No. 130067

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. MATTHEW SMITH, Defendant-Appellee.	) Appeal from the Appellate Court of Illinois, First District, No. 1-18-1070)) There on Appeal from the Circuit Court of Cook County, Criminal Division, No. 12 CR 16555)) The Honorable Michele Pitman, Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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ARGUMENT

This Court should reverse the appellate court's judgment because its rulings are incorrect.

I. The Temporary Exclusion of Defendant's Mother from the Courtroom Because She Was a Witness Does Not Entitle Defendant to a New Trial.

The People's opening brief showed that the temporary exclusion of defendant's mother from the courtroom provides no basis for a new trial. Peo. Br. 15-25.[1] Defendant's response is contrary to the record and settled law.

A. The Trial Court Did Not Abuse its Discretion.

The People's brief demonstrated that (1) courts have discretion to exclude witnesses from the courtroom; and (2) the trial court did not abuse its discretion when it temporarily excluded defendant's mother because she was a witness. Peo. Br. 15-18. In response, defendant agrees that excluding witnesses is a "long-time practice" that is reviewed for an abuse of discretion and acknowledges that the People have offered several reasons why his mother might have been called to testify, such as to rebut his potential testimony about his time in custody or his clothing. Def. Br. 20-22. Yet defendant contends that those explanations are "absurd" because his mother "was not a witness." *Id*. at 17, 20-21.

Defendant is foreclosed from arguing that his mother was not a witness because it is contrary to the position he took at trial. When trial

[1] The parties' briefs are cited as "Peo. Br." and "Def. Br."

began, defense counsel observed that prosecutors had listed defendant's mother as a witness and the parties had asked the court to exclude all witnesses from the courtroom. R334. But rather than arguing that defendant's mother was not a witness (as defendant now argues), defense counsel asked the court to make an "exception" and allow his mother to remain in court. *Id.* The prosecutor responded that defendant's mother was with defendant in the police station after his arrest and might be needed to impeach defendant on certain subjects. R335.

The court said to defense counsel, "Then she's a witness." R336. Defense counsel agreed, stating, "She is." *Id.* Counsel then repeated her request that an "exception" be made because (1) part of defendant's time in custody was recorded, so it was unlikely his mother would need to testify about that period; and (2) defendant could benefit from his mother's presence in court because defendant (who was 22) was "still a young man." *Id.* The court denied defendant's request for an exception and ordered that his mother be excluded like the other witnesses, at least until the parties decided that her testimony would not be needed. R336-37.

The record is clear, therefore, that the trial court excluded defendant's mother because the parties agreed that she was a witness. And because defendant said his mother was a witness, he may not change his position now. *People v. Staake*, 2017 IL 121755, ¶ 55 (defendant "forfeits his right to complain of an error where to do so is inconsistent with the position taken

previously"); *McMath v. Katholi*, 191 Ill. 2d 251, 255-56 (2000) (party "foreclosed" from taking position on appeal that is "contrary to her trial position").

In any event, the court did not abuse its discretion by temporarily excluding defendant's mother. The "threshold for finding an abuse of discretion is high," *People v. Jackson*, 232 Ill. 2d 246, 265 (2009), because defendant must show the court's decision was "arbitrary, fanciful, or unreasonable," *People v. Brand*, 2021 IL 125945, ¶ 36. Here, the trial court's decision was not "arbitrary, fanciful, or unreasonable" because it considered the parties' arguments; counsel agreed that defendant's mother was a witness; it is a longstanding practice to exclude witnesses from the courtroom; and the court limited the exclusion by requiring the prosecutors to inform the court if they decided not to call defendant's mother. Peo. Br. 16-18. Therefore, it cannot be said that the trial court abused its discretion.

Lastly, the People demonstrated that any error was harmless because, given the strength of the evidence against defendant (which included multiple eyewitnesses identifying defendant as the shooter), he would have been convicted even if his mother were in court at the start of trial. *Id.* at 18. Defendant does not dispute that the evidence against him was strong, but instead claims that his mother "would have offered him a sense of comfort." Def. Br. 25. That is irrelevant because the harmless-error analysis focuses not on defendant's comfort but whether "the result [of trial] would have been

the same absent the error," a question that depends on the evidence, which here was overwhelming. *People v. Salamon*, 2022 IL 125722, ¶ 121.

