No. 128747

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MITCHELL DEANDRE BUSH, Defendant-Appellant.	)	On Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-19-0283 There on Appeal from the Circuit Court of Peoria County, Illinois, No. 16-CF-373 The Honorable John P. Vespa, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE
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NATURE OF THE CASE

Defendant was found guilty of felony murder, second degree murder, aggravated battery with a firearm, reckless discharge of a firearm, two counts of mob action, and unlawful possession of a weapon by a felon (UPWF) following a Peoria County jury trial.[1] The appellate court reversed defendant's conviction for aggravated battery with a firearm, vacated the jury's finding of guilt for reckless discharge of a firearm, and remanded for a new trial on the aggravated battery with a firearm charge. A75. The appellate court affirmed defendant's remaining convictions, A83, and defendant appeals from that judgment.

[1] Citations to defendant's appendix, the common law record, the report of proceedings, and defendant's opening brief appear as "A_," "C_," "R_," and "Def. Br. __," respectively.

ISSUES PRESENTED

1. Whether the evidence was sufficient to prove defendant guilty of mob action.

2. Whether defendant was properly convicted of felony murder predicated on mob action where he had a felonious purpose separate and apart from killing Dwayne Jones.

3. Whether defendant cannot establish a due process cumulative error claim predicated on (a) a forfeited claim that a juror should have been excused mid-trial, and (b) the trial court's exercise of its discretion to exclude a witness's rap video.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 602. This Court allowed defendant leave to appeal on March 30, 2022.

STATUTORY PROVISIONS INVOLVED

Section 2-8. "Forcible felony"

"Forcible felony" means treason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnaping, kidnaping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement and any other felony which involves the use or threat of physical force or violence against any individual.

720 ILCS 5/2-8.

Section 9-1. First degree Murder.

(a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:

***

(3) he is attempting or committing a forcible felony other than second degree murder.

720 ILCS 5/9-1 (2016).[2]

Section 25-1. Mob action.

(a) Mob action consists of any of the following:

(1) The use of force or violence disturbing the public peace by 2 or more persons acting together and without authority of law.

720 ILCS 5/25-1.

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[2] Section 9-1(a)(3) has since been amended to read: "he or she, acting alone or with one or more participants, commits or attempts to commit a forcible felony other than second degree murder, and in the course of or in furtherance of such crime or flight therefrom, he or she or another participant causes the death of a person." 720 ILCS 5/9-1(a)(3) (2021)

STATEMENT OF FACTS

Defendant was charged with numerous offenses for shooting and killing Dwayne Jones and shooting and injuring Lathaniel Gulley during a neighborhood altercation. C6-C12.

Pretrial Motion

Before trial, defendant moved to admit, as a prior inconsistent statement, a rap video made by Lathaniel — the surviving victim — and his brother Gabe Gulley. R214-224. In the video, Gabe starts by declaring that it describes true events and then raps a description of events surrounding the shooting. R214, 223. Lathaniel then appears and says, "This is a real life story." R223. The People objected on the ground that the video was a work of art, not a prior statement. R224. The trial court denied defendant's motion. R224.

The First Altercation

The evidence at trial showed that the conflict between the families of Laterra Price and Minnie Roberson began when Price (who was eight- or nine-months pregnant) and her teenaged cousins, Tresean Dillard (who used crutches due to a broken leg) and Jayurion Mayfield, went to Roberson's house to seek the return of an expensive belt belonging to Price that her son had sold to Roberson's son. R539, 582-83, 642, 680, 879, 882, 1060-67, 1069,

1084. According to members of Roberson's family, when Price and her cousins showed up at Roberson's home, the families argued with each other, Dillard and Jayurion made threats, and a fight broke out, between Roberson's daughters and boyfriend — Lathaniel — on one side, and Dillard and Jayurion on the other. R553, 557, 579, 632, 657, 664, 678, 681, 698, 878-79. According to Jayurion, before Price's group reached Roberson's house, six or seven people came out of Roberson's house and started yelling at them. R1067-68, 1070-71. Jayurion and Dillard held Price back, but Roberson's family attacked; Price's group did not fight back because they were outnumbered. R1069, 1076, 1084

Eventually police arrived and found Price, Dillard, and Jayurion next to Price's car in the street in front of Roberson's house. R489, 583, 1071. Roberson was in her front yard, and the two groups were still arguing. R489-90. Sharonda Brown, Dillard's mother and Price's cousin, arrived a short time later, after Price called Brown, yelling and screaming that Dillard had "got[ten] jumped." R492, 880, 1146. Brown said police at the scene told her that Roberson's family always started trouble and were going to get kicked off the block. R1072, 1146. After repeated requests from police, Price's group left the scene. R491, 583-84, 710, 1085. Price assured police that she would not return to Roberson's home. R515.

The Conflict Spreads

While Brown was on her way home, Dillard called and told her that Roberson's family was sending him threatening text messages and telling him to return to Roberson's house. Brown then drove past Roberson's house several times, where some kids threatened her and told her Roberson was going to get more people.

Meanwhile, Jayurion's father, Henry Mayfield, was receiving dialysis for kidney failure. R1095. He had been receiving dialysis for about a month and had a catheter connected to his heart and his arm. R889, 1095. After undergoing dialysis, Henry typically felt ill, so he planned to spend the rest of the day with defendant, who was his cousin, playing games or watching sports. R889, 915, 970, 1099-1100. Jayurion's mother, Kimberly Williams, picked up Henry from dialysis and then picked up defendant. R914, 1095, 1099. Defendant was armed with a handgun, which he testified he found in his family's garage the previous day and brought with him in the hope that Henry could help him sell it. R915-18.

While Kimberly drove with Henry and defendant, Price called. Price told Kimberly on speakerphone that Jayurion had been "jumped" by the people at Roberson's house (separately, Price also told Kimberly's daughter, Jerrica Williams, that Jerrica's younger brother, Jayurion, had been "jumped

on"). R856, 968, 1095, 1100-02, 1107. Kimberly told Henry (in defendant's presence) that the people at Roberson's house had jumped Jayurion, and Kimberly then drove to Price's house to pick up Jayurion. R1102. Jayurion joined Kimberly, Henry, and defendant in the car, and told them what had happened at Roberson's house earlier. R971, 1073-74, 1082, 1103-04. After Jayurion told Kimberly where Roberson's house was (a few blocks away), Kimberly drove to Roberson's house and parked in the street in front. R1072, 1103, 1117. Defendant claimed that he was looking at his cellphone and was unaware of any of the conversations that occurred while he was in the car. R920, 926, 968, 971-72, 976.

Around this same time, Roberson and Lathaniel went to pick up Lathaniel's son from school. R584, 681. Roberson learned (from her children and a neighbor) about a commotion or gathering in front of her house. R665, 694. Concerned, she dropped Lathaniel's son off at Lathaniel's mother's house, then picked up Gabe and Lathaniel's friend, Jones. R585, 630-31, 665, 667. When this group returned to Roberson's house, Brown stopped out front yelling for Roberson and Lathaniel to come to the street corner. R585-86, 639, 668, 681. Believing that Brown was trying to lure them out to kill them, Roberson refused, and Brown left. R586, 640, 702-04, 715. Brown returned about 10 minutes later with Dillard and Jerrica, at which point two other

cars also arrived, including Kimberly's car with Henry, defendant, and Jayurion in it. R586, 670, 673, 681, 705, 715, 857, 881, 921, 1108-09, 1119-20, 1123. Ultimately, two groups of between 15 and 20 people each formed in front of Roberson's house: Roberson's group was behind a fence in her front yard and Price's group was on the street and sidewalk. R563, 586, 674, 861, 1075.

Defendant claimed that he assumed that he and Henry were going to hang out at Roberson's house. R920. It was not until defendant heard Kimberly yell for Roberson that his "alert system" went off. R921.

The Second Confrontation

The two groups began shouting at each other. Members of Price's group armed themselves; for example, Brown armed herself with a mop handle from the garbage can, Jerrica had a plastic broomstick; and Henry also had a broomstick. R548 588, 839-41, 863, 1005. Some of the member's of Price's groups were banging on and shaking Roberson's fence. R716-17, 864, 1004.

Lathaniel testified that neither he nor Jones was armed, but he admitted that he was ready to and wanted to fight. R696, 699. Members of Price's group testified that the members of Roberson's group were armed with

knives, bats, broomsticks, and socks with cans in them. R864, 1075-76, 1090, 1110, 1120.

Defendant admitted that he pulled out his gun and showed it to Lathaniel but claimed that he did so only after hearing threats. R926-28. Lathaniel responded, "[F]uck that gun, we got guns, too." R866-67, 929. Defendant cocked the gun and told Lathaniel, "This ain't no toy. I'm not playing." R930. Defendant then looked over to see where Henry was. R930-31.

