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.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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TABLE OF CONTENTS

POINTS AND AUTHORITIES

NATURE OF THE CASE

Defendant fatally shot Kevin Guice in front of multiple witnesses, then was arrested minutes later as he tried to flee the scene. Following a jury trial, defendant was convicted of first degree murder. The appellate court (1) reversed defendant's conviction because it concluded that the trial court violated defendant's right to a public trial by temporarily excluding his mother from the courtroom because she was a potential witness; (2) remanded for further proceedings on defendant's motion to suppress lineup identifications; and (3) issued three other rulings to address issues the court believed were likely to recur on remand. No issue is raised on the pleadings.

ISSUES PRESENTED

1. Whether the appellate court erred by holding that defendant was entitled to a new trial because the trial court temporarily excluded defendant's mother from the courtroom because she was a potential witness.

2. Whether the appellate court erred by holding that a lineup conducted by police was unduly suggestive because, in the lineup, defendant chose to wear the same shirt that he wore during the murder.

3. Whether the appellate court erred by holding that the trial court abused its discretion when, at the jury's request during deliberations, it provided the jury a photograph of defendant that had been properly admitted at trial.

4. Whether the appellate court erred by holding that two isolated comments by the prosecutor in closing argument were improper.

5. Whether the appellate court erred by holding that prosecutors violated their discovery obligations because a forensic expert's testimony about the standards laboratories use to detect gunshot residue and the ways that gunshot residue can be removed "contradicted" the conclusion in her report that a sample in this case tested negative for gunshot residue.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315(a) and 604(a). This Court allowed the People's petition for leave to appeal on January 24, 2024.

STATEMENT OF FACTS

A. Defendant's Arrest for the Murder of Kevin Guice

In the early morning hours of August 11, 2012, defendant fatally shot Kevin Guice in front of several witnesses in Harvey, Illinois, following a brawl at a local bar. R662-64, 702-04, 783-84.[1] Police arrested defendant minutes later as he tried to flee, the eyewitnesses identified defendant in lineups later that same day, and police charged defendant with first degree murder. R995-1001; SC5.

B. Defendant's Motion to Suppress Lineup Identifications

Before trial, defendant moved to suppress the eyewitnesses' lineup identifications, claiming that the lineups were unduly suggestive. C104-06.

[1] Citations to "C_" and R_" refer to the common law record and report of proceedings; "SC_" and "E_" refer to the secured record and trial exhibits.

At a hearing on that motion, Jason Banks, the Deputy Chief of the Harvey Police Department, testified that he conducted two lineups on the day of Guice's murder. R213-16. He conducted the first lineup in the early afternoon, when eyewitness Arlanza Townsend was available. R220-23. Defendant stood in the third position wearing the white undershirt he was wearing at the time of his arrest. R253; E5 (lineup photograph). At the time, defendant was 5'7" and weighed 145 pounds. R256. The other four people in the lineup were black men of "medium" complexion, like defendant; their height ranged from 5'6" to 5'8" and their weight ranged from 145 to 200 pounds. R255-58. After viewing the lineup, Townsend identified defendant as the shooter. R231.

Around 10:00 p.m. that same day, several other eyewitnesses (Latrice Perdomo, Aaliyah Ali, and Selenthia Davis) became available and viewed another lineup. R232-35. In this second lineup, defendant chose to stand in the fourth position; he also chose to wear the red and white shirt that he had worn at the time of the shooting and tried to discard during his attempt to flee. R260, 268; E9 (lineup photograph). The other four men in the lineup were black men of "medium" complexion like defendant; their height ranged from 5'6" to 5'10" and their weight ranged from 145 to 175 pounds. R265-68. Each eyewitness viewed the second lineup individually, while the other eyewitnesses waited in another room. R260-64. Two of the eyewitnesses (Perdomo and Ali) identified defendant as the shooter and Davis (who did not

see the shooting) identified defendant as the person who instigated a brawl in the bar that led to the shooting. *Id.*

The trial court denied defendant's motion to suppress because the lineups were not suggestive. R288. In its ruling, the court said in part that the "Court doesn't find that there's anything suggestive by way of any police suggestion to any of the witnesses" and there is "nothing that would jump out" to the witnesses "that would cause an improper identification." R286-88.

C. Defendant's Motion in Limine to Exclude His Photograph

Before trial, defendant moved to exclude a photograph that was "taken in the bar before the shooting" and showed defendant with several other men. SC189. During argument on the motion, the prosecution explained that (1) a photographer in the bar where the shooting occurred took photographs of customers, instantly printed them, then sold them to the customers; and (2) police recovered the photograph in defendant's possession when he was arrested. R611. The prosecution argued that the photograph was relevant because it was taken in the bar shortly before the shooting and showed that defendant was wearing a red and white shirt like the shirt eyewitnesses described the shooter as wearing; this was important, the prosecutor explained, because as defendant fled police in a car, he took off that shirt in an attempt to conceal his identity. R609.

Defense counsel agreed that the photograph was taken at the bar that was "the site of the shooting," but argued it was prejudicial because some of the men in the photo were making what could be interpreted as "gang signs."

R608, 610. Counsel further argued that introducing the photograph was unnecessary because "[w]e are not contesting that [defendant] was wearing that [red and white] shirt, which was recovered from the car, that he was wearing that shirt in the club." R610-11. The trial court denied the motion but ordered the parties not to mention gangs at trial. R615.

D. Defendant's Trial and Conviction

1. Exclusion of potential witnesses

At the start of trial, both parties moved to exclude from the courtroom everyone named on the parties' witness lists. R334. In open court, defense counsel asked for one exception: that defendant's mother, Trae Smith, not be excluded, even though she was included on the People's witness list. *Id.*[2] Defense counsel stated that the defense did not intend to call defendant's mother to testify. *Id.* Prosecutors told the court that defendant's mother was a potential witness and should be excluded like the other potential witnesses because she was with defendant in the police station after he was apprehended and might be needed to impeach defendant depending on whether he testified and what he testified about regarding his time at the station. R334-35. Defense counsel did not dispute that defendant's mother was a potential witness; rather, when the trial court observed that defendant's mother was a potential witness, counsel agreed, "She is." R336. However, counsel argued that defendant's communications with his mother

[2] The record shows multiple different spellings of Ms. Smith's first name; here the People use the spelling employed by the appellate court.

were captured on videotape, which made it unlikely that she would need to testify. *Id.*

The trial court denied defendant's request that his mother not be excluded with the other potential witnesses and explained, "[S]he was at the police station from what I'm hearing when he was questioned by police. With that she certainly is a possible witness." R336-37. However, the court ordered prosecutors to inform the court if they later decided that they would not call defendant's mother to testify, so that she could attend the trial. R337.

2. The prosecution's case

At defendant's jury trial, the prosecution presented testimony from (1) multiple eyewitnesses identifying defendant as the person who killed Guice; and (2) police officers attesting that defendant was arrested minutes after the shooting while fleeing in a car with a gun that matched the description of the murder weapon.

Perdomo testified that Guice was the president of a social club and she was the vice president. R691. The social club performed acts of community service, including donating meals, working in shelters, and giving coats and blankets to the homeless. R692. The night of the shooting, the club was celebrating its 30th anniversary at a bar called The Press Box. *Id.* There were approximately 100 people in the bar, including people who were not attending the anniversary party. R711.

