No. 126830

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- JEREMY MUDD, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-19-0252. There on appeal from the Circuit Court of Cook County, Illinois , No. 17 CR 12579. Honorable Charles P. Burns, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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E-FILED
10/4/2021 10:42 AM
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ARGUMENT

The prosecutor in rebuttal closing argument erred when he shifted the burden of proof to Jeremy Mudd and misstated the evidence about the availability fingerprint testing. The appellate court erred when it held that it is a matter of "general knowledge, common experience, or common sense" for jurors that a defendant has access to and can obtain forensic testing of the State's evidence. Where the State introduced no evidence about this and it is not a matter of common knowledge for jurors, Jeremy Mudd's conviction should be reversed and the case remanded for a new trial.

In the appellate court, Jeremy Mudd argued the State committed misconduct during rebuttal closing argument by misstating the evidence and shifting the burden to Mudd when its prosecutor, despite no testimony being elicited on the subject, told the jurors that, "[B]oth sides have access to the evidence. Both sides if they wanted testing to be done can request testing to be done. Both sides." *People v. Mudd*, 2020 IL App (1st) 190252-U, ¶¶2, 12. As part of its response below, the State argued that no testimony or evidence needs to be presented on this subject as it is a concept understandable by a lay juror. (St. App. Ct. Br. 21) Adopting that argument and finding no prosecutorial misconduct, the appellate court held the concept that "a defendant has access to evidence to be used against him 'to have a test by his chosen expert' is a matter of 'general knowledge, common experience, or common sense,'" and thus no testimony needed to have been elicited on the subject before the prosecutor made his argument. *Mudd*, at ¶23, citing *People v. Walter Jackson*, 391 Ill.App.3d 11, 42-43 (1st Dist. 2009). In his petition for leave to appeal, Mudd asked this Court to review, *inter alia*, whether this concept is a matter of common knowledge for jurors.

Circumventing the appellate court's holding and the compelling reason for granting review, the State now asserts, "this Court need not resolve whether it is common knowledge that defendants may ask to test evidence because prosecutors may make legal statements provided they are accurate, regardless of whether that legal concept is commonly known." (St. Br. 20) As the State has forfeited its ability to argue later that the matter is of common knowledge

(*see* Ill.S.Ct. R. 341(h)(7), (i) (West 2021) ("Points not argued are forfeited and shall not be raised. . . in oral argument, or on petition for rehearing")), Mudd rests on his opening brief's argument as to why a defendant's ability to obtain forensic testing of the State's evidence is not a matter of general knowledge, common experience, or common sense for a juror. (Def. Op. Br. 19-23)

Instead of addressing whether the prosecutor's assertion in rebuttal closing argument was a matter of general knowledge, the State claims this argument was appropriate because it was "an accurate statement of Illinois law" and thus it was unnecessary for the State to introduce any evidence to support the argument. (St. Br. 15-21) However, the complex legal nature of this Court's discovery rules (*see* Ill.S.Ct. R. 412(e) (West 2021)) does not give prosecutors carte blanche to argue matters not in evidence. And contrary to the State's position (St. Br. 20), Mudd's argument responding to the appellate court's holding (which adopted a State argument below) is not a concession that the prosecutor acted appropriately by arguing facts not in evidence and shifting the burden to Mudd. By noting the complexity of this Court's discovery rules, Mudd merely refutes the appellate court's holding that the subject matter is of such common knowledge to the average citizen that no evidence needed to be introduced prior to the State here crafting an argument based upon it. While the State may be correct that a defendant's ability to obtain forensic testing of the State's evidence is a legal concept in general, authority from this Court and the appellate court refutes the State's current position that the legal underpinnings of the instant closing argument cured the prosecutor's misconduct in introducing that legal concept without evidence having been elicited.