Henry was headed towards Lathaniel and Jones to attack them with a stick, Jones grabbed it, and the two struggled for control of it. R677, 682-83, 931, 1007. Lathaniel heard Henry yell, "shoot." R682-83. Defendant then approached and fired several shots at Roberson's group. R549, 561, 683, 717, 744, 867. One hit Jones in the abdomen, another hit Lathaniel in the arm. R683, 685, 788, 800. Jones died a short time later. R804.

Defendant testified that he did not know if his first shot hit anyone and denied that he was aiming at or trying to hit anyone. R946, 962, 975. Rather, he fired the gun to get Roberson's group to back off. R944, 962. Defendant had never fired a gun before and did not believe that he would kill someone by firing it in the way that he did. R950.

After the gunshots, everyone fled. R549, 562, 685-86, 868, 1079, 1111. Defendant picked Henry up off the ground where he had fallen, helped him into Kimberly's car, got in the driver's seat, and drove to his own home. Defendant got out, and Henry drove off in Kimberly's car. R947-48.

After the Shooting

Later that evening, defendant drove to Joliet and threw the gun in a river. R966, 973-74. The next day, defendant and Henry were arrested. R813. During an interview with police, defendant initially denied being the shooter. R816. Then he claimed someone dropped the gun during the fight and he picked it up. R816. When police showed defendant screenshots from cellphone videos taken during the fight, defendant admitted that he had brought the gun with him in Kimberly's car. R816. Defendant said he was scared during the shooting. R828, 838. Later, at trial, defendant testified that he lied to police because he did not believe he had the legal right to use the gun as he did. R976.

The Juror Issue

On the third day of trial, a juror realized that she was related to Lathaniel and Gabe, in that her daughter was married to Lathaniel and Gabe's mother. R776. The juror testified that she did not know Gabe or Lathaniel, she had not recognized Lathaniel's name when the witness list

was read to the jury (defense counsel's questioning of the juror focused on Lathaniel, as he was on the witness stand when the juror realized the relationship), she had no preconceived opinions about Lathaniel, and her relationship would not affect her ability to be fair and impartial. R778-79.

Outside the presence of the jury, the trial court commented that his initial view was that "she stays on the jury. I don't think it's even a close call." R779. The court then asked the parties if they wanted to be heard on the matter, and they declined. R779. The court ruled that the juror would remain on the jury. R780.

Instructions, Deliberations, and Judgment

At defendant's request, the trial court instructed the jury on second degree murder and involuntary manslaughter, as well as the affirmative defense of self-defense. R1329-34.

The jury found defendant guilty of felony murder, second degree murder, aggravated battery with a firearm, two counts of mob action, and UPWF. C972-78. The trial court sentenced defendant to consecutive prison terms of 65 years for felony murder and 15 years for aggravated battery with a firearm, and a concurrent seven-year term for UPWF. C1031. No sentences were imposed for the remaining findings of guilt.

Appeal

As relevant here, on appeal, defendant raised two claims specific to his felony murder conviction, and a due process claim of cumulative error premised on four alleged trial errors.

As to felony murder, defendant argued that the People failed to prove him guilty of felony murder because the evidence was insufficient to prove the predicate offense of mob action, A64, and, alternatively, that mob action could not serve as the predicate felony for felony murder because the act that constituted mob action was inherent in Jones's murder and did not have an independent felonious purpose, A68. The appellate court rejected both arguments. It found the evidence sufficient to prove mob action and that the acts that gave rise to the mob action convictions were independent from, and involved a separate felonious purpose from, the acts that resulted in Jones's death. A67-70.

Defendant further claimed that he was denied a fair trial due to the cumulative effect of four alleged errors, two of which he raises before this Court: (1) the trial court's exclusion of the rap video; and (2) the decision by the court and defense counsel to allow the juror to remain despite her relationship by marriage to one of the victims. The appellate court rejected defendant's cumulative error claim. It held that the trial court did not abuse

its discretion in excluding the rap video. A78. It further held that the juror did not suffer from an implied or actual bias, so defendant could not show error. A78-79. As to defendant's third claim of error (that the verdicts were inconsistent, which he does not raise here), the appellate court noted that it had resolved in defendant's favor his claim that the verdicts for reckless discharge of a firearm and aggravated battery with a firearm were legally inconsistent, and that defendant did not explain how these inconsistent verdicts otherwise denied him a fair trial; the court found his other claim of inconsistent verdicts meritless. A78. Finally, as to defendant's fourth claim of error, the court held that defense counsel was not ineffective for his comments in closing argument. A79-80. Ultimately, the appellate court rejected defendant's cumulative error claim because he had obtained relief on one of the component claims and none of the remaining allegations constituted error. A80.

STANDARDS OF REVIEW

This Court reviews the sufficiency of the evidence by considering whether, after viewing the evidence in the light most favorable to the People, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *People v. Brand*, 2021 IL 125945, ¶ 58.

Whether defendant's mob action convictions were a proper predicate for felony murder is a legal question reviewed *de novo*. *See People v. Davison*, 236 Ill. 2d 232, 239 (2010).

Whether any trial errors had the cumulative effect of denying a defendant due process is a question of law that this Court reviews *de novo*. *See People v. Graham*, 206 Ill. 2d 465, 174 (2003) (due process claims reviewed *de novo*); *People v. Jackson*, 205 Ill. 2d 247, 283 (2001) (claim of cumulative error is due process claim). Similarly, the Court reviews *de novo* whether an unpreserved error rises to the level of plain error. *See People v. Schoonover*, 2021 IL 124832, ¶ 26.

In examining evidentiary rulings, the Court considers only whether they were an abuse of the trial court's discretion, meaning that the court's decision to exclude the evidence was arbitrary, fanciful or unreasonable, or where no reasonable person would take the view adopted by the court. *People v. Patterson*, 2014 IL 115102, ¶ 114.

ARGUMENT

This Court should affirm the appellate court's judgment. First, a reasonable juror, viewing the evidence in the light most favorable to the People, could find beyond a reasonable doubt that defendant committed mob action. Second, mob action properly served as a predicate felony here because

defendant committed it with an independent felonious purpose other than killing Jones. Illinois law does not require that the predicate felony consist of a separate act from the act that resulted in the victim's death, but even if it did, defendant committed multiple acts constituting mob action, only one of which resulted in Jones's murder.

Finally, defendant's cumulative error claim is meritless. Defendant waived the first of his alleged component errors — that the trial court should have removed the juror when she discovered her relationship with Lathaniel — because he did not request her removal and a trial court has no duty to remove a juror for cause *sua sponte*. Accordingly, the claim is not noticeable as plain error, nor is it a cognizable component of defendant's cumulative error claim. Moreover, defense counsel was not deficient for declining to seek the juror's removal because the record demonstrates that the juror had neither an express nor implied bias, so any such request would have been futile. And because defendant cannot establish that he was prejudiced by counsel's decision, counsel's alleged ineffectiveness also cannot be a component of defendant's cumulative error claim.

Finally, the trial court did not abuse its discretion when it excluded the rap video. But even if it had, this evidentiary error would be the sole cognizable component of defendant's cumulative error claim, and a

cumulative error claim cannot rest on a single error. In any event, the alleged error in excluding the video was harmless beyond a reasonable doubt.

I. Defendant Was Properly Convicted of Mob Action and Felony Murder.

A. The People proved beyond a reasonable doubt that defendant committed mob action.

The evidence, when viewed in the light most favorable to the prosecution, was sufficient to establish each element of mob action beyond a reasonable doubt. In reviewing a challenge to the sufficiency of the evidence, this Court asks whether, when viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Jones*, 2023 IL 127810, ¶ 28. It is not this Court's function to retry the defendant or to substitute its judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of witnesses. *Id.* A criminal conviction will not be overturned unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *Id.*

The People proved each element of the offense of mob action. To prove mob action, the evidence needed to show that defendant: (1) acted together with one or more persons without authority of law; and (2) knowingly,

intentionally, or recklessly used force or violence to disturb the public peace. 720 ILCS 5/25-1(a)(1) ("A person commits mob action when he or she engages in . . . the knowing or reckless use of force or violence disturbing the public peace by 2 or more persons acting together and without authority of law."). Here, the People proved beyond a reasonable doubt that defendant acted together with Henry to knowingly, or at least recklessly, use force or violence to disturb the public peace.

