No. 127894

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- JOSE CASTILLO, Petitioner-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 4-19-0633. There on appeal from the Circuit Court of the Eleventh Judicial Circuit, Livingston County, Illinois, No. 17-CF-187. Honorable Jennifer H. Bauknecht, Judge Presiding.

BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

JAMES E. CHADD
State Appellate Defender

CATHERINE K. HART
Deputy Defender

NATALIA GALICA
Assistant Appellate Defender
Office of the State Appellate Defender
Fourth Judicial District
400 West Monroe Street, Suite 303
Springfield, IL 62704
(217) 782-3654
4thdistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER-APPELLANT

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CYNTHIA A. GRANT
SUPREME COURT CLERK

ORAL ARGUMENT REQUESTED

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NATURE OF THE CASE

Jose Castillo was convicted of two counts of aggravated battery following a bench trial. (R. 103). The circuit court sentenced Castillo to concurrent terms of ten years on count one and five years on count two. (R. 103). Castillo then appealed his convictions, which was affirmed by the appellate court. *People v. Castillo*, 2021 IL App (4th) 190633-U. This Court granted Castillo's petition for leave to appeal on January 26, 2022. No issue is raised challenging the charging instrument.

ISSUES PRESENTED FOR REVIEW

I.

Whether a jail block in a maximum security prison, which is not accessible to the public or other prisoners, constitutes "public property" under the aggravated battery statute (720 ILCS 5/12-3.05(c) (2016)).

II.

Whether an appellate court may take judicial notice of an essential element that was not established at trial by the State.

STATUTES AND RULES INVOLVED

720 ILCS 5/12-3.05 (2016). Aggravated battery.

(c) Offense based on location of conduct. A person commits aggravated battery when, in committing a battery, other than by the discharge of a firearm, he or she is or the person battered is on or about a public way, public property, a public place of accommodation or amusement, a sports venue, or a domestic violence shelter.

STATEMENT OF FACTS

When Jose Castillo first encountered inmate John Eilers at the Pontiac Correctional Center, Eilers and some other men were "trying to extort" Castillo into buying them items from the commissary, but Castillo did not respond. (R. 89). Then, Eilers threatened Castillo by stating that he knew where Castillo and his family lived and that he would "try to threaten and kill and rape [Castillo's] mom." (R. 90). Castillo knew that Eilers was a gang member in Chicago, Illinois and could be dangerous. (C. 82). According to Castillo, Eilers "verbally threatened to kill my mother, rape my mother and then stated that he was gonna shoot his gun at my mom's house and shoot the little kids at my moms [*sic*] house." (C. 82). Specifically, Eilers threatened that he would rape Castillo's mother "with a hot curling iron." (R. 93). According to Investigator Jeremy Olson, Castillo thought that the threats were particularly credible because Eilers was getting released from Pontiac Correctional Center in 90 days. (R. 70).

In response to the threats, on February 9, 2016, Castillo threw a "liquid substance," which included fecal matter, through his perforated cell, which is designed to act as a block or screen while still allowing for air flow, when he saw Eilers passing it. (R. 57; 63-64; 93). At the time, Correctional Officer John Thorp was walking a foot behind Eilers because he was escorting Eilers across cell houses. (R. 56; 60; 62). Castillo did not see Thorp when he threw the substance at Eilers, but it hit both Thorp and Eilers. (R. 93; 60).

Based on that incident, Castillo was charged with aggravated battery against a peace officer under 720 ILCS 5/12-3.05(d)(4)(I) (2016), and aggravated battery on "public property" under 720 ILCS 5/12-3.05(c) (2016). (C. 17-18). Following a 2017 bench trial, the court found Jose Castillo guilty of both counts of aggravated battery and sentenced him to concurrent terms of ten years on count one and five years on count two. (R. 103).

On September 17, 2019, Castillo timely filed a Notice of Appeal. (C. 104). On appeal, Castillo argued: (1) the State failed to prove him guilty of aggravated battery because a cell block in a maximum-security prison which is inaccessible to the public does not constitute "public property" for the purposes of the aggravated battery statute, and the State failed to prove ownership of Pontiac Correctional Facility; and (2) he was denied the effective assistance of counsel during sentencing because his attorney failed to present mitigating evidence and failed to devote proper time and attention to his case. *People v. Castillo*, 2021 IL App (4th) 190633-U, ¶ 7. Relying on *People v. Hill*, 409 Ill.App.3d 451, 454 (4th Dist. 2011), the Fourth District ruled that the facility constituted public property because it was owned by the government. *Id.* at ¶ 15. The appellate court also took judicial notice of the fact that Pontiac is owned by the State, and therefore found that the State presented sufficient evidence to satisfy the pubic property element of the charge. *Id.* at ¶¶ 17-18. Finally, the court ruled that counsel provided effective assistance. *Id.* at ¶ 26.

This Court granted leave to appeal on January 26, 2022.

ARGUMENT

I.

Property that is inaccessible to the public, such as the cell block in this case, should not be considered "public property" under the aggravated battery statute based on the definition of the term and the legislative history of the statute.

Jose Castillo was convicted of aggravated battery under Section 12-3.05(c) of the Criminal Code (720 ILCS 5/12-3.05(c) (2016)) based on allegations that he threw a liquid substance containing fecal matter at inmate John Eilers from his cell while Eilers was being escorted between cell houses in Pontiac Correctional Center. (R. 57; 63-64; 93). Section 12-3.05 elevates a simple battery to an aggravated battery if the State is able to prove that the accused "or the person battered is, on or about a public way, public property or public place of accommodation or amusement." 720 ILCS 5/12-3.05. However, defining a cell block in a maximum security prison as "public property" within the meaning of the aggravated battery statute is antithetical to the plain meaning of the term, the legislative history of the statute, and Illinois caselaw. This Court should clarify that the definition of "public property" is limited to property that includes references to *both* the accessibility of the property to the general public and the ownership of the property by the government. As Castillo's charged battery did not occur on "public property" within the meaning of the statute, this Court should vacate his conviction for aggravated battery and remand for re-sentencing for misdemeanor battery.

Standard of Review

The question of whether a cell block in a maximum security prison is "public property" within the meaning of the aggravated battery statute is a pure question of law, and the standard of review is *de novo*. *People v. Ojeda*, 397 Ill.App.3d 285, 287 (2d Dist. 2009); *People v. Hill*, 409 Ill.App.3d 451, 454 (4th Dist. 2011).

Argument

To establish that a defendant committed aggravated battery, the State must first prove that the defendant committed a simple battery. In order to do that, the State must establish that the defendant "intentionally or knowingly without legal justification * * * cause[d] bodily harm * * * or ma[de] physical contact of an insulting or provoking nature with an individual." 720 ILCS 5/12–3 (2016). The State must then prove a factor that enhances simple battery to aggravated battery. See 720 ILCS 5/12–3.05 (2016). The statute under which Castillo was convicted enhances simple battery to aggravated battery if the offense is committed "on or about a public way, public property or public place of accommodation or amusement." 720 ILCS 5/12–3.05(c); (C. 18). Here, in order to prove Castillo guilty of aggravated battery, the State had to establish that the battery occurred "on or about * * * public property." 720 ILCS 5/12–3.05(c); (C. 18).

