or the court to have suffered direct physical or psychological harm as a result of a violent crime perpetrated or attempted against that person." 725 ILCS 120/3(a)(1). Being shot at may surely may result in psychological harm. Thus, the Court should reject defendant's efforts to avoid the settled rule that multiple victims require multiple convictions.

A second "cardinal rule of statutory construction" that must be applied before resort to the rule of lenity is the requirement that the court "consider

the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another." *Gutman*, 2011 IL 110338, ¶ 39. In *Gutman*, this Court relied on the General Assembly's intent when enacting the money laundering statute to decline to apply the rule of lenity. *Id.* ¶ 44. As the Court explained, while the term "proceeds" in the money laundering statute could reasonably be interpreted to mean "profits" instead of "receipts," the statute nevertheless contemplated that a defendant could be found guilty of money laundering without a showing of profits. *Id.* ¶ 39. The Court reasoned that it was "highly unlikely that the Illinois legislature was perfectly fine with criminals laundering money in those instances in which a net gain was not realized in the underlying transaction." *Id.*

Similarly, it is highly unlikely that the General Assembly would be "perfectly fine" with allowing individuals like defendant to escape punishment for each officer shot at. Here, there is no aggravated form of the offense to address circumstances where a defendant fires at multiple officers. And defendant appears to concede that the statute was enacted to protect officers from being shot at while on duty. *See* Def. Br. 35 (subsection in question was designed to "to deter a particular antisocial act — 'shooting at a police officer'") (quoting 87th Ill. Gen. Assemb., House Proceedings, June 11, 1992, at 26 (Statement of Rep. McAuliffe)); *see also id.* at Def. Br. 36 (quoting 88th Ill. Gen. Assemb., House Proceedings, Nov. 15, 1994, at 27-28

(Statement of Rep. Dart)) ("Again, the focus appears to have been deterrence of the dangerous decision to 'shoot at police officers.'"). Given this agreed-upon purpose and the absence of an aggravated form of the offense to address circumstances where a defendant fires at multiple officers, the legislature necessarily would have intended to authorize a conviction for each officer fired upon, to ensure that the conduct the statute was designed to protect against — shooting at police officers — was fully deterred. Otherwise, the threat to all but one officer shot at would go unpunished.

The federal cases cited by defendant are inapposite, *see* Def. Br. 32, 42-43 (citing *Bell v. United States*, 349 U.S. 81 (1955), and *Ladner v. United States*, 358 U.S. 169 (1958)), because the statutes at issue in these cases lacked the clear legislative intent that compels the construction of the statute at issue here. *See Bell*, 349 U.S. at 83 (no "guiding light afforded by the statute in its entirety or by any controlling gloss"); *Ladner*, 358 U.S. at 175-76 (finding it just as likely "that the congressional aim was to prevent hindrance to the execution of official duty, and thus to assure the carrying out of federal purposes and interests, and was not to protect federal officers except as incident to that aim").

A third rule of statutory construction that must be applied before resorting to the rule of lenity is the requirement that the statute be considered a whole. *Gutman*, 2011 IL 110338, ¶ 12. The People's opening brief demonstrated that construing subsection (a)(3) to allow multiple

convictions when multiple officers are in the line of fire finds support in the statute as a whole, including subsection (a)(4), which criminalizes shooting at a police vehicle. *See* 720 ILCS 5/24-1.2(a)(4); Peo. Br. 11. In *People v. Hardin*, 2012 IL App (1st) 100682, the defendant shot at a police vehicle occupied by two officers. *Id.* ¶ 27. The appellate court vacated one of the defendant's resulting convictions under (a)(4) because the defendant discharged the firearm at a single police vehicle; the court explained, however, that multiple convictions would have been appropriate under (a)(3) because there were multiple officers. *Id.* ¶ 37. Defendant contends that *Hardin*'s discussion of (a)(3) is dicta, Def. Br. 42, but that is not the case, as the court's interpretation of (a)(3) and (a)(4) rested on "view[ing] the statute as a whole" "when subsections (a)(3) and (a)(4) are considered together." *Id.* ¶ 27; *see also Exelon Corp. v. Dep't of Revenue*, 234 Ill. 2d 266, 277-78 (2009).

Similarly, the People's opening brief explained that section 24-1.2(a) permits multiple convictions if a defendant fired a single shot in the direction of a peace officer, in violation of subsection (a)(3), and an emergency medical services personnel, in violation of subsection (a)(5), and, further, that there is no rational basis to conclude that shooting at one peace officer and one emergency medical services personnel would support two convictions while shooting at two peace officers would not. *See* Peo. Br. 11-12. Defendant disputes that firing at one peace officer and one emergency medical services personnel would allow two convictions, arguing that the legislature did not

"unambiguously authorize[]" multiple convictions for "simultaneous violations." Def. Br. 40. But defendant is incorrect: as explained, *see* Peo. Br. At 11-12, in these circumstances, the defendant's act would violate distinct statutory provisions and require proof of different facts. And the law is clear that "[w]hen the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense." 720 ILCS 5/3-3; *see also People v. Henry*, 204 Ill. 2d 267, 290 (2003) ("[W]here, as here, the same act constitutes a violation of two distinct statutory provisions, but each offense requires proof of an additional fact not required to prove the other offense, the two offenses are not the same for double jeopardy purposes.").

Finally, defendant argues that *Carter* suggests that, pursuant to the rule of lenity, subsection (a)(3) could authorize multiple convictions for a shot fired at multiple police officers only through "language expressly providing that a single and separate violation occurs for each on-duty peace officer at which the discharge of a firearm is directed." Def. Br. 34. On the contrary, *Carter* turned to the rule of lenity only *after* "applying the principles of statutory construction" and "conclud[ing] that the statute neither prohibits nor permits the State to bring separate charges for the simultaneous possession of firearms and firearm ammunition." 213 Ill. 2d at 301. As this Court explained, the term "any" in the statute at issue could be singular or plural, and thus the statute was equally likely to allow multiple convictions

as not. In other words, in *Carter* (unlike in this case), principles of statutory construction, including the plain language of the provision, provided no answer to determining legislative intent. Thus, *Carter* does not hold that every provision that does not expressly permit multiple convictions is ambiguous as to whether it authorizes such convictions.