The evidence showed that defendant was in the car with Kimberly and Henry when Price said over speakerphone that Roberson's family had "jumped" Jayurion and Kimberly described the earlier fight. R856, 968, 1095, 1100-02, 1107. Defendant was still in the car when Jayurion got in and told Henry and Kimberly about the earlier confrontation with the Roberson family. R971, 1073-74, 1082, 1103-04. Defendant then rode with Henry, Kimberly, and Jayurion to Roberson's house. R1072, 1103, 1117. They arrived at the same time as two other cars carrying Kimberly's and Price's relatives. R586, 670, 673, 681, 705, 715, 857, 881, 921, 1108-09, 1119-20, 1123. Henry armed himself with a stick, and defendant almost immediately began brandishing his gun and making threats before cocking the trigger. R926-31. Other members of their group — some also armed with sticks and mop handles — banged on Roberson's fence. R548 588, 716-17, 839-41, 863,

1004-05. Then, as at least some witnesses testified, while Henry fought with the victims, he yelled for defendant to shoot. R682-83. Viewed in the light most favorable to the People, a reasonable juror could conclude that defendant acted together with Henry (and Kimberly and possibly more than a dozen of their friends and family members) to confront Roberson's family through the use of force or violence. And, given the events at Roberson's house earlier in the day and the conversations that occurred about those events in defendant's presence, a rational juror could infer that this concerted action was a knowing, and at the very least, reckless, use of force and violence disturbing the peace.

It is irrelevant that defendant and Henry lacked an express agreement to attack Jones and Lathaniel, *see* Def. Br. 14, or that defendant's only acts of violence were firing shots in the direction of the victims, *see* Def. Br. 15-16. For purposes of proving mob action, it suffices that defendant and Henry together used violence to disturb the peace, and firing seven shots into a crowd during a brawl certainly constitutes such an act. *See In re B.C.*, 176 Ill. 2d 536, 549 (1997) ("To sustain a conviction for mob action it must be shown that a defendant was part of a group engaged in physical aggression reasonably capable of inspiring fear of injury or harm.") (citing *People v. Simpkins*, 48 Ill. 2d 106, 109 (1971)).

Defendant's objection that the People and appellate court relied on evidence that Henry and others were "'swinging poles at people,' '[s]houting threats,' and '[s]creaming and yelling,'" Def. Br. 17 (citing *People v. Bush*, 2022 IL App (3d) 190283, ¶ 92), similarly misses the mark. As an initial matter, defendant does not contest that he also shouted threats. And, in any event, firing a gun multiple times as his group fought with Roberson's was enough to establish the offense of mob action. But the exact nature of defendant's participation in the group effort to disturb the peace through the use of force is irrelevant. In *Simpkins*, the People charged three defendants with mob action, alleging that each "used force in such manner as to disturb the peace *by firing a revolver*." 48 Ill. 2d at 110 (emphasis added). The defendants challenged their convictions, arguing that the trial evidence showed that none of them had possessed a gun or fired a shot. *Id.* But this Court upheld their convictions because "[t]he particular means by which each defendant participated in the creation of the disturbance was not critical, and the fact that none of the individual defendants had fired a revolver was immaterial." *Id.* at 111. In other words, so long as the evidence establishes that defendant worked together with Henry to knowingly disturb the peace through the use of force — and the evidence plainly does so —the precise role defendant played in the creation of the disturbance is immaterial. By

brandishing a gun, making threats, and ultimately firing the gun multiple times, he unquestionably played *a* role, and that is sufficient.

Indeed, it is clear from this Court's precedent that merely joining a group attack, even without evidence of prior planning or coordination, is sufficient to establish mob action. *See People v. Davis*, 213 Ill. 2d 459, 480 (2004). In *Davis*, the victim, Skelton, and several friends and family members went looking for Skelton's television, which Skelton believed his sister had sold. *Id.* at 463. After Skelton's group knocked on several doors, a group of neighborhood residents confronted them. *Id.* The defendant was not a part of either group, but he joined a group of 10 to 20 men in attacking Skelton and hitting him approximately 6 times with a stick. *Id.* at 463-64. Despite the lack of evidence that the defendant was part of the group before the attack began, and despite his limited involvement in the attack, this Court upheld his conviction for felony murder predicated on mob action because he had acted together with others to knowingly use violence to disturb the peace. *Id* at 474-75. Here, the People presented far more evidence of a concerted plan between defendant and Henry — the phone conversation in the car, Jayurion recounting the events earlier in the day, the simultaneous arrival at Roberson's house — than between the defendant and his fellow attackers in *Davis*. And even if defendant's only acts were

participating in the brawl at Roberson's home, consistent with *Davis*, that would be sufficient to prove him guilty of mob action. *See* 213 Ill. 2d at 474.

Defendant's reliance on *People v. Barnes*, 2017 IL App (1st) 142886, *see* Def. Br. 14, is misplaced because, unlike in *Barnes*, a rational juror could conclude that defendant and Henry shared a common purpose when they confronted the Roberson family at their house. *Barnes* overturned a conviction for armed violence predicated on mob action where the defendant and an unidentified man shot at each other in the street. 2017 IL App (1st) 142886, ¶ 90. The court explained that because "two people shooting at each other do not share a common purpose" but "have diametrically opposed purposes," the defendant could not have been "acting together" with the other man, as required for mob action. *Id.* ¶¶ 26, 72. But here the evidence demonstrated that defendant and Henry (as well as Kimberly and the others in Price's group) had a shared purpose: to violently confront Roberson and her family over events earlier in the day.

Defendant's reliance on *People v. Kent*, 2016 IL App (2d) 140340, *see* Def. Br. 13, is similarly inapt because the evidence here shows that both defendant and Henry used force or violence. *Kent* overturned a mob action conviction because there was no evidence that both defendant and another person together used force or violence against the victim. 2016 IL App (2d)

140340, ¶ 26. But here, Henry attacked the victims with a stick and called for defendant to shoot, and defendant then fired his gun several times in the direction of the victims. In other words, a rational juror reasonably could have concluded from this evidence that defendant and Henry acted together in using force or violence. Indeed, *Kent*'s reasoning makes plain that the evidence here sufficed to prove mob action. The appellate court there explained that "The State could have established the 'acting together' element by showing that Wilson [the other person] was forcefully attempting to enter the home and that defendant struck [the victim] to assist Wilson." *Id.* ¶ 23. Here, the evidence sufficiently permits the reasonable conclusion that Henry was attempting to forcibly attack the victims and defendant fired his gun to assist Henry. Accordingly, the evidence was sufficient to prove defendant guilty of mob action.

B. Defendant's mob action was a proper predicate for felony murder because defendant acted with a felonious purpose other than to kill Jones.

Defendant's further argues that mob action was not a proper predicate for felony murder in his case. Def. Br. 18-27. Not so. The trial evidence demonstrated that defendant joined Henry, Miller, and others in confronting and attacking Roberson's family, including Jones and Lathaniel. This conduct, constituting the crime of mob action, resulted in Jones's death.

Although defendant testified that he neither intended nor knew that his actions would kill Jones, the evidence showed that defendant intended to commit mob action. Because defendant acted with a felonious purpose separate from an intent to kill Jones, mob action was a proper predicate felony for felony murder.

1. Defendant committed mob action with a felonious purpose separate from an intent to kill Jones.

Defendant was properly convicted of felony murder because the evidence established that he committed mob action, a felony involving the use or threat of physical force or violence against an individual, and Jones died during the commission of that crime. "A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death . . . he is attempting or committing a forcible felony other than second degree murder." 720 ILCS 5/9-1(a)(3) (2016). "Forcible felony means . . . any . . . felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8.

First, as discussed, the evidence sufficed to prove that defendant committed mob action. *See* Section I.A., *supra*. Second, defendant's conduct included a felonious purpose distinct from an intent to kill Jones. The felony murder statute is intended to deter violence caused by the commission of a forcible felony by subjecting an offender to a first degree murder charge if

another person is killed during the forcible felony. *Belk*, 203 Ill. 2d at 192. The offense of felony murder is unique because it does not require the People to prove the intent to kill, distinguishing it from other forms of first degree murder. *Davis*, 213 Ill. 2d at 471. Accordingly, this Court has expressed concern that a felony murder charge may improperly allow the People to eliminate the offense of second degree murder and avoid the burden of proving an intentional or knowing first degree murder because many murders are accompanied by predicate felonies. *Id.* (citing *Morgan*, 197 Ill. 2d at 447). To remedy this concern, the Court held that the predicate felony underlying a charge of felony murder must have an independent felonious purpose. *Davison*, 236 Ill. 2d at 240.

Here, the evidence demonstrates that defendant intended to commit mob action. Knowing that the Roberson group had "jumped" Henry and Kimberly's son Jayurion, defendant went with them to Roberson's home, where they arrived at the same time as two other cars carrying Kimberly's and Henry's friends and relatives. Defendant testified that he got out of the car, immediately brandished a gun, threatened Roberson's family, and eventually — after Henry attacked the victims with a stick — fired at them. According to defendant's testimony, he did not know whether his first shot hit anyone and did not believe that he was likely to kill anyone using the gun the

way that he did. R946, 950, 962, 975. In other words, while there is sufficient evidence that defendant intended to commit mob action, by defendant's own testimony, he did not commit that forcible felony with the intent to kill Jones. *Cf. Morgan*, 197 Ill. 2d at 417-18, 447-48 (approving appellate court's holding that defendant lacked independent felonious purpose where he admitted intent to kill his victims). Therefore, in this case, mob action was a proper predicate for felony murder because defendant acted with the separate felonious purpose to disturb the peace by using force or violence. And, because acts in the commission of this forcible felony caused Jones's death, defendant is guilty of felony murder. 720 ILCS 5/9-1(a)(3) (2016).

