

No. 127805

IN THE  
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF  
ILLINOIS

Plaintiff-Appellee,

v.

TRUMANE TOMPKINS,

Defendant-Appellant.

) On Appeal from the Appellate of  
) Illinois, First District,  
) No. 1-19-0693.

)  
) There on Appeal from the Circuit  
) Court of Cook County, Illinois,  
) No. 18 CR 6765.

)  
)  
) The Honorable  
) Timothy J. Joyce,  
) Judge Presiding.

**BRIEF OF PLAINTIFF-APPELLEE  
PEOPLE OF THE STATE OF ILLINOIS**

KWAME RAOUL  
Attorney General of Illinois

JANE ELINOR NOTZ  
Solicitor General

KATHERINE M. DOERSCH  
Criminal Appeals Division Chief

NICHOLAS MOELLER  
Assistant Attorney General  
100 West Randolph Street, 12th Floor  
Chicago, Illinois 60601-3218  
(773) 590-6936  
eserve.criminalappeals@ilag.gov

*Counsel for Plaintiff-Appellee  
People of the State of Illinois*

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## TABLE OF CONTENTS

	<u>Page(s)</u>
<b>NATURE OF THE CASE .....</b>	<b>1</b>
<b>ISSUES PRESENTED FOR REVIEW .....</b>	<b>1</b>
<b>JURISDICTION .....</b>	<b>2</b>
<b>STATUTE INVOLVED .....</b>	<b>2</b>
<b>STATEMENT OF FACTS .....</b>	<b>2</b>

## POINTS AND AUTHORITIES

<b>Standards of Review .....</b>	<b>9</b>
<i>People v. Fane</i> , 2021 IL 126715 .....	9
<i>People v. Hardman</i> , 2017 IL 121453 .....	9
<i>People v. Jolly</i> , 2014 IL 117142 .....	9
<b>Argument .....</b>	<b>9</b>
<b>I. The Trial Court Did Not Abuse Its Discretion by Rejecting Defendant’s Proffered Non-Pattern Instruction Because It Misstated the Law and, in Any Event, any Error in Declining to Instruct the Jury under Section 10-30 Was Harmless. ....</b>	<b>10</b>
<i>People v. Pollock</i> , 202 Ill. 2d 189 (2002) .....	10
<b>A. Defendant’s tendered non-pattern instruction misstated the law because it failed to instruct the jury to determine whether the People offered a reasonable justification for the officer’s failure to turn on his body camera. ....</b>	<b>10</b>
<i>Heaton v. Quinn</i> , 2015 IL 118585.....	16-17
<i>People v. Carlson</i> , 79 Ill. 2d 564 (1980) .....	11
<i>People v. Hardman</i> , 2017 IL 121453 .....	12
<i>People v. McDonald</i> , 2016 IL 118882 .....	16-17
<i>People v. Mohr</i> , 228 Ill. 2d 53 (2008) .....	11, 16

<i>People v. Pollock</i> , 202 Ill. 2d 189 (2002) .....	15
<i>People v. Wright</i> , 2017 IL 119561 .....	11
<i>Schultz v. St. Clair Cnty.</i> , 2022 IL 126856 .....	14
50 ILCS 706/10-20 .....	14
50 ILCS 706/10-30 .....	<i>passim</i>
720 ILCS 5/7-1 .....	13
Ill. S. Ct. R. 451 .....	11
<b>B. Any error in failing to instruct the jury pursuant to section 10-30 was harmless. ....</b>	<b>18</b>
50 ILCS 706/10-30 .....	18
<i>In re E.H.</i> , 224 Ill. 2d 172 (2006) .....	18
<i>People v. Flowers</i> , 138 Ill. 2d 218 (1990) .....	19
<i>People v. Hart</i> , 214 Ill. 2d 490 (2005) .....	21
<i>People v. Hudson</i> , 222 Ill. 2d 392 (2006) .....	19
<i>People v. Mohr</i> , 228 Ill. 2d 53 (2008) .....	18
<i>People v. Naylor</i> , 229 Ill. 2d 584 (2008) .....	22
<i>People v. Reddick</i> , 123 Ill. 2d 184 (1988) .....	18
<i>People v. Williams</i> , 2022 IL 126918 .....	22
<i>Wrobel v. Ill. Dep't of Emp't Sec.</i> , 344 Ill. App. 3d 533 (2003) .....	20
50 ILCS 706/10-30 .....	18
<b>II. Any Error in Admitting the Portion of the Recording Showing Marijuana Was Harmless. ....</b>	<b>23</b>
<i>In re E.H.</i> , 224 Ill. 2d 172 (2006) .....	23
<i>People v. King</i> , 2020 IL 123926 .....	24

<b>III. Even When Viewed Together, Any Errors Do Not Warrant Reversal.</b> .....	25
<i>McDonnell v. McPartlin</i> , 192 Ill. 2d 505 (2000) .....	25