Around 1:00 a.m., Guice took a microphone and asked for a moment of silence for a recently deceased member of the club. R696. In response, a male voice in the crowd started yelling "fuck that bitch." R697. Members of the social club moved toward the voice and a "big fight" broke out. *Id.* Guice did not join the fight but instead helped Permodo and several other women out to the parking lot. R698-700.

As Guice was trying to hurry Perdomo toward a friend's car, defendant "ran up" on them, "pulled a big gun out and fired." R702. Defendant shot straight at Guice from about five feet away. R703. Defendant was wearing a white, red, and blue button-up shirt, he had a "Mohawk" hairstyle, and his gun was a silver revolver. R703, 722. Defendant's shots hit Guice, Guice collapsed, then defendant ran away. R704. Later that day, at around 10:00 p.m., Permodo went to the police station and identified defendant in a line-up. R705-07. Defendant was wearing a red and white shirt in the lineup but Perdomo testified that she identified defendant because she recognized him as the shooter and not based on the shirt he was wearing. R736.

Ali likewise testified that a fight broke out in The Press Box after someone interrupted the moment of silence. R776-77. After Ali made it out to the parking lot, she saw defendant shoot Guice. R782-84. Defendant was wearing a red and white shirt and had a Mohawk haircut. *Id.* Later that day, Ali viewed a lineup at the police station and identified defendant as the shooter. R785-87.

Similar to the other eyewitnesses, Townsend testified that a fight broke out in The Press Box when someone interrupted the moment of silence by yelling, "Fuck your club member. Play the music." R655-56. Guice was holding a microphone and said, "Hold on. Hold on. Calm down. Calm down," but people continued to fight. R656. Townsend left the bar and got into his truck but could not leave because he was blocked in. R659. As he waited, Townsend saw defendant run to a car and get in; moments later, defendant got out of the car holding a silver handgun. R660-62. Defendant then began shooting. R661-63. Later that day, around 1:00 p.m., Townsend went to the police station and identified defendant in a lineup; in the lineup, defendant was wearing a white shirt, not the shirt he was wearing during the shooting. R671-72. At trial, Townsend identified the red and white shirt police recovered from the car defendant fled in as the same shirt the shooter wore. R664-65.

Davis, the fourth and final eyewitness, testified that defendant was the person who interrupted the moment of silence by saying "disrespectful" things, such as "'fuck that.'" R747-49. A big fight then broke out; when Davis was finally able to leave the bar, she saw Guice lying dead in the parking lot. R750-51. Later that day, she went to the police station and identified defendant as the person who interrupted the moment of silence. R754.

Deputy Chief Banks testified that Townsend viewed the first lineup, which was conducted at around 1:30 p.m. at police headquarters, and

identified defendant. R1063-65. In a second lineup conducted at around 10:00 p.m., Perdomo and Ali identified defendant as the person who shot Guice, and Davis identified defendant as the person she saw fight in the club and then run outside. R1067-75.

Officer Gregory Williams testified that he responded to reports of a fight at The Press Box and found people outside screaming "[t]hat's them. That's the car right there" and pointing at a silver Buick. R995. The Buick was driving away at a high rate of speed; Williams pursued the Buick in his car, and Detective Daniel Walz pursued in another police car. R996. The Buick continued to drive in a "very reckless" manner until it abruptly stopped. R997. Defendant got out of the Buick's front passenger side wearing a white tank top and tried to flee on foot. R998. Williams caught up with defendant, arrested him, and placed him in a squad car. R999-1000. Williams then returned to the Buick and recovered a silver revolver from the floor of the front passenger seat. R1002-03.

Detective Walz similarly testified that he responded to reports of an incident at The Press Box, where people in the crowd yelled at him, "it's that Buick right there. They were in the Buick." R1035-36. Walz followed the Buick, which was travelling at a high rate of speed. R1034-36. The Buick hit a curb and came to a stop; a black male in a white tank top then got out of the front passenger seat and ran. R1037. Williams chased after that person while Walz secured the Buick, its driver, and another passenger. R1038-39.

When Williams returned to the Buick, Walz saw him recover a silver revolver from the car. R1040. Walz assisted in a further search of the Buick and recovered a red and white shirt from the front seat. R1044.

Another officer testified that he booked defendant after his arrest and recovered several items in his possession, including the photograph of defendant in the bar that was the subject of his motion in limine. R1027. The photograph was admitted into evidence. *Id.*

Mary Wong, a forensic scientist, testified that she performed gunshot residue (GSR) tests on defendant's red and white shirt and his hands. R922-24. Wong explained that, under Illinois state lab procedures, "to return a finding for a positive for" GSR, she "must find three tri-component particles" on a sample. R924. She found no particles on defendant's shirt and one particle on his right hand. R925. That finding did not necessarily mean defendant did not fire a gun because it was possible that GSR particles were removed from defendant's hand by various activities, such as running, sweating, wiping his hands, being handcuffed, or removing his shirt. R924, 935-36. Particles also dissipate with the passage of time. R936-37. Over defendant's objections, Wong testified that some laboratories use different standards, and some hold that only one particle (as was found here) is sufficient to believe that the person fired a gun. R933-34. However, Wong reiterated that in her analysis, the sample from defendant's right hand did not test positive because she found only one particle. R941-42.

The medical examiner testified that Guice was shot multiple times and died from a gunshot wound to the head. R820-22, 834. The silver revolver recovered from the Buick contained six .357 casings from spent rounds (a revolver does not eject spent casings automatically, they must be removed manually). R874-76, 888, 1005. A forensic scientist confirmed that those casings were fired by the revolver. R966. The medical examiner recovered a bullet core and a bullet jacket during Guice's autopsy but, due to their damaged condition, the forensic scientist could not determine whether they were fired from the revolver. R859, 967-70.

3. Defendant's case

After the prosecution rested, defendant told the trial court that he would not testify; defendant's mother then viewed the rest of trial. R1145.

The defense entered a stipulation that a police officer previously had said there were 200-300 people outside of The Press Box when he arrived. R1147. Deborah Hansen, an investigator for the defense, testified that Davis told her during an interview that three men ran out of the bar after the fight: a tall man with dreadlocks, a "short guy" with a red and blue flannel shirt, and another man whose appearance she did not recall. R1151-53.

4. Closing Argument, Jury Deliberations and Verdict

In closing, defense counsel conceded that defendant was in the bar on the night of the murder, but claimed the case was a "whodunit" because the witnesses had incorrectly identified defendant as the shooter; the prosecution

argued that the evidence was overwhelming and that the defense was asking the jury to believe the eyewitnesses were "liars." R1175-1230.

After closing arguments, the parties discussed which evidence should go to the jury room during deliberations. R1258. The trial court agreed with defendant that the photograph of defendant in the bar would not go back with the jury because "[t]here is no one who testified that this photograph was taken that night." R1260-61.

During deliberations, the jury sent notes asking for certain things, including "Photo taken inside bar?" R1263-64; SC228. The trial court initially noted that the parties agreed that the request referred to the photograph of defendant that police had recovered upon his arrest and had been admitted into evidence. R1264. Defense counsel objected that the photograph was irrelevant and prejudicial. R1265-67. The prosecution noted that the court had rejected those arguments when it denied defendant's motion in limine. R1267-68. The trial court agreed with the prosecution and ordered that the photograph be given to the jury. R1269. Defense counsel then stated that she had "another objection" and argued for the first time that "we don't know what photo they're asking for, and if they're asking for this particular photo, they are making the assumption that it was taken in the bar. We are saying that there is no foundation for that." R1272. The court rejected those arguments and sent the photograph to the jury, along with a response to a separate question. R1273-74.