Likewise unavailing is defendant's speculation that his mother's presence might have "made him more relatable to the jurors" or "impacted how witnesses testified." Def. Br. 25. Effectively, defendant is asking this Court to consider the chance of jury nullification (*i.e.*, that jurors would set aside the evidence and acquit defendant due to sympathy evoked by his family's attendance) and that eyewitnesses who identified defendant before trial would recant (*i.e.*, perjure themselves) because defendant's family attended trial. Defendant cites no authority for countenancing such speculation; to the contrary, it is settled that when reviewing prejudice from an alleged error, courts must "exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like" because defendants have "no entitlement to the luck of a lawless decisionmaker." *Strickland v. Washington,* 466 U.S. 668, 695 (1984). Defendant's argument also fails because it assumes (without record support) that no other family members attended trial and the jury held that against him; however, the court did not exclude defendant's entire family (they were not witnesses) and counsel later observed that defendant's other family members appeared "at most of the court dates," which presumably included trial. R1356.

Finally, defendant is incorrect when he cites a case from six decades ago that held that the wrongful *denial* of a motion to exclude witnesses is

never harmless and argues that, by analogy, he "should not have to demonstrate prejudice" here where the court *granted* a motion to exclude. Def. Br. 22 (citing *People v. Dixon*, 23 Ill. 2d 136, 140 (1961)). *Dixon* is not good law, as this Court has since held that where "there was no showing of prejudice, there was no reversible error" if courts erroneously deny motions to exclude. *People v. Chennault*, 24 Ill. 2d 185, 187-88 (1962); *see also People v. Brinkley*, 33 Ill. 2d 403, 407 (1965). And, even setting that aside, *Dixon's* reasoning does not apply here. The purpose of excluding witnesses is "to prevent the shaping of testimony by hearing what other witnesses say." *Perry v. Leeke*, 488 U.S. 272, 281 n.4 (1989). *Dixon* held that an erroneous decision to allow witnesses to *remain* in the courtroom is not harmless error because it is "impossible or inordinately difficult" to prove whether their testimony was shaped by hearing others testify. 23 Ill. 2d at 140. But that concern does not exist (and, therefore, harmless error analysis should apply) when courts *exclude* witnesses from court because such orders necessarily prevent witnesses from hearing others testify.

Accordingly, the court did not abuse its discretion by temporarily excluding defendant's mother and, even if it did, that error was harmless.

B. Temporarily Excluding Defendant's Mother Did Not Implicate the Public Trial Right.

The People's opening brief also established that the appellate court's ruling that the temporary exclusion of defendant's mother "violated [defendant's] right to a public trial," *People v. Smith*, 2023 IL App (1st)

181070, ¶ 28, is incorrect because it is settled that excluding witnesses from the courtroom does not implicate a defendant's public trial right, much less violate it, Peo Br. 19-25.

As the People noted, the purpose of the public trial right is to prevent "secret trials," *In re Oliver*, 333 U.S. 257, 268 (1948), and this Court "has clearly held" that the right is "only" implicated "in instances in which the press and public are barred from judicial proceedings," *People v. Schoonover*, 2021 IL 124832, ¶ 45. And, consistent with that precedent, courts across the country — including the appellate court, other state supreme courts, and federal courts of appeal — have repeatedly held that excluding witnesses from the courtroom does not implicate (let alone violate) the public trial right. Peo. Br. 21-22 (collecting cases); *e.g.*, *Nicely v. State*, 733 S.E.2d 715, 720 (Ga. 2012) ("[W]e have found case upon case in which courts have held that the rule of sequestration ordinarily does not even implicate the right to a public trial, much less infringe upon it."); *People v. Revelo*, 286 Ill. App. 3d 258, 266 (2d Dist. 1996) (exclusion of witnesses does not implicate public trial right); *United States v. Love*, 743 Fed. Appx. 138, 138-39 (9th Cir. 2018) (same).