## NATURE OF THE CASE

A jury found defendant guilty of unlawful use of a weapon by a felon, Sup. Sec. C36; R311-13,<sup>1</sup> and the trial court sentenced him to seven-and-a-half years in prison, R369-70. On appeal, defendant argued that the trial court erred in (1) refusing a non-Illinois Pattern Jury Instruction (IPI) offered pursuant to section 10-30 of the Law Enforcement Officer-Worn Body Camera Act (Act) (50 ILCS 706/10-30), concerning a police officer's failure to activate his body camera, and (2) allowing the admission of a recording showing police officers handling a bag of marijuana that did not belong to defendant. A5-6. Defendant appeals from the judgment of the Illinois Appellate Court, First District, which affirmed the trial court's judgment, holding that the proposed non-pattern jury instruction was an inaccurate statement of law, and that any error in admitting the recording of the marijuana was harmless. A13, 18. No question is raised on the pleadings.

## ISSUES PRESENTED

1. Whether the trial court properly rejected defendant's proffered non-pattern jury instruction because it misstated the law, given that section 10-30 of the Act instructs a factfinder to "consider" a police officer's failure to activate his body camera only if it finds both that (1) the violation was intentional, and (2) the People failed to provide a reasonable justification.

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<sup>1</sup> Citations to the common law record, report of proceedings, supplemental secured record, defendant's brief, and the appendix to defendant's brief appear as "C\_\_\_," "R\_\_\_," "Supp. Sec. C\_\_\_," "Def. Br.," and "A\_\_\_," respectively.

2. Alternatively, whether any error in failing to instruct the jury under section 10-30 of the Act was harmless.

3. Whether the admission of a recording showing a bag of marijuana unrelated to defendant was harmless error.

4. Whether cumulative error required reversal of defendant's conviction.

### **JURISDICTION**

Jurisdiction lies under Supreme Court Rules 315 and 612(b)(2). On January 26, 2022, this Court granted defendant's petition for leave to appeal. *People v. Tompkins*, No. 127805 (Jan. 26, 2022).

### **STATUTE INVOLVED**

The Law Enforcement Body-Worn Camera Act provides, in pertinent part, that:

The [body camera] recordings may be used as evidence in any administrative, judicial, legislative, or disciplinary proceeding. If a court or other finder of fact finds by a preponderance of the evidence that a recording was intentionally not captured, destroyed, altered, or intermittently captured in violation of this Act, then the court or other finder of fact shall consider or be instructed to consider that violation in weighing the evidence, unless the State provides a reasonable justification.

50 ILCS 706/10-30.

### **STATEMENT OF FACTS**

In 2018, police arrested defendant Trumane Tompkins after he and other occupants fled from a car that crashed while eluding a traffic stop. *See* C82-83. Officers recovered a handgun following the vehicle and foot chase,

C83, and defendant was charged with four counts of unlawful possession of a weapon by a felon and six counts of aggravated unlawful use of a weapon, C12-22.

Prior to trial, defendant filed a motion seeking to exclude an officer's body camera recording as unduly prejudicial. C145; R77. The recording showed an officer throwing a large bag of marijuana to a second officer (the recording officer) shortly before the second officer retrieved the handgun that was found immediately after defendant's arrest and gave rise to the charges against him. R76-77. The marijuana had been recovered by officers from an individual other than defendant who had also fled the crashed car. R77. The People asserted that the portion of the body camera recording showing the marijuana could not be excised from the recording without affecting the relevant portions of the recording (that is, the portions showing the recovery of the handgun) and offered to have the recording officer testify that the marijuana did not belong to defendant. R77-79. The trial court denied defendant's motion. R80.

At trial, the People presented evidence showing that officers in a marked police vehicle attempted to stop a black Hyundai Sonata for a traffic violation. R203-06. The car briefly pulled to the side of the road before speeding off. R206. It drove through a red light — almost “T-boning another car” — and then failed to stop at several stop signs before crashing into the

side of a house. R207-10. Following the crash, three individuals, including defendant, exited the Sonata and fled in different directions. R210-11.

Officer Constantino Martinez testified that he and his partner, Katie Blocker, were on patrol when they joined the pursuit of the black Sonata.

R248. After the Sonata crashed, defendant fled on foot and crossed in front of Martinez's vehicle. R251-53. Martinez exited the vehicle and chased defendant on foot, while Blocker followed another occupant of the crashed car. R252-53, 57. As defendant ran, he "kept holding his waistband like he was holding something and he was trying to retrieve it from wherever he had it in his front waistband." R254. Defendant then retrieved a black and red object from his waistband and tossed it over the gate of a nearby house's fence. R255. At the time, Martinez was 10 to 15 feet from defendant in an area well lit both by streetlights and the headlights of responding police vehicles. R254, 56. After defendant threw the object, he stopped running and "immediately put his hands up in the air." R256. Martinez arrested defendant. R255-56. Blocker joined Martinez, and Martinez directed her to the gate where defendant had thrown the object. R258. There, Blocker found a handgun. R260-61. Martinez returned to the location and observed a red and black handgun lying in the mouth of a gangway between two homes. R261-62.