2. The Court should reaffirm that there is no "same-act" test in Illinois, and that the People need not prove felonious conduct separate from the act that killed the victim.

Defendant's felony murder conviction was properly predicated on mob action because he had the independent felonious purpose to commit mob action. This Court has expressly rejected the "same-act" test, which is a different standard for determining whether felony murder is a proper charge in a particular case, *Viser*, 62 Ill. 2d at 579-80, and which asks whether the defendant engaged in felonious *conduct* distinct from the act that killed the victim. *See Davis*, 213 Ill. 2d at 490-97 (Garman, J., dissenting). In other

words, the independent felonious purpose test focuses on the crime's *mens rea*, while the independent felonious conduct test focuses on its *actus reus*.

Some States have adopted the "same-act" test, holding that a felonious assault or other act that results in the victim's death merges with the murder and cannot serve as the predicate felony for a felony murder charge. *See*, *e.g.*, *Barnett v. State*, 783 So. 2d 927, 930 (Ala. Crim. App. 2000); *Commonwealth v. Kilburn*, 780 N.E.2d 1237, 1240 (Mass. 2003); *see also Davison*, 236 Ill. 2d at 245 (Garman, J., concurring) (describing the divergent approaches). Some of this Court's decisions can be read to adopt the same-act test by requiring, not an independent felonious purpose, but felonious *conduct* distinct from the conduct resulting in the victim's death. *See, e.g.*, *Davis*, 213 Ill. 2d at 474 ("It was improper to find the defendant to be a first degree murderer when the predicate felony was inherent in the killing."); *Morgan*, 197 Ill. 2d at 447 ("where the acts constituting forcible felonies arise from and are inherent in the act of murder itself, those acts cannot serve as predicate felonies for a charge of felony murder"). Yet the Court also has stated that its decisions in cases like *Morgan* and *Davis* are consistent with *Viser*. *See Davison*, 236 Ill. 2d at 243-44 ("Although in *Morgan* we considered whether the acts constituting the predicate felony arose from, and were inherent in, the murder itself," the Court held "'that the predicate felony under lying a charge

of felony murder must have an independent felonious purpose'" (quoting *Morgan*, 197 Ill. 2d at 458)); *see also Davison*, 236 Ill. 2d at 246-47 (Garman, J., concurring) (the Court has "ostensibly" returned the felony murder analysis "to the proper question — whether the defendant acted with the purpose of committing an independent felony apart from the homicide").

The Court should clarify that *Vizer* remains good law and there is no same-act test in Illinois because applying the same-act test would be inconsistent with the legislative intent underlying this State's felony murder statute. The primary objective of statutory interpretation is to give effect to the legislature's intent, presuming the General Assembly did not mean to create absurd, inconvenient, or unjust results. *In re Madison H.*, 215 Ill.2d 364, 372 (2005). This Court considers the statute in its entirety, keeping in mind the subject it addresses and the General Assembly's apparent objective. *People v. Davis*, 199 Ill. 2d 130, 135 (2002). The best indicator of legislative intent is the statute's language, given its plain and ordinary meaning. *People v. Jones*, 223 Ill. 2d 569, 581 (2006). When the statutory language is clear and unambiguous, it should be given effect without resort to other tools of interpretation. *Id.*

There is no language in Illinois's felony murder statute or the statute defining forcible felonies that suggests that the General Assembly intended to

limit felony murder to cases where the defendant commits two separate felonious acts. To the contrary, the definition of forcible felony enumerates specific felonies for which a single act will usually constitute the felony and cause the victim's death, demonstrating that the General Assembly intended felony murder to apply in circumstances where the defendant commits a single felonious act. 720 ILCS 5/2-8. For example, the inclusion of arson on the list of forcible felonies shows the General Assembly's intent that a defendant who set fire to a building he believes is empty but is nevertheless occupied, and the fire causes the death of the occupant, is guilty of felony murder. *Davis*, 213 Ill. 2d at 488 (Garman, J. concurring). Thus, the plain language of the governing statutes is incompatible with the same-act test.

Furthermore, the same-act test detracts from the purpose of the felony murder statute — to hold the felon responsible for the deadly consequences of his actions. *See People v. Lowery*, 178 Ill. 2d 462, 470 (1997); *see also Davison*, 236 Ill. 2d at 248 (Garman, J., concurring) ("Our legislature has clearly expressed the intent that when a defendant intends to commit a forcible felony, his committing that felony is a sufficient basis to impose liability for murder if the victim dies as a result."). The goal of the felony murder statute is to deter violent felonies by subjecting offenders to prosecution for first degree murder under circumstances where the

commission of a forcible felony results in someone's death. *People v. Shaw*, 186 Ill. 2d 301, 322 (1998). The same-act test restricts felony murder to cases in which a defendant commits at least two separate felonious acts, only one of which kills the victim. Thus, it strips the felony murder statute of much of its power to deter defendants from using violence in the commission of a felony.

Frequently, the distinction between the independent felonious purpose test and the same-act test will not affect the validity of a felony murder conviction. For example, in *Davison*, the defendant and his friends chased the victim, and the defendant then threw a bat at and stabbed the victim. 236 Ill. 2d at 242. There was no doubt that the defendant acted with the intent to commit mob action. *Id.* at 243. And, because the defendant committed several acts, including throwing the bat and stabbing the victim, his conduct also satisfied the same-act test. *Id.* Accordingly, under either the independent felonious purpose test or the same-act test, the defendant's conviction could stand.

But as the concurrence in *Davison* noted, the outcome would have been different had the "defendant and his friends searched for the victim with the same intent they had in this case, to 'g[e]t [the victim] good,' but when they found him, [the] defendant struck only one blow as his friends restrained the

victim, and that blow resulted in his death." *Id.* at 248 (Garman, J., concurring). In that hypothetical, under the same-act test, a felony murder conviction could not stand, even though the defendant acted with an independent felonious purpose, because the act proving the felony would have "arisen out of" and been "inherent in" the act of murder itself. *Id.* This outcome under the same-act test would be contrary to the legislative intent underlying the felony murder statute. "There is nothing in the statute that would impose felony-murder liability on the defendant who strikes the victim multiple times, but not impose liability on the defendant who strikes the victim only once." *Id.* at 248-49 (Garman, J., concurring).

People v. O'Neal, 2016 IL App (1st) 132284 — on which defendant relies, *see* Def. Br. 21-23 — does not establish the contrary. Not only is it factually distinguishable from this case, but it demonstrates that the separate felonious purpose test is a sufficient safeguard against this Court's concerns regarding the potential misuse of felony murder. *See, e.g.*, *Davison*, 236 Ill. 2d at 244 (cautioning that "felony-murder charges could potentially enable the State to eliminate second degree murder"). In *O'Neal*, the defendant — believing he was acting in self-defense — fired at a van that he understood was carrying rival gang members with the intent to kill the van's passengers. 2016 IL App (1st) 132284, ¶ 1. He instead shot and killed a

friend who was in another car. *Id.* The defendant was convicted of felony murder predicated on aggravated discharge of a firearm. *Id.* ¶¶ *2-3.*

The appellate court reversed the conviction because the People did not prove an independent felonious purpose where the defendant's stated intent in discharging the firearm — to kill the passengers of the van — was the same intent as that required for murder. *Id.* ¶ 64. Although the appellate court also found that the defendant's "act of discharging a firearm in the direction of the van — the predicate felony charged in the felony-murder count — was inherent in the murder itself," *id.* ¶ 55, the fact that discharge of a firearm may be a lesser included offense of murder is relevant neither to the outcome of the case nor to the goal of the protecting against prosecutorial gamesmanship. The dispositive fact was that the defendant in *O'Neal* admitted his intent to kill when he committed aggravated discharge of a firearm and therefore did *not* have an independent felonious purpose; his only purpose was to kill, the same purpose the prosecution would have to prove had it charged him with knowing or intentional murder. Accordingly, the prosecution could not prevent the defendant from mitigating that intent with proof of provocation or imperfect self defense by charging the offense as felony murder rather than knowing or intentional murder. *Id.* ¶ 106 (McBride, J., concurring) (quoting *Davis*, 213 Ill. 2d at 492 (Garman, J.,

concurring)). But the fact that aggravated discharge of a firearm may be a lesser included offense of murder does not raise this concern, for many instances of aggravated discharge of a firearm are not motivated by an intent to kill, and therefore have an independent felonious purpose and may serve as predicate offenses for felony murder. *See id.* ¶ 99 (McBride, J., concurring) (collecting cases). In other words, *O'Neal* demonstrates that where a defendant acted with the felonious purpose of committing murder, the separate felonious purpose test is sufficient to protect his right to argue for acquittal based on self-defense or mitigation to second degree murder.