Indeed, defendant does not contest that this Court would construe statutes with similar wording to subsection (a)(3), including the statutes prohibiting kidnapping and unlawful restraint, to authorize multiple convictions. *See* Def. Br. 42; *see also* Peo. Br. 13. Defendant's only response to the kidnapping and unlawful restraint statutes is that they are found in part B of Title III, while the statute at issue here is in part D. But the rules of statutory construction should not be applied differently depending on whether a statutory provision appears in part B. Indeed, as discussed, this Court in *Butler* used settled interpretative principles to find that the armed robbery statute, which is in part C, permits multiple convictions. *See supra* p. 4.

In sum, because the meaning of subsection (a)(3) is readily ascertainable from the statute as a whole and in light of the clear legislative intent and the well-settled rule in Illinois that separate victims require separate convictions, the rule of lenity does not apply.

B. Multiple convictions do not violate the one-act, one-crime rule.

Defendant next argues that even if multiple convictions were authorized by subsection (a)(3), such convictions would violate the one-act, one-crime rule. *See* Def. Br. 43-48. This argument rests on defendant's assertion that the rule that multiple victims permit multiple convictions does not apply because police officers are not victims under the aggravated discharge of a firearm statute. Def. Br. 48. But as discussed above, this argument fails. *See supra* pp. 3-4. Thus, as the appellate court recognized, A25-27 ¶¶ 79-81, defendant's multiple convictions do not run afoul of the one-act, one-crime rule.[1]

C. Even if the statute requires multiple discharges for multiple convictions, the charging instrument was sufficient.

In the alternative, the People's opening brief demonstrated that multiple convictions were proper even if the statute required multiple discharges of the firearm because, contrary to the appellate court's holding, the indictment provided sufficient notice to defendant to prepare his defense.

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[1] The one-act, one-crime rule would, however, apply to defendant's hypothetical, *see* Def. Br. 39-40, in which a defendant discharges a firearm in the direction of a police officer who is seated in a marked squad car, thereby violating subsections (a)(2) (discharge in the direction of a person or vehicle occupied by a person), (a)(3) (same for a peace officer), and (a)(4) (same for a vehicle occupied by a peace officer). Because there would only be one physical act, the discharge, and one victim, the police officer, only one conviction could stand.

Peo. Br. 13-16. Because the appellate court raised this issue sua sponte, the "question is whether, in light of the facts of record, the indictment was so imprecise as to prejudice defendant's ability to prepare a defense." *People v. Phillips*, 215 Ill. 2d 554, 562 (2005).[2]

At the outset, defendant is incorrect that the appellate court's holding did not rest on perceived deficiencies in the charging instrument. Def. Br. 49. The appellate court clearly stated that "the trouble is this: in the charging instrument, the State did not differentiate between the shots that defendant had fired. Instead, in the charging instrument, the State differentiated between the peace officers that defendant had fired at." A23; *see also* A30 ("In the charging instrument, the State differentiated between peace officers instead of between discharges of the firearm in their direction. . . . [W]e conclude, therefore, that only one conviction of aggravated discharge of a firearm is permissible.").

Notably, the appellate court did not hold that the evidence was insufficient to sustain defendant's multiple convictions. *See* A23 ¶ 74 ("there was testimony that defendant had fired more than one shot"). And the officers testified that defendant fired between two and five shots when they

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[2] Defendant argues that this argument is forfeited because it was not included in the People's petition for leave to appeal, but this Court "may affirm the trial court's judgment on any basis established by the record." *People v. Ligon*, 2016 IL 118023, ¶ 32. Moreover, enforcing forfeiture against the People would be inconsistent with the fact that defendant did not raise this argument in the trial court or the appellate court, the latter of which raised and decided the issue in defendant's favor sua sponte.

were grouped together, R226, 297-98, 310-11, and subsequently fired another shot at Officer Ferriman, R299. Thus, even if the statute required multiple discharges to sustain multiple convictions, the only reason to vacate all but one of defendant's convictions as "surplus" would be a deficiency in the charging instrument, not a lack of evidence.[3]

Instead, the appellate court asserted, and defendant argues, that the charging instrument improperly failed to "differentiate" among the shots fired at the four officers. Def. Br. 50; A23, 30. But defendant cites no authority to support the proposition that each count had to expressly state that the discharge in the direction of one officer was different from the discharge in the direction of the others. The charging instrument charged defendant with four separate counts of discharging a firearm at four different officers. This differentiates this case from *People v. Crespo*, 203 Ill. 2d 335 (2001), where the indictment charged the defendant with the exact same act — the same stabbing of the same victim — with "different theories of criminal culpability." *Id.* at 342.

[3] Defendant's assertion that this Court should "not invade the province of the jury" by finding the evidence sufficient to sustain defendant's multiple convictions, Def. Br. 51, is both irrelevant — the appellate court's holding and the People's argument is based on the sufficiency of the charging instrument, not the evidence at trial — and incorrect, as whether the evidence at trial was sufficient is "a matter of law," *People v. Sutherland*, 223 Ill. 2d 187, 272 (2006).

As to defendant's argument that the People improperly stated in closing argument that one discharge could yield multiple convictions, it is doubly forfeited because he made no contemporaneous objection and failed to include it in his motion for a new trial. *People v. Enoch*, 122 Ill.2d 176, 186 (1988). Even if the argument were not forfeited, "[p]rosecutors are afforded wide latitude in closing argument, and "a prosecutor's comments in closing argument will result in reversible error only when they engender substantial prejudice against a defendant to the extent that it is impossible to determine whether the jury's verdict was caused by the comments or the evidence." *People v. Caffey*, 205 Ill. 2d 52, 131 (2001). Given the officers' uncontradicted testimony regarding the shots fired, *see supra* pp. 11-12, defendant can make no such showing.