It is therefore unsurprising that several of defendant's cases reject his claim that the exclusion of his mother violated his public trial right. Def. Br. 24-25. For example, *People v. Taylor* held that excluding the defendant's parents did not implicate his right to a public trial because they were listed as "potential witnesses." 244 Ill. App. 3d 460, 467 (2d Dist. 1993). Similarly,

Revelo held that courts do "not impinge upon a defendant's right to a public trial when exercising this long-recognized power" to exclude witnesses from the courtroom. 286 Ill. App. 3d at 266. And *People v. Holveck* held that the right to a public trial is not violated where (as here) the court did not exclude the media. 141 Ill. 2d 84, 100-01 (1990). Nor do defendant's remaining cases support his claim, as they do not address the exclusion of individuals the parties agreed were witnesses. *See* Def. Br. 24 (citing *People v. Thompson*, 238 Ill. 2d 598, 605-06 (2010) (addressing voir dire procedures), *People v. Evans*, 2016 IL App (1st) 142190, ¶ 9 (exclusion due to possible "contamination of potential jurors and the small size of the courtroom"), *Addy v. State*, 849 S.W.2d 425, 429-30 (Tex. App. Ct. 1983) (exclusion for "security" reasons), and *State v. Sams*, 802 S.W.2d 635, 637 (Tenn. Crim. App. 1990) (exclusion for causing disturbances where prosecutors were "crystal clear" they "had no intention" of calling them)).

In sum, courts have discretion to exclude witnesses from the courtroom, the trial court did not abuse its discretion here, and the exercise of that discretion did not implicate (let alone violate) the public trial right.

II. The Remaining Issues Addressed by the Appellate Court Provide No Basis for a New Trial or Other Proceedings.

As the People's opening brief explained, the appellate court addressed several issues it believed could recur on remand (without discussing whether those alleged errors were sufficient to require a new trial), but the appellate court's rulings on those issues are incorrect. Peo. Br. 25-47.

A. There Is No Basis to Remand for Further Proceedings on Defendant's Motion to Suppress Lineup Identifications.

The People's brief demonstrated that the appellate court's ruling that defendant carried his burden to show that one of the lineups was unduly suggestive because defendant was allowed to wear his red shirt — and the court's corresponding order for further proceedings on his motion to suppress, where the People would bear the burden to prove the witnesses' identifications were not based on suggestiveness in the lineup — is contrary to settled law. Peo. Br. 25-31. Defendant's arguments in response are rebutted by the record and this Court's precedent.

To recap, it was undisputed at trial that (1) defendant wore a red shirt the night Kevin Guice was murdered; and (2) as defendant fled in a car, he took off his red shirt and was wearing a white undershirt when the car stopped and he was arrested. R1190-96; Peo. Br. 2-4. Later that day, police conducted a lineup and Arlanza Townsend identified defendant as the shooter; in that lineup, defendant wore his white undershirt. E5; R268, 671. The record shows that as the day progressed, defendant became cold, and he chose to put his red shirt back on. R268, 1077. When other eyewitnesses became available, police conducted a second lineup, and defendant continued to wear his red shirt by choice. E9; R268. After viewing this lineup, Latrice Perdomo and Aaliyah Ali identified defendant as the shooter, and Selenthia Davis (who did not see the shooting) identified defendant as the person who started the brawl shortly before the shooting. R705-07, 754, 786-87.

The appellate court held that the second lineup was unduly suggestive because defendant wore the "red shirt that police recovered" from the car he fled in and was similar to what eyewitnesses said the shooter wore. *Smith*, 2023 IL App (1st) 181070, ¶¶ 40-42. As the People's opening brief established, however, that ruling is incorrect because it is settled that (1) lineups are not suggestive if a suspect wears clothing the eyewitnesses said the perpetrator wore; and (2) police may allow suspects to wear their own clothes and are not required to give suspects different clothes to wear. Peo. Br. 28-30 (collecting cases); *People v. Johnson,* 149 Ill. 2d 118, 147 (1992) (lineup was proper where defendant wore a dark coat like eyewitnesses said the perpetrator wore).