For example, if the State's position were valid, then this Court's opinion in *People v. Patterson*, 217 Ill.2d 407, 445-46 (2005), would not be correct. There, this Court analyzed whether the State committed misconduct in questioning its DNA expert on redirect examination

about the availability of both parties to test the evidence. *Id*. at 445-46. But if the State's position were accurate, this Court would not have needed to address the exchange and instead would have merely held that this was a correct statement of law and prosecutors do not err when they make such statements. *See* (St. Br. 15-17) Likewise, the multiple instances of the appellate court analyzing this issue in a similar manner as to *Patterson* would be in error. *See*, *e.g.*, *People v. Lewis Jackson*, 399 Ill.App.3d 314, 318-19 (1st Dist. 2009)[1]; *People v. Kelley*, 2015 IL App (1st) 132782, ¶67 (discussing *Patterson* and the import of evidence being presented that testing was available to the defendant). These cases permit the State to present evidence of this matter, well outside of the common knowledge of the jury, through witness testimony. They do not permit this matter to be raised, without evidence, for the first time in closing argument in an attempt to shift the burden of proof by effectively telling the jury that the defense should have conducted forensic testing that the State chose not to conduct.

The "painstakingly drafted" Illinois Pattern Jury Instructions (*see People v. Haywood*, 82 Ill.2d 540, 545 (1980)), further submarine the State's current argument. I.P.I. Criminal No. 1.01, one of the first instructions given to a jury prior to its deliberations, explains the differences between the facts and the law:

> Members of the jury, the evidence and arguments in this case have been completed, and I now will instruct you as to the law. The law that applies to this case is stated in these instructions, and it is your duty to follow all of them. You must not single out certain instructions and disregard others. When I use the word "he" in these instructions, I mean a male or a female. It is your duty to determine the facts and to determine them only from the evidence in this case. You are to apply the law to the facts and in this way decide the case. . .The evidence which you should consider consists only of the testimony of the witnesses, the exhibits, and stipulations which the court has received. Illinois

[1] In Mudd's opening brief, the correct citation to the *Lewis Jackson* opinion was not included in the table of contents. Appellate counsel apologizes for this error and the confusion with *People v. Walter Jackson*, 391 Ill.App.3d 11, 42-43 (1st Dist. 2009), which was cited in the appellate court's order as a basis for its matters of common knowledge holding. *Mudd*, at ¶22.

> Pattern Jury Instruction-Criminal No. 1.01[1], [2], [3], and [9]; *see also* (Sec C. 5; R. 88-89)

And Mudd's jury received this instruction just like any other jury. (Sec C. 5; R. 88-89) But it was not given an instruction about whether the defense is able to request forensic testing of the State's evidence, and there is no pattern instruction on that subject. As a result, what the State is asking this Court to approve of is for a prosecutor to instruct the jury on the law when no instruction has been or will be given to the jury on the subject. This would circumvent the method this Court approved in *Patterson* – witness testimony about a matter outside of common knowledge – and instead allow the prosecutor to raise this matter for the first time in closing argument in a way that shifts the burden of proof to the defense.

This lack of instruction distinguishes the cases cited by the State; in those cases, the jury received pattern instructions about basic principles of law (e.g., the role of a foreperson, the mental state for the charged offense, and circumstantial evidence), and the State was held to have properly discussed those legal principles in closing argument. (St. Br. 15-17) For example, this Court in *People v. Glasper*, 234 Ill.2d 173, 211-13 (2009), analyzed whether the State committed misconduct in argument. Part of the alleged error there was whether the prosecutor erroneously made comments about the foreperson's role during deliberations. *Id*. at 212-13. And while the State is accurate that *Glasper* did not consider whether any evidence during the trial had been presented on the subject (St. Br. 17), the State omits any discussion of what was provided to the jury in *Glasper*: Illinois Pattern Jury Instructions, Criminal, No. 26.01 ("Concluding Instruction" detailing the foreperson's role). *Glasper*, 234 Ill.2d at 212-13; *see also* I.P.I. Criminal No. 1.01.

The State's remaining authority suffers from similar infirmities. (St. Br. 15-16) In *People v. Hasprey*, 194 Ill.2d 84, 86-87 (2000), the prosecutor committed no misconduct by informing the jurors as to the *mens rea* portion of the charged offense and **which they were instructed**

on (the error on appeal was whether this *mens rea* was accurately conveyed). *See People v. Hasprey*, 308 Ill.App.3d 841, 846-47 (4th Dist. 1999) (I.P.I. 23.31 given to jury), *overruled on other grounds by Hasprey*, 194 Ill.2d at 87. Likewise in *People v. Adams*, 109 Ill.2d 102, 117-18 (1985), this Court held jurors may be informed that "circumstantial evidence is sufficient for conviction" and that they "are not required to search out a series of potential explanations compatible with innocence and elevate them to reasonable doubt" because those are accurate statements of law. Notably absent from the State's citation to *Adams* is that, at the time, I.P.I. Criminal No. 3.02 explicitly mentioned those "legal" concepts. *See People v. Housby*, 84 Ill.2d 415, 434 (1981); *People v. Watts*, 98 Ill.2d 70, 72-73 (1983); *People v. Jones*, 105 Ill.2d 342, 355 (1985); Illinois Pattern Jury Instructions, Criminal, No. 3.02 (2d ed.1981); *compare People v. Bryant*, 113 Ill.2d 497, 510 (1987) ("We now conclude that the 'reasonable theory of innocence' charge should not be used.").