Legislative intent regarding public property

When interpreting terms in a statute, the primary consideration for courts is determining and effectuating the intent of the legislature and "[t]he most reliable means of accomplishing that goal is to apply the plain and ordinary meaning of the statutory language." *People v. Amigon*, 239 Ill.2d 71, 85 (2010). "Criminal or penal statutes must be strictly construed in favor of the accused, and nothing should be taken by intendment or implication beyond the obvious or literal meaning of the statute." *People v. Davis*, 199 Ill. 2d 130, 135 (2002). In construing a statute, courts should assume that the legislature did not intend to produce an "absurd or unjust result." *State Farm Fire & Cas. Co. v. Yapejian*, 152 Ill. 2d 533, 541 (1992).When the legislature does not define a particular term within a statute, courts presume that the legislature intended that the term be read in light of its popularly understood meaning. *Ojeda*, 397 Ill.App.3d at 287.

The statute itself does not contain a definition for "public property." *Hill*, 409 Ill.App.3d at 454. Because the term is not defined, this Court should look to the popularly understood meaning of the term. One of the multiple definitions in Merriam-Webster for "public" is "accessible to or shared by all members of the community." Merriam-Webster, "Public," *available at* http://www.merriam-webster.com/dictionary/public. Additionally, the term can be defined as "supported by public funds and private contributions rather than by income from commercials." *Id.* Similarly, Black's Law Dictionary defines "public" as "Open or available for all to use, share, or enjoy." Black's Law Dictionary (19th ed. 2019). Additionally, the term "public building" is defined as "A building that is accessible to the public; esp., one owned by the government." *Id.* These definitions shed light on the legislatures intent: the plain definition of the term includes references to *both* the accessibility of the property to the general public and the ownership of the property by the government.

The legislative history of the statute also aids in understanding the legislature's intent. The elevation of batteries occurring on public property from simple to aggravated batteries was predicated on the legislative determination "that a battery committed *in an area open to the public*, whether it be a public way, public property or public place of accommodation or amusement, constitutes a more serious threat to the community than a battery committed elsewhere." *People v. Ward*, 95 Ill.App.3d 283, 287 (2d Dist. 1981) (citing Ill.Ann.Stat., ch, 38, par. 12-4(b)(8), Committee Comments, at 465 (Smith-Hurd 1979) (emphasis added). The legislature's purpose indicates that while some government-owned property may be considered public property, the inquiry should instead focus on the danger to the community at large, particularly in "open areas" where other members of the community may be present. *Id.* Additionally, during debates on whether to amend the aggravated battery statute to include batteries against a "correctional institution employee," it was argued that such an amendment

was necessary because there had been a battery against a medical technician at Dwight Correctional Center that could not be prosecuted under the existing version of the aggravated battery statute. 81st Ill. Gen. Assem., House Proceedings, June 14, 1979 at 232–33 (statement of Representative MacDonald); *see* 720 ILCS 5/12-3.05(d)(4) (2016). If all government-owned property was "public property" within the meaning of the aggravated battery statute, then it would have been unnecessary to amend that statute to include batteries to employees at state-owned prisons. Additionally, legislative intent may be discerned from the use of terms in other sections of the same or other Illinois statutes. *See People v. Wicks*, 283 Ill.App.3d 337, 342 (4th Dist. 1996). Section 21-1.01 of the Criminal Code defines the offense of "criminal damage to government supported property." 720 ILCS 5/21-1.01 (2016). The legislature's use of "public property" in the aggravated battery statute and "government supported property" later in the Criminal Code indicates that these terms are not synonymous.

The statute itself also provides support for the argument that accessibility is key to determining whether an area is "public property." "Under the principle of *noscitur a sociis*, i.e., a word is known by the company it keeps, courts avoid ascribing to one word in a federal statute a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of [the legislature]." *Yates v. United States*, 574 U.S. 528, 543 (2015). Applying that principle, the definition of the term "public property" becomes illuminated based on the terms surrounding it. While the term "public property" is not specifically defined, the context in which it is used demonstrates that it is not meant to apply to any government-owned property, but that it must consider whether members of the public or community have access to it. Under the statute, a battery is aggravated if it takes place "on or about a public way, public property, [or] a public place of accommodation or amusement." 720 ILCS 5/12-3.05(c). The two other terms both encompass spaces that are publicly accessible. Public ways include public streets and areas surrounding them. *See People v. Lowe*, 202 Ill. App. 3d 648, 655 (4th Dist. 1990).

Public places of accommodation or amusement are "places where the public is invited to come into and partake of whatever is being offered therein." *People v. Murphy*, 145 Ill. App. 3d 813, 815 (3d Dist. 1986). The statute—including the term "public property"—provides "a general description of areas frequented by the public." *People v. Handley*, 117 Ill. App. 3d 949, 952 (4th Dist. 1983). Thus, the language of the statute indicates that the location where the battery takes place must be open and accessible to members of the public or community in order to be "public property."

Illinos Caselaw interpreting public property

Since the statute was enacted, a long line of Illinois cases have grappled with defining the term "public property." In *People v. Ward*, 95 Ill.App.3d 283, 286-88 (2d Dist. 1981), the defendant argued that it was improper for the State to amend the information during the jury instructions conference to state that the battery took place "about a public place of accommodation" rather than "about public property." In holding that this amendment was proper, the court found that the legislature believed "a battery committed in an area open to the public, whether it be a public way, public property or public place of accommodation or amusement, constitutes a more serious threat to the community than a battery committed elsewhere." *Id.* at 287–88. Thus, the analysis focused on whether the battery occurred in a "public area," which was defined by the court as "an area accessible to the public." *Id*. It did not matter to the court whether the property was actually publicly or privately owned. *Id.* Following the holding of *Ward*, the Third and Fourth Districts defined the relevant test as whether the area where the offense occurred is accessible to the general public. *People v. Kamp*, 131 Ill.App.3d 989, 993(3d Dist. 1995); *Blackburn v. Johnson*, 187 Ill.App.3d 557, 588 (4th Dist. 1989).

In *People v. Kamp*, 131 Ill.App.3d 989, 993 (3d Dist. 1985), the Third District applied both definitions when it considered whether the evidence presented at trial was sufficient to establish that battery which occurred in a public park was on "public property." The court

found that the ownership of the park by a public entity alone did not mean that the park was public. *Id.* Instead, the court ruled that the significant factor was whether the "alleged offense occurred in an area accessible to the public." *Id.* (citing *People v. Ward*, 95 Ill.App.3d 283, 288 (2d Dist. 1981)).