Martinez further testified that he forgot to turn on his body-worn camera as he exited his vehicle to chase defendant. *See* R263. At the time,



Martinez explained, he was concerned about the safety of his fellow officers and the dangerous car chase. *Id.*

Officer Blocker testified consistently with Martinez. *See* R281-85.

When she reunited with Martinez, he directed her to an area where defendant had thrown something. R288. There, she found a red and black handgun lying between the home's stoop and front gate. R288-89, 292. The People played a recording from Blocker's body camera, which showed her finding a red and black handgun lying on a concrete walkway near a house. R293-95; Peo. Exh. 7.<sup>2</sup>

Officer Piotr Opacian also testified consistently with Martinez regarding the car chase. R202-10. After Martinez arrested defendant, Opacian joined the other officers at the location of the arrest. R217. There, Opacian recovered and inventoried a loaded red and black handgun. R218. The People played a recording from Opacian's body camera, which showed Opacian approaching the area of the arrest. R220-21; Peo. Exh. 2.<sup>3</sup> Another officer throws Opacian a plastic bag filled with marijuana, which Opacian then carries throughout the majority of the recording. *Id.* Opacian enters a front yard and recovers a red and black handgun. *Id.* Following the playing

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<sup>2</sup> People's Exhibit 7 is included in the record's physical exhibits, in a file labeled "2318 9 to 11" on a DVD labelled "Thompkins 18 CR6765 Clipped BWC."

<sup>3</sup> People's Exhibit 2 is included in the record's physical exhibits, in a file labeled "2326 to 45" on a DVD labelled "Thompkins 18 CR6765 Clipped BWC."

of the recording, Opacian testified that the marijuana shown belonged to another individual from the Sonata and not to defendant. R221-22. He also testified that the marijuana was not recovered in the area near defendant's flight and arrest. R241.

On cross-examination of Martinez and Opacian, defense counsel asked whether officers were required to activate their body cameras during a foot pursuit. R228-30, 270-71. Both officers answered that they were required to turn on their cameras in such circumstances. R231, 271.

The parties stipulated that defendant had a prior felony conviction. R298-300.

Following the close of evidence, defendant requested the following non-pattern instruction, based upon 50 ILCS 706/10-30:

You have heard testimony that Officer Martinez was wearing a body-worn camera but did not turn it on prior to or during his encounter with the defendant. If you find that the officer intentionally did not capture a recording of this encounter, then you should consider that fact when determining what weight to give to Officer Martinez's testimony.

Sup. Sec. C. 36; *see also* R311. The trial court declined to give the instruction. It explained that the Act was ambiguous as to whether the court or the jury was required to make the finding that the officer had intentionally failed to record the events. R314. The court stated it would not make such a finding as a prerequisite to giving the instruction. R314. The court found that the People had given a reasonable justification for Martinez's failure to record the events: his concern for the safety of himself, his partner, and

others during the car chase and ensuing foot chase. R314-15. In light of that reasonable justification, the court concluded, the statute did not require that the instruction be given. R314-15.

In closing argument, defense counsel argued that the People failed to meet their burden because Officer Martinez was the only individual who saw defendant in possession of the gun, and he had failed to turn on his camera. R323. Counsel repeatedly stated that Martinez had not followed the rules, and thus no one “really kn[e]w” what he had seen. R325. At the end of his argument, counsel again asserted that Martinez had not followed the rules and deprived the jury of crucial evidence. R327-28. In response, the People briefly argued on rebuttal that the “camera issue” was a distraction from the evidence that defendant possessed a gun. R329.

Among its other instructions, the jury was instructed to “consider all the evidence in the light of your own observations and experience in life” and to weigh and consider each witness’s testimony “in light of all the evidence in the case.” R339-40.

The jury found defendant guilty of all counts. R351. The trial court merged the counts into one conviction of unlawful use of a weapon by a felon and sentenced him to seven-and-a-half years in prison. R374.

On appeal, defendant argued that the trial court erred in declining to give the non-pattern instruction and in admitting the recording from Opacian’s body camera, which depicted the bag of marijuana. *People v.*

*Tompkins*, 2021 IL App (1st) 190693-U, ¶ 2; *see also* A5. The appellate majority held the trial court did not abuse its discretion in rejecting the non-pattern instruction because the proposed instruction misstated the law by omitting the statutory language “unless the State provides a reasonable justification.” A13. The appellate majority further held that any error in refusing the instruction was harmless given the weight of the evidence against defendant, defense counsel’s focus on Martinez’s camera throughout trial, and other instructions directing the jury to evaluate witness testimony in light of all of the circumstances. A15. Regarding the bag of marijuana, the appellate majority held that although the trial court erred in allowing the video recording of the marijuana, its admission was harmless because testimony made clear that it did not belong to defendant and was not recovered from or even near him. A17-18.