Thus, even if the statute requires multiple discharges of the firearm, to show that only one conviction was proper, defendant would have to demonstrate that the charging instrument was so imprecise as to prejudice his ability to prepare a defense. *Phillips*, 215 Ill. 2d 554, 562. Given that defendant does not identify any way in which he was prejudiced by the charging instrument (and he was not so prejudiced), and that the testimony established multiple discharges, multiple convictions were proper.

II. Defendant's Claims for Cross-Relief Are Defaulted and Meritless.

A. Defendant's public trial claim fails because he acquiesced to the procedure and, even if he merely forfeited the claim, he cannot show plain error.

Defendant asserts that his right to a public trial was violated because the court briefly excluded spectators from the courtroom until the first group of potential jurors could be seated in the jury box. Def. Br. 68. But defendant acquiesced to that procedure, foreclosing even plain error review. And even if the error were merely forfeited, it could not be excused as plain error.

1. Defendant acquiesced to the trial court's method of proceeding.

Defendant acquiesced to the trial court's method of proceeding in jury selection by inquiring into the trial court's preference and voicing no complaint. Prior to jury selection, the trial court noted the large number of potential jurors who would need to be accommodated in the courtroom and informed the other "[p]eople in the courtroom" that they would need to step out temporarily. R67. Defense counsel noted that defendant's mother, grandmother, and a legal intern were in the courtroom, and asked, "Can they stay in the room and, if necessary, do you want them all to leave?" R68. The trial court responded that as soon as the first twelve potential jurors were "in the box," he would have the bailiff "bring them in." R68. After reading the charges and providing preliminary instructions, the trial court seated twelve jurors in the jury box and only then began examining them. R69-74.

Defendant concedes that nothing in the record suggests that the court did not follow through on his promise to return defendant's mother, grandmother, and the intern to the courtroom after the first twelve jurors were seated. *See* Def. Br. 68. And, by merely inquiring into the trial court's preference and voicing no complaint, defendant acquiesced to the judge's chosen procedure. *See* Black's Law Dictionary (10th ed. 2014) (defining "acquiesce" as "accept tacitly or passively"). Because defendant acquiesced, plain error review is unavailable. *People v. Averett*, 237 Ill. 2d 1, 23-24 (2010) (declining to apply plain error review because "[w]hen a defendant acquiesces . . ., the defendant cannot later complain"); *In re Swope*, 213 Ill. 2d 210, 217 (2004) ("Simply stated, a party cannot complain of error which that party induced the court to make or to which that party consented."); *People v. Harvey*, 211 Ill. 2d 368, 385 (2004) (a defendant's "agreement to the procedure later challenged on appeal goes beyond mere waiver").

Defendant's argument that his inquiry gave the trial court an "opportunity to rethink" the exclusion, thereby obviating the need for a "formal objection" and preserving the claim under *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1909 (2017) and *People v. Radford*, 2020 IL 123975, Def. Br. 74-75, misses the mark. For one thing, both *Weaver* and *Radford* repeatedly emphasized the need for an "objection." *See*, *e.g.*, *Weaver,* 137 S. Ct. at 1912 (discussing the benefit "when a defendant objects to a courtroom closure"); *Radford*, 2020 IL 123975, ¶ 37 ("A contemporaneous objection is particularly

crucial when challenging any courtroom closure."). Moreover, *Weaver* and *Radford* explained that the lack of a contemporaneous objection "deprive[s the trial court] of the chance to cure the violation either by opening the courtroom or by explaining the reasons for closure." *Weaver*, 137 S. Ct. at 1912; *see also Radford*, 2020 IL 123975, ¶ 37 ("Defendant fails to recognize that, if there is no objection at trial, there is no opportunity for the judge to develop an alternative plan to a partial closure or to explain in greater detail the justification for it."). Here, defendant's failure to express any dissatisfaction with the court's chosen plan — indeed, his statement conveyed that he was comfortable with having the three individuals leaving briefly — informed the trial court that there was no objection and therefore no reason to consider an alternate plan.

2. Alternatively, defendant forfeited any challenge to the trial court's method of proceeding and does not show plain error.

Even if defendant did not acquiesce to the brief exclusion of spectators, his public trial claim is forfeited and the forfeiture cannot be excused as plain error. "*Both* a trial objection *and* a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial." *Enoch*, 122 Ill.2d at 186 (1988) (emphasis in original). Defendant provided neither. He never argued that the alleged partial closure violated his right to a public trial, the trial court reasonably did not treat counsel's mere inquiry

as an objection, R68, and defendant omitted the alleged error from his post-trial motion, C257-58.

To excuse his forfeiture as plain error, defendant must (1) identify an error that is "clear or obvious" and (2) show that either (a) the evidence of guilt was closely balanced or (b) the error was so serious that it undermined the fairness of the proceedings. *People v. McLaurin*, 235 Ill. 2d 478, 489 (2009). Defendant cannot show plain error because, as a threshold matter, he lacks evidence that the trial court in fact partially closed the courtroom, much less that such a closure would have violated his public trial rights. Not only did defendant fail to object, he made no record, so he cannot establish that the three individuals left the courtroom. This Court "has long recognized that to support a claim of error, the appellant — in this case the defendant in the appellate court — has the burden to present a sufficiently complete record such that the court of review may determine whether there was the error claimed." *People v. Carter*, 2015 IL 117709, ¶ 19. "Any doubts stemming from an inadequate record will be construed against" the appellant. *People v. Hunt*, 234 Ill. 2d 49, 58 (2009). Because the record does not affirmatively establish that anyone left the courtroom, this Court should construe the record against defendant and decline to find that any closure occurred.