In *People v. Ojeda*, 397 Ill. App. 3d 285, 287 (2d Dist. 2009), the court also addressed "what the legislature meant by 'public property'" in the aggravated battery statute. The defendant argued that a public high school was not "public property" because it was only accessible to the students. *Id*. at 286. The court held that "property is not public solely because it is funded by local taxpayers. Rather, 'public' *also* refers to that which is for the public's use." *Id*. at 287 (emphasis in original). The *Ojeda* court made a point to address the holding in *Kamp* that "a public entity's ownership of the park did not alone mean that the park was public . . . the court in *Kamp* determined that the property must also be accessible to the public." *Ojeda*, 397 Ill. App. 3d at 287 (emphasis added). Agreeing with *Kamp*, the court found that for an area to be "public property" it must be both owned by the government and accessible to the public. *Id*. Although public schools are primarily used by students, "the public does have use of public schools in some way" because schools often "provide space for public functions." *Id*. at 288. The court found that, though the public's use of schools may not be unrestricted, "limits on the use of public property do not make the property any less 'public.'" *Id*. at 288.

Other cases have decided that the "government owned property" definition is more accurate; however, these cases are wrongly decided or, in the alternative, distinguishable. *People v. Hill*, 409 Ill.App.3d 451 (4th Dist. 2011); *People v. Messenger*, 2015 IL App (3d) 130581; and *People v. Wells*, 2019 IL App (1st) 163247. In *Hill*, the defendant was an inmate in a county jail who attacked another inmate in a jail pod. 409 Ill.App.3d at 452. A jail pod consists of a main housing area and 12 to 14 cells. *Id.* The attack itself happened in the day room, which

is a common area for the inmates. *Id.* The trial court took judicial notice that the jail was public property. *Id.* The Fourth District held that the jail pod was public property because the county jail was owned by the government, it was used for the public purpose of housing inmates, and it happened in one of the pods. *Id.* at 455.

Likewise in *Messenger*, the Third District came to the same conclusion when the defendant "battered a fellow inmate while they were in a common area for inmates" and the State's witness testified that the county owned the entre jail complex. 2015 IL App (3d) 130581, ¶¶ 4, 20. Based on those facts, the court held that the county jail was public property within the meaning of the aggravated battery statute because the county jail was owned by the government and "one temporarily detained in a county jail is still a citizen and member of the community." *Id.* at ¶ 22.

Finally, in *Wells*, the First District found that a high school was public property because it was government owned and "used for the public purpose of educating children." *People v. Wells*, 2019 IL App (1st) 163247, ¶ 40. In that case, the defendant was charged with aggravated battery and aggravated criminal sexual abuse because, while he was acting as a security guard and swim coach at the high school, he " ingratiated himself to the girls, gave hugs, and squeezed their buttocks." *Id.* at ¶ 13. Because the court found that the high school was public, and therefore government owned, it held that the high school was public property under the aggravated battery statute. *Id.* at ¶ 40. Additionally, it noted that the school was "open to the public, even if access was limited." *Id.* (internal quotations omitted).

The reasoning behind *Hill* and *Messenger* is flawed and this Court should not adopt the reasoning behind these cases. In *Hill* and *Messenger*, the courts only focused on the ownership of the property–the prisons. This is incorrect because it does not focus on the core concern of the statute: whether the public is in danger because of the battery. By focusing solely on the ownership of the property, the courts overlooked the concerns addressed by the legislature in enacting the Statute.

Wells is distinguishable because even under the proposed definition, the battery would still be considered aggravated due to the ability of the public to access the school. In that case, the battery in *Wells* occurred in the back of the school building, in an area other students could access. 2019 IL App (1st) 163247, ¶¶ 4-5, 10. As the court in *Ojeda* noted, the public does have some access to public schools. Although public schools are primarily used by students, "the public does have use of public schools in some way" because schools often "provide space for public functions." *Ojeda*, 397 Ill. App. 3d at 288. The court found that, though the public's use of schools may not be unrestricted, "limits on the use of public property do not make the property any less 'public.'" *Id*. at 288. Thus, even under the proposed definition, the result would not change.

The core concern of the aggravated battery statute was not implicated in cases like *Messenger* and *Hill*. That is because the members of the public are unable to gain access to most locations within the prison, except for limited, specified visiting areas. In the same way that the State in *Ojeda* had to demonstrate that the public had access to the school property in some way, the State must show that members of the public are able to access the areas in the prison in which these batteries occurred. Absent such a showing, the concerns contemplated by the legislature in enacting this statute are not met.

Pontiac Correctional Center is not public property within the meaning of the aggravated battery statute

Unlike *Ward*, *Kamp*, *Blackburn*, and *Ojeda*, the community does not have access to the location at issue in the present case: an interior cell block hallway in a maximum security prison. (R. 57); *see also* IDOC, "Pontiac Correctional Center: Facility Data," www2.illinois.gov/idoc/facilities/Pages/pontiaccorrectionalcenter.aspx (describing Pontiac Correctional Center as a maximum security prison and describing the visitation rules for the facility). Specifically, at the time of the battery, Castillo was located in his cell and Eilers was handcuffed and being escorted through the hallway. (R. 63-64). This is an area where no inmates

were allowed without being handcuffed and lead by a guard. (R. 63-64). As such, the legislative intent behind the elevation is not applicable because this case does not involve "a battery committed in an area open to the public." *People v. Ward*, 95 Ill.App.3d 283, 287 (2d Dist. 1981). Thus, this Court should find that a restricted area of the prison is not public property because it is not open and accessible to the community.

Moreover, the reasoning employed by those cases does not comport with the legislative intent behind the statute. Following the addition of public property as an enhancing element in 1968 (Laws 1968, p. 166, § 1), the appellate court observed that elevating batteries based on their location "might have been intended to remedy the deteriorating condition of public safety on the streets, thereby calming the widespread reticence of citizens who fear travel beyond their immediate neighborhoods," or it "might also have been intended to preserve public order in the tumultuous times through which we have been passing since the early 1960's." *People v. Cole*, 47 Ill.App.3d 775, 780 (4th Dist. 1977). A decade later the Fourth District reiterated that "our legislature was of the belief that a battery committed in an area open to the public constitutes a more serious threat *to the community* than a battery committed elsewhere." *People v. Lee,* 158 Ill. App. 3d 1032, 1036 (4th Dist. 1987) (emphasis in original). When no member of the community can access the property where the offense occurs, the legislative purpose behind the enhancement has not been satisfied. The owner of the property in question should not be relevant; rather the relevant inquiry is whether the location is accessible to the public, even if that access is not unfettered. *Ojeda*, 397 Ill.App.3d at 287-88.

Conclusion

In light of the legislative history, it is clear that the term "public property" does not encompass *all* government-owned property, but rather government-owned property that is accessible and open to members of the community. Indeed, this definition prevents the application of the statute from being over-broad. For instance, if a battery occurred in an apartment of

a public housing project, it should not be elevated to an aggravated battery simply because it occurred on government-owned land, despite the fact that the apartment is not accessible to all members of the public. That kind of elevation would not be consistent with the legislature's intent to protect members of a community that are in an area commonly frequented by all members of the community. Indeed, this would be an absurd and unjust result.