Defendant is incorrect that the People's authority is inapposite: as here, the defendants in those cases wore clothing in the lineup like eyewitnesses said the perpetrators wore. Peo. Br. 28-30 (collecting cases); *e.g.*, *People v. Williams*, 2021 IL App (1st) 171119-U, ¶ 40 (a lineup "is not suggestive merely because the defendant is the only person wearing a specific item of clothing, even where that piece of clothing was purportedly worn by the offender at the time of the offense"); *People v. Faber*, 2012 IL App (1st) 093273, ¶57 ("The fact that [defendant] was the only person wearing a sleeveless T-shirt a witness described the offender as wearing is not sufficient to render the lineup suggestive."); *People v. Johnson*, 222 Ill. App. 3d 1, 7-8 (1st Dist. 1991) (lineup was not suggestive where defendant was the only

person wearing red pants like the perpetrator).[2] And, unsurprisingly, defendant's own authority fails to support his request for a new trial. *See* Def. Br. 31 (citing *People v. McBride*, 14 N.Y.3d 440, 448 (N.Y. App. Div. 2010) (lineup not suggestive where defendant wore grey, hooded sweatshirt like the perpetrator), and *People v. Owens*, 74 N.Y.2d 677, 678 (N.Y. 1989) (claim challenging lineup procedures failed where, as here, evidence against defendant included in-court identifications)).

Defendant is also incorrect that the second lineup was unduly suggestive because "police selected the clothing [defendant] would wear." Def. Br. 29, 31. As the People acknowledged, a lineup might be suggestive if police "require" the defendant to wear a "distinctive" piece of clothing that the preparator allegedly wore. Peo. Br. 30-31; *compare United States v. Wade*, 388 U.S. 218, 233 (1967) (lineup might be suggestive if "only the suspect was required to wear distinctive clothing which the culprit allegedly wore"), *with Coleman v. Alabama*, 399 U.S. 1, 6 (1970) (lineup not suggestive where no evidence proved defendant was "required" to wear particular clothing). But here, the record establishes that defendant *chose* to wear his red shirt in the second lineup and police did not require him to do so. R268 (officer's testimony that defendant chose to wear his red shirt); R1077 (prosecution's offer of proof that defendant asked to put on his red shirt because he was cold). Defendant's unsupported speculation that police forced him to wear his

[2] Nonprecedential Rule 23 orders are available on the Illinois courts' website, https://www.illinoiscourts.gov/top-level-opinions/.

red shirt also ignores that in the first lineup defendant wore his white undershirt and Townsend identified him anyway. E5; R671. Defendant's related argument that the red shirt was not his, Def. Br. 29, is also incorrect, as defense counsel admitted that it *was* his shirt, *e.g.*, R610-11 (counsel stating, "We are not contesting that [defendant] was wearing that [red] shirt, which was recovered from the car, that he was wearing that shirt in the club[.]").

Likewise meritless is defendant's argument that the second lineup was unduly suggestive because the other participants were older and he was the only person with a mohawk. Def. Br. 32. It has long been settled that participants in a lineup "need not be physically identical," *People v. Simpson*, 172 Ill. 2d 117, 140 (1996), and, thus, they need not be the same age or have the same hairstyle, *see, e.g., Williams*, 2021 IL App (1st) 171119-U, ¶ 41 (collecting cases holding that police are not required to ensure lineup participants have the same hairstyle as defendant); *People v. Shields*, 181 Ill. App. 3d 260, 265 (1st Dist. 1989) (lineup identification admissible where defendant was 10 to 20 years older than the other participants and the only one with gray hair). That precedent applies even more strongly here because, as this Court can confirm by reviewing the lineup photographs, *see* E5, 9, defendant looked similar to the other participants despite any differences in age or hairstyle. Indeed, as the trial court held:

> [W]hen I look at these photos, the Court does not find that these fillers and the people in this lineup look much older than the defendant. It is actually surprising to hear their ages, because I'm looking at them and looking at the photos, and these are good lineups. . . . The Mohawk that I'm hearing about, it is not very pronounced. It's not spiky or dyed a different color. . . .
>
> [T]he Court does not find there's anything suggestive with a witness looking at these lineups.

R287-88. Therefore, defendant has failed to establish that the second lineup was improper.