Moreover, as defendant concedes, nothing in the record suggests that the three individuals, if they did leave, were not brought back into the

courtroom as soon as the first twelve potential jurors were seated and before any questions were asked of them. *See* Def. Br. 68. Nor does the record indicate that any media were excluded. Thus, on this record, it must be presumed that, if the three individuals left at all, they returned to the courtroom as per the trial court's assurances, and that any members of the media who wanted to be present were permitted in the courtroom. *Carter*, 2015 IL 117709, ¶ 19; *Hunt*, 234 Ill. 2d at 58. This procedure would "not constitute clear or obvious error by depriving defendant of his Sixth Amendment right to a public trial." *Radford*, 2020 IL 123975, ¶ 42.

As the Court has explained, "not every courtroom closure results in an unfair trial, nor does each closure affect the values underlying the sixth amendment's public right guarantee." *Id.* ¶ 33. Particularly relevant here, the Court has further explained (when discussing circumstances where closure may be "justified"), the Supreme Court has "provided, as an example, that a judge may want to give preliminary instructions to the venire as a whole, rather than repeating those instructions, perhaps with unintentional differences, to several groups of potential jurors." *Id.* (citing *Weaver*, 137 S. Ct. at 1909). That is precisely what happened below, because the trial court could fit all the prospective jurors into the courtroom before the first twelve were seated only by removing spectators. R68-69. And even though spectators were temporarily removed, "[d]ozens of members of the venire who did not become jurors . . . were able to observe the selection process. They

served as the eyes and ears of the public." *Radford*, 2020 IL 123975, ¶ 41. In addition, we must presume the media was allowed to attend, further "preserv[ing] the defendant's sixth amendment right to a public trial." *People v. Holveck*, 141 Ill. 2d 84, 101 (1990).

By contrast, as the appellate court noted, in the cases finding error, spectators were excluded from *voir dire* itself — *i.e.*, while the jurors were being examined and selected. A15-16 (citing *Weaver*, 137 S. Ct. at 1905; *Presley v. Georgia*, 558 U.S. 209, 210 (2010)). Defendant cites no case finding error when spectators were excluded from the court's preliminary instructions only, as opposed to the actual examination of jurors. *See also* Def. Br. 70 (conceding that the "dictionary definition of *voir dire*" is the "preliminary examination," not the preliminary instructions); *Presley*, 558 U.S. at 210 (cited Def. Br. 70) (spectators excluded for entirety of *voir dire*); *compare State v. Parks*, 363 P.3d 599, 602-03 (Wash. Ct. App. 2015) (no public trial violation when trial court swore venire and gave venire questionnaires in jury assembly room). Defendant's reliance on *Gomez v. United States*, 490 U.S. 858 (1989), *see* Def. Br. 70, is misplaced because that case involved a magistrate conducting jury selection over the defendant's objection, *see* 490 U.S. at 860, 874, which plainly did not occur here. In sum, even if the trial court did exclude the three individuals while the first twelve jurors were seated (but before the beginning of *voir dire*), there was no error

(much less a clear or obvious error) because this procedure would have been consistent with the Sixth Amendment.

Finally, even if a clear or obvious error occurred, defendant could not establish that error would warrant reversal. He does not argue the evidence was closely balanced, and thus does not argue that first prong plain error occurred. *See* Def. Br. 72. And he cannot satisfy the second prong of the plain error test, which is "a narrow and limited exception. . . whose purpose is to protect the rights of the defendant and the integrity and reputation of the judicial process." *People v. Herron*, 215 Ill. 2d 167, 177 (2005) (internal quotation marks omitted). Neither the United States Supreme Court nor this Court has held, or even suggested, that the partial closure of a courtroom may be a structural error that cannot be forfeited. To the contrary, the United States Supreme Court has stated that "state courts may determine" whether a defendant raising a public trial claim "is procedurally barred from seeking relief as a matter of state law." *Waller v. Georgia*, 467 U.S. 39, 50 (1984); *see also Peretz v. United States*, 501 U.S. 923, 936 (1991) (citing *Levine v. United States*, 362 U.S. 610, 619 (1960), for the proposition that "failure to object to closing of courtroom is waiver of right to public trial");; *State v. Pinno*, 850 N.W.2d 207, 225-26 (Wis. 2014) (Sixth Amendment public trial claim subject to forfeiture).

And this Court has expressly declined to adopt defendant's approach, under which "a new trial would automatically be required whenever the trial

court" makes a technical error in partially closing the courtroom "despite the lack of a contemporaneous objection." *Radford*, 2020 IL 123975, ¶ 36. This approach, the Court reasoned, would require reversal "irrespective of the decision's impact on the fairness and openness of the proceeding, the reason for a defendant's lack of objection, and the fact that any possible error in partially closing the courtroom could have been cured had the defendant objected." *Id.* Defendant makes no compelling argument why this Court should reverse course now. Indeed, providing relief under these circumstances would fly in the face of *Radford*'s warning against rewarding a defendant who "remain[s] silent about a possible error and wait[s] to raise the issue, seeking automatic reversal only if the case does not conclude in his favor." *Id.* ¶ 37.

B. Defendant's statutory speedy trial claim is forfeited and he cannot avoid the forfeiture via plain error or ineffective assistance of counsel.

1. Defendant forfeited the statutory speedy trial claim.

Defendant next asserts that his statutory speedy trial rights were violated because, according to defendant, the trial court abused its discretion in granting two continuances pursuant to 725 ILCS 5/103-5(c) for the People to pursue forensic evidence. Def. Br. 52, 56. This claim is doubly forfeited. To invoke his statutory right to discharge for a speedy trial violation, *see* 725 ILCS 5/103-5(d), defendant was required to file a pretrial motion to dismiss, *see* 725 ILCS 5/114-1(a)(1); *People v. Pearson*, 88 Ill. 2d 210, 219 (1981).

Because he failed to do so, defendant's statutory speedy trial claim is, in the words of the statute, "waived." 725 ILCS 5/114-1(b). Defendant also failed to include a speedy trial claim in his post-trial motion, which was required to preserve this issue for appeal. *See People v. Allen*, 222 Ill. 2d 340, 350 (2006) ("The failure to object to alleged error at trial and raise the issue in a posttrial motion ordinarily results in the forfeiture of the issue on appeal."). Defendant concedes that he has forfeited this claim but asks that this Court excuse his forfeiture because the violation constituted plain error or find that his trial counsel was ineffective for failing to move to dismiss the charges. *See* Def. Br. 63. Neither argument presents a basis for relief.