Likewise, the scenario in the present case should not be considered a public area, even though it is allegedly on government-owned property. Significantly, there is already a separate portion of the aggravated battery statute that is designed to protect correctional officers–indeed, the aggravated battery against Thorpe was based on that portion of the statute. (C. 17); 720 ILCS 5/12-3.05(d)(4)(i) (2016). But for the battery against Eilers to be an aggravated battery under this statute is an unjust result. This is because the core concern of the statute was not implicated, as there was no danger to the community at large, particularly in "open areas" where other members of the community may be present. *See People v. Ward*, 95 Ill.App.3d 283, 287 (2d Dist. 1981) (citing Ill.Ann.Stat., ch, 38, par. 12-4(b)(8), Committee Comments, at 465 (Smith-Hurd 1979).

To prevent this unjust result this Court should narrow the definition of "public property" to government-owned property that is accessible to all members of the community. Again, the legislature specifically amended the statute because correctional facilities were not encompassed by the statute with only the "public property" language. 81st Ill. Gen. Assem., House Proceedings, June 14, 1979 at 232–33 (statement of Representative MacDonald). Had the legislature intended for all correctional facilities–regardless of whether the public or members of the community were able to access the property–this amendment would not have been necessary.

Thus, in accordance with the plain meaning of "public property," the legislative history, and Illinois case law this Court should find that a restricted area, which community members cannot access, should not be considered public property–irrespective of ownership. Thus, the definition of "public property" should be government-owned property that is accessible to all members of the community. Therefore, because the State failed to prove the cell block was public property, this Court should vacate Castillo's conviction for aggravated battery on public property and remand for resentencing for misdemeanor battery.

II.

Where the State did not present any evidence of the ownership of the maximum security prison, the State failed to meet its burden of proof and the appellate court should not have taken judicial notice of that fact.

If this Court rules that "public property" is any property owned by the government, this Court should still vacate Castillo's conviction for aggravated battery because the State failed to prove Castillo was guilty of the offense. The State presented no evidence as to the ownership of the facility and therefore did not meet its burden of proof on the element of "public property." The appellate court took judicial notice of the ownership of Pontiac Correctional Center on appeal, despite acknowledging that this fact constitutes an element of the offense. *People v. Castillo*, 2021 IL App (4th) 190633-U, ¶ 17. It was improper for the appellate court to take judicial notice of that fact because it effectively absolved the State of its burden to prove each element beyond a reasonable doubt.

Standard of Review

Typically, when a circuit court issues a ruling on an evidentiary matter, including judicial notice, that ruling is reviewed for an abuse of discretion. *In re S.M.*, 2015 IL App (3d) 140687, ¶ 13; *see In re A.B.*, 308 Ill. App. 3d 227, 234 (2d Dist. 1999). However, in this case, the question is whether the appellate court violated Castillo's due process rights when it took judicial notice of a fact that was not before the trial court. Therefore, because this is a question of law, the standard of review is *de novo*. *See United States v. Love*, 20 F.4th 407, 410 (8th Cir. 2021) (recognizing that a claim that judicial notice resulted in constitutional error should be reviewed *de novo*).

Argument

An essential element of proof to sustain a conviction cannot be inferred but must be established. *People v. Mosby*, 25 Ill. 2d 400, 403 (1962). It is axiomatic that the State carries the burden of proving each element of a charged offense beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 52. Such burden rests on the State throughout the entire trial and never shifts to the defendant. *People v. Murray*, 2019 IL 123289, ¶ 28.

In *Murray*, this Court recognized the significance of ensuring that the State actually proved each element of a charged offense. 2019 IL 123289, ¶ 45. In that case, the State conceded that the testimony of an expert witness did not disclose specific crime evidence, which was required by the unlawful possession of a firearm by a street gang member statute under which the defendant was charged. *Id.* at ¶ 29. This Court explained, "[i]f the State fails to present evidence that establishes the elements of the charged offense, cross-examination by the defendant is not required. Because the State bears the burden of proof, it similarly bears the consequences of any omission of proof." *Id.* (Internal citations omitted). Thus, this Court affirmed that the State always has the burden of proving the elements of the offense, and that this burden cannot be shifted to the defendant. *Id.* at ¶ 38. This Court also noted, "[t]he current trend in the appellate court of excusing proof of each element of the offense is in direct conflict with our precedents and the language of the Act." *Id.* at ¶ 42.

Judicial notice is an evidentiary tool employed to admit matters into evidence without resort to formal proof. *Nat'l Aircraft Leasing, Ltd. v. Am. Airlines, Inc.*, 74 Ill.App.3d 1014, 1017-18 (1st Dist. 1979). The types of evidence which may be introduced via judicial notice, however, is limited. While courts may take judicial notice of facts which are either commonly known or readily verifiable from undisputable sources, courts may not take judicial notice of matters which are subject to dispute. *See Murdy v. Edgar*, 103 Ill.2d 384, 394 (1984). Nor may judicial notice be used to relieve a party of its burden to prove an essential element of its case. *See Nat'l Aircraft*, 74 Ill.App.3d at 1018. Further, a reviewing court should not take judicial notice of critical evidentiary material that was not presented to and not considered by the fact finder during its deliberations. *See Vulcan Materials Co. v. Bee Construction*, 96 Ill.2d 159, 166 (1983).

If the appellate court takes judicial notice of an essential element of the offense, the court effectively relieves the State of its burden to prove each element beyond a reasonable doubt. For example, in *People v. Clark*, 406 Ill.App.3d 622, 632 (2d Dist. 2010), the State asked the appellate court to take judicial notice of the location of a park in a case where the defendant was charged with intent to deliver within 1,000 feet of a public park. The court began its discussion about the State's request by noting that the State's citation to Google Maps was reliable. *Id.* Therefore, the court took judicial notice of the park's location. *Id.* However, the court ultimately limited the scope of its consideration of that fact because, "introducing a fact for judicial notice on appeal, albeit by a means that is considered reasonably unquestionable (*i.e.*, an image on a Google Map depicting Bressler Park to be, generally, north of the Auburn and Furman intersection), does not relieve the State of its burden to prove each element of the offense *at trial*." *Id.* at 634 (emphasis in original). Thus, while the court did use that fact for the purpose of understanding the testimony, the court ultimately concluded that it could not take judicial notice of the defendant's distance from the park because the State did not prove that fact at trial. *Id.*

This Court should come to a similar conclusion in this case. Here, the appellate court excused the State from its burden of proof by taking judicial notice of a fact which the State was required to prove. In an aggravated battery case, elevated due to its occurrence on public property, the prosecution must prove beyond a reasonable doubt that the offense occurred on "public property." 720 ILCS 5/12-3.05(c). The Fourth District concluded in its opinion that "public property" means property which is owned by the government. *Castillo*, 2021 IL App (4th) 190633-U, ¶ 15. Thus, the ownership of Pontiac Correctional Center was an essential element of the offence. At trial, however, the State provided no testimony or other evidence as to the ownership of Pontiac Correctional Center at trial. It never even asked the trial court

to take judicial notice of such a fact. While the trial court has broad discretion in determining whether the battery occurred on public property, *People v. Lowe*, 202 Ill.App.3d 648, 654 (4th Dist 1990), the court made no factual findings concerning whether the correctional facility was public property, and the record is devoid of any evidence on this essential element of aggravated battery. Accordingly, it cannot be concluded that a rational trier of fact could have found beyond a reasonable doubt that Pontiac Correctional Center constituted public property. Without any such evidence, the aggravated battery count premised on Castillo committing battery on or about public property should be reduced to simple battery. Yet, the appellate court took judicial notice of the ownership of Pontiac Correctional Center on appeal, despite acknowledging that this fact constitutes an element of the offense. *Castillo*, 2021 IL App (4th) 190633-U, ¶ 17.