Lastly, the People demonstrated that even if the second lineup was unduly suggestive, that error was harmless. Peo. Br. 31-32. Under the appellate court's ruling, (1) Townsend's identification of defendant was admissible because he viewed the first lineup, which was not suggestive; and (2) Permodo's identification of defendant in the second lineup would be admissible because she testified that her identification was unaffected by defendant's red shirt, R736, which fulfills the People's burden to show that she identified defendant based on her independent recollection. Thus, even if the identifications of the other witnesses were suppressed, it would not change the outcome of trial because the remaining evidence against defendant is overwhelming: (1) two eyewitnesses (Townsend and Permodo) identified defendant as the shooter; (2) defendant fled from police, which shows consciousness of guilt; and (3) inside the car defendant used to flee, police recovered a handgun that matched the description of the gun the shooter used. Peo. Br. 31-32.

B. The Trial Court Did Not Abuse Its Discretion by Giving the Jury the Photograph of Defendant that Was Admitted at Trial.

When police arrested defendant, they recovered a photograph of defendant wearing his red shirt at the Press Box (the bar where the shooting occurred) and the photograph was admitted into evidence; during deliberations, the jury asked for certain things, including "Photo taken inside bar?" and the court sent the photograph to the jury. Peo. Br. 33-36. The appellate court held that the photograph was admissible but giving it to the jury in response to the note was an abuse of discretion because the prosecution "failed to provide evidence that the photo was taken at the Press Box the night of the shooting" and giving the jury the photograph in response to the note "told them, with the court's imprimatur, that it was." *Smith*, 2023 IL App. (1st) 181070, ¶ 64. The People's brief demonstrated, however, that the trial court did not abuse its discretion (and/or any error was harmless) for several reasons, including because it was undisputed that defendant was at the Press Box the night of the murder. Peo. Br. 35-36.

Defendant's response — that sending the photograph to the jury "unfairly strengthened" the eyewitnesses' identification of defendant by "placing" him in the bar on the night of the shooting without evidence of when the photograph was taken, Def. Br. 36-38 — ignores that defense counsel repeatedly admitted that defendant was at the bar on the night of the murder. Specifically, defendant's pre-trial motion to exclude the photograph (which was based on alleged gang signs in the photograph and which the trial

court denied) agreed that the photograph was "taken in the bar before the shooting," SC189, and defendant argued it was unnecessary to admit the photograph because he did not dispute that he was at the bar the night of the shooting, R610-12. And, consistent with that representation, defense counsel expressly told the jury that defendant was at the bar on the night of the shooting. R1190-92. Simply put, defendant conceded that he was at the bar on the night of the shooting, so it is illogical for him to now argue that the trial court abused its discretion (or he suffered any prejudice) because the photograph "placed [defendant] within the bar." Def. Br. 37.

Defendant's alternative argument — that he is entitled to a new trial because the photograph "depicted individuals flashing gang signs," *id.* — is likewise meritless because defendant failed to prove that anyone in the photograph was making gang signs. Before trial, defendant moved to exclude the photograph because it showed him holding his fingers in the air and it was possible that jurors might believe it was a gang sign. R610-11. Importantly, however, defense counsel admitted that "it isn't necessarily a gang sign" and the prosecutor stated that he did not see "specific gang signs." R610. In turn, the trial court observed that "[t]here's nothing that indicates these are gang signs." R614. The court explained, "He's clearly holding up two fingers like peace, a peace sign. There's nothing that indicates in here that this is gang evidence." R616. The court denied defendant's motion to exclude the photograph but ordered the parties not to mention gangs at trial,

and the parties complied with that order. R617. And the appellate court agreed that the photograph "was properly admitted into evidence," thus implicitly rejecting defendant's "gang signs" argument. *Smith*, 2023 IL App. (1st) 181070, ¶¶ 62, 64. In short, defendant's claim fails because he has not established that the photograph actually depicts gang signs. *See*, *e.g.*, *People v. Brown*, 2024 IL App (4th) 220959-U, ¶ 65 (claim that court erred by admitting photograph failed because there was "no evidence provided in the trial court or on appeal that the gesture [in the photograph] is gang related").