Following deliberations, the jury found defendant guilty of first degree murder. R1277.

E. Defendant's Posttrial Motions and Sentencing

Defense counsel moved for a new trial and argued, among other things, that the temporary exclusion of defendant's mother from the courtroom "denied [defendant] his right to a public trial." SC270-71. In rejecting this claim, the trial court explained:

> The defendant's mother — the Court would certainly allow her to remain in the courtroom. This is a public trial. However, she was a witness to the defendant's statements. Therefore, she possibly could be a witness. I can't say that the State would not have called her. If I had heard that there was no basis to call the mother, the Court would have absolutely allowed the mother to remain in the courtroom. . . . When I heard from defense counsel that the defendant would not be testifying, the Court immediately indicated that the mother could remain in the courtroom, and she was allowed to remain in the courtroom.

R1320. The court denied defendant's motion and sentenced defendant to 30 years in prison. R1319-21, 1374.

F. Appellate Court's Decision

On appeal, the appellate court held that the temporary exclusion of defendant's mother violated his right to a public trial because "the State failed to show that there was any reasonable probability that [she] would actually testify." *People v. Smith*, 2023 IL App (1st) 181070, ¶ 24. The court found that this error was "dispositive" and required a new trial. *Id.* at ¶¶ 1, 30.

The appellate court then addressed "additional issues that are likely to recur on remand." *Id.* at ¶ 30. The court first held that defendant had carried his burden to show that the second lineup was unduly suggestive because defendant was wearing the same shirt in the lineup that he wore on the night of the shooting; the court therefore ordered that, on remand, the suppression hearing be advanced to the second stage, where the prosecution bore the burden to prove that the lineup identifications were based on the witnesses' independent recollections. *Id.* at ¶¶ 42-43. Next, the court held that the prosecution violated its discovery obligations because parts of Wong's testimony, including her testimony regarding the standards used by other forensic laboratories, contradicted the conclusion in her report that the GSR tests were negative. *Id.* at ¶ 53. In addition, the court held that the prosecution erred by arguing in closing that jurors could find defendant not guilty only if they believed that the eyewitnesses were liars. *Id.* at ¶ 59. Lastly, the appellate court held that that the trial court erred by providing the photograph of defendant to the jurors during deliberations because doing so told the jury that it was taken at the bar on the night of the shooting when the prosecution presented no evidence at trial that that was so. *Id.* at ¶ 64.

STANDARDS OF REVIEW

A trial court's decision to exclude a potential witness from the courtroom is reviewed for an abuse of discretion, *In re M.W.*, 2013 IL App (1st) 103334, ¶ 23 (citing *People v. Chennault*, 24 Ill. 2d 185, 187 (1962)), as is

the trial court's response to a jury's request to view evidence during deliberations, *People v. Hollahan*, 2020 IL 125091, ¶ 11. The trial court's factual findings when ruling on a motion to suppress must be upheld unless they are contrary to the manifest weight of the evidence, but the ultimate legal question of suppression is reviewed de novo. *People v. Colyar*, 2013 IL 111835, ¶ 24. This Court also reviews de novo whether a prosecutor's comments during closing argument warrant a new trial, *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), and whether prosecutors violated their discovery obligations, *People v. Hood*, 213 Ill. 2d 244, 256 (2004).

ARGUMENT

This Court should reverse the appellate court's judgment because each of its rulings was incorrect.

I. Defendant Is Not Entitled to a New Trial on the Ground that the Trial Court Temporarily Excluded His Mother from the Courtroom Because She Was a Potential Witness.

The appellate court's ruling that the trial court violated defendant's right to a public trial by temporarily excluding his mother from the courtroom because she was a potential witness is contrary to settled law. Simply put, trial courts have discretion to exclude potential witnesses, and exercise of that discretion does not implicate the public trial right.

A. The Trial Court Had Discretion to Exclude Defendant's Mother from the Courtroom.

In Illinois and other jurisdictions across the country, it "is well settled that a trial court, acting within its discretion, may grant a motion to exclude

witnesses from the courtroom." *People v. Revelo*, 286 Ill. App. 3d 258, 266 (2d Dist. 1996) (collecting cases); *see also*, *e.g.*, *People v. Chennault*, 24 Ill. 2d 185, 187 (1962) (the "exclusion of witnesses is a matter within the sound discretion of the court"); *People v. Jenkins*, 10 Ill. App. 3d 588, 590 (1st Dist. 1973).[3] As the United States Supreme Court has observed, excluding potential witnesses from the courtroom is "a 'timehonored practice designed to prevent the shaping of testimony by hearing what other witnesses say.'" *Perry v. Leeke*, 488 U.S. 272, 281 n.4 (1989); *see also Geders v. United States*, 425 U.S. 80, 87 (1976) (trial court's "broad power" to exclude witnesses has been recognized for "centuries" as a way to prevent witnesses from "'tailoring' their testimony to that of earlier witnesses"). Thus, the trial court had discretion to exclude defendant's mother.

Nor did the trial court abuse its discretion. *See, e.g., In re M.W.*, 2013 IL App (1st) 103334, ¶ 23 (court's decision to exclude witnesses from courtroom is reviewed "under the abuse of discretion standard") (citing *Chennault*, 24 Ill. 2d at 187). An abuse of discretion occurs if a decision was

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[3] Effective in 2011, Illinois Rule of Evidence 615 provides that trial courts "must order" that witnesses be excluded upon a party's request, but Illinois courts have held that Rule 615 was not intended to alter the existing common law rule that trial courts have *discretion* to exclude (or not exclude) a witness. *See, e.g., In re N.F.*, 2020 IL App (1st) 182427, ¶¶ 32-37 (noting that "nothing in our rules of evidence reflects an intention to modify the longstanding" common law rule that courts have discretion to exclude); *see also People v. Chatman*, 2022 IL App (4th) 210716, ¶ 67 (exclusion remains a matter of discretion); Ill. R. Evid. Comm. Comments (2011) (discussing the committee's intent to incorporate "the current law of evidence in Illinois whenever the Illinois Supreme Court or the Illinois Appellate Court had clearly spoken on a principle of evidentiary law within the last 50 or so years").

"arbitrary, fanciful, or unreasonable." *People v. Brand*, 2021 IL 125945, ¶ 36. Here, defendant cannot show that the trial court's decision to temporarily exclude his mother was arbitrary, fanciful, or unreasonable.

As the prosecution explained to the trial court, defendant's mother was a potential witness (and, indeed, had been included on the prosecution's witness list before trial, *see* SC112) because she was with defendant at the police station after he was apprehended, and it was possible her testimony would be needed to impeach defendant depending on whether he testified and what he testified about regarding his time at the station. R334-36. In addition, her testimony might have been needed for other purposes; for example, had defendant testified that he did not own and had never worn the red and white shirt that witnesses said the shooter was wearing, his mother might have been called to impeach that testimony. Indeed, defendant did not dispute that his mother was a potential witness; rather, when the trial court observed that defendant's mother was a potential witness, defense counsel agreed, "She is." R336. Thus, while defendant argued that it was very *unlikely* that his mother would be needed to testify, he did not contend that there was *no possibility* of her testifying, nor could he credibly do so.