It is entirely improper to judicially notice an element of the offense. Such an approach does serious violence to a defendant's constitutional right to have every element of his offense proven to a finder of fact beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Further, in doing so, the appellate court interfered with the role of the finder of fact as the ultimate arbiter of whether the State had proven every element of the offense of aggravated battery beyond a reasonable doubt. *See People v. White*, 241 Ill.App.3d 291, 298-99 (2d Dist. 1993) (the finder of fact alone determines facts of case). This Court should therefore rule that it is improper for the appellate court to take judicial notice of facts that constitute an essential element of the offense. As the Second District correctly recognized in *Clark*, the burden to prove every element of an offense rests with the State, and it would be improper for the court to take judicial notice of such a fact on appeal. This Court should adopt the reasoning of the Second District because it is consistent with the principles established in *Murray*, that " [b]ecause the State bears the burden of proof, it similarly bears the consequences of any omission of proof." 2019 IL 123289, ¶ 29.

As this Court recently stated in *People v. Cline*, 2022 IL 126383, ¶ 33, "It is not the function of a court of review to retry a defendant, nor is it permissible for a reviewing court to take judicial notice of material that was not considered by the trier of fact in weighing the credibility of an expert witness's testimony." Similarly, it is not the function of the appellate court to take judicial notice of a fact that was not presented before the trial court when determining whether a defendant was proven guilty beyond a reasonable doubt.

The State must be held to its burden and should be required to prove beyond a reasonable doubt all elements of the offense–whether through stipulation or testimony. The appellate court should not retroactively relieve the State of its burden by taking judicial notice of an unproven fact. Allowing the appellate court to do so would be unjust and unfair. Therefore, this Court should reverse the appellate court's decision on this issue, and reverse Castillo's conviction for aggravated battery.

CONCLUSION

For the foregoing reasons, Jose Castillo, Petitioner-Appellant, respectfully requests that this Court reverse the decision of the appellate court and remand to the trial court for resentencing on misdemeanor battery.

Respectfully submitted,

CATHERINE K. HART
Deputy Defender

NATALIA GALICA
Assistant Appellate Defender
Office of the State Appellate Defender
Fourth Judicial District
400 West Monroe Street, Suite 303
Springfield, IL 62704
(217) 782-3654
4thdistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER-APPELLANT

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 or words contained in 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, the certificate of service, and those matters to be appended to the brief under Rule 342, is twenty-two pages.

/s/Natalia Galica
NATALIA GALICA
Assistant Appellate Defender

APPENDIX TO THE BRIEF

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
LIVINGSTON COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-19-0633
	)	Circuit Court No: 2017CF187
	)	Trial Judge: Jennifer Bauknecht
v	)	
	)	
	)	
CASTILLO, JOSE B63315	)	
Defendant/Respondent	)	

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
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APPEAL TO THE APPELLATE COURT OF ILLINOIS
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	)	
	)	
CASTILLO, JOSE B63315	)	
Defendant/Respondent	)	

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Report of Proceedings

E-FILED
Transaction ID: 4-19-0633
File Date: 11/5/2019 10:11 AM
Carla Bender, Clerk of the Court
APPELLATE COURT 4TH DISTRICT

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
LIVINGSTON COUNTY, ILLINOIS

PEOPLE	)	
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v	)	
	)	
	)	
CASTILLO, JOSE B63315	)	
Defendant/Respondent	)	

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Party	Exhibit #	Description/Possession	Page No
People	1A 1	2 DVDS - SENT VIA US MAIL ON 11/5/2019	E 2 - E 2
People	2	#2	E 3 - E 3

COPY

No. 4-19-0633

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- JOSE CASTILLO, Defendant-Appellant.	Appeal from the Circuit Court of the Eleventh Judicial Circuit, Livingston County, Illinois No. 17-CF-187 Honorable Jennifer H. Bauknecht, Judge Presiding.

AMENDED NOTICE OF APPEAL

An appeal is taken to the Appellate Court, Fourth Judicial District:

Appellant(s) Name:	Mr. Jose Castillo
Appellant's Address:	Menard Correctional Center P.O. Box 1000 Menard, IL 62259
Appellant(s) Attorney:	Office of the State Appellate Defender
Address:	400 West Monroe Street, Suite 303 Springfield, IL 62704
Offense of which convicted:	Two Counts of Aggravated Battery
Date of Judgment or Order:	September 16, 2019
Sentence:	15 years in the Illinois Department of Corrections
Nature of Order Appealed:	Conviction, Sentence, and Denial of Motion to Reconsider Sentence

John M. McCarthy

JOHN M. MCCARTHY
Deputy Defender
ARDC No. 6216508
Office of the State Appellate Defender
400 West Monroe Street, Suite 303
Springfield, IL 62705-5240
(217) 782-3654
4thdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

2021 IL App (4th) 190633-U

NO. 4-19-0633

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 16, 2021
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
JOSE CASTILLO,	)	No. 17CF187
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Presiding Justice Knecht and Justice Holder White concurred in the judgment.

ORDER

¶ 1 Held: The appellate court affirmed the trial court's judgment and sentence, finding defendant was proven guilty of aggravated battery beyond a reasonable doubt and trial counsel did not provide ineffective assistance at sentencing.

¶ 2 In May 2019, defendant, Jose Castillo, an inmate at Pontiac Correctional Center (Pontiac), was found guilty of two counts of aggravated battery after a bench trial. He was sentenced to concurrent terms of 10 and 5 years. Count I alleged defendant struck an individual he knew to be a correctional officer with "an unknown liquid substance about the face and body" while the officer was engaged in the performance of his authorized duties (720 ILCS 5/12-3.05(d)(4)(i) (West 2018)). Normally a Class 2 felony (720 ILCS 5/12-3.05(h) (West 2018)), because of his prior convictions, defendant was subject to a mandatory Class X sentence of 6 to 30 years with a 3-year term of mandatory supervised release (MSR) (730 ILCS

5/5-4.5-95(b) (West 2018)). Count II alleged defendant made physical contact of an insulting or provoking nature with another inmate by striking him with "an unknown liquid substance," knowing Pontiac to be public property (720 ILCS 5/12-3.05(c) (West 2018)). This was a Class 3 felony, punishable by two to five years in the penitentiary along with one year of MSR (720 ILCS 5/12-3.05(h) (West 2018); 730 ILCS 5/5-4.5-40(a), (l) (West 2018)). Because the offenses were committed while defendant was in the custody of the Illinois Department of Corrections (DOC), his sentences were mandatorily consecutive to the sentence he was already serving (730 ILCS 5/5-8-4(d)(6) (West 2018)). Defendant filed a motion to reconsider the sentence, which was denied, and he pursues this appeal.