Moreover, even if it were error to give the photograph to the jury because it depicted gang signs, that error would have been harmless because gangs were not mentioned at trial and the evidence of defendant's guilt is overwhelming. *People v. Easley*, 148 Ill. 2d 281, 330 (1992) (erroneous admission of gang evidence was harmless where, as here, eyewitness testimony and other evidence implicated the defendant); *People v. Campbell*, 2015 IL App (1st) 131196, ¶¶ 28-30 (similar). And, lastly, defendant's cited authority either undermines his claim or is inapposite. *See People v. Morales*, 2012 IL App (1st) 101911, ¶¶ 40-48 (admission of gang evidence to bolster eyewitness identification was not an abuse of discretion); *People v. Smith*, 141 Ill. 2d 40, 58-62 (1990) (defendant entitled to new trial where, unlike here, prosecutors repeatedly told jurors the murder was gang-related though no evidence supported that assertion).

C. The Prosecution's Isolated Comments in Closing Argument Provide No Basis for a New Trial.

The People's brief also established that neither of the prosecutor's two isolated comments entitles defendant to a new trial. Defense counsel argued in closing that the case was a "whodunit" because it was too "dark and panicked" for anyone to identify the shooter. R1189-95. In rebuttal, the prosecutor disagreed that the case was a whodunit and stated, "in order for you to find [defendant] not guilty, you have to find that what they're saying is that all four people [who identified defendant] lied." R1214. The prosecutor later said that "[t]he only way this is [a] whodunit is if you ignore the testimony that you have, if you find the four people who were in front of you [are] liars." R1230. The appellate court found that the prosecutor's comments were "improper" but did not consider whether they entitled defendant to a new trial because it had already granted defendant a new trial based on his mother's exclusion. *Smith*, 2023 IL App (1st) 181070, ¶¶ 58-59.

The People's brief conceded that the first comment (that "to find [defendant] not guilty" the jury would have to believe the witnesses lied) was error because it misstated the burden of proof. Peo. Br. 38; *People v. Banks*, 237 Ill. 2d 154, 184-85 (2010) (error to argue that "to acquit defendant" jurors would have to find witnesses lied). However, the People demonstrated that the error was harmless because (1) it was an isolated comment in the course of a long argument during which the prosecutor repeatedly told jurors that the People bore the burden of proof, R1181, 1187-89, 1214; (2) the court

repeatedly instructed the jury that the People bore the burden of proof, R1234-37, 1240; and (3) the evidence against defendant was overwhelming. Peo. Br. 38-41.

Defendant does not seriously dispute these points, and his contention that the comment is not subject to harmless-error analysis, Def. Br. 42, is incorrect, *see, e.g., People v. Mudd*, 2022 IL 126830, ¶¶ 44-45 (prosecutor's statement that allegedly shifted burden of proof did not affect outcome of trial where, as here, jury was instructed that prosecutors bore burden of proof); *People v. Flores*, 128 Ill. 2d 66, 94-95 (1989) (similar). Indeed, defendant's own authority applies harmless-error analysis where the prosecutor argued that the jury needed to find that witnesses were lying to find the defendant guilty. *See United States v. Vargas*, 583 F.2d 380, 387 (7th Cir. 1978) ("[I]t is necessary to consider whether the error was harmless.") (cited at Def. Br. 43). Therefore, this Court should hold that the prosecutor's first comment was harmless error.

Further, the People demonstrated that the second comment — that the case was not a "whodunit" as defendant claimed because "[t]he only way this is [a] whodunit is if you ignore the testimony that you have, if you find the four people who were in front of you [are] liars," R1230 — was permissible because prosecutors may argue that jurors would have to find that witnesses lied to believe the defendant's view of the case. Peo. Br. 41; *Banks*, 237 Ill. 2d at 154, 184-85 (prosecutors may argue that to believe "the defendant's version

of events" jurors would have to believe that witnesses lied). Notably, defendant's authority likewise holds that it is permissible to argue that jurors would have to find that the prosecution's witnesses lied to believe defendant's version of the incident. Def. Br. 43 (citing *People v. Coleman*, 158 Ill. 2d 319, 345-46 (1994), and *People v. Siefke*, 195 Ill. App. 3d 135, 145 (2d Dist. 1990)).