Moreover, defendant provided no reason for the trial court to believe that his case presented special circumstances requiring the court to exempt his mother from the normal practice that potential witnesses are excluded from the courtroom. And the court was careful to ensure that she was

permitted to return to the courtroom as soon as she was no longer a potential witness by directing the prosecution to immediately tell the court if and when it decided that it would not call her. R337. Indeed, the record shows that, once the prosecution reached that decision, defendant's mother was allowed to watch the remainder of trial. R1145.

Accordingly, the record shows that the trial judge considered the parties' arguments, then employed a longstanding practice, one used in courts across this country, that potential witnesses should not observe trial. Defendant therefore cannot show that the decision to temporarily exclude his mother from the courtroom was arbitrary, fanciful, or unreasonable.

Lastly, even if, for the sake of argument, the trial court abused its discretion, that error was harmless. *See, e.g., Chennault*, 24 Ill. 2d at 187 (where "there was no showing of prejudice, there was no reversible error"). An error is harmless if "the result [of trial] would have been the same absent the error." *People v. Salamon*, 2022 IL 125722, ¶ 121. Given the strength of the evidence against defendant — which includes multiple eyewitnesses identifying defendant as the shooter — it cannot be disputed that defendant would have been convicted even if his mother had sat in the gallery and observed the initial portions of trial. Therefore, the trial court did not abuse its discretion and, even if it did, any such error was harmless.

B. Excluding a Potential Witness from the Courtroom Does Not Implicate, Let Alone Violate, the Public Trial Right.

The appellate court acknowledged the longstanding authority holding that trial courts have the discretion to exclude potential witnesses from the courtroom. *Smith*, 2023 IL App (1st) 181070, ¶ 21. Nevertheless, the court held that the temporary exclusion of defendant's mother "implicated" defendant's "right to a public trial." *Id.* at ¶ 23. Therefore, rather than analyzing whether the trial court abused its discretion to exclude potential witnesses, the appellate court analyzed whether the trial court's exclusion of a potential witness violated defendant's right to a public trial under the four-part test provided by *Waller v. Georgia*, 467 U.S. 39, 47-48 (1984), which requires that (1) "the party seeking to close the [proceeding] must advance an overriding interest that is likely to be prejudiced," (2) "the closure must be no broader than necessary to protect that interest," (3) "the trial court must consider reasonable alternatives to closing the proceeding," and (4) the trial court "must make findings adequate to support the closure."

As an initial matter, the public trial claim defendant has raised on appeal may only be reviewed for plain error — which requires him to show, among other things, a "clear and obvious error" — because when the prosecution moved to exclude his mother with the other potential witnesses, defendant objected only that she was unlikely to testify, not that her exclusion would violate his right to a public trial. *See, e.g., People v. Radford*, 2020 IL 123975, ¶ 22 (reviewing public trial claim for plain error where the

defendant failed to object). That is to say, contrary to what the appellate court held, defendant's objection that his mother should not be excluded because she was unlikely to testify did not preserve the separate and distinct claim that excluding her violated defendant's right to a public trial. *See, e.g., People v. Lovejoy*, 235 Ill. 2d 97, 148 (2009) ("A specific objection at trial forfeits all grounds not specified."). In any event, whether reviewed for plain error or reversible error, the result is the same: excluding a witness from the courtroom does not implicate, let alone violate, the right to a public trial.

Courts have long recognized that the Sixth Amendment right to a public trial embodies the traditional "distrust for secret trials." *In re Oliver*, 333 U.S. 257, 268 (1948). Public trials ensure that "the public may see [that a defendant] is fairly dealt with and not unjustly condemned." *Waller*, 467 U.S. at 46 (internal quotations omitted). Importantly, however, this Court "has clearly held" that the *Waller* test and its progeny "only apply in instances in which the press and public are barred from judicial proceedings." *People v. Schoonover*, 2021 IL 124832, ¶ 45 (collecting cases). As the Court explained, it "is well settled that the presence of the media preserves a defendant's right to a public trial as well as the fundamental protections afforded by that right." *Id.* at ¶ 46. Because the media is "in effect" the public, as long as the media is not barred from trial, "a trial court preserves a defendant's right to a public trial." *Id.*

In turn, a person's "right of access to criminal trials is not absolute" because "[u]ltimately, the central aim of a criminal proceeding is to fairly try the accused." *Id.* at ¶ 44. And, as discussed, part of a fair trial is the "time-honored practice" of excluding potential witnesses "to prevent the shaping of testimony by hearing what other witnesses say.'" *Leeke*, 488 U.S. at 281 n.4; *see also Geders*, 425 U.S. at 87; *supra* Section I.A.

Consistent with those principles, it is settled that excluding a potential witness from the courtroom does not implicate a defendant's right to a public trial, much less violate it. Indeed, setting aside the opinion below, the appellate court has repeatedly held that a trial court's decision to exclude someone because they are a potential witness does not implicate the public trial right and, therefore, the decision is reviewed for an abuse of discretion and not under the *Waller* test. *E.g.*, *Revelo*, 286 Ill. App. 3d at 266 ("A trial court does not impinge upon a defendant's right to a public trial when exercising this long-recognized power" to exclude potential witnesses); *Jenkins*, 10 Ill. App. 3d at 590 ("Exercise of this power [to exclude potential witnesses] does not infringe on a defendant's right to a public trial."); *see also People v. Taylor*, 244 Ill. App. 3d 460, 467-68 (2d Dist. 1993) (reviewing trial court's decision to exclude family members who were potential witnesses for an abuse of discretion, not under the *Waller* test).

Similarly, other state supreme courts consistently have held that a trial court's decision to exclude a potential witness does not implicate a

defendant's right to a public trial, much less violate it. As the Georgia Supreme Court noted, it could not find a single case where the exclusion of a potential witness was held to violate the right to a public trial; and, "to the contrary, we 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." *Nicely v. State*, 733 S.E.2d 715, 720 (Ga. 2012) (collecting cases); *see also*, *e.g.*, *State v. Njonge*, 334 P.3d 1068, 1076 (Wash. 2014) (exclusion of potential witnesses "does not implicate the public trial right, but is instead a matter of trial court discretion rooted in the court's courtroom management prerogative"); *State v. Jordan,* 325 S.W.3d 1, 53 (Tenn. 2010) (exclusion of potential witnesses "does not threaten any of these interests" that the right to a public trial is meant to safeguard); *State v. Culkin*, 35 P.3d 233, 259 (Haw. 2001) ("[T]he right to a public trial is not implicated by the exclusion of a potential witness pursuant to the witness exclusionary rule."); *People v. Baker,* 14 N.Y.3d 266, 274 (N.Y. 2010) (similar).

Likewise, federal courts consistently have held that excluding witnesses does not implicate or violate the public trial right. *See*, *e.g.*, *United States v. Love*, 743 Fed. Appx. 138, 138-39 (9th Cir. 2018) (orders to exclude potential witnesses from the courtroom "do not violate the Sixth Amendments public-trial guarantees"); *United States v. Izac*, 239 Fed. Appx. 1, 4 (4th Cir. 2007) ("right to a public trial was not implicated" by exclusion of witness).