The dissenting justice disagreed on both points. The dissent reasoned that the trial court “erred when it invaded the province of the jury and made the factual finding that the State offered a reasonable justification” for Martinez’s failure to activate his camera, emphasizing that “the jury, as the finder of fact, must determine whether the ‘State provides a reasonable justification’ because reasonableness is a question of fact, rather than a question of law.” *Tompkins*, 2021 IL App (1st) 190693-U, ¶ 46 (Walker, J., dissenting). Although defendant’s proposed instruction did not include this provision, the dissenting justice stated that the instruction “substantially

covered the Act.” *Id.* ¶ 49 (Walker, J., dissenting). The dissent further found that the court erred in admitting the footage of the marijuana, and that defendant was entitled to a new trial as a result of “cumulative error.” *Id.* ¶¶ 51-53 (Walker, J., dissenting).

### STANDARDS OF REVIEW

The trial court’s denial of a non-pattern jury instruction is reviewed for an abuse of discretion. *People v. Fane*, 2021 IL 126715, ¶ 33. Whether defendant’s proposed jury instruction correctly stated the law presents a question of statutory interpretation, which is reviewed *de novo*. *People v. Hardman*, 2017 IL 121453, ¶ 19.

The question of whether an evidentiary error is harmless is a legal question subject to *de novo* review. *See People v. Jolly*, 2014 IL 117142, ¶ 28.

### ARGUMENT

As the appellate court correctly held, the circuit court did not abuse its discretion by denying defendant’s proposed non-pattern jury instruction because it misstated the law. Generally, a trial court is not required to give a jury instruction *sua sponte*, nor is it required to correct a proffered instruction that misstates the law. Section 10-30 provides that a factfinder may draw an adverse inference from a police officer’s failure to activate his body camera only if two requirements are met: (1) the officer’s failure to activate the body camera was intentional; and (2) the People offered no reasonable justification for the violation. Defendant’s proffered instruction permitted the jury to draw an adverse inference if it determined that the

failure to turn on the camera was intentional, but made no mention of whether the People's justification was reasonable. Accordingly, the proposed instruction plainly misstated the law, and the trial court did not abuse its discretion by declining to give it.

Alternatively, any error in declining to instruct the jury under section 10-30 was harmless. First, other jury instructions and defense counsel's closing argument directed the jury to consider, in weighing Officer Martinez's testimony, his failure to turn on his camera. Second, the jury would not have drawn an adverse inference had a properly worded instruction been given, because the evidence showed that (1) the failure to turn on the body camera was not intentional, and (2) the People's justification for the officer's failure to turn on the body camera was reasonable.

Additionally, any error in admitting the recording from Officer Opacian's body camera showing the bag of marijuana was harmless because a witness for the People plainly testified that the marijuana evidence was unrelated to defendant. Moreover, the challenged video evidence allowed defense counsel to undercut the People's case by arguing that the owner of the marijuana was also the owner of the recovered gun.

Finally, defendant was not prejudiced by the alleged errors, even if considered cumulatively, because he received a fair trial.

**I. The Trial Court Did Not Abuse Its Discretion by Rejecting Defendant's Proffered Non-Pattern Instruction Because It Misstated the Law and, in Any Event, any Error in Declining to Instruct the Jury under Section 10-30 Was Harmless.**

As the appellate court correctly held, the trial court did not abuse its discretion in declining to give defendant's proposed instruction, for a trial court does not abuse its discretion in rejecting a jury instruction that misstates the law, *People v. Pollock*, 202 Ill. 2d 189, 211 (2002), and defendant's proposed instruction misstated the law.

**A. Defendant's tendered non-pattern instruction misstated the law because it failed to instruct the jury to determine whether the People offered a reasonable justification for the officer's failure to turn on his body camera.**

Although a jury instruction may be appropriate where evidence shows that a police officer failed to activate his body camera, *see* 50 ILCS 706/10-30, no pattern jury instruction governs this circumstance. A court may nonetheless give a non-IPI instruction so long as it is "an accurate, simple, brief, impartial, and nonargumentative statement of the law." Ill. S. Ct. R. 451(a). It was defendant's burden to request the instruction premised on Martinez's failure to activate his body camera, *People v. Wright*, 2017 IL 119561, ¶ 88 (parties bear burden to request a specific instruction), for a trial court is not required to offer a jury instruction *sua sponte* except "on the elements of the crime charged, on the presumption of innocence and on the question of burden of proof." *Id.* Indeed, a party forfeits any claim of instructional error where the party does not object and offer a remedial instruction. *People v. Mohr*, 228 Ill. 2d 53, 64 (2008). And where, as here, a

party proffers an incorrect or incomplete instruction, the court is under no obligation to rewrite or correct the instruction. *People v. Carlson*, 79 Ill. 2d 564, 583 (1980).