Defendant's response — effectively, that this authority is inapposite because his counsel presented no theory of the case, *see id.* — is rebutted by the record. Counsel argued that the case was a "whodunit" because the scene was too "dark and panicked" for anyone to identify the shooter, R1189-95, a theory that the prosecution permissibly noted would require the jury to believe that the eyewitnesses lied when they testified that they were able to clearly identify defendant as the shooter, R1230. Accordingly, the second comment was not error or, if it was, it was harmless like the first comment.

D. Wong's Testimony Provides No Basis for a New Trial.

The People's opening brief also established that (1) prosecutors complied with their discovery obligations regarding Mary Wong, a gunshot residue (GSR) expert who testified at trial; and (2) alternatively, defendant cannot show that he was prejudiced by that alleged error. Peo. Br. 42-47.

Defendant is incorrect that prosecutors violated their discovery obligations because Wong's testimony was in "complete opposition" to her report's conclusion that defendant's hand tested negative for GSR. Def. Br. 51. Wong's testimony was consistent with her report's conclusion because she testified that (1) to find a sample is "positive" for GSR, she "must find three

tri-component particles"; and (2) defendant's hand did not test positive because she found only one particle. R924-25, 940-42. True, as defendant notes, Wong testified that some laboratories require only one particle to conclude that someone fired a gun, Def. Br. 51-52, but she also testified that some laboratories require *four*, R946. More importantly, Wong explained that the Illinois state laboratory's policy requires three particles because it views that to be the "scientifically correct" standard, and she reiterated that defendant's sample tested negative because she found only one. R941. Lastly, while defendant complains that Wong testified that most samples yield negative results, Def. Br. 51, that testimony does not contradict her report's conclusion nor does defendant cite any authority that this type of information must be disclosed before trial. Thus, defendant has failed to prove a discovery violation.

Further, the People's brief established that even if there were a discovery violation, defendant cannot request a new trial now because he did not request a continuance when Wong testified. Peo. Br. 45-46; *see*, *e.g.*, *People v. Hood*, 213 Ill. 2d 244, 262 (2004) (defendant not entitled to new trial because he could have "requested a continuance to secure his own expert" to counter the allegedly new opinion of the prosecution's expert). Defendant's response reduces to one point: requesting a continuance to retain an expert would have been pointless because that expert would offer the "same" opinion as Wong, *i.e.*, "that [defendant's] test was negative" and "Illinois requires

three particles." Def. Br. 52. That concession is fatal to defendant's claim: he admits that if Wong's pre-trial report had stated word-for-word the testimony she provided at trial, he would not have retained an expert (or otherwise changed his litigation strategy) because there was nothing for him to dispute. And if Wong's testimony did not affect how defendant litigated his case, then it is absurd for defendant to claim he is entitled to a new trial.

Second, the People's brief demonstrated that defendant failed to carry his burden under *People v. Lovejoy*, 235 Ill. 2d 97, 120 (2009), which requires defendant to prove that the alleged discovery violation affected the outcome of trial based on factors such as the strength of the other evidence, the importance of the allegedly undisclosed evidence, and whether advance notice would have allowed defendant to discredit that evidence. Defendant does not specifically address *Lovejoy's* prejudice test and otherwise fails to demonstrate he suffered any prejudice. Indeed, defendant cannot show prejudice because: (1) Wong testified that three particles is the scientifically correct standard, so her testimony that some laboratories use a one-particle standard is unimportant and could not have swayed the jury; (2) the other evidence against defendant was overwhelming; and (3) as noted, defendant concedes that additional time would not have helped him because any expert he retained would have provided the same testimony. Peo. Br. 46-47.