The final case the State relies upon is *People v. Munson*, 206 Ill.2d 104 (2002). (St. Br. 15-16) But *Munson* is worlds away from the instant matter. In *Munson*, the prosecutor did not commit misconduct when, in response to the defendant's closing argument that the State had presented no eyewitnesses, she mentioned the State's inability to introduce an accomplice's statement. 206 Ill.2d at 145-46. Thus, the import of *Munson* is that this Court has approved of rebuttal closing argument mentioning the lack of State's evidence **where the State is legally not permitted to introduce said evidence**. *See Bruton v. United States*, 391 U.S. 123 (1968). But in Mudd's case, there was nothing preventing the State from eliciting evidence, on redirect examination, from Officer Garcia (or calling the appropriate forensic scientist from the Illinois State Police) that Mudd had the ability to have the firearm tested for fingerprints and/or DNA. *See Patterson*, 217 Ill.2d at 445-46; *Kelley*, 2015 IL App (1st)

132782 at ¶¶60-69 (no prosecutorial misconduct where State elicited testimony on the subject of forensic testing availability for the defense).

Thus, *Munson* only serves to highlight why the prosecutor in Mudd's case committed misconduct. Simply put, the prosecutor committed misconduct when he, absent evidentiary proof to support it, argued to the jury that both sides had access to the firearm and could have tested it. Without that evidentiary support, error occurred by the prosecutor misstating the evidence and concurrently shifting the burden of proof onto Mudd. *See People v. Beasley*, 384 Ill.App.3d 1039, 1048 (4th Dist. 2008). As *Beasley* correctly held, while a defendant is "able to submit evidence for analysis," he "has no burden to do so. A defendant's failure to submit evidence for analysis cannot be considered "unconscionable." *Id*. In other words, by bringing this matter to the jury's attention for the first time in rebuttal closing argument, the State here was not merely making a basic, accurate statement of law about a defendant's right to request forensic testing – it was effectively shifting the burden by telling the jury to overlook a key weakness in the State's case, the lack of physical evidence, because the defense had not exercised that right to request forensic testing. *Beasley* also shows that the State is mistaken when it claims Mudd cited "no case holding that a prosecutor erred when making a *legal* statement because the prosecutor failed to call a witness to testify about what the law is." (St. Br. 18) (emphasis in original); *compare Lewis Jackson*, 399 Ill.App.3d at 318-19 (because the State elicited testimony on the subject, no misconduct for prosecutor to comment in rebuttal argument that the defendant had the ability to ask for forensic testing of the State's evidence).

Turning to the State's alternative argument that its prosecutor did not shift the burden of proof, the State relies upon several of this Court's opinions that analyze the propriety of prosecutors' rebuttal closing arguments. (St. Br. 21) Those cases are highly distinguishable and do not affect the outcome here. In *People v. Hall*, 194 Ill.2d 305, 348-49 (2000), trial counsel

"questioned the reliability of the testimony of the State's hair and fiber expert and questioned why the State did not order DNA testing on the hair fragments." In light of that argument (as well as the trial judge granting a defense pre-trial motion asking for said DNA testing), this Court found no prosecutorial misconduct. *Id*.