Accordingly, the appellate court's ruling that "defendant's right to a public trial was implicated" and the trial court was required to apply the "test set forth in *Waller*" the moment "when the defense objected that [defendant's mother] was not a probable witness" is contrary to settled law. *Smith*, 2023 IL App (1st) 181070, ¶ 23. And, tellingly, the appellate court cited no cases that support its departure from this established precedent. *See id.* Instead, one of the two cases the appellate court relied on, *Taylor*, 244 Ill. App. 3d at 467, expressly did *not* apply the *Waller* test to the exclusion of the defendant's parents because they were potential witnesses. And the other case, *People v. Willis*, 274 Ill. App. 3d 551, 553-55 (1st Dist. 1995), did not involve the exclusion of potential witnesses during trial.

The appellate court's rule not only lacks legal support, it also lacks logical support. Under the appellate court's rule, a defendant's mere objection that a witness probably will not be needed to testify is sufficient to transform a run-of-the-mill motion to exclude witnesses (which is a matter solely within the trial court's discretion and subject to harmless error analysis) into a motion for a total courtroom closure (which requires application of the multi-part *Waller* test, and violations are treated as structural error that automatically requires a new trial). But it makes no sense to hold that a trial court's discretionary decision to exclude potential witnesses automatically threatens a defendant's Sixth Amendment right to a public trial every time the defendant disputes the probability that a witness

will testify. *Cf. Schoonover*, 2021 IL 124832, ¶ 46 (it "is well settled that the presence of the media preserves a defendant's right to a public trial"). Rather, where a defendant objects to a witness's exclusion on the ground that it is not "probable" that the witness will testify, the issue for the trial court to decide is whether that witness should be excluded with the other potential witnesses, an issue that is subject to the trial court's discretion.

For example, the appellate court expressed concern that prosecutors might falsely claim that a defendant's family member is a witness "as a pretext to exclude them from the courtroom for whatever advantage the State believes it gains by doing so." *Smith*, 2023 IL App (1st) 181070, ¶ 27. Of course, there is no evidence here that the prosecution acted in bad faith when it stated that defendant's mother was a potential witness (nor did the appellate court identify any evidence that this has been a problem in other cases); to the contrary, as noted, defense counsel agreed that defendant's mother was a potential witness. R366. But even if, in a hypothetical case, a defendant believes the prosecutor's assertion that someone is a potential witness is a pretext, the defendant can object on that basis, and if the prosecutor is unable to articulate a reason to believe the person might be needed to testify, then the trial court can exercise its discretion by denying the motion to exclude that person. Thus, the hypothetical concerns the appellate court expressed below are addressed by the application of the

longstanding rule providing discretion to exclude potential witnesses, and do not implicate the Sixth Amendment public trial right.

* * *

In sum, the trial court did not abuse its discretion by excluding defendant's mother because she was, as defendant admitted, a potential witness. And the trial court's decision did not implicate, let alone violate, defendant's right to a public trial.

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

In addition to holding that defendant was entitled to a new trial because the trial court violated his right to a public trial, the appellate court remanded for further proceedings on defendant's motion to suppress lineup identifications and addressed several other issues it believed were likely to recur on remand (without addressing whether those alleged errors were sufficient to require a new trial). The appellate court's rulings are inconsistent with the record and settled law.

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

A defendant who files a motion to suppress a lineup identification bears the burden to show that the lineup was unduly suggestive; if the defendant makes that showing, then the burden shifts to the prosecution to present clear and convincing evidence that the witness identified the defendant based on their independent recollection and not due to the

suggestiveness of the lineup. *See, e.g., People v. Clifton*, 2019 IL App (1st) 151967, ¶ 60 (collecting cases). The appellate court's ruling that defendant carried his burden to show that the second lineup was unduly suggestive because defendant wore his red and white shirt — and the court's corresponding order remanding to the trial court for further proceedings on defendant's motion to suppress — is contrary to settled law.

To recap the facts relevant to this issue, police conducted two lineups on the day of Guice's murder. During the first lineup, conducted in the early afternoon, Townsend identified defendant as the shooter. R671. In that lineup, defendant wore the white undershirt he was wearing at the time of his arrest; one of the other men in the lineup wore a red shirt, and the others wore shirts of various colors. E5; R268. As the afternoon progressed, defendant became cold, and he chose to put on the red and white shirt he was wearing when he killed Guice. R268, 1077. Later that evening, police conducted a second lineup, and defendant wore his red and white shirt. E9; R260, 268. After viewing this lineup, Perdomo and Ali identified defendant as the shooter and Davis (who did not see the shooting) identified defendant as the person who instigated the brawl shortly before the shooting. R705-07, 754, 784-87.

Before trial, defendant moved to suppress all the identifications, alleging that they were the result of unduly suggestive lineups; at the hearing on that motion, defendant relied solely on photographs of the lineups

and the testimony of the officer who conducted the lineups. R210-85. The trial court concluded that the lineups were not suggestive and denied the motion to suppress. R286-88. As discussed, all four eyewitnesses identified defendant at trial. *Supra* pp. 7-8. Perdomo also testified that she identified defendant in the lineup because she recognized him as the shooter, and not because he was wearing a red and white shirt. R736.

On this record, the appellate court agreed with the trial court that the first lineup (where Townsend identified defendant) was not suggestive. *Smith*, 2023 IL App (1st) 181070, ¶¶ 38-39, 43. However, the appellate court found that the second lineup (which the other eyewitnesses viewed) was unduly suggestive because defendant "was wearing *the* red shirt that police recovered" from the car defendant used to flee the scene. *Id.* at ¶¶ 40, 42 (emphasis in original). The appellate court "acknowledge[d]" that "police did not compel [defendant] to wear the red shirt in the second lineup," but concluded that police should have told defendant to "remove the shirt for the brief time witnesses were viewing the second lineup" and/or "provide[d] him with a T-shirt or sweatshirt" to wear. *Id.* at ¶ 41. The appellate court accordingly "vacated the trial court's order denying [defendant's] motion to suppress in part, only as to identifications made in the second lineup" and remanded for second stage proceedings, where the People bore the burden to prove that the witnesses identified defendant based on their recollections and not any suggestiveness in the lineup. *Id.* at ¶ 43.

The appellate court's ruling that the second lineup was unduly suggestive because defendant wore his red and white shirt is contrary to settled law. To be impermissibly suggestive, the lineup used by police "must 'give rise to a very substantial likelihood of irreparable misidentification.'" *Sexton v. Beudreaux*, 138 S. Ct. 2555, 2559 (2018). Specifically, defendant must prove that, "[t]hrough some specific activity on the part of the police, the witness [was] shown an individual who is more or less spotlighted by the authorities." *People v. Andrew Johnson*, 149 Ill. 2d 118, 147 (1992); *see also People v. Kennedy*, 2021 IL App (1st) 181344-U, ¶ 29 (collecting cases).[4]

Defendant failed to make that showing here. As courts have repeatedly held, a lineup is not unduly suggestive merely because a suspect wears clothing described to police by the victims. *See*, *e.g.*, *People v. Peterson*, 311 Ill. App. 3d 38, 49-50 (1st Dist. 1999) (collecting cases). For example, in *Andrew Johnson*, this Court held that a lineup was not suggestive even though the eyewitnesses described the perpetrator as wearing a dark coat and the defendant wore a dark coat in the lineup. 149 Ill. 2d at 148. As the Court explained, a lineup might be unduly suggestive if a defendant is "ordered to wear an orange coat when all the others in the lineup were made to wear brown coats, or some other such activity which might single him out," but there was "no error, here, where the defendant simply wore his own clothing." *Id.* Similarly, the United States Supreme Court held that a lineup

[4] The nonprecedential Rule 23 orders cited in this brief are available on the Illinois courts' website, at https://www.illinoiscourts.gov/top-level-opinions/.

was not unduly suggestive when the defendant was the only person in the lineup to wear a hat, and one of the perpetrators was described as wearing hat, where nothing in the record showed that police "required" the defendant to wear the hat. *Coleman v. Alabama*, 399 U.S. 1, 6 (1970).