Determining whether defendant’s proposed instruction constituted a correct statement of the law requires this Court to construe section 10-30 of the Act. The primary goal of statutory interpretation is “to determine and effectuate the legislature’s intent.” *People v. Hardman*, 2017 IL 121453, ¶ 19. The plain and ordinary meaning of the statutory language is the best indicator of the legislature’s intent. *Id.*

Section 10-30 permits the use at trial of body camera recordings with the caveat that:

If a court or other finder of fact finds by a preponderance of the evidence that a recording was intentionally not captured, destroyed, altered, or intermittently captured in violation of this Act, then the court or other finder of fact shall consider or be instructed to consider that violation in weighing the evidence, unless the State provides a reasonable justification.

50 ILCS 706/10-30.

Under the plain language of this provision, an adverse inference based on a violation of the Act is warranted only if two conditions are met. First, the factfinder must “find[ ] by a preponderance of the evidence that a recording was intentionally not captured.” *Id.* Second, the factfinder must further conclude that the People failed to “provide[ ] a reasonable justification” for the violation. *Id.* Indeed, defendant and the dissenting justice below agree that “whether [an officer’s] explanation was reasonable” is



“a factual question . . . for the jury.” Def. Br. 10; *Tompkins*, 2021 IL App (1st) 190693-U, ¶ 46 (Walker, J., dissenting) (“the jury, as the finder of fact, must determine whether the ‘State provides a reasonable justification.’”).

Defendant’s proffered instruction was incomplete because it failed to present this second, factual question to the jury because it omitted the final clause from section 10-30: “unless the State provides a reasonable justification.” *Compare* 50 ILCS 706/10-30, *with* Sup. Sec. C. 36. By the plain language of the statute, a factfinder is not to consider an intentional violation of the Act where the People give a reasonable justification for the violation. 50 ILCS 706/10-30. Because defendant’s proffered instruction omitted a critical part of section 10-30, the trial court rightly rejected it.

Defendant disagrees because, in his view, the finding of an intentional violation necessarily implies that there is no reasonable justification. Def. Br. 16. Yet whether an act is intentional and whether that same act is justified are two separate questions. A commonly known example is a shooting done in self-defense: the defendant intentionally shoots the victim, but his intentional action is justified as self-defense. *See* 720 ILCS 5/7-1(a) (self-defense statute).

Moreover, defendant’s interpretation overlooks that the General Assembly clearly required both findings. 50 ILCS 706/10-30. To conclude that the phrase “unless the State provides a reasonable justification” is superfluous in a jury instruction would necessarily hold that the same

language was superfluous in the Act, in violation of the basic tenet of statutory interpretation that “that every clause of a statute must be given a reasonable meaning, if possible, and should not be rendered meaningless.” *Schultz v. St. Clair Cnty.*, 2022 IL 126856, ¶ 27.

Defendant also argues that no officer could ever have a reasonable justification for violating the Act. Def. Br. 16-17. But again, the General Assembly clearly would not agree because it included the justification condition in the statute. If the legislature believed there was no possible reasonable justification, why would they include it in the Act? Again, such a reading would impermissibly render the statute’s explicit language superfluous. *Schultz*, 2022 IL 126856, ¶ 27. Moreover, potential reasonable justifications abound. For instance, if an officer arrives at a location, finds an individual in need of medical attention requiring two hands, and chooses to immediately render aid rather than turn on a body camera, the officer has intentionally failed to capture footage. Yet, a jury could determine the officer’s decision was reasonable. Alternatively, officers are not required to turn on their cameras inside a courthouse with a functioning camera system. 50 ILCS 706/10-20(3)(C). However, if an officer declines to turn on the camera when entering a courthouse, relying on a plainly visible surveillance system that unbeknownst to the officer is *not functioning*, the officer has intentionally failed to capture video and thus violated the statute. But a jury

could find the officer's action was reasonably justified by his mistaken belief that section 10-20(3)(C).

Accordingly, because section 10-30 requires the factfinder to conclude both that an intentional act occurred and that the People offered no reasonable justification before drawing an adverse inference, defendant's proffered instruction misstated the law by failing to instruct the jury to make the second necessary finding. Consequently, the trial court did not abuse its discretion in rejecting the incorrectly worded instruction. *See Pollock*, 202 Ill. 2d at 211.

Below, the trial court recognized the importance of section 10-30's "reasonable justification" language to the statute's operation, finding that the State had offered a reasonable justification for failing to activate the body camera: in other words, the court treated this element of the statute (the "unless" clause) as a prerequisite to obtaining the instruction. It appears to be the better reading of the statute that the reasonableness of the People's justification for the violation should ultimately be a question for the factfinder responsible for drawing the adverse inference, as defendant argues, rather than for the court which is determining whether to give the instruction to the jury.