2. Defendant did not establish plain error to overcome the forfeiture.

Defendant cannot show plain error because there was no "clear or obvious" violation of defendant's statutory speedy trial rights. First, the trial court did not clearly or obviously err in attributing the delay following the continuances to defendant because he did not object to the delay as required by statute, which provides that "[d]elay shall be considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record." 725 ILCS 5/103-5(a). Indeed, even defendant appears to recognize that "the objection must include 'some affirmative statement in the record requesting a *speedy* trial.'" Def. Br. 60 (quoting *People v. Phipps*, 238 Ill. 2d 54, 66 (2010) (emphasis in original)). Defendant does not claim to have made a written demand, but

alleges that he made what amounted to an oral demand because "after the state proposed each of six delays to obtain the results of fingerprint and DNA analyses, [he] objected, reminded the trial court that he was in custody, and declared his readiness for trial." Def. Br. 61.

A generic statement that defendant is in custody and ready for trial does not meet the statutory requirement of "an oral demand for trial on the record." 725 ILCS 5/103-5(a). For his part, defendant asserts that counsel's statement that he was in custody was "'language that would be used only in reference to [his] speedy-trial right.'" Def. Br. 61 (quoting *People v. Murray*, 379 Ill. App. 3d 153, 161-62 (2d Dist. 2008)). But as the appellate court noted, this statement "was not specifically and exclusively relevant to the speedy-trial statute. It was relevant to delay in general." A12-13; *see also id.* at A13 ("Objecting to a continuance because one's client is languishing in jail does not specifically invoke or allude to the speedy-trial statute the way a request to attribute the delay to the State would."). For this same reason, as the appellate court reasoned, the fact that the trial court noted defendant's objection to the motion for a continuance does not mean that the court understood the objection as a demand under the speedy trial statute. *See* A13.

People v. Huff, 195 Ill. 2d 87 (2001), cited at Def. Br. 61, does not suggest otherwise. There, the defendant, who was not in custody, filed a document that bore the heading "Demand for Speedy Jury Trial" and invoked

the statutory right to demand trial within 160 days (the operative timeframe under section 103-5(b)). *Huff*, 195 Ill. 2d at 93-94. *Huff* rejected the argument that the written demand was insufficient because it did not specifically cite section 103-5(b), noting that this provision "does not itself require a defendant to invoke its protections in any particular form." *Id.* at 92. Here, defendant did not make a written demand and did not invoke a right to trial within 120 days (the operative timeframe under 103-5(a)).

But even if defendant had properly objected under section 103-5(a), he could not show that the trial court clearly or obviously erred in allowing the People's requests for a continuance under section 103-5(c), because the People demonstrated sufficient diligence. Section 103-5(c) allows, upon a showing of due diligence, the trial court to grant the People a continuance of 60 days to obtain material evidence and 120 days to obtain results of material DNA testing. 725 ILCS 5/103-5(c). As defendant concedes, a trial court's grant of a motion under section 103-5(c) is reviewed for an abuse of discretion. Def. Br. 52-53. No such abuse occurred here, and thus there is no clear error.

Defendant "directs this Court's attention to the first and third of the six continuances in his case — *i.e.*, continuances that were granted on the state's August 30 and October 25, 2016 motions." Def. Br. 56. The August 30, 2016 motion for a continuance explained that: defendant was charged for events that occurred on July 26, 2016; there existed evidence that was suitable for potential recovery of forensic evidence, including latent

fingerprints and DNA; defendant was taken into custody on July 28, 2016; the People filed a motion to collect DNA and latent print standards from defendant on August 15, 2016; seized evidence was transported to the lab on August 16, 2016; probable cause was found at a preliminary hearing on August 19, 2016; the People requested hearing dates for their motions to collect standards on August 22, 2016, but that no dates had yet been scheduled; and as of August 29, 2016, the laboratories had received the evidence and the analyses were pending. C56-57.

In other words, the People's motion established that within 22 days of the crime and 20 days of defendant's arrest, the People had collected evidence, delivered it to the laboratory, and was waiting for the trial court to rule on its motion to obtain samples from defendant. This comprised (using defendant's words) "'a course of action that a reasonable and prudent person intent upon completing tests within 120 days would follow.'" Def. Br. 55 (quoting *People v. Battles*, 311 Ill. App. 3d 991, 1005 (5th Dist. 2000)). Defendant nevertheless complains that the prosecution did not "indicate that it was making any efforts to expedite the pending analyses." Def. Br. 56. But, of course, the prompt collection and transfer of the evidence itself expedited the process, and the People had to wait for defendant to provide samples.

The October 25, 2016 motion for a continuance, which was the People's third, also demonstrated diligence, adding that a "meeting for standards

collection was coordinated with defense counsel's schedule and standards were collected from defendant Hartfield on 9/6/16 and transported to the lab that same week." C74. In other words, within a week of the first continuance being granted the same date as the motion was filed, August 30, 2016, *see* C58, the People obtained samples from defendant and promptly provided those materials for testing. That motion further stated that reports were ready in "Drug Chemistry and initial Forensic Biology," C75, showing that the People were continuing to pursue the results and had in fact completed some testing.

Contrary to defendant's assertion, *see* Def. Br. 59, the People were not required from the first day to request that the laboratory complete testing on only those items critical to the case, assuming the People even knew which those were in the early stages of the investigation. Indeed, *People v. Swanson*, 322 Ill. App. 3d 339 (3d Dist. 2001), cited at Def. Br. 54, holds that there is no such requirement. There, the appellate court determined that the People were diligent when, due to a backlog in testing, it was not clear whether there was a sample suitable for DNA testing until 80 days after the defendant's arrest, and the People then "requested DNA testing and placement on the ASAP list." 322 Ill. App. 3d at 343. Nothing in *Swanson* suggests that the trial court here abused its discretion in finding that the People demonstrated diligence by, within three weeks of the crime, collecting evidence and delivering it to the laboratory, collecting samples from

defendant promptly after the court ordered him to provide them, immediately providing those for testing, and completing some of the testing soon afterward.