Likewise, apart from the decision below, the appellate court consistently has held "that 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." *E.g.*, *People v. Williams*, 2021 IL App (1st) 171119-U, ¶ 40 (collecting cases); *see also Peterson*, 311 Ill. App. 3d at 49-50 (collecting cases). In *People v. Faber*, for example, the appellate court held that "the fact that [defendant] was the only person [in the lineup] wearing a sleeveless T-shirt a witness described the offender as wearing is not sufficient to render the lineup suggestive." 2012 IL App (1st) 093273, ¶ 57. And in *People v. Calvin Johnson*, the appellate court held that a lineup was not suggestive where the defendant was the only one wearing red pants like the victim said the perpetrator wore. 222 Ill. App. 3d 1, 7-8 (1st Dist. 1991).

Similarly, courts in other jurisdictions have also repeatedly held that a lineup is not suggestive merely because the defendant is the only person wearing an item of clothing that matches the description of what the perpetrator wore. *See*, *e.g., Brookfield v. Yates*, No. 11 C 357, 2013 U.S. Dist. LEXIS 174246, *4, 87-89 (E.D. Cal. Dec. 12, 2013) (lineup was not unduly

suggestive where witnesses said perpetrator wore a red shirt and defendant was only person in the lineup wearing a red shirt); *United States v. Williams*, 522 F.3d 809, 810-12 (7th Cir. 2008) (same, where defendant wore white tennis shoes like the suspect wore and everyone else in the lineup wore blue slippers issued by the prison); *United States v. Peterson*, 411 F. Appx. 857, 864 (6th Cir. 2011) (same, where defendant was only person in dark clothing like the robber wore).

Tellingly, neither of the cases the appellate court relied on supports its ruling. *See Smith*, 2023 IL App (1st) 181070, ¶ 40 (citing *People v. Ayoubi*, 2020 IL App (1st) 180518, and *United States v. Wade*, 388 U.S. 218 (1967)). To start, in *Ayoubi*, the defendant argued that a photo array was suggestive because he "was the only photo array participant wearing a green hoodie, similar to the description of the perpetrator." 2020 IL App (1st) 180518, ¶ 35. The court rejected that argument because, among other reasons, "the police did not make defendant wear" the green hoodie in the photograph. *Id.* The same is true here: police did not require defendant to wear his red and white shirt in the second lineup. *Smith*, 2023 IL App (1st) 181070, ¶ 41. Therefore, *Ayoubi* does not support the appellate court's decision.

Nor does *Wade*, 388 U.S. at 237. There, the United States Supreme Court held for the first time that a post-indictment lineup is "a critical stage of the prosecution" at which the defendant is entitled to the aid of counsel. *Id.* In the course of that decision, the Court noted, in dicta, examples of

factors that could render a lineup suggestive, including where "only the suspect was *required* to wear distinctive clothing which the culprit allegedly wore." *Id.* at 232-33 (emphasis added). This factor is not present here because, again, the police did not require defendant to wear his red shirt. And, as discussed, courts have consistently held that a lineup is not unduly suggestive merely because the defendant wore his own clothes, even if those clothes matched the description of the clothes worn by the perpetrator. *Supra* pp. 27-30. Simply put, the appellate court's ruling that the second lineup was unduly suggestive because defendant wore his red and white shirt is contrary to longstanding precedent from the United States Supreme Court, this Court, and other courts across the country.

In the alternative, the Court should affirm defendant's conviction because any error related to the second lineup was harmless. An evidentiary error is harmless if the People "prove beyond a reasonable doubt" that the result of trial "would have been the same absent the error." *Salamon*, 2022 IL 125722, ¶¶ 121, 127 (erroneous admission of defendant's confession was harmless given the other evidence of his guilt). Here, the appellate court held that the trial court should have found that defendant met his burden to show that the second lineup was impermissibly suggestive and then shifted the burden to the prosecution to show that the three eyewitnesses who viewed the second lineup identified defendant based on their independent recollection and not due to any suggestiveness in the lineup. *Smith*, 2023 IL

App (1st) 181070, ¶ 43. But even if the trial court erred in that way, the error was harmless.

Notably, under the appellate court's ruling, Townsend's identification is still admissible, because he viewed the first lineup, which the appellate court held was not suggestive. *Id.* In addition, Permodo's identification of defendant in the second lineup would still be admissible because she testified that her identification was not affected by defendant's red shirt, R736, which fulfills the People's burden to show that the witness identified the defendant based on his or her independent recollection and not due to any suggestiveness in the lineup. Thus, under the appellate court's ruling, the best case scenario for defendant on remand would be for the trial court to find that the People are unable to meet their burden with respect to the identifications made by Ali (the *third* person to identify defendant as the shooter) and Davis (who did not see the shooting but testified that defendant shouted "disrespectful" things during the moment of silence). R747-49, 782-83. But even if the identifications of those two eyewitnesses were suppressed, it would not change the outcome of trial because the remaining evidence against defendant is overwhelming:

- Two other eyewitnesses (Townsend and Permodo) identified defendant;

- It is undisputed that defendant fled the scene and attempted to avoid arrest when police pursued him, which shows consciousness of guilt, *see, e.g., People v. Hart*, 214 Ill. 2d 490, 519 (2005);
- Inside the car defendant used to flee, police recovered a silver handgun that matched the description of the gun witnesses gave police; and
- There is no exculpatory evidence in this case.

Accordingly, there is no basis to remand to the trial court for further proceedings on defendant's motion to suppress the identifications because (1) defendant failed to prove the second lineup was unduly suggestive; and (2) even if defendant were able to carry that burden, any error would be harmless.

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

A trial court's response to the jury's request to view evidence during deliberations is reviewed for an abuse of discretion. *People v. Hollahan*, 2020 IL 125091, ¶ 11. Here, the trial court did not abuse its discretion by giving the jury, at its request, the photograph of defendant that was admitted at trial.

To recap the relevant facts, police recovered several items in defendant's possession when they arrested him, including a photograph of defendant in his red and white shirt taken at The Press Box. R1027; SC189. Before trial, defendant moved to exclude the photograph, describing it as a

photograph "taken in the bar before the shooting." SC189. The prosecution explained to the trial court that a photographer in The Press Box took photographs of customers, instantly printed them, and sold them to customers. R611. Defense counsel agreed that the photograph was "taken at the club, which was the site of the shooting," but argued that it was prejudicial because some of the men in the photograph were making what could be interpreted as "gang signs." R608, 610. Defense counsel further argued that it was unnecessary to introduce the photograph at trial because "[w]e are not contesting that [defendant] was wearing that [red and white] shirt, which was recovered from the car, that he was wearing that shirt in the club." R610-11. And defense counsel later reiterated, "[W]e are not saying he wasn't in the club, and we are not saying he wasn't wearing that very shirt that the State has as a piece of evidence." R612. The trial court denied the motion but ordered that the parties not mention gangs at trial. R615.