Here, in contrast, defendant denied any intent to kill. Indeed, he testified that he did not believe firing the gun as he did was likely to harm anyone. Accordingly, unlike in *O'Neal*, the People did not charge felony murder to improperly eliminate self-defense or second degree murder, *see Davison*, 236 Ill. 2d at 240, 244, but rather because the evidence showed that defendant intended to commit a forcible felony *other* than murder, and the General Assembly has determined that a defendant should be liable for the consequences when someone dies as a result of committing such a felony, *see id.* at 248-49 (Garman, J., concurring).

In sum, defendant's decision to commit mob action caused Jones's murder, not the other way around. *See Shaw*, 186 Ill. 2d at 322 ("Felony

murder depends solely on a cause and effect relationship between the crime committed and the resulting murder to impose liability."). In *Morgan*, where the defendant intended to kill his victims, this Court distinguished *Viser* because in *Viser* the "charges of felony murder arose from the cause and effect relationship between the crime committed — aggravated battery — and the resulting murder," whereas in *Morgan*, "it was the murders . . . which gave rise to the predicate felonies." 197 Ill. 2d at 447. This case falls squarely on the *Viser* side of the line: the predicate felony of mob action clearly gave rise to the murder. Defendant brought a gun to a stick fight, and under this Court's precedents, he is liable for the consequences of that conduct.

Because both the plain language of the felony murder and forcible felony statutes and their purpose demonstrate that the General Assembly did not intend for felony murder to require a separate felonious act, this Court should reject defendant's invitation to adopt the same-act test and should instead apply the independent felonious purpose test alone.

3. Even were the Court to adopt the same-act test, defendant was properly convicted of felony murder because he engaged in felonious conduct different from the act resulting in Jones's death.

Even under the same-act test, this Court should uphold defendant's felony murder conviction because "the same evidence was not used to prove

both the predicate felony, mob action, and the murder." *See Davis*, 213 Ill. 2d at 474. In *Davis*, the defendant initially admitted to participating in the beating of the victim, telling police that he hit the victim twice on the head with a stick. *Id.* at 467. At trial, he testified that he swung a stick at the victim but did not hit him. *Id.* at 468. This Court held that mob action was a proper predicate for felony murder because "to convict defendant of mob action, it was not necessary to prove that defendant struck [the victim]." *Id.* at 474

Similarly, in this case, the evidence showed that defendant joined Henry, Kimberly, and others in attacking the Roberson group. Defendant admitted to participating in the fight; he told police, and testified at trial, that he went to Roberson's house with Henry, Kimberly, and Jayurion — where they were joined by 15 to 20 others — brandished a gun and threated Roberson's family and, eventually, fired several times at them as Henry attacked them with a stick. As in *Davis*, defendant had committed mob action before he shot Jones — when he brandished the gun and made threats as Henry forcibly attacked Roberson's family. Moreover, as in *Davis*, to prove mob action, it was not necessary to prove that defendant shot Jones. Defendant's participation in the fight and firing several shots other than the

one that struck Jones was sufficient to establish mob action. *See* 213 Ill. 2d at 474.

Accordingly, even if this Court were to adopt the same-act test, defendant was properly convicted of felony murder because the mob action was separate from, and indeed well underway before, defendant's acts that resulted in Jones's death.

II. Defendant's Cumulative Error Claim Is Meritless Because There Was at Most a Single, Preserved Error, and It Was Harmless Beyond a Reasonable Doubt.

In this Court, defendant's cumulative error claim rests on two allegations of error — (1) that the trial court and defense counsel erroneously allowed the juror to remain despite her relationship to Lathaniel; and (2) that the trial court improperly denied defendant's request to admit the rap video. But the juror-related claim is unpreserved and does not rise to the level of plain error or ineffective assistance of counsel, and so may not be considered as a component of a cumulative error claim.

That leaves only the trial court's alleged error in excluding the rap video. But a cumulative error claim cannot rest on a single cognizable error because such a claim affords a defendant relief when *multiple* trial errors, though not individually reversible, "ha[d] the cumulative effect of denying [the] defendant a fair trial." *People v. Speight*, 153 Ill. 2d 365, 376 (1992); *see*

Taylor v. Kentucky, 436 U.S. 478, 487 n.15 (1978) (granting relief where "the cumulative effect" of multiple trial errors "violated the due process guarantee of fundamental fairness"). In any event, even if the trial court abused its discretion in excluding the rap video, that exclusion did not deprive defendant of a fair trial.

A. Defendant's unpreserved claim of juror bias cannot be considered as a component of his due process cumulative error claim because he cannot show plain error or ineffective assistance of counsel.

Defendant's juror bias claim cannot be considered as a component of his due process cumulative error claim because it is unpreserved and he fails to show plain error or ineffective assistance of counsel. Defendant did not object when the trial court decided to allow the juror to remain on the panel after she realized and disclosed that she was related by marriage to Lathaniel. Accordingly, defendant's claim that the trial court erred in allowing the juror to remain may be considered as part of his cumulative error claim only if he can show plain error. He either cannot obtain plain error review due to his acquiescence in the error or fails to show plain error; either way, the juror bias claim cannot be considered as part of his due process cumulative error claim.

1. Unpreserved errors that do not amount to plain error or ineffective assistance of counsel may not be considered in a due process claim of cumulative error.

To prevail on a claim of cumulative error, a defendant first must establish *more than one* trial error; if there is only a single error (or no error at all), then there is no cumulative harm to weigh and the claim of cumulative error necessarily fails. *See People v. Albanese*, 104 Ill. 2d 504, 524 (1984) ("Having concluded that none of the points relied upon by defendant constituted error, logic dictates that there is no possibility for cumulative error."); *People v. Graf*, 2021 IL App (2d) 200406-U, ¶ 95 (claim of cumulative error based on only one cognizable claim of error failed because "there [wa]s no cumulative error argument to be made");[3] *United States v. Moore*, 641 F.3d 812, 830 (7th Cir. 2011) (where defendant "did not identify more than one error, the cumulative error doctrine does not apply"). Only if a defendant establishes two or more component errors must the People show that the cumulative effect of those errors did not deny him a fair trial because the errors were collectively harmless. *Speight*, 153 Ill. 2d at 377; *United States v. Groce*, 891 F.3d 260, 270-71 (7th Cir. 2018).

[3] Copies of all nonprecedential orders cited in this brief are available at https://www.illinoiscourts.gov/top-level-opinions. *See* Ill. S. Ct. R. 23(e)(1).

Defendant's juror claim cannot be considered as a component of his cumulative error claim because an alleged trial error cannot be considered as a component of a due process claim of cumulative error unless it is either preserved for review or, if unpreserved, rises to the level of plain error. *People v. Scott*, 148 Ill. 2d 479, 545-46 (1992) (considering unpreserved component errors offered in support of claim of cumulative error "only [to] consider whether they amounted to plain error"); *see People v. Caffey*, 205 Ill. 2d 52, 117 (2001) (rejecting claim of cumulative error because preserved component errors were harmless and unpreserved component errors "did not rise to the level of plain error"); *People v. Hall*, 194 Ill. 2d 305, 351 (2000) (rejecting claim of cumulative error where preserved errors were harmless and unpreserved errors "were not plain error"); *People v. Barnett*, 2023 IL App (4th) 220402-U, ¶ 66 (rejecting claim of cumulative error based on three unpreserved component errors where two were not clear and obvious and the third did not rise to the level of plain error). Nor are Illinois courts alone in restricting cumulative error review to component errors that are preserved or plain. *See, e.g.*, *see also Groce*, 891 F.3d at 270-71 ("On a claim of cumulative error, we consider both — but only — plain or preserved errors."); *United States v. Delgado*, 672 F.3d 320, 340 n.24 (5th Cir. 2012) (*en banc*) ("[U]npreserved errors that are not plain have no place in a cumulative error

analysis."); *United States v. Ladson*, 643 F.3d 1335, 1342 (11th Cir. 2011) ("Assessing cumulative error, the court reviews all errors preserved for appeal and all plain errors."); *United States v. Necoechea*, 986 F.2d 1273, 1282 (9th Cir. 1993) ("In reviewing for cumulative error, the court must review all errors preserved for appeal and all plain errors.").

Limiting cumulative error review in this way advances the purposes of the forfeiture doctrine and preserves the bars that a defendant must clear to obtain review of a forfeited claim.[4] The forfeiture doctrine serves to "encourage the defendant to raise issues before the trial court, allowing the court to correct its own errors" and "disallowing the defendant to obtain a reversal through inaction." *People v. Herron*, 215 Ill. 2d 167, 175 (2005); *accord People v. Reid*, 136 Ill. 2d 27, 38 (1990); *see also People v. Williams*, 2022 IL 126918, ¶ 48 ("'An accused may not sit idly by and allow irregular proceedings to occur without objection and afterwards seek to reverse his conviction by reason of those same irregularities.'" (citation omitted)).