The Act is ambiguous as to whether the trial court should make preliminary factual determinations before providing a jury instruction. Again, the Act states:

*If* a court or other finder of fact finds by a preponderance of the evidence that a recording was intentionally not captured, destroyed, altered, or intermittently captured in violation of this Act, *then* the court or other finder of fact shall consider or be instructed to consider that violation in weighing the evidence, *unless* the State provides a reasonable justification.

50 ILCS 706/10-30 (emphasis added). Both the “if” and “unless” clauses could be read as preconditions not only to whether the adverse inference is drawn, but as preconditions to whether the jury instruction is given at all. *See* R314 (trial court notes that statute is ambiguous as to whether court or jury should find by preponderance of the evidence whether failure to activate body camera is intentional).

Requiring a trial court to make preliminary factual determinations before giving an instruction would vary drastically from the typical jury instruction conference, in which the trial court considers the issues raised and the evidence presented and then determines which instructions are necessary and appropriate to guide the jury’s deliberations. *See Mohr*, 228 Ill. 2d at 65. The court’s rulings rest not on a preponderance standard, but the less onerous “some evidence” standard. *See People v. McDonald*, 2016 IL 118882, ¶ 23. Presumably, the General Assembly did not intend to make such a drastic departure from the routine jury instruction procedure without providing more explicit direction. *See Heaton v. Quinn (In re Pension Reform Litig.)*, 2015 IL 118585, ¶ 70 (the legislature is presumed to know the existing law and draft legislation in accordance).

Indeed, in the absence of such explicit direction, it is reasonable to assume that the General Assembly did not intend such a drastic departure and instead intended that an instruction under section 10-30 be available, like other jury instructions, when “some evidence” would support it. Thus, where a properly worded instruction regarding section 10-30 is proffered, the trial court must review the evidence and issues raised at trial and determine if “the record contains some evidence to support the giving of the instruction.” *See McDonald*, 2016 IL 118882, ¶ 23. If the court makes the threshold finding, the jury should then be instructed — in accordance with section 10-30 — that (1) if it finds by a preponderance of the evidence that an intentional violation of the Act occurred, (2) then it should consider whether the People provided a reasonable justification for that violation, and if not, (3) the jury may consider that violation in weighing the evidence. *See* 50 ILCS 706/10-30.

This Court need not determine whether the evidence in the present case met the “some evidence” threshold however, because defendant’s proffered instruction did not accurately reflect section 10-30. Instead, as defendant worded the instruction, he treated the reasonableness of the justification as an issue for the court, not the jury. And because his proposed instruction was not an accurate statement of the law, the trial court did not abuse its discretion by refusing it.

**B. Any error in failing to instruct the jury pursuant to section 10-30 was harmless.**

Even assuming, *arguendo*, that the trial court erred in refusing to give defendant's proposed instruction under section 10-30, any such error was harmless because the result of the trial would not have been different had the rejected instruction been given. *See Mohr*, 228 Ill. 2d at 69.

The harmless standard differs depending on the nature of the error: errors of constitutional magnitude must be shown to be harmless beyond a reasonable doubt, while non-constitutional errors are harmless where there is no reasonable probability that the verdict would have been different absent the error. *In re E.H.*, 224 Ill. 2d 172, 180 (2006). Defendant argues that the more stringent constitutional standard is appropriate here because he has a constitutional right to an impartial jury. Def. Br. 12, 18. However, as this Court has noted, only "certain instructions, such as the burden of proof and elements of the offense, are essential to a fair trial." *People v. Reddick*, 123 Ill. 2d 184, 198 (1988). Defendant's proffered instruction did not involve the burden of proof, the elements of his offense, or any other constitutional right. Instead, the instruction derived solely from a statute, *see* 50 ILCS 706/10-30, and consequently the non-constitutional standard applies.

Moreover, any error in refusing the instruction was harmless under either standard because the jury instructions, as a whole, accurately conveyed the law to the jury. *See People v. Hudson*, 222 Ill. 2d 392, 399

(2006) (“The sole function of instructions” is to convey to the jury the correct principles of law applicable to the evidence so that, “having determined the final state of facts from the evidence, the jury may, by the application of proper legal principles, arrive at a correct conclusion according to the law and the evidence.”) (internal quotation marks omitted); *see also People v. Flowers*, 138 Ill. 2d 218, 233 (1990) (“[I]f the language of an instruction is inaccurate, and, standing alone, may mislead the jury, other instructions may explain the inaccuracy, remove the error or render it harmless”).