The photograph then was admitted into evidence at trial without objection. R1027. In closing argument, defense counsel told the jury that defendant was in the bar when the fight started and was arrested by police while fleeing the scene. R1190-92, 1207. Counsel argued, however, that the eyewitnesses misidentified defendant as the shooter due to the "dark and panicked" circumstances of the shooting. R1192-95. Counsel further argued that defendant's shirt proved he was not guilty because (1) it did not test positive for GSR; and (2) eyewitnesses described the shooter's shirt as "red,"

but the jury could see that the shirt defendant wore was "red, white, and black." R1196, 1204. And during closing, defense counsel told the jury, "[Y]ou're going to see all of the photographs, of course." R1199.

Nevertheless, the photograph of defendant in The Press Box was not sent to the jury room. During deliberations, the jury asked for, among other things, the "Photo taken inside bar?" R1263-64; SC228. Over defendant's objection, the trial court sent the photograph to the jury. R1273-74.

The appellate court held that the photograph "was properly admitted into evidence" but nevertheless ruled that the trial court abused its discretion by giving the photograph to the jury in response to its note. *Smith*, 2023 IL App. (1st) 181070, ¶ 64. According to the appellate court, "responding with [the photograph] to the jury's question as phrased supplied additional evidence than was presented at trial. This answered a factual question and filled in an evidentiary blank left by the State." *Id.* The court reasoned that the prosecution "failed to provide evidence that the photo was taken at the Press Box the night of the shooting. The jury may have surmised so but giving them the photo in response to 'Photo taken inside bar?' told them, with the court's imprimatur, that it was." *Id.*

The appellate court's ruling is faulty for several reasons. To begin, the ruling is based on the court's conclusion that, by providing the photograph to the jury in response "to the jury's question as phrased," the trial court informed the jury "that the photo was taken at the Press Box the night of the

shooting." *Id.* But that cannot be true because the "jury's question as phrased" did not mention "The Press Box" or the "night of the shooting." *See* SC228. Rather, the jury's note requested "Photo taken inside bar?" *Id.* Therefore, it cannot be said that providing the photo to the jury was the same as telling the jury that the photograph was taken in The Press Box on the night of the shooting.

Moreover, even if the appellate court were correct that providing the photograph to the jury somehow conveyed to the jury that the photograph was taken in The Press Box on the night of the shooting, such an error would be harmless. *See*, *e.g., Hollahan*, 2020 IL 125091, ¶ 11 (error in responding to jury's question is harmless if it does not prejudice defendant). The appellate court found that giving the jury the photograph prejudiced defendant because it "places [defendant] at the scene wearing the distinctive shirt described by witnesses." *Smith*, 2023 IL App. (1st) 181070, ¶ 64. But that finding overlooks that defense counsel expressly told the jury that (1) defendant was at the scene on the night of the shooting, and (2) defendant was wearing his red shirt. R1190-92, 1196, 1204, 1207. Therefore, even if providing the photograph conveyed to the jury that the photograph showed defendant was in The Press Box on the night of the shooting wearing a red shirt, that did not prejudice defendant because it merely repeated what defense counsel had told the jury. Accordingly, the trial court's decision to provide the photograph to the jury is no basis for a new trial.

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

Neither of the two isolated comments in the prosecution's closing argument that the appellate court found to be improper provide a basis for a new trial. During closing argument, defense counsel claimed that the eyewitnesses who testified were not credible and the case was a "whodunit" because prosecutors had failed to prove who killed Guice. R1189-90. In rebuttal, the prosecution disagreed that the case was a "whodunit" and stated, "[I]n 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, lied to your face." R1214. The prosecutor later added 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 trial court overruled defendant's objection to the first statement, and defendant did not object to the second. R1214, 1230.

The appellate court found that both statements were "improper" and "risk[ed] denying defendant a fair trial." *Smith*, 2023 IL App (1st) 181070, ¶ 59. However, the court declined to consider whether the statements entitled defendant to a new trial because it had already granted defendant a new trial on the basis that the temporary exclusion of defendant's mother violated his right to a public trial. *Id.* at ¶ 58. This Court should hold that neither comment entitles defendant to a new trial.

1. The first comment was not reversible error.

This Court has drawn a distinction between a prosecutor arguing "that a jury would have to believe the State's witnesses were lying in order *to believe* the defendant's version of events" — which is permissible argument — and a prosecutor arguing "that a jury would have to believe the State's witnesses were lying in order *to acquit* defendant," which is impermissible argument. *People v. Banks*, 237 Ill. 2d 154, 184-85 (2010) (emphasis in original). For purposes of this appeal, the People do not contest that the prosecutor inadvertently erred by making the first comment, *i.e.*, that "in order for you to find him not guilty, you have to find that what they're saying is that all four [of the eyewitnesses] lied, lied to your face." R1214. However, that isolated comment did not prejudice defendant and, therefore, it is not reversible error.

A reviewing court will find reversible error "only if the defendant demonstrates" that the improper comments "were so prejudicial that real justice was denied or the verdict resulted from the error." *People v. Jackson*, 2020 IL 124112, ¶ 83; *People v. Runge*, 234 Ill. 2d 68, 142 (2009) (same). Defendant cannot carry that burden for three independent reasons.

First, when considering whether prejudice exists, a reviewing court must "consider the closing argument as a whole, rather than focusing on selected phrases or remarks." *E.g.*, *People v. Perry*, 224 Ill. 2d 312, 347 (2007); *Jackson*, 2020 IL 124112, ¶ 82 (same). And, as a general rule, isolated comments made during a lengthy closing argument are not

prejudicial. *E.g.*, *Jackson*, 2020 IL 124112, ¶¶ 85-87. Here, the prosecutor's comment was brief and isolated: it was only one sentence in the midst of a long closing argument and rebuttal that totaled 35 transcript pages. *See* R1214. Moreover, right before making the challenged comment, the prosecutor expressly said that defendant "has absolutely no burden to prove anything or disprove anything." *Id*. And throughout the rest of closing argument, the prosecutor repeated that it was the *prosecution* that bore the burden of proof. *E.g.*, R1181, 1187-89. Thus, within the context of the prosecution's entire closing argument, there is no chance that jurors believed defendant bore the burden of proof; rather, the prosecutor made clear to the jury that the prosecution bore the burden of proof. *See*, *e.g., People v. Mudd*, 2022 IL 126830, ¶¶ 44-45 (statement that allegedly shifted the burden of proof was not reversible error where the prosecutor stated multiple times that the prosecution bore the burden of proof); *Jackson*, 2020 IL 124112, ¶¶ 85-86 (defendant was not prejudiced by the prosecution's improper remarks because they were isolated and "made between several correct" related statements).

Second, even setting that aside, it is settled that prejudice is cured where the trial court instructs the jury that the prosecution bears the burden of proof. *See*, *e.g., Mudd*, 2022 IL 126830, ¶ 42 (final jury instructions "offset any potential juror confusion about which party bore the burden of proof"); *People v. Flores*, 128 Ill. 2d 66, 95 (1989) (any error "was cured when the jury

was properly instructed by the trial court on the State's burden of proof"). The same is true here. At the start of trial, the judge instructed the venire that the prosecution "has the burden of proving the guilt of the defendant beyond a reasonable doubt" and "defendant is not required to prove his innocence." R361. Then, after the parties' closing arguments, the trial court instructed the jury that it was the prosecution's burden to prove each element of the charged offenses. *E.g.*, R1234-37, 1239-40. And, the trial court once again instructed the jury: "The State has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the State throughout the case. *The defendant is not required to prove his innocence*." R1237 (emphasis added). In light of these clear, repeated instructions, the jury plainly knew that the prosecution bore the burden of proof, not defendant.