[4] Although older decisions sometimes use the terms "waiver" and "forfeiture" interchangeably in criminal cases, this Court has since clarified that "[w]hereas forfeiture is the failure to make the timely assertion of the right, waiver is the intentional relinquishment or abandonment of a known right." *People v. Blair*, 215 Ill. 2d 427, 444 n.2 (2005) (internal quotation marks omitted).

For this reason, the only lenses through which a defendant may pursue a forfeited claim are plain error or ineffective assistance of counsel. *People v. Byron*, 164 Ill. 2d 279, 295 (1995) (when reviewing unpreserved error, "the threshold inquiry must rise to the level of plain error or ineffective assistance of counsel"); *People v. Denson*, 2013 IL App (2d) 110652, ¶ 10 ("Where an issue is forfeited, [the appellate court] may review it only for plain error or ineffective assistance."). Plain error and ineffective assistance of counsel place distinct and demanding prejudice burdens on defendants. Accordingly, "[i]f [courts] reviewed the cumulation of preserved and unpreserved errors for harmless error," even though the unpreserved errors would be reviewable only for plain error if raised alone, "[it] would undermine plain-error review." *United States v. Caraway*, 534 F.3d 1290, 1302 (10th Cir. 2008). Indeed, this Court "ha[s] emphasized that the plain error rule is not 'a general saving clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court.'" *People v. Moon*, 2022 IL 125959, ¶ 21 (quoting *People v. Precup*, 73 Ill. 2d 7, 16 (1978)). Rather, "it is a narrow exception to forfeiture principles designed to protect the defendant's rights and the reputation of the judicial process." *Id.*

Allowing errors that did not rise to the level of plain error to serve as components of a cumulative error claim would undermine this principle, for it

would permit a defendant to obtain *de novo* review of unpreserved errors simply by bundling them with a single preserved error, thus shifting the burden from the defendant to the People. "For example, under that procedure if there was one trivial preserved error that could possibly have influenced the jury, the government would need to prove the cumulative harmlessness of the unpreserved errors; whereas without the trivial preserved error, the defendant would have to prove prejudice [under the plain error standard]." *Caraway*, 534 F.3d at 1302; *see People v. Mohr*, 228 Ill. 2d 53, 70 (2008) (Thomas, J., dissenting) (cautioning that erroneous analysis for harmlessness rather than plain error shifts burden from defendant who failed to preserve his claim of error to State); *People v. Darr*, 2018 IL App (3d) 150562, ¶ 46 (rejecting argument "that, by combining multiple unpreserved, forfeited errors, a defendant may transform his claim into one that is preserved or not forfeited").

Additionally, "reversal on harmless-error review is mandatory when the error is sufficiently prejudicial; in contrast, reversal for unpreserved error on plain-error review is discretionary." *Caraway*, 534 F. 23d at 1302; *see People v. Clark*, 2016 IL 118845, ¶ 42 ("As the language of [Supreme Court Rule 615(a)] indicates, remedial application of the plain error doctrine is discretionary."); Ill. S. Ct. R. 615(a) (providing that plain errors "*may* be

noticed although they were not brought to the attention of the trial court" (emphasis added)). By prohibiting reviewing courts from "notic[ing]" errors unless the errors are "plain," Rule 615(a) protects the forfeiture doctrine by preventing a defendant from avoiding his burden to show plain error for an unpreserved claim merely by asserting an unrelated preserved claim. Ill. S. Ct. R. 615(a). In sum, an unpreserved error may not be considered, whether alone or in combination with other errors, unless it rises to the level of plain error.

For similar reasons, while it is true that a defendant may allege an ineffective assistance of counsel claim based on multiple unpreserved errors that do not rise to the level of plain error, *see People v. Lewis*, 2022 IL 126705, ¶¶ 83-85 (considering whether multiple errors constituted deficient performance and cumulatively prejudiced defendant); *People v. Foster*, 168 Ill. 2d 465, 488 (1995) (same), he may not recast the underlying errors as cumulative error and evade the demanding prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984). *See, e.g.*, *People v. Johnson*, 2021 IL 126291, ¶ 53 ("Surmounting *Strickland*'s high bar is never an easy task") (internal quotations omitted). *Strickland* requires a defendant to "affirmatively prove" that prejudice resulted from counsel's errors. 466 U.S. at 693; *accord Patterson*, 2014 IL 115102, ¶ 81 ("[s]atisfying the [*Strickland*]

prejudice prong necessitates a showing of actual prejudice, not simply speculation that defendant may have been prejudiced"). Accordingly, just as a defendant cannot turn plain error's demanding burden on its head by joining an unpreserved claim with an unrelated preserved claim, so too, a defendant may not escape the affirmative burden of *Strickland*'s prejudice prong by linking his ineffective assistance counsel claim to a preserved claim and calling the combined effect "cumulative error."

In sum, defendant's unpreserved juror claim cannot form the basis for his cumulative error claim unless he shows that the trial court's decision to allow the juror to remain rose to the level of plain error.

2. Defendant fails to show that the trial court's decision to allow the juror to remain was plain error.

As an initial matter, defendant did not merely forfeit the alleged juror error, but affirmatively acquiesced to the juror's continued presence on the jury. Therefore, defendant is estopped from challenging the court's decision, even as plain error. Under the doctrine of invited error, a defendant is estopped from challenging the propriety of an action on appeal if he acquiesced to that action by requesting or agreeing to it. *People v. Parker*, 223 Ill. 2d 494, 507-08 (2006); *People v. Harvey*, 211 Ill. 2d 368, 385 (2004). Accordingly, where a defendant acquiesces to the inclusion of a juror on the

jury, he cannot challenge the trial court's decision to allow that juror to sit as plain error. *People v. Metcalfe*, 202 Ill. 2d 544, 557 (2002); *see also United States v. Brazelton*, 557 F.3d 750, 754-55 (7th Cir. 2009) (defendant's decision to forgo opportunity to ask for juror to be stricken for cause constituted waiver notwithstanding contention of implied bias).

Were the rule otherwise, a defendant could allow a juror with a relationship to the victim to sit on his jury and gamble that the juror's bias was directed against the victim, and thus that his decision not to challenge the juror would work in his favor. *See id.* at 555-56. Then, if convicted, he could claim, as defendant does here, that the trial court erred in failing to strike the juror *sua sponte*. *See id.* at 556. Thus, failing to hold the defendant to his decision not to challenge the juror would allow him "two bites of the apple." *Id.* at 555. As this Court has noted, "the rule requiring contemporaneous objections to the qualifications of jurors is well founded," as it "serves to minimize the incentive to sandbag in the hope of acquittal and, if unsuccessful, mount a post-conviction attack on the jury selection process." *Id.* (cleaned up); *see also People v. Allen*, 2016 IL App (4th) 140137, ¶ 51 ("find[ing] it inappropriate to engage in plain-error review when the issue at hand may have been a strategic decision by counsel"); *People v. Garcia*, 188 Ill. 2d 265, 280 (1999) (refusing to notice alleged error in tendering jury

instruction where it may have been part of defense strategy); *People v. Barnard*, 104 Ill. 2d 218, 232 (1984) (similar).

Here, because defendant affirmatively acquiesced to the juror remaining on the jury, he cannot obtain review, even for plain error. After the juror disclosed her relationship to Lathaniel, the trial court asked the parties if they wanted to be heard on whether the juror should remain; defendant declined the invitation. *See*, *e.g.*, *Metcalfe*, 202 Ill. 2d at 551-52 (when defendant failed to challenge juror for cause he waived his objection to her). Accordingly, defendant cannot now challenge her inclusion, as plain error or otherwise.

Moreover, even if defendant had not acquiesced, the trial court's decision was not clear or obvious error. *See People v. Jackson*, 2022 IL 127256, ¶ 21 (first step of plain error analysis "is to determine whether a clear or obvious error occurred"). The juror stated unequivocally that she could be fair and impartial, and the court found her assurances credible. Thus, the evidence showed that the juror did not have an express bias, much less a clear or obvious one.

The Constitution guarantees criminal defendants "due process of law" and the right to "an impartial jury." U.S. Const. amends V, VI. These mandates are satisfied if the juror has given final, unequivocal assurances,

deemed credible by the judge, that for purposes of deciding the case, she can "set aside any opinion [she] might hold," *Patton v. Yount*, 467 U.S. 1025, 1036 (1984); "relinquish her prior beliefs," *Thompson v. Altheimer & Gray*, 248 F.3d 621, 626 (7th Cir. 2001), or "lay aside her biases or her prejudicial personal experiences," *United States v. Gonzalez*, 214 F.3d 1109, 1114 (9th Cir. 2000). *See Thompson*, 248 F.3d at 626 (collecting cases). Here, the juror provided unequivocal assurances that her relationship through her daughter's marriage to Lathaniel's mother gave her no opinion of Lathaniel that would influence her decision making. Indeed, she said that she did not really know him and had no opinions about him. R779. Further, she said that she was able to put to one side any possible prejudices and decide the case impartially as instructed and sworn to do. And the court credited her assurances. R779 (stating that "she stays on the jury. I don't think it's even a close call.").