Although the jury was not expressly instructed to consider whether Officer Martinez intentionally did not turn on his camera, it was instructed to “consider all the evidence in the light of your own observations and experience in life” and to weigh and consider each witness’s testimony “in light of all the evidence in the case.” R 339-40. Logically, the jury’s consideration of all evidence in the case included the evidence that Martinez had not turned on his body camera and that officers are generally required to activate their body cameras during a foot pursuit. R231; 270. Defense counsel repeatedly directed the jury to focus on Martinez’s body camera, basing much of his opening statement, cross-examinations of Martinez and Opacian, and closing argument on the lack of footage from Martinez’s body camera — indeed, he asserted eight times in closing argument alone that Martinez had not turned on his camera. R200-01, 228-231, 270-74, 276-77, 279, 323, 325-28.

Moreover, the lack of an instruction under section 10-30 worked to defendant's benefit, because section 10-30 restricts the circumstances under which the jury is to "consider" the failure to activate a body camera. As explained, a properly worded instruction would have told the jury to consider the failure to record in weighing the evidence, if and only if they found that Martinez had done so intentionally and that the People lacked a reasonable justification. *See supra* Section I.A. Instead, the trial court simply instructed the jury to consider all the evidence and defense counsel then directed them to consider specifically Martinez's failure to turn on the camera without any such limitation.

Indeed, had the jury been instructed under section 10-30, it is unlikely to have found the preconditions to an adverse inference. First, Officer Martinez's un rebutted testimony was that he merely forgot to turn the camera on in the middle of a dangerous nighttime chase. R263. Forgetting to act is not the same as intentionally acting. *See Wrobel v. Ill. Dep't of Emp't Sec.*, 344 Ill. App. 3d 533, 537 (2003) ("One does not typically forget to do something intentionally; forgetting is a matter of carelessness."). Thus, the jury likely would not have found that Martinez had acted intentionally. Moreover, the jury likely would have found — like the trial court did, R314-15 — that Martinez had a reasonable justification for his failure to turn on the camera. Martinez participated in a dangerous, high-speed car chase that ended when the pursued vehicle crashed into a house. R206-210. After



hastily parking his car, Martinez immediately began chasing defendant on foot through a residential neighborhood. R263. Due to the danger of the chase, Martinez focused on the safety of his partner, the public, and himself as he pursued the fleeing defendant. *Id.* Given the understandable safety implications cited by Martinez, the jury likely would have found that any violation of the Act was reasonably justified. Accordingly, the jury likely would not have held the failure against Martinez, even if the trial court had given a section 10-30 instruction.

The omission of the instruction was harmless for the additional reasons that the evidence of defendant's guilt was strong, and other evidence corroborated Officer Martinez's testimony, demonstrating its credibility. Martinez's un rebutted testimony was that he saw defendant reach into his waistband while fleeing, throw something red and black over a fence, and then, almost immediately, stop and comply with Martinez's orders. R255-56. All three officers saw a red and black gun sitting in the open, mere feet from where Martinez had seen defendant throw a red and black object. R218, 261-62, 289. Defendant's flight from the police was probative of his consciousness of guilt, as he knew that, as a felon, he was not legally permitted to possess a firearm. *See People v. Hart*, 214 Ill. 2d 490, 519 (2005) (flight from police can be considered evidence of guilt). And the fact that defendant stopped and submitted to arrest immediately after throwing the object, R256, further evidences his consciousness of guilt because he stopped only after he believed

that he had disposed of the gun. Thus, given the corroborating evidence, the jury was unlikely to discredit Martinez's testimony even if the jury had been instructed pursuant to section 10-30.

Accordingly, contrary to defendant's argument, *see* Def. Br. 24, the People's evidence of guilt was strong, and the case did not amount to a credibility contest that rendered the evidence closely balanced. A credibility contest occurs when at least two witnesses give contrasting accounts of what occurred. *People v. Williams*, 2022 IL 126918, ¶ 61. Although a defendant is under no obligation to present evidence, his decision not to do so does not create a credibility contest such that a court must deem the evidence closely balanced. *Id.* Thus, the cases cited by defendant — *People v. Naylor*, 229 Ill. 2d 584, 606-07 (2008) (finding evidence closely balanced where testimony state witnesses and defense witnesses conflicted) and *People v. Sebbby*, 2017 IL 119445, ¶¶ 62-63 (same) — are inapposite. *Williams*, 2022 IL 126918, ¶ 61 (holding *Naylor* is inapposite where defendant presents no evidence).

Additionally, defendant's suggestion that someone else had "stash[ed]" the recovered gun is belied by the record. *See* Def. Br. 24. The gun was found lying in the open on a walkway that was clearly visible from the sidewalk and street. *See* State's Exhibit 2. It strains credulity to believe that someone intending to "stash" a firearm for later use would "hide" it in plain sight where any passerby could see or take it.

Accordingly, in light of the other instructions given to the jury, defense counsel's focus on Martinez's failure to turn on his body camera, and the strength of the People's evidence, any error in refusing the non-pattern instruction was harmless.