¶ 3 I. BACKGROUND

¶ 4 In June 2017, the State indicted defendant on two counts of aggravated battery based on an incident in February 2016 at Pontiac. Defendant had thrown four milk cartons containing what he testified to be "feces, urine, and my semen" in the face of John Eilers—another inmate with whom he had been having continuing problems. When defendant threw the contents of the milk cartons at inmate Eilers, he also struck Lieutenant John Thorpe, a correctional officer who was escorting Eilers at the time. According to defendant, Eilers had been threatening and harassing him for days and threatened harm to defendant's family upon his release. Although defendant denied Thorpe was immediately present or an intended target, after a bench trial, the trial court found defendant guilty of both counts and sentenced him to 10 years on count I and a concurrent sentence of 5 years on count II. By statute, both sentences were mandatorily consecutive to the sentences defendant was already serving. Defendant's motion to reconsider his sentence was denied and he filed a timely notice of appeal, raising two issues.

¶ 5 II. ANALYSIS

¶ 6 A. Issues for Review

¶ 7 On appeal, defendant contends, first, the State failed to prove him guilty of aggravated battery as alleged in count II, claiming a cell block in a maximum-security prison inaccessible to the public does not constitute "public property" for purposes of the aggravated battery statute, and the State failed to prove ownership of Pontiac. Next, defendant contends he was denied the effective assistance of counsel during his sentencing because his attorney failed to present mitigating evidence and failed to devote proper "time and attention" to his case.

¶ 8 We begin by noting defendant's claims of error relate only to the conviction and sentence for count II, aggravated battery of inmate Eilers in violation of section 12-3.05(c) of the Criminal Code of 2012 (Criminal Code) (720 ILCS 5/12-3.05(c) (West 2018)), the only count involving "public property." He neither claims error in nor argues the insufficiency of evidence for his conviction on count I, aggravated battery of Lieutenant John Thorpe. Defendant's conviction on count I, the Class 2 felony for which defendant faced mandatory Class X sentencing, stands unchallenged and we need not discuss it further.

¶ 9 We next observe these issues were not raised by defendant by way of objection, motion, or posttrial motion before the trial court—a fact that is not mentioned by either defendant or the State. "To preserve an alleged error for appeal, a defendant must object at trial and file a written posttrial motion." People v. Bates, 2018 IL App (4th) 160255, ¶ 69, 112 N.E.3d 657 (citing People v. Colyar, 2013 IL 111835, ¶ 27, 996 N.E.2d 575). Failure to do so results in forfeiture. Bates, 2018 IL App (4th) 160255, ¶ 69 (citing People v. Sebby, 2017 IL 119445, ¶ 48, 89 N.E.3d 675). Defendant does not ask us to forgive his procedural forfeiture and consider the issues by way of the plain-error doctrine. Instead, he ignores his procedural forfeiture entirely and proceeds to argue them. Even more unfortunately, the State does likewise. Forfeiture,

however, is a limitation on the parties, not the court, and we may exercise our discretion to review otherwise forfeited issues. People v. Rajner, 2021 IL App (4th) 180505, ¶ 23. We elect to address the merits of defendant's claims.

¶ 10 B. Public Property

¶ 11 As to count II, defendant claims the legal insufficiency of the evidence against him for the offense of aggravated battery on public property, as charged in the indictment. Specifically, defendant contends a cell block in a maximum-security prison is not "public property" for the purposes of the aggravated battery statute and, alternatively, that the State failed to present sufficient evidence of "ownership" of Pontiac. Although defendant couched his issue in terms of the "sufficiency of the evidence," asserting the State failed to prove him guilty beyond a reasonable doubt, we must first address the question of statutory construction, an issue of law which is subject to de novo review. People v. Fort, 2017 IL 118966, ¶ 20, 88 N.E.3d 718. Based upon our statutory interpretation, we then must decide whether the evidence was sufficient to prove defendant guilty. The proper standard of review for a sufficiency-of-the-evidence claim is whether the judgment is against the manifest weight of the evidence. People v. Moore, 301 Ill. App. 3d 759, 764, 704 N.E.2d 442, 445 (1998). The trial court's decision is given great deference, and we will reverse only where the evidence is so unsatisfactory, unreasonable, or improbable that it raises a reasonable doubt of the defendant's guilt. People v. Evans, 209 Ill. 2d 194, 209, 808 N.E.2d 939, 947 (2004).

¶ 12 Contrary to defendant's first claim of error, his "public property" issue does not require us to determine whether a particular cell block within Pontiac is "public property," since he was not so charged. Count II of the indictment reads, in relevant part, as follows:

> "knowingly made physical contact of an insulting or provoking nature with Inmate John Eilers, in that the defendant struck John Eilers with an unknown liquid substance about the face and body, knowing Pontiac *** to be public property."

Defendant attempts to narrow the issue beyond what was necessary for conviction. All that was required of the State, and by the statute under which defendant was charged, was that at the time of the offense, defendant knew it was occurring on public property—namely Pontiac—not at a specific location on a particular cell block within the facility.

¶ 13 Under section 12-3.05(c) of the Criminal Code (720 ILCS 5/12-3.05(c) (West 2018)), the offense of aggravated battery can be aggravated based on the location and can be "public property," which need not necessarily be accessible to the public to be defined as such. See People v. Messenger, 2015 IL App (3d) 130581, ¶ 22, 40 N.E.3d 417. In fact, citing our holding in People v. Hill, 409 Ill. App. 3d 451, 454, 949 N.E.2d 1180, 1183 (2011), the Messenger court found the plain and ordinary meaning of "public property" was simply property owned by the government. Messenger, 2015 IL App (3d) 130581, ¶ 22. Defendant relies heavily on language found in People v. Ojeda, 397 Ill. App. 3d 285, 921 N.E.2d 490 (2009), and the same line of cases he cites here defining "public property," for purposes of the aggravated battery statute, as property which is accessible to the public. We expressly rejected that analysis in Hill and continue to do so, despite defendant's invitation to reconsider our holding. See Hill, 409 Ill. App. 3d at 455 ("We do not agree with the Second District's restrictive view of the definition of 'public property.' "). In Hill, we noted the court in Ojeda substituted "public building" for "public property" under the aggravated battery statute and held:

> "[n]othing indicates the General Assembly meant for the plain and ordinary meaning of "public property" to be anything other than government-owned property. Moreover, the county jail is property used for the public purpose of housing inmates." Hill, 409 Ill. App. 3d at 455.