Moreover, even if the trial court's decision to grant the two continuances was clear or obvious error (which it was not), defendant cannot shoulder his additional burden at the second step of the plain error doctrine. He does not argue that the evidence is closely balanced and thus does not argue that first prong plain error occurred. *See* Def. Br. 63. Instead, defendant asserts that the alleged error was second prong plain error because the "'speedy trial statute enforces the constitutional right to a speedy trial guaranteed by the federal and Illinois Constitutions.'" Def. Br. 63 (quoting *People v. Mosley*, 2016 IL App (5th) 130223, ¶ 9). He cites four cases that appear to support his position, *see* Def. Br. 63 (citing *Mosley*, 2016 IL App (5th) 130223, ¶ 9; *People v. Smith*, 2016 IL App (3d) 140235, ¶ 10; *People v. McKinney*, 2011 IL App (1st) 100317, ¶ 29; *People v. Gay*, 376 Ill. App. 3d 796, 799 (4th Dist. 2007), and a fifth that is less clear, *see Murray*, 379 Ill. App. 3d at 157 (stating "that the matter may be reviewed for plain error," though not expressly holding that any error would constitute second prong plain error). In four of these five decisions, however, the plain error language is dicta because the appellate court held that there was no violation of the statutory right to a speedy trial. *See Mosley*, 2016 IL App (5th) 130223, ¶ 9; *McKinney*, 2011 IL App (1st) 100317, ¶ 32; *Murray*, 379 Ill. App.3d at 162;

Gay, 376 Ill. App. 3d at 803; *but see Smith*, 2016 IL App (3d) 140235, ¶¶ 20-21 (statutory speedy trial error was "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process").

Equally important, to the extent that these cases suggest that that a statutory speedy trial violation can second prong plain error, they are incorrect. Although the right to a speedy trial set forth in the federal and state constitutions may be "fundamental," *People v. Crane*, 195 Ill. 2d 42, 46 (2001), "the statutory right and constitutional right are not coextensive," *People v. Hunter*, 2013 IL 114100, ¶ 9; *see also People v. Gooden*, 189 Ill. 2d 209, 216 (2000) (distinguishing between constitutional right to speedy trial, which this Court deemed "fundamental," and "additional statutory right" set forth in Speedy Trial Act). To establish a constitutional violation, a defendant must show that he was prejudiced by the delay, whereas a statutory violation may occur in the absence of prejudice. *See People v. Campa*, 217 Ill. 2d 243, 250-51 (2005); *see also Barker v. Wingo*, 407 U.S. 514, 532 (1972) (delay could prejudice defendant, in violation of constitutional speedy trial right, if witnesses were to "die or disappear," or become "unable to recall accurately events of the distant past"). Defendant does not allege that he was prejudiced, as is necessary to establish a constitutional violation. *See Campa*, 217 Ill. 2d at 250-51.

Thus, petitioner argues only that his statutory right to a speedy trial was violated, but even if such a violation occurred, it would not constitute

second prong plain error, as the statute conferring the speedy trial right makes clear. Where the General Assembly confers a statutory right, it may limit the scope of that right and impose conditions on its exercise. *See People v. Staten*, 159 Ill. 2d 419, 429-30 (1994) (recognizing "legislative prerogative to set reasonable conditions" on exercise of statutory speedy trial right). This Court has applied that principle to the Speedy Trial Act, strictly enforcing its provisions dictating the form of an effective speedy trial demand. *See People v. Sandoval*, 236 Ill. 2d 57, 65-69 (2010) (holding defendant did not file effective speedy trial demand where he failed to specify charges to which demand applied); *Staten*, 159 Ill. 2d at 428-30 (requiring that defendant file speedy trial demand in form specified by statute).

This Court should similarly enforce the legislature's express requirement that a defendant file a pretrial motion to invoke his statutory speedy trial right. The General Assembly provided defendants with a statutory right to a trial within a strictly defined period, but it conditioned that right on the filing of a pretrial motion to dismiss. 725 ILCS 5/114-1(a)(1), (b) (claims alleging violations of Speedy Trial Act are "waived" if not raised through motion to dismiss). The General Assembly's approach makes sense, given that the Speedy Trial Act is a prophylactic to "prevent the constitutional speedy-trial issue from arising in a case." *Gooden*, 189 Ill. 2d at 220. Absent a violation of a defendant's constitutional right to a speedy trial, no purpose would be served by retroactive application of the

prophylaxis. At that point, vacating the defendant's conviction would simply afford him a "procedural loophole" and "obstruct the ends of justice." *Id.* at 221.

Notably, none of the cases cited by defendant for the proposition that violations of section 103-5(a) constitute second prong plain error consider that constitutional and statutory speedy trial rights are not coextensive, that the latter is merely a prophylactic rule designed to protect the former, or acknowledge the conditions set by the legislature in section 114-1. *See Mosley*, 2016 IL App (5th) 130223, ¶¶ 20-22; *Smith*, 2016 IL App (3d) 140235, ¶¶ 20-21; *McKinney*, 2011 IL App (1st) 100317, ¶ 29; *Murray*, 379 Ill. App.3d at 162; *Gay*, 376 Ill. App. 3d at 803. To the extent that these cases can be read to equate a statutory speedy trial violation with second prong plain error, they eviscerate the General Assembly's express and sensible limitation on statutory claims, and this Court should reject them.