**II. Any Error in Admitting the Portion of the Recording Showing Marijuana Was Harmless.**

Any error in admitting the portion of the recording showing a bag of marijuana was also harmless. *See Tompkins*, 2021 IL App (1st) 190693-U, ¶ 41. As discussed, evidentiary errors are harmless where there is no reasonable probability that the verdict would have been different absent the error. *In re E.H.*, 224 Ill. 2d at 180. Defendant suggests that the constitutional right to a fair trial renders every evidentiary error an issue of constitutional magnitude. *See* Def. Br. 27. On the contrary, this Court has specifically identified separate harmless error standards for general evidentiary errors and constitutional errors. *In re E.H.*, 224 Ill. 2d at 180. Defendant argues that the body camera recording should have been barred as irrelevant under Illinois Rule of Evidence 403, and he does not identify any constitutional source of error. *See* Def. Br. 27. Accordingly, the lesser standard for non-constitutional errors applies. Regardless, any error in refusing the instruction was harmless even under the constitutional standard.

When weighing whether the admission of evidence is harmless, courts consider: “(1) whether the error contributed to the defendant's conviction, (2)

whether the other evidence in the case overwhelmingly supported the defendant's conviction, and (3) whether the challenged evidence was duplicative or cumulative." *People v. King*, 2020 IL 123926, ¶ 40. As noted above, the evidence overwhelmingly established defendant's guilt. *See supra* at 16-17. And the error here could not have contributed to defendant's conviction. The recording showing the bag of marijuana was brief and, at its conclusion, Officer Opacian immediately told the jury that the marijuana was unconnected to defendant. R221-22. Thus, there is no reason to believe that the evidence had any prejudicial effect on the jury.

Indeed, the marijuana evidence may even have helped defendant. The People's theory of the case was that defendant fled from police because he illegally possessed the gun. R322. Yet the presence of the marijuana — which the parties agreed was not defendant's — provided an alternate explanation for the Sonata and its occupants to flee from police. And the recording showed officers holding the bag of marijuana near the location where the gun was recovered. *Peo. Exhibit 2*. This evidence thus allowed defense counsel's argument that the individual who possessed the marijuana (not defendant) could also have possessed and tossed the recovered gun. R236. Consequently, not only did the body camera recording not hurt defendant because the testimony showed and the parties agreed that it was not defendant's, but it helped him because it provided support for his argument that the owner of the marijuana also possessed the gun.

Accordingly, any error in admitting the portion of the recording showing the bag of marijuana was harmless.

### **III. Even When Viewed Together, Any Errors Do Not Warrant Reversal.**

Any errors that occurred in defendant's trial, even when viewed cumulatively, did not prejudice defendant. A defendant is not entitled to a new trial based on an allegation of cumulative error unless the record reveals that the trial, taken as a whole, was unfair. *McDonnell v. McPartlin*, 192 Ill. 2d 505, 536 (2000). Even assuming, *arguendo*, that the trial court erred both in failing to instruct the jury under section 10-30 and in admitting the recording showing the bag of marijuana, defendant received a fair trial. As discussed above, defendant was not prejudiced by either alleged error, *supra* at 14-19. In both instances, any potential prejudice was cured either by other jury instructions and closing argument, *supra* at 15-16, or by testimony that the marijuana did not belong to defendant, *supra* at 18. And in both instances defendant was more likely to benefit from the alleged error than to be harmed by it. *Supra* at 16, 18-19. When comparing the minimal potential prejudice from both claims against the strength of the evidence, it is clear that even when both alleged errors are taken together, defendant received a fair trial.

**CONCLUSION**

This Court should affirm the appellate court's judgment.

October 3, 2022

Respectfully submitted,

KWAME RAOUL  
Attorney General of Illinois

JANE ELINOR NOTZ  
Solicitor General

KATHERINE M. DOERSCH  
Criminal Appeals Division Chief

/s/ Nicholas Moeller  
NICHOLAS MOELLER  
Assistant Attorney General  
100 West Randolph Street, 12th Floor  
Chicago, Illinois 60601-3218  
(773) 590-6936  
eserve.criminalappeals@ilag.gov

*Counsel for Plaintiff-Appellee  
People of the State of Illinois*

**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 26 pages.

/s/ Nicholas Moeller  
Nicholas Moeller  
Assistant Attorney General

**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 October 3, 2022, the foregoing **Brief of Plaintiff-Appellee** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided notice to the following registered e-mail addresses:

Douglas R. Hoff  
Yasaman Hannah Navai  
Office of the State Appellate Defender  
First Judicial District  
203 North LaSalle Street, 24th Floor  
Chicago, Illinois 60601  
1stdistrict.eserve@osad.state.il.us;

Kimberly Foxx,  
Cook County State's Attorney,  
300 Daley Center,  
Chicago, Illinois 60602,  
eserve.criminalappeals@cookcountyil.gov

/s/ Nicholas Moeller  
Nicholas Moeller