¶ 14 Defendant seeks solace in People v. Wells, 2019 IL App (1st) 163247, ¶ 41, 136 N.E.3d 1055, by noting its reference to the public school at issue being " 'open to the public,' even if access was limited." Defendant fails to mention this language came after the court concluded, based on the rationale of Hill and Messenger, "we find it was sufficient to establish that Hubbard High School was a public school, and as a government-owned entity, it was therefore 'public property' within the meaning [of] the aggravated battery statute." Wells, 2019 IL App (1st) 163247, ¶ 40. In fact, the Wells court went on to say:

> "In the same way that the jail in Hill was 'public property' that was government owned and used 'for the public purpose of housing inmates,' the high school here was a public school, which was used for the public purpose of educating children." Wells, 2019 IL App (1st) 163247, ¶ 40.

¶ 15 In Hill, the defendant was charged with aggravated battery for committing a battery inside the Macon County jail. Hill, 409 Ill. App. 3d at 452. Our analysis focused on the fact the battery occurred in the jail, not that it occurred in a particular "pod" within the jail. Hill, 409 Ill. App. 3d at 454. We mentioned the "pod" merely in passing to note it was within property owned by the government and therefore public property. Hill, 409 Ill. App. 3d at 455. Similarly, in Messenger, the defendant was charged with aggravated battery while incarcerated in the

Whiteside County jail. Messenger, 2015 IL App (3d) 130581, ¶ 4. There, unlike in Hill, where the defendant contended the particular "pod" in which the battery occurred was not "public property" (see Hill, 409 Ill. App. 3d at 453), the defendant in Messenger contended the entire jail was not "public property" because it was inaccessible to the public. Messenger, 2015 IL App (3d) 130581, ¶¶ 6, 10. Once again disavowing the line of cases upon which defendant relies here, the Messenger court concluded the county jail was public property, making no distinction for where the battery occurred therein. Messenger, 2015 IL App (3d) 130581, ¶ 23. Just as in Hill and Messenger, the battery here occurred within the facility, which is public property, regardless of the specific location.

¶ 16 C. Ownership

¶ 17 This brings us to defendant's next claim of error—that the State "provided no evidence of the ownership of Pontiac." This too was never raised before the trial court at trial or by way of a posttrial motion. While it is true the record is devoid of any effort to seek judicial notice that Pontiac was owned by the State—or was public property—throughout the bench trial, witnesses identified the location of the offenses as Pontiac. Lieutenant Thorpe testified he was a correctional officer and related the incidents of February 9, 2016, taking place at Pontiac. Jeremy Olsen identified himself as an investigator with DOC who was involved in investigating the incident at Pontiac. The parties stipulated to playing a video from DOC taken at Pontiac. Defendant testified he was currently serving a sentence in DOC and discussed being in a penitentiary. The State asks us to take judicial notice of the fact "Pontiac *** is a public correctional center and therefore public property." " 'A court may take judicial notice of matters generally known to the court and not subject to reasonable dispute.' " Hill, 409 Ill. App. 3d at 456 (quoting In re A.B., 308 Ill. App. 3d 227, 237, 719 N.E.2d 348, 356 (1999)). As we further

noted in Hill, we "may take judicial notice of a fact even if it constitutes an element of the offense." Hill, 409 Ill. App. 3d at 456 (citing People v. White, 311 Ill. App. 3d 374, 380, 724 N.E.2d 572, 577 (2000)). Although defendant now complains of the absence of judicial notice, he did not do so before the trial court, and he does not even now seek to claim the failure constitutes ineffective assistance of counsel. This court, however, may take judicial notice of readily verifiable facts if doing so will aid in the efficient disposition of the case, even if judicial notice was not sought in the trial court. Kramer v. Ruiz, 2021 IL App (5th) 200026, ¶ 32 n.3 (citing Aurora Loan Services, LLC v. Kmiecik, 2013 IL App (1st) 121700, ¶ 37, 992 N.E.2d 125). Further, we may take judicial notice of information on a public website even though the information was not in the record on appeal. People v. Crawford, 2013 IL App (1st) 100310, ¶ 118 n.9, 2 N.E.3d 1143; People v. Clark, 406 Ill. App. 3d 622, 633-34, 940 N.E.2d 755, 767 (2010). The efficacy of such a practice was acknowledged by our supreme court in People v. Davis, 65 Ill. 2d 157, 357 N.E.2d 792 (1976). "In our judgment, the extension of the doctrine of judicial notice to include facts which, while not generally known, are readily verifiable from sources of indisputable accuracy is an important aid in the efficient disposition of litigation, and its use, where appropriate, is to be commended." Davis, 65 Ill. 2d at 165.

¶ 18 Here, a clear reading of the transcript reveals no one contested the fact Pontiac was public property owned by the State. Defendant never sought to claim otherwise. His position throughout was that he had not thrown the liquid on the correctional officer, had no intention to do so, and that the officer was not immediately present when he threw it at the other inmate. The parties were sufficiently unconcerned about Pontiac's status as public property that neither the State nor defendant argued that issue in their closing arguments. Ascertaining the State's ownership of Pontiac as a correctional facility of DOC is a simple matter, and one we can do by

way of judicial notice. Since the evidence conclusively showed the offense occurred at Pontiac and we can judicially notice the State ownership of Pontiac, the State presented sufficient evidence to satisfy the public-property element in count II. The trial court's judgment does not stand against the manifest weight of the evidence. Moore, 301 Ill. App. 3d at 764.

¶ 19 D. Ineffective Assistance

¶ 20 Defendant's second claim of error asserts ineffective assistance of counsel. When presented with such a claim, we apply the well-established, two-part Strickland test, wherein the defendant must prove (1) counsel rendered deficient performance and (2) counsel's deficient performance prejudiced the defendant. People v. Pope, 2020 IL App (4th) 180773, ¶ 61, 157 N.E.3d 1055; see also People v. Young, 341 Ill. App. 3d 379, 383, 792 N.E.2d 468, 472 (2003) (citing Strickland v. Washington, 466 U.S. 668, 687, 694 (1984)); People v. Peck, 2017 IL App (4th) 160410, ¶ 26, 79 N.E.3d 232. Strickland imposes a steep burden for defendants to surmount, requiring defendants to demonstrate both prongs while simultaneously requiring reviewing courts to pay great deference to trial counsel's decisions, meaning we must refrain from hindsight or second-guessing. See People v. McGath, 2017 IL App (4th) 150608, ¶ 38, 83 N.E.3d 671 (citing Strickland, 466 U.S. at 689). Our review of trial counsel's decisions regarding trial strategy should be "highly deferential," lest we engage in second-guessing counsel's decisions "through the lens of hindsight." People v. Perry, 224 Ill. 2d 312, 344, 864 N.E.2d 196, 216 (2007). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. [Citation.]" (Internal quotation marks omitted.) People v. Manning, 241 Ill. 2d 319, 334, 948 N.E.2d 542, 551 (2011) (quoting Strickland, 466 U.S. at 689). When asked to review an

ineffective-assistance-of-counsel claim not previously raised in the trial court, our review is de novo. People v. Sturgeon, 2019 IL App (4th) 170035, ¶ 85, 126 N.E.3d 703.