3. Defendant did not demonstrate that his counsel was ineffective.

As an alternative to second prong plain error, defendant seeks to avoid his forfeiture of the alleged violation of his statutory speedy trial right by asserting that his counsel was ineffective for failing to move to dismiss the charges based on the Speedy Trial Act and raise the issue in the post-trial motion. Def. Br. 63-65. A defendant can bring a claim of ineffective assistance of counsel on direct appeal if the record is sufficient to resolve the matter. *See People v. Veach*, 2017 IL 120649, ¶ 50. To prevail on an

ineffective assistance claim, defendant must show both that counsel's performance was deficient and that the alleged deficiency prejudiced him. To establish deficient performance, defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). A court "must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 689). To establish prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *see also Staten*, 159 Ill. 2d at 432 (defendant "must be able to demonstrate that if his attorney had made a proper demand for a speedy trial and then moved for discharge at the time of trial, there is a *reasonable probability* the trial court would have discharged him on speedy-trial grounds") (emphasis in original).

Here, defendant cannot show deficient performance because counsel reasonably could have concluded, as the trial court held, C58, R44, that the People had acted diligently and declined to object to the requests for a continuance on this basis. *See supra* pp. 24-26. Defendant cannot show, particularly on a record that includes no evidence regarding counsel's decision-making process but strong evidence that the motion would have

been denied, that counsel's decision not to move to dismiss the charges was outside the wide range of reasonable professional assistance.

For many of the same reasons, defendant cannot show prejudice because there is no reasonable probability that the trial court would have granted a motion to dismiss based on a violation of the Speedy Trial Act. As discussed, not only did the People demonstrate diligence, but the trial court granted the motions for continuances, demonstrating the court's agreement that the People had made the requisite showing. Nor is there a reasonable probability that a reviewing court would have found that the trial court abused its discretion in making those findings. Defendant thus cannot avoid his forfeiture of his statutory speedy trial claim via a claim of ineffective assistance of counsel.

C. Defendant's jury note claim is forfeited and he fails to show plain error.

Finally, defendant asserts that the trial court's response to a mid-deliberation jury note misled the jury into believing that it did not have to find beyond a reasonable doubt that the discharge was in the direction of a police officer or that defendant knew that the person was a police officer. Def. Br. 11. But defendant forfeited this argument, and it cannot be excused as plain error.

1. Defendant forfeited his jury note claim.

During deliberations, the jury sent a note asking, "Does suspect need to know there were 4 cops on the scene in the area where gun was fired to be

guilty of all four counts of aggravated discharge of [a] firearm? [T]hird proposition, that the defendant knew that _____ was [a] peace officer." SupC3. By "third proposition," the jury note apparently referred to the trial court's instruction that, for each aggravated discharge of a firearm count, the jury had to find, as a "[t]hird proposition," that "the Defendant knew that [the officer] was a peace officer." R620-23.

The circuit court sent the following written response to the jury:

> Question #1
> No[.]
>
> Question #2
> You must determine based on the evidence which officer or officers, if any, may have been in the line of fire when the firearm was discharged.

SupC4. Defendant objected to providing any response other than to direct the jury to follow the court's original instructions, but did not object to the language of the response. R632; C257.

As the jury was instructed, to violate subsection (a)(3), defendant had to (1) knowingly discharge a firearm (2) in the direction of a peace officer (3) "with knowledge that such person is a peace officer" (4) who is engaged in his or her official duties. Def. Br. 12-13 (citing 720 ILCS 5/24-1.2(a)). Notwithstanding defendant's failure to make a contemporaneous objection to the language of the trial court's response to the jury note, he now argues that the trial court's answers to the jury note inaccurately stated the law as to the

second and third elements of the offense (which defendant terms the "trajectory element" and the "knowledge element"). Def. Br. 11-30.

The argument is forfeited because, as defendant concedes, "he did not expressly argue against the legal accuracy of" the trial court's response. Def. Br. 29. Instead, defendant argued that the court should provide no further instruction at all and merely direct the jury to follow the court's original instructions. R632; C257. But it is settled that "[o]bjections at trial on specific grounds waive [or forfeit] all other grounds of objection." *People v. Miller*, 173 Ill. 2d 167, 191 (1996); *see also People v. Nelson*, 235 Ill. 2d 386, 436-37 (2009) (only "[t]imely and specific objections at trial afford the trial court an opportunity to prevent most errors"). Had defendant objected to the substance of the court's proposed response to the jury note, the court could have corrected any potential error. But defendant did not do so. And defendant's argument that the trial court should say nothing at all was insufficient to alert the court that defendant had a complaint regarding the substance of the court's response.

2. Defendants fails to demonstrate that the response to the jury note constituted plain error.

Defendant has not demonstrated that the trial court's response to the jury note constituted plain error such that his forfeiture may be forgiven. *See* Def. Br. 29-30 (seeking review under Ill. S. Ct. R. 451(c)); *People v. Downs*, 2015 IL 117934, ¶ 14 (Rule 451(c) is coextensive with plain error review under 615(a)). For starters, there was no clear or obvious error.

"The general rule when a trial court is faced with a question from the jury is that the court has a duty to provide instruction to the jury when the jury has posed an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion." *People v. Millsap*, 189 Ill. 2d 155, 160 (2000); *see also Averett*, 237 Ill. 2d at 24 ("Generally, a trial court must provide instruction when the jury has posed an explicit question or asked for clarification on a point of law arising from facts showing doubt or confusion."). Further, the reviewing court "must determine whether the instructions, taken as a whole, fairly, fully, and comprehensively apprised the jury of the relevant legal principles." *People v. Nere*, 2018 IL 122566, ¶ 67 (internal quotation marks omitted). "It is sufficient if the instructions given to the jury, considered as a whole, fully and fairly announce the applicable law." *People v. Bannister*, 232 Ill. 2d 52, 86 (2008); *see also id.* at 86-87 (instructions as a whole adequately instructed jury even though phrasing of particular modified instruction "was less than ideal").