Lastly, contrary to defendant's contention, Def. Br. 49, the appellate court correctly rejected his claim that Wong's testimony about the one-

particle standard was inadmissible under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Defendant forfeited his *Frye* claim by failing to raise it at trial. *Snelson v. Kamm*, 204 Ill. 2d 1, 25 (2003). Moreover, Wong's testimony that some laboratories use a one-particle standard does not implicate *Frye* because it is an observation Wong made based on her experience, not a scientific opinion. *In re Det. of New*, 2014 IL 116306, ¶ 28 (testimony about an expert's "observation and experience" generally "is not subject to the *Frye* test"). And, as the appellate court correctly noted, defendant "offers no authority" that any court has ruled that testimony about the one-particle standard is inadmissible under *Frye*. *Smith*, 2023 IL App (1st) 181070, ¶ 52.

III. Defendant's Remaining Claims Are Not Before this Court.

Lastly, the Court should decline to address defendant's remaining claims because, as defendant admits, the appellate court has not yet addressed them. Def. Br. 39, 44; *Williams v. BNSF Ry. Co.*, 2015 IL 117444, ¶ 55 (arguments "on a point other than one decided by the Appellate Court are not properly directed to this Court until the question has first been decided by the appellate court"). As in *Williams*, upon reversing the appellate court's judgment, this Court should remand for the appellate court to rule on defendant's remaining claims.

However, should the Court address these claims in the first instance, it should reject them as meritless. Defendant first argues that the trial court "minimized the burden of proof," Def. Br. 44, when it sustained an objection to defense counsel's argument that it was "the State's burden of proving

beyond a reasonable doubt that [defendant] did these things, that he was in that car that was fleeing and hitting people, that he was the person who pulled the trigger of the gun that killed Kevin Guice," R1198-99. The trial court correctly sustained the objection because defendant was not charged with hitting anyone with the car, so prosecutors were not required to prove that he did. *Id*. Moreover, defense counsel thereafter told the jury — without objection — that prosecutors bore the burden to prove beyond a reasonable doubt that defendant was responsible for "the death of Kevin Guice." R1208. And after closing argument, the court repeatedly instructed the jury that the prosecutors bore the burden to prove beyond a reasonable doubt that defendant was guilty. R1234-37. Thus, the jury was not misled about the burden of proof.

Defendant is also incorrect that he is entitled to a new trial based on three statements the prosecution made in closing that the appellate court did not address. To begin, defendant's claim that the prosecution erred by "referring to the defense theory as 'fairytales,'" Def. Br. 8, 41, is meritless, *see People v. Kirchner*, 194 Ill. 2d 502, 549 (2000) (prosecutor may call defense theory "laughable"); *People v. Robinson*, 391 Ill. App. 3d 822, 840 (2d Dist. 2009) (prosecutor may argue defense theory is "ridiculous" and a "fairy tale"). Defendant is also incorrect that a prosecutor "cannot offer his own opinion" about the evidence or the defendant's guilt, Def. Br. 39, and the prosecutor therefore erred by stating that he believed "there is no question that

defendant killed Kevin Guice," R1229; *see People v. Johnson*, 119 Ill. 2d 119, 143 (1987) (it is "perfectly permissible" for prosecutor "to state an opinion" based on the evidence); *People v. Baker*, 2021 IL App (1st) 171204-UB, ¶¶ 136-37 (permissible to opine there was "no question" defendant was guilty). And the final comment that defendant challenges — the prosecutor's observation that defendant had tried to "run[ ] from justice" and jurors were "the only people in this world who can stop him, who can hold him responsible for killing Kevin," R1230 — was permissible as well, *see People v. Cross*, 2019 IL App (1st) 162108, ¶ 105 (collecting cases holding and noting that courts have "repeatedly" held that prosecutors may "ask for justice for the victim" and to "hold[ ] this defendant responsible"). And lastly, for the reasons discussed, any error was harmless because these were isolated comments in a lengthy argument, the jury was properly instructed by the court, and the evidence against defendant was overwhelming. *Supra* pp. 16-17. The bottom line is that defendant's conviction should be affirmed because he received a fair trial and is indisputably guilty.

CONCLUSION

This Court should reverse the appellate court's judgment.

January 10, 2025

Respectfully submitted,

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RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance and the certificate of service, is 5,930 words.

/s/ Michael L. Cebula
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CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On January 10, 2025, the foregoing **Reply Brief of Plaintiff-Appellant People of the State of Illinois** 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 email address:

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail 13 copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

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