In *People v. Anton Brown*, 172 Ill.2d 1, 42-43 (1996), trial counsel argued as to the credibility of the victim's mother (a key State's witness): "There's nobody. They didn't bring out anybody or anything to show us that Gloria Wallace is a truthful person. Where is anybody from—that Gloria knows, that [the victim] knows, that said yeah, [the victim] and [Gloria] were on good terms." In light of that argument, this Court found no misconduct in the prosecutor noting no witness testified to rebut Gloria's description of her relationship with the victim. *Id*. And in *People v. Richardson*, 123 Ill.2d 322, 355 (1988), trial counsel faulted the State for not calling more witnesses and told the jurors, "I don't believe you have been given everybody that should have been given." Relying upon *People v. Holman*, 103 Ill.2d 133, 151-52 (1984), and its holding that this Court has "consistently held that comment on the failure of a potential defense witness to testify is permitted when made in response to defense counsel's own reference to the State's failure to call the witness to the stand," this Court found no misconduct. *Richardson*, 123 Ill.2d at 355.[2]

Unlike those cases, Mudd's counsel's closing argument did not fault the State for failing to call any witnesses. (R. 80-81) Instead, counsel merely noted the fact that there was no evidence that the firearm was submitted for fingerprint or DNA analysis. (R. 80-81) Contrary to the State's argument, trial counsel's closing argument did not open the floodgates for the prosecutor

[2] The State also relies on two foreign matters to buttress its argument. (St. Br. 22) Other jurisdictions have taken a different tact. *See*, *e.g.*, *Hayes v. State*, 660 So.2d 257, 265-66 (Fla. 1995); *People v. Clark*, 214 P.3d 531, 540-41 (Colo. App. Ct. 2009).

to shift the burden of proof to Mudd and tell the jury (without evidence on the matter) that he could have accessed the firearm and tested said evidence. "The burden of proof never shifts to the accused but remains with the State throughout the trial." *People v. Howery*, 178 Ill.2d 1, 32 (1997). The *Beasley* Court's analysis in this area of the law is the correct one: "[W]hile the defendant may have invited the State explain why it chose not to submit certain items for [testing], **a defendant in a criminal case can never** 'open the door' to shift the burden of proof." 384 Ill.App.3d at 1048 (emphasis added).

Addressing Mudd's invited error argument (Def. Op. Br. 19), the State asserts this Court's decisions in *Hall*, *Anton Brown*, and *Richardson* refute his argument that a response is not invited unless the defendant's argument was improper. (St. Br. 24) First, appellate counsel must apologize to this Court for the inaccurate quotation of *United States v. Young*, 470 U.S. 1, 12-13 (1985). Counsel erroneously relied upon an appellate court opinion's citation of *Young* for that quotation. *See People v. Nowicki*, 385 Ill.App.3d 53, 91 (1st Dist. 2008) ("*People v. Starks*, 169 Ill.App.3d 588, 600. . .([1st Dist.] 1988), citing [*Young*] ("the invited response doctrine allows a party who is provoked by his opponent's improper argument to right the scale by fighting 'fire with fire,' in those situations where there are 'instances of impropriety in [the] initial argument'"); *compare Young*, 470 U.S. at 12-13 ("In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo. Thus the import of the evaluation has been that if the prosecutor's remarks were 'invited,' and did no more than respond substantially in order to 'right the scale,' such comments would not warrant reversing a conviction.").

However, the principal of the invited response doctrine applying only where defense counsel's prompting comment is in error itself is not novel. *See*, *e.g.*, *People v. Vriner*, 74

Ill.2d 329, 343-44 (no reversible error where defense counsel improperly attacked prosecutor's belief in his own case inviting prosecutor's vouching comments); *People v. James*, 2017 IL App (1st) 143036, ¶55 ("the 'invited response doctrine' **only permits a party** to 'right the scale by fighting fire with fire' where that party's opponent has already improperly incited the passions of the jury.") (emphasis added); *People v. Gorosteata*, 374 Ill.App.3d 203, 221 (1st Dist. 2007) (citing *Young*), *overruled on other grounds*, *People v. Chambers*, 2016 IL 117911; *People v. Enoch*, 189 Ill.App.3d 535, 548 (1st Dist. 1989) ("A defendant should not be allowed to benefit from this own counsel's misconduct which invited the State's response."); *People v. Trass*, 136 Ill.App.3d 455, 467 (1st Dist. 1985) ("While neither defense counsel's nor the State's comments were appropriate, defendant should not now be allowed to benefit from his own counsel's misconduct which invited the response from the State.").