Here, defendant concedes that the jury "was properly instructed on the aggravated-discharge counts before it began its deliberations." Def. Br. 26. For each charge, the jury was instructed that it had to find that "the Defendant discharged the firearm in the direction of [the specific officer]" and "that the Defendant knew that [the specific officer] was a peace officer." Def. Br. 21 (citing C620-23). Defendant argues, however, that the judge's response to the jury note might have misled the jury as to the requirement

that the discharge must be in the direction of a police officer (the "trajectory element"). Defendant is incorrect: The jury asked about the "knowledge element" — e.g., the requirement that "defendant knew that _____ was [a] peace officer," SupC3 — not the trajectory element; thus, the trial court's response could not have misled the jury about the trajectory element.

Defendant also argues that the trial court misleadingly informed the jury that the trajectory element was satisfied if an officer "perhaps was in the line of fire," Def. Br. 13, but this is belied by the content of the court's response. The court's use of the words "if any" clearly contemplated that the jury could conclude that no officer was in the line of fire. *See* SupC4 (informing jury that it "must determine based on the evidence which officer or officers, if any, may have been in the line of fire when the firearm was discharged"). The jury could not reasonably have concluded from this response that the People needed only prove that an officer *might* have been in the line of fire, particularly given that the jury had already received concededly proper instructions before they began their deliberations.

Defendant's argument that the court's response could have misled the jury as to the "knowledge element" fails because the response was an accurate statement of law: The court was correct that the jury did not need to find that defendant knew how many officers were at the scene. Instead, as the court explained, the jury needed to determine whether, as to each individual officer, defendant knew that the person was a police officer. For

example, to be guilty of aggravated discharge of a firearm as to Officer Demko, the "knowledge element" required that defendant know that Demko was an officer, not the total number of officers on the scene. Thus, contrary to defendant's argument, *see* Def. Br. 18, by answering "no" to the first question, the trial court did not suggest that "the state did not have to prove the knowledge element as to each count." Instead, the court merely (and correctly) explained that the jury did not have to find that defendant "kn[e]w there were 4 cops on the scene." For these reasons, the trial court's response to the jury note does not show any error, much less clear or obvious error.

Finally, even if the trial court's response to the jury note demonstrated clear or obvious error, defendant has not shown plain error. Here, he argues first that "the evidence was closely balanced on precisely those two elements," i.e., whether, for each count, the discharge was in the direction of a peace officer and whether defendant knew that such person was a peace officer. Def. Br. 30. But the evidence was not closely balanced as to whether the discharge was in the direction of the officers, as the uncontradicted evidence established that defendant shot at the officers from close range while he was attempting to escape. R220-26, 281, 294, 299. Defendant does not dispute that the officers testified that the shots were in their direction, R226, 283, 298-99, 310-11, but seeks to discount their testimony by arguing that they described their positioning in different terms. *See* Def. Br. 28 (noting that Demko testified that Derouchie was "closest" to but "behind" him, R284,

while Derouchie testified that the two "were nearly side by side[,] three to five separated, R226). But even if the accounts differed, those differences were not material because these officers consistently testified that the shots were fired in their direction. Moreover, "minor discrepancies in the evidence, whether between two witnesses or within the testimony of one witness, are not unusual" and do not establish that evidence is closely balanced. *In re M.W.*, 232 Ill. 2d 408, 438 (2009).

Nor was the evidence closely balanced as to whether defendant knew the officers were peace officers. There is no dispute that defendant was close to the officers, who yelled at him to stop and were wearing badges and clearly marked uniforms with shoulder insignia and "Sheriff" on the back. R220-26, 279-280, 294, 299.

Nor has defendant shown that any error in the trial court's response to the jury note rises to the level of second prong plain error. Defendant relies on *People v. Ogunsola*, 87 Ill. 2d 216, 220-22 (1981), *see* Def. Br. 29, but that case is inapposite. In *Ogunsola*, the jury was not instructed as to even the elements of the crime; here, as defendant concedes, Def. Br. 26, the jury was properly instructed as to each element before deliberations began. And, in any event, an "incorrect instruction on an element of the offense is not necessarily reversible error"; rather, an erroneous jury instruction constitutes second prong plain error only when it "creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the

applicable law." *People v. Hopp*, 209 Ill. 2d 1, 10, 12 (2004). Because defendant concedes that the jury was properly instructed as to the elements of the crime, there was no serious risk that the jury convicted defendant because the jurors did not understand the applicable law.

For similar reasons, the cases cited by defendant for the proposition that conflicting instructions, when one is an incorrect statement of law, cannot be harmless, Def. Br. 26, are inapposite. First, most were not in the plain error context. More importantly, they involved explicit misstatements of law. For instance, in *People v. Pollock*, 202 Ill. 2d 189 (2002), an instruction stated that the defendant could be held accountable if she knew or should have known about a danger, when the law in fact required that the defendant have actual knowledge. *See id.* at 211, 216; *see also People v. Bush*, 157 Ill. 2d 248, 252-53 (1993) (cited Def. Br. 26) (instruction regarding home invasion misstated that every entry is unauthorized if defendant commits illegal act at any subsequent point); *People v. Haywood*, 82 Ill. 2d 540, 545 (1980) (cited Def. Br. 26) (instruction misstated that to establish affirmative defense of intoxication defendant had to prove that he was rendered "incapable of any mental action"); *People v. Jenkins*, 69 Ill. 2d 61, 64-65 (1977) (instruction misstated that jury could find defendant guilty of attempted murder without determining that defendant's use of force was unjustified even though that was central issue of case).

Here, the clarifying note does not explicitly misstate the law, and reading the clarifying note in context and as part of the instructions as a whole confirms that there is no "conflict," *see supra* pp. 36-37, so there is no serious risk the jury did not understand the law. Thus, defendant cannot excuse his forfeiture as second prong plain error.

CONCLUSION

This Court should reverse the portion of the appellate court's judgment vacating three of defendant's convictions for aggravated discharge of a firearm and otherwise affirm the appellate court's judgment.

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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) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 40 pages.

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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On October 20, 2021, the foregoing **Plaintiff-Appellant's Reply Brief and Response to Request for Cross-Relief** was at the same time (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my e-mail address to the e-mail addresses of the persons named below:

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