Third, and independently, given the strength of the evidence against him, defendant cannot reasonably argue that he would have been acquitted but for the prosecutor's brief comment. *See*, *e.g.*, *People v. Nieves*, 193 Ill. 2d 513, 533 (2000) (no prejudice where "[t]he evidence of defendant's guilt was substantial enough that the jury would have returned a verdict of guilty even if the prosecutor had not made this argument"). As discussed, multiple eyewitnesses testified that defendant was the shooter; it is undisputed that defendant attempted to flee from police, which shows consciousness of guilt; it is also undisputed that, in the car he used to flee, police recovered a silver

handgun that matched the description of the gun the shooter used; and there is no exculpatory evidence to counteract this strong evidence of defendant's guilt. Therefore, in sum, defendant was not prejudiced by the prosecutor's brief comment.

2. The second comment was not plain error.

In the appellate court, defendant also challenged the prosecutor's comment in rebuttal that defense counsel was wrong to describe the case as a "whodunit" 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. But that comment was permissible because prosecutors may argue that the jury would have to believe the prosecution's witnesses were lying in order to believe the defendant's theory of the case. *E.g.*, *Banks*, 237 Ill. 2d at 184-85. Moreover, even if the comment were error (it is not) defendant cannot show prejudice for the reasons discussed: it was an isolated statement, the prosecution told jurors that the People bore the burden of proof, the trial court instructed jurors that the People bore the burden of proof, and the evidence against defendant was overwhelming.

Lastly, because defendant did not object to this comment at trial, the alleged error may be reviewed only under the plain error doctrine. But, as discussed, the prosecutor's comment was not improper, so defendant has failed to make the threshold showing of a clear and obvious reversible error. *See People v. Williams*, 2022 IL 126918, ¶ 49. And even if he had made this showing, he has failed to demonstrate either that (1) the evidence was

"closely balanced," or (2) the error was so serious that it "affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Jackson*, 2020 IL 124112, ¶ 81. As discussed, the evidence is not closely balanced; and this Court has consistently held that isolated comments in closing argument (absent a serious pattern of prosecutorial misconduct in other parts of the trial) do not constitute second prong plain error. *People v. Adams,* 2012 IL 111168, ¶ 24; *People v. Nicholas,* 218 Ill. 2d 104, 123 (2005).

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

The appellate court's last ruling — that prosecutors violated their discovery obligations because Wong's testimony "contradicted" her report — is likewise rebutted by the record and settled law.

1. Wong's testimony did not contradict her report.

At trial, Wong, a forensic scientist in the Illinois State Police Forensic Sciences Division, testified that under the state's laboratory rules, "to return a finding" that a sample is "positive" for GSR, she "must find three tri-component particles" on the sample. R924. She further testified that the sample taken from defendant's right hand did not test positive because she only found one component particle on it. R924-25. According to Wong, her testing "leads [her] to a conclusion that the kit administered to [defendant] indicates that he may not have discharged a firearm with either hand." R924. An expert cannot definitively say that someone did not fire a gun, however, because, as Wong explained, GSR can be removed in various ways, such as through sweating, certain activities, or the passage of time. R934-36,

942-44. She also testified that some laboratories use different standards; for example, some laboratories require only one particle to conclude that a person fired a gun, while other laboratories require four particles. R933-34, 946. Wong explained that the Illinois state laboratory's policy required three particles to yield a positive result because it believed that to be the "scientifically correct" standard. R941. Wong reiterated that under her analysis, defendant's sample did not test positive for GSR because she found only one particle. R941-42.

The appellate court held that the prosecution violated its discovery obligations because Wong's testimony "contradicted" the report she provided before trial. *Smith*, 2023 IL App (1st) 181070, ¶ 53. Specifically, the appellate court reasoned, Wong's report "indicated a negative result" for the presence of GSR on defendant's sample, but "the overall effect of her testimony was, despite the negative result, [defendant] likely fired a gun." *Id*. at ¶ 55. According to the appellate court, the prosecution therefore violated its discovery obligations under *Lovejoy*, 235 Ill. 2d at 97 (cited in *Smith*, 2023 IL App (1st) 181070, ¶ 53).

However, *Lovejoy* is a much different case and does not control here. In *Lovejoy*, an expert for the prosecution prepared a report before trial stating that a sample taken from a tile in the defendant's bathroom tested "negative" for the presence of blood. *Id.* at 113. Then, at trial, the expert attested for the first time that those tests had yielded a "false negative" and, in fact, the

sample *did* contain blood. *Id.* at 114-18. As this Court noted, that testimony was "in complete opposition" to what the expert had said in her report. *Id.* at 119. The Court held that the prosecution violated its discovery obligations because the expert's report "disclosed the result of the scientific test, but did not disclose the fact that [the expert] intended to disregard the result and interpret it to mean the opposite of what was reported." *Id.*

By contrast, Wong's testimony did not contradict the assertion in her report that defendant's sample tested negative for the presence of GSR. Instead, Wong repeatedly testified that defendant's sample tested negative for GSR because one particle is insufficient to be considered a positive result. *E.g.*, R924-25, 940-42.

The appellate court nevertheless took issue with Wong's testimony that some forensic laboratories use a one-particle standard, but in doing so, the appellate court overlooked that (1) Wong explained that the Illinois state laboratory had expressly adopted the three-particle standard — rather than the one-particle standard — because it had determined that it is the "scientifically correct" standard; and (2) she agreed in her "opinion as a scientist" that there "is not a positive finding" of GSR in this case because there was only one particle on defendant's sample. R940-41. This testimony is not comparable to the expert's about-face in *Lovejoy*, where the expert attested for the first time at trial that the negative result in her report was a "false negative" and the sample in question contained blood.

In addition, the appellate court faulted Wong's testimony that GSR may be removed in various ways, including sweating, but that testimony did not "contradict" Wong's conclusion that the GSR test was negative. Rather, the testimony is an example of what experts are supposed to do: explain to lay jurors the meaning and limits of scientific testing and educate them on subjects on which they may not be fully informed, which in this case includes whether and how someone who was seen firing a gun might nevertheless test negative for GSR. In sum, the prosecution did not violate its discovery obligations because Wong's testimony did not contradict her report.

2. Defendant failed to show that he was prejudiced by the alleged discovery violation.

Even if Wong's testimony could be considered the complete opposite of what was in her report such that it constitutes a discovery violation, defendant is not entitled to a new trial. A new trial "should only be granted if defendant, who bears the burden of proof, demonstrates that he was prejudiced by the discovery violation and the trial court failed to eliminate the prejudice." *Lovejoy*, 235 Ill. 2d at 120. Here, defendant cannot carry that burden for two independent reasons.

First, defendant cannot claim to have been prejudiced — and thus, he is not entitled to a new trial — because he did not request a continuance when Wong testified. This Court has consistently held that if a defendant believes the prosecution has violated its discovery obligations by presenting evidence to the jury that the prosecution did not disclose before trial, the

defendant must request a continuance to investigate the evidence; if the defendant fails to request a continuance, he may not