¶ 21 Defendant claims he received ineffective assistance of counsel during sentencing when counsel "did not present additional evidence in mitigation and demonstrated that he did not properly devote time and attention to [defendant's] case." This assertion of error ignores the fact that the mitigation defendant claimed to be absent was either present in the presentence investigation report, admitted as evidence at sentencing, or defendant's own testimony—which the trial court expressly accepted for purposes of mitigation at sentencing. At the conclusion of the bench trial, after finding defendant guilty and continuing the matter for sentencing, the following dialogue occurred:

> "THE COURT: I did take notes Mr. Ripley [(defense counsel)], of [defendant's] testimony; and so if you wish for me to take notice of that at the sentencing hearing in mitigation, I think that would be fine.
>
> MR. RIPLEY: Thank you.
>
> THE COURT: Because I do understand that was a majority of [defendant's] testimony.
>
> MR. RIPLEY: Yes."

¶ 22 At sentencing, defendant's counsel, noting the nonviolent nature of the offense, pointed out that defendant's record, although lengthy, was filled with low-level felonies indicative of someone with substance abuse issues and technical registration violations of a 20-year-old sex offense conviction. Counsel expressly noted defendant's apparent lack of disciplinary record while incarcerated. He also commented on the trial court's prior acceptance

of defendant's trial testimony for mitigation and said he had no intention of repeating it. Defendant's claim counsel "neglected to present mitigation in support of [defendant] during sentencing" is disingenuous at best.

¶ 23 Although counsel did not repeat defendant's bench trial testimony at the sentencing hearing, the trial court and counsel had already agreed defendant's testimony, which was to a substantial degree more mitigation than fact, would be considered by the court at sentencing for purposes of mitigation. Defendant's statement in allocution contained much of the same information. The trial court imposed a 10-year sentence—substantially less than the 20 years requested by the State, and only 4 years above the minimum sentence possible. See 730 ILCS 5/5-4.5-25(a) (West 2018).

¶ 24 "To show ineffective assistance of counsel, a defendant must demonstrate that 'his attorney's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.' " People v. Simpson, 2015 IL 116512, ¶ 35, 25 N.E.3d 601 (quoting People v. Patterson, 192 Ill. 2d 93, 107, 735 N.E.2d 616, 626 (2000)). It is axiomatic that counsel's choice of trial strategy is " 'virtually unchallengeable' and will generally not support an ineffective assistance of counsel claim." People v. Walton, 378 Ill. App. 3d 580, 589, 880 N.E.2d 993, 1000 (2007) (quoting People v. Palmer, 162 Ill. 2d 465, 476, 643 N.E.2d 797, 802 (1994)). As an initial matter, we find no fault in counsel's strategic choice to avoid repeating evidence received from defendant at trial. The trial court had already indicated its intention to consider his testimony as mitigation, and, having dealt with defendant throughout the case, counsel was cognizant of the likelihood they were going to hear it all again in defendant's allocution—a fact borne out by the record.

¶ 25 The failure to offer evidence in mitigation of a sentence does not, in and of itself, demonstrate incompetence. People v. Holman, 164 Ill. 2d 356, 370, 647 N.E.2d 960, 967 (1995). Here, however, the record refutes defendant's claims and reveals substantial mitigation was before the trial court, either from defendant's testimony at trial or his presentence investigation report. The latter included a lengthy handwritten response outlining defendant's childhood history of special education, harassment by other children in school, abuse, substance abuse history, and family history. Each of the general categories of mitigating evidence defendant claims to have been omitted from his sentencing hearing was present. Much of it was heard by the court during defendant's trial and heard again during allocution. When mitigating evidence is before the court, we presume the court considered it in the absence of some indication to the contrary, other than the sentence itself. People v. Jones-Beard, 2019 IL App (1st) 162005, ¶ 21, 139 N.E.3d 1027; see also People v. Johnson, 2020 IL App (1st) 162332, ¶ 91, 148 N.E.3d 126 ("In the absence of evidence to the contrary, we presume that the sentencing court considered all mitigating evidence presented."). The trial court, despite defendant's lengthy criminal history, imposed a sentence of only 4 years over the minimum possible, and only half of the 20 years requested by the State. In this instance, defendant's sentence is, perhaps, the best evidence of the court's consideration of evidence in mitigation. Defendant fails to show how counsel was ineffective in this regard and further fails to show how he was prejudiced thereby.

¶ 26 Lastly, defendant claims counsel failed to devote adequate time to his motion for reconsideration of his sentence. He highlights (1) an obvious typographical error probably caused by "cutting and pasting" documents, (2) counsel's misstatement regarding the minimum sentence, and (3) argument he says was unsupported by affidavit. What defendant calls argument unsupported by affidavit is information the trial court heard and read from his trial testimony and

the presentence report. The attorney he contends was ill-prepared for the motion hearing was the same counsel defendant had throughout the trial and sentencing. At sentencing, he properly acknowledged the six-year minimum sentence and asked the court to impose it. His simple misstatement of the minimum during the hearing on the motion for reconsideration is pounced upon as a basis for invalidating his conviction. "To establish prejudice, a defendant must show that, but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different." Sturgeon, 2019 IL App (4th) 170035, ¶ 84. Considering defendant's 14 prior felony convictions and the fact he received only 4 years over the minimum on a Class X 6-to-30-year possible sentence, we see no prejudice and find no evidence in this record to support defendant's argument.

¶ 27 III. CONCLUSION

¶ 28 For all the reasons set forth above, we find the evidence at trial was sufficient to prove defendant guilty of count II, and he did not receive ineffective assistance from his trial counsel. We therefore affirm the judgment and sentence of the trial court.

¶ 29 Affirmed.

No. 127894

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- JOSE CASTILLO, Petitioner-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 4-19-0633. There on appeal from the Circuit Court of the Eleventh Judicial Circuit, Livingston County, Illinois, No. 17-CF-187. Honorable Jennifer H. Bauknecht, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@ilag.gov;

Mr. David J. Robinson, Deputy Director, State's Attorney Appellate Prosecutor, 725 South Second Street, Springfield, IL 62704, 4thdistrict@ilsaap.org;

Randy Yedinak, Livingston County State's Attorney, 110 North Main Street, Pontiac, IL 61764, lvsa@livingstoncountyil.gov;

Mr. Jose Castillo, Register No. B63315, Pontiac Correctional Center, P.O. Box 99, Pontiac, IL 61764

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 March 11, 2022, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the in an envelope deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Rachel A. Davis
LEGAL SECRETARY
Office of the State Appellate Defender
400 West Monroe Street, Suite 303
Springfield, IL 62704
(217) 782-3654
Service via email will be accepted at
4thdistrict.eserve@osad.state.il.us