Nor, contrary to defendant's assertion, was there evidence that the juror clearly or obviously had an implied bias. *See* Def. Br. 37-43. "In certain extraordinary situations, a juror's bias may be implied from her relationship with a party or other trial participant." *Ittersagen v. Advocate Health & Hosps. Corp.*, 2021 IL 126507, ¶ 47. Such extraordinary circumstances do not exist here because defendant's allegations of implied bias amount to nothing

more than a suspicion that the juror would be partial towards her daughter's wife's sons — whom the juror said she hardly knew (as confirmed by the fact that she did not recognize their names on the witness list). But a mere suspicion of bias or partiality is insufficient to disqualify a juror. *People v. Collins*, 106 Ill. 2d 237, 274 (1985); *People v. Cole*, 54 Ill. 2d 401, 415 (1973).

For example, in *People v. Porter*, 111 Ill. 2d 386 (1986), this Court rejected a claim of implied bias where the juror attended church with the victim's mother. *Id.* at 404. The Court held that "the burden was on the defendant to establish that the relationship between the juror and the victim's mother was of such a character that a presumption of prejudice would arise therefrom," and the defendant had failed to satisfy that demanding standard. *Id.* In *Porter*, as here, the juror realized her relationship to the victim after the trial had started, suggesting that the relationship was not a strong one. *See id.* at 405; *see also Ittersagen*, 2021 IL 126507, ¶ 60 (juror's failure to recognize connection to party until partway through trial indicated attenuated relationship). Similarly, in *Porter*, the juror did not know the victim's mother's name or have a relationship with her, *see id.* at 404, just as the juror here did not recognize Lathaniel and Gabe's names and stated that she had no relationship with them. Accordingly, the record does not support a conclusion that the relationship

between the juror and Lathaniel was such that it would support a finding of implied bias. At the very least, any error by the trial court's error in not excusing the juror was not clear or obvious.

Defendant's reliance on *People v. Parmly*, 117 Ill. 2d 386 (1987), *see* Def. Br. 41, is misplaced. *Parmly* did not address the defendant's biased juror claim because the Court reversed his conviction based on an unrelated evidentiary error. 117 Ill. 2d at 396. To be sure, a special concurrence — joined by only one other justice — would have held that the trial court abused its discretion in declining to excuse the juror. *Id.* at 397 (Clark, J., concurring). But even if a majority of the Court would have agreed, in *Parmly*, unlike here, there was "substantial evidence that [the juror] and the victim were friends." *Id.* at 404 (Clark, J., concurring). The juror explained during *voir dire* that he would occasionally stop by the victim's home to "say hi" and stay for approximately 15 minutes. *Id.* at 401 (Clark, J., concurring). But evidence discovered by a defense investigator showed that the juror had understated the nature of his relationship with the victim. *Id.* at 401-02 (Clark, J., concurring). Witnesses identified by the investigator testified that the juror and the victim were "good friends"; that when the juror's wife went into labor with their youngest child, they left their other children in the victim's care; and that the juror had visited the victim's home approximately

150 times during a 7-year friendship. *Id.* at 402-03 (Clark, J, concurring). By contrast, there is nothing in the record here to suggest the juror had *any* relationship with Lathaniel, much less that they were "good friends." Nor is there any suggestion that the juror misrepresented her relationship with Lathaniel. On the contrary, she fully disclosed the relationship as soon as she realized who Lathaniel was. Accordingly, this case bears no resemblance to *Parmly*.

People v. Brisbon, 89 Ill. App. 3d 513 (1st Dist. 1980), on which defendant also relies, *see* Def. Br. 42, is similarly inapposite. There, the trial court *sua sponte* excused a juror who knew one of the victims "well." *Brisbon*, 89 Ill. App. 3d at 515. But, as in *Parmly*, the evidence showed that the juror and the victim were friends, and that the juror had concealed the nature of their relationship when questioned by the court. *Id.* at 516. Again, the juror here did not know Lathaniel "well," but instead had a remote relationship (through marriage) to him. The trial court's decision not to excuse the juror thus is consistent with *Brisbon*. *See Brisbon*, 89 Ill. App. 3d at 521 (observing that trial court may properly decline to excuse juror who has "remote relationship" to victim that would not influence his verdict). Moreover, this Court has been clear that "although a trial court certainly has the discretion to remove a juror *sua sponte* for cause (see *People v. Lucas*, 132 Ill. 2d 399,

425 . . . (1989)), a trial court does not have a duty to do so." *Metcalfe*, 202 Ill. 2d at 557. So, *Brisbon*'s holding that the trial court properly exercised its discretion to dismiss the juror there, is irrelevant to whether the trial court clearly or obviously erred in *not* doing so here.

In sum, defendant's unpreserved claim that the trial court should have *sua sponte* dismissed the juror cannot serve as a component of his due process cumulative error claim either because defendant acquiesced in that decision or because it was not plain error.

3. Defense counsel was not ineffective for failing to move to excuse the juror.

Nor was defense counsel ineffective for failing to move to remove the juror because such a motion would have failed. To show ineffective assistance of counsel, defendant must show both that counsel was deficient and that this deficiency prejudiced him. *Strickland*, 466 U.S. at 687; *People v. Manning*, 227 Ill. 2d 403, 412 (2008). For counsel's performance to be considered deficient here, defendant must show that a motion to excuse the juror stood a reasonable chance of success at the time of trial. *People v. Bew*, 228 Ill. 2d 122, 128 (2008).

Here, a motion to remove the juror did not stand a reasonable chance of success. *See, e.g.*, *People v. Douglas*, 2011 IL App (1st) 093188, ¶ 32 ("Defense counsel is under no obligation to pursue a motion that has no

chance of success."); *People v. Lundy*, 334 Ill. App. 3d 819, 830 (1st Dist. 2002) (no ineffectiveness of counsel when no showing is made that had motion to suppress been litigated, it had reasonable probability of success). The trial court said that it was not "even a close call" that the juror should remain on the jury given her assurances of impartiality. Given this statement, counsel was reasonable not to ask the court to excuse the juror, as the court had just made clear that such a motion had no chance of success. *See, e.g.*, *Rodriguez v. United States*, 286 F. 3d 972, 984-85 (7th Cir. 2002) (counsel's decision not to challenge admissibility of evidence was not unreasonable where trial court had already indicated it was probable that evidence was admissible).

Moreover, the trial court was right. The juror's testimony had just established that that she had neither an explicit bias nor a close enough relationship to Lathaniel to qualify as an implied bias. *See supra* 46-50. In other words, not only had the trial court signaled to counsel that a motion would be fruitless, but the trial court was correct that any such motion would have been meritless. *See People v. Pingelton*, 2022 IL 127680, ¶ 60 ("A defendant's trial attorney cannot be considered ineffective for failing to raise or pursue what would have been a meritless motion or objection.").

Moreover, counsel's actions during jury selection are generally considered a matter of trial strategy, *Manning*, 241 Ill. 2d at 333, and

counsel's strategic choices are virtually unchallengeable, *People v. Palmer*, 162 Ill. 2d 465, 476 (1994). Considering the juror's statements that she barely knew the victim, had no opinion of him, and could be impartial, it is possible — indeed, likely — that counsel concluded that the juror was not biased against defendant. Indeed, counsel initially raised no objection to the juror, and the juror may have had other characteristics that made her preferable in counsel's judgment to the remaining alternate. Attorneys consider many factors in deciding which jurors to challenge; this is part of trial strategy and "reviewing courts should hesitate to second-guess counsel's strategic decisions." *Manning*, 241 Ill. 2d at 335. In this case — where the juror did not realize her relationship to Lathaniel until the middle of trial — additional considerations may have affected counsel's decision. For example, counsel could have determined that the juror seemed particularly engaged during favorable testimony that had already been elicited at trial such that it was better to keep her on the jury. *See, e.g.*, *Johnson v. Loftus*, 518 F.3d 453, 457 (7th Cir. 2008) (holding petitioner failed to overcome presumption that counsel's choice was strategic where there were "many factors which could support the choice" including that "perhaps he thought" that "testimony went so well he did not want to risk undermining it").