The import of these cases and this doctrine is that a prosecutor's misconduct in rebuttal argument may be excused on review but only if those comments were invited by misconduct by trial counsel. That of course did not occur here and the State has pointed to nothing erroneous in Mudd's attorney's closing argument that would warrant the State misstating the evidence and shifting the burden of proof. Mudd rests on the remainder of his opening brief's discussion as to why the prosecutor here shifted the burden of proof to him and committed misconduct in rebuttal closing argument. (Def. Op. Br. 10-19)

Assuming *arguendo* that Mudd has demonstrated misconduct on the part of the State's prosecutor, the State argues Mudd has not met either prong of the plain error test nor the prejudice prong of the well-known *Strickland v. Washington*, 466 U.S. 668 (1984), analysis for counsel's ineffectiveness. (St. Br. 10-14, 27-38) Initially, it should be noted that the State's argument assumes Mudd did not preserve the prosecutorial misconduct in the trial court. (St. Br. 10-14) The State makes no alternative argument in the event this Court concludes that Mudd did preserve

the issue, and thus the State has forfeited its ability to demonstrate said preserved error was harmless beyond a reasonable doubt. *See People v. Thurow*, 203 Ill.2d 352, 363 (2003)("[I]t is the State that 'bears the burden of persuasion with respect to prejudice.'"); *People v. Diggins*, 2016 IL App (1st) 142088, ¶17 (State cannot establish error was harmless were it makes no argument on the subject). Mudd rests on his opening brief's argument as to why the misconduct here was preserved and why the State cannot demonstrate said misconduct was harmless beyond a reasonable doubt. (Def. Op. Br. 23-24)

Turning to the State's plain error argument as to why neither prong of that doctrine has been shown by Mudd, the State rehashes its routinely-rejected argument that for the first prong of plain error there must be an additional showing of prejudice more than clear error occurring in closely balanced case. (St. Br. 14, fn. 2, 27-30) Just a few years ago, this Court thoroughly rejected an identical argument. *People v. Sebby*, 2017 IL 119445, ¶¶64-72, conclusively shows no additional demonstration of prejudice is required when clear error occurs in a closely balanced case. This Court was definitive in *Sebby*:

> As our cases clearly indicate, though, prejudice rests not upon the seriousness of the error but upon the closeness of the evidence. What makes an error prejudicial is the fact that it occurred in a close case where its impact on the result was potentially dispositive. . .There lies the core of our first-prong plain error jurisprudence, which as remained unchanged since [*People v.*] *Herron*[, 215 Ill.2d 167, 178 (2005)]. *Sebby*, 2017 IL 119445 at ¶68.

Just like it did in *Sebby*, this Court should once again reject the State's request to impart a third factor into the plain error doctrine.

But even if under the first prong of plain error a separate prejudice showing were necessary apart from the evidence being closely balanced, such prejudice is palpable here. Absent any physical or forensic evidence demonstrating Mudd knowingly possessed the firearm, the case here turned on the two officers' credibility about seeing what they claimed to have witnessed. As explained in his opening brief (Def. Op. Br. 12-13), the State's evidence as to whether

Mudd knowingly possessed the firearm was subject to multiple discrepancies in the officers' version of events. Coupled with those discrepancies, the prosecutorial misconduct here went to the key issue in the case: whether the firearm could be tied to Mudd. By shifting the burden to him and misstating the trial evidence, the prejudice from the prosecutor's misconduct is obvious even if this Court departs from its prior, first prong analysis in *Herron* and *Sebby*.

As for the State's argument that Mudd has not established either prong of the plain error doctrine and why alternatively he was not prejudiced by trial counsel's failure to object a second time to the State's burden shifting/misstating the evidence rebuttal closing argument (St. Br. 32-38), Mudd rests upon his opening brief's argument as to why each of those standards were met here requiring a new trial. (Def. Op. Br. 24-27) However, Mudd disagrees with the State's assertion that a defendant needs to establish a serious pattern of misconduct under the second prong of plain error. (St. Br. 37) In *People v. Mullen*, 141 Ill.2d 394, 404-06 (1990), this Court found both prongs of the plain error doctrine met even though the prosecutor committed a single instance of misconduct in rebuttal closing argument as it was "of such magnitude that the commission of thereof denie[d] the accused a fair and impartial trial." Thus, whether via harmless error, plain error, or ineffective assistance of counsel, this Court should reverse Jeremy Mudd's conviction and remand the case for a new trial.

CONCLUSION

For the foregoing reasons, Jeremy Mudd, Defendant-Appellant, respectfully requests that this Court reverse his conviction and remand the case for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 12 pages.

/s/Christofer R. Bendik
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NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On October 4, 2021, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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