To be sure, as defendant notes, defense counsel said in post-trial proceedings that he misheard the juror's description of her daughter's relationship to Lathaniel's mother, and that had he heard correctly, he would have asked to remove the juror. Def. Br. 45 (citing C1000 ("Defense counsel did not request her removal because he did not actually hear the juror state that the juror's daughter was married to [Lathaniel's] mother, but only thought that the juror's daughter was a friend or acquaintance of [Lathaniel's] mother.")). As an initial matter, counsel does not claim that he misheard the nature of the juror's relationship with Lathaniel, or why — when the juror barely knew or recognized Lathaniel — the variance in the juror's daughter's relationship to Lathaniel's mother would have changed counsel's strategy. But even if counsel would have sought the juror's removal, counsel was not deficient for failing to do so because such a request had no reasonable chance of success. As noted, the juror stated unequivocally that she could be fair and had, at best, an attenuated relationship to Lathaniel, and the trial court found her credible. Indeed, the court said it was not a close call whether to allow the juror to remain, so any motion to remove the juror for cause likely would have failed. In any event, even if it is debatable whether counsel should have asked to remove the juror, this alone is insufficient to show deficiency under *Strickland*. *See Manning*, 241 Ill. 2d

at 336 ("While some might find defense counsel's failure to challenge A.C. questionable, this alone is insufficient to find that counsel's conduct was deficient under *Strickland*."). Accordingly, defendant cannot establish that counsel's performance was deficient and his ineffective of counsel claim fails for that reason alone.

Moreover, defendant cannot establish that he was prejudiced by the juror's continued presence on the jury. This Court has rejected the argument that prejudice must be presumed, even where counsel's actions allowed a biased juror to hear a defendant's case. *See Metcalfe*, 202 Ill. 2d at 560 ("We find no merit to defendant's claim that prejudice must be presumed in this case."). To show prejudice, a defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *See id.* at 562.

Here, the evidence established that defendant was with Henry and Kimberly when Price described the earlier confrontation over speakerphone. He was also in the car when Jayurion told Kimberly and Henry that he had been "jumped" by Roberson's family and described the location of Roberson's house. He rode in the car with Kimberly and Henry to Roberson's house, where they arrived at the same time as two other cars carrying Kimberly's and Price's friends and family. Defendant immediately joined in the

escalating conflict between the two families, by his own admission brandishing a gun and making threats. Then, when Henry attacked Lathaniel with a stick, defendant fired his gun, hitting Lathaniel and killing Jones. Defendant later disposed of the gun and lied to police. In sum, compelling evidence proved defendant guilty beyond a reasonable doubt. *See Metcalfe*, 202 Ill. 2d at 562 (defendant could not satisfy *Strickland*'s prejudice prong where "evidence was more than sufficient to prove defendant guilty beyond a reasonable doubt"). Moreover, there was no evidence that the juror bore an actual bias against defendant. *See id.* at 562-63 (no *Stricland* prejudice where there was "no evidence that [juror's] bias against the system was directed at defendant and not the State"). Consequently, defendant cannot establish a reasonable probability that the result of the trial would have been different had the juror been removed, and his ineffective assistance claim fails for this reason, as well. *See id.* at 563.

Accordingly, defendant's claim that counsel was ineffective for failing to seek to remove the juror cannot serve as a component of defendant's cumulative error claim.

B. The trial court properly exercised its discretion when it excluded the rap video, and any alleged error was harmless.

The trial court appropriately exercised its discretion when it excluded the rap video, which defendant had proffered as a prior statement inconsistent with Gabe's testimony that he could not remember much about the day of the shooting. A trial court's ruling on the admissibility of evidence will not be reversed absent an abuse of discretion. *People v. Pikes*, 2013 IL 115171, ¶ 12. The threshold for finding an abuse of discretion is high and can be overcome only with a showing that the court's ruling was arbitrary, fanciful, or such that no reasonable person "would take the view adopted by the trial court." *People v. Illgen*, 145 Ill. 2d 353, 364 (1991) (internal quotations omitted). Defendant fails to make that showing.

The trial court reasonably concluded that Gabe's statements on the rap video were not reliable because the rap video was a work of art. To be sure, the rule against hearsay does not preclude admission of an inconsistent out-of-court statement if it is subject to cross examination and the statement "narrates, describes, or explains an event or condition of which the witness had personal knowledge" and "is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording." 725 ILCS 5/115-10.1; *see also People v. Simpson*, 2015 IL

116512, ¶ 27. But defendant is incorrect the trial court should not have considered other indicia of reliability, or a lack thereof, in deciding whether to admit the video. *See* Def. Br. 32. Although appellate court decisions have held that "the fact a statement is admissible under section 115-10.1 of the Code *already* demonstrates its reliability, so no *additional* evidence of the statement's reliability need be shown," *see, e.g.*, *People v. Carlos*, 275 Ill. App. 3d 80, 84 (4th Dist. 1995) (emphasis in original), just because no additional evidence of reliability *need* be shown does not mean that the trial court lacks discretion to exclude evidence when there is particular cause to doubt its reliability. Indeed, "[w]hile reliability can be inferred where the evidence falls firmly within a hearsay exception, reliability is not automatically assumed." *See, e.g.*, *Zaragoza v. Ebenroth*, 331 Ill. App. 3d 139, 142 (3d Dist. 2002).

Here, it was reasonable for the trial court to question the reliability of the statements Gabe and Lathaniel made in the rap video because it was an artistic expression. *See People v. Cross*, 2021 IL App (4th) 190114, ¶ 139 (music videos are commonly understood as artistic endeavors). "Musicians often embellish the details of a story when singing about a personal experience. Hip hop artists in particular frequently use their music to boast about crimes that either they had no part in or are even entirely fictional."

Id. Although Gabe participated in the events at issue, he may have taken artistic license with his descriptions to make the rap video more compelling. As the New Jersey Supreme Court has observed:

> The difficulty in identifying probative value in fictional or other forms of artistic self-expressive endeavors is that one cannot presume that, simply because an author has chosen to write about certain topics, he or she has acted in accordance with those views. One would not presume that Bob Marley, who wrote the well-known song "I Shot the Sheriff," actually shot a sheriff, or that Edgar Allan Poe buried a man beneath his floorboards, as depicted in his short story "The Tell-Tale Heart," simply because of their respective artistic endeavors on those subjects.

State v. Skinner, 95 A.3d 236, 251 (N.J. 2014). In sum, because the reliability of a statement is diminished when it is created as a part of an artistic endeavor, *Cross*, 2021 IL App (4th) 190114, ¶ 141, the trial court's decision not to admit the rap video was not arbitrary, fanciful, or such that no reasonable person would agree with it.

Defendant's contention that the trial court's approach "adversely affects criminal defendants in exercising their constitutional rights to present a complete defense and to confront the witnesses against them," Def. Br. 35, conflates the court's evidentiary ruling with a due process claim. "A defendant is not denied his right to present a defense every time a trial court excludes an arguably favorable piece of evidence, and a defendant cannot transform a routine evidentiary issue into a constitutional claim through

linguistic maneuvering." *Id.* ¶ 124. Here, the exclusion of the rap video in no way precluded defendant from pursuing his theory that the Roberson group were the aggressors. For example, the jury heard evidence that Roberson's family "jumped" Dillard and Jayurion earlier in the day when they arrived at Roberson's house, that Roberson and Lathaniel subsequently recruited others for the further confrontation they anticipated would occur later that day, and that members of Roberson's group armed themselves with knives, sticks, and socks filled with cans. Plainly, the trial court's ruling did not prevent defendant from pursuing self-defense and second degree murder. Indeed, the jury found that defendant had acted with a sincere, albeit unreasonable, belief that he was acting in self-defense, and found him guilty of second degree, rather than first degree, murder on the "strong probability" charge.

For similar reasons, any error in excluding the rap video was harmless. *See People v. Tompkins*, 2023 IL 127805, ¶ 61 (evidentiary error did not require reversal where harmless).. "When deciding whether error is harmless, a reviewing court may (1) focus on the error to determine whether it might have contributed to the conviction; (2) examine the other properly admitted evidence to determine whether it overwhelmingly supports the conviction; or (3) determine whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence." *In re Rolandis*

G., 232 Ill. 2d 13, 43 (2008); *see also Tompkins*, 2023 IL 127805, ¶ 60. "Error in the exclusion of hearsay testimony is harmless where the excluded evidence is merely cumulative of other evidence presented by the parties." *Caffey*, 205 Ill. 2d at 92. The rap video was cumulative of other evidence introduced at trial because, as explained, defendant presented evidence that the Roberson group — rather than he, Henry, and the Price group — were the aggressors, and that he was merely trying to protect himself. Indeed, defendant concedes that "the music video closely resembled the actual events surrounding [Jones's] death," as established by other evidence. Def. Br. 33. Accordingly, any error in the exclusion of the video was harmless.

CONCLUSION

This Court should 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, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 13,554 words.

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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On June 1, 2023, the foregoing **Brief of Plaintiff-Appellee People of the State of Illinois** was electronically filed with the Clerk, Illinois Supreme Court, and served upon the following by way this Court's Odyssey e-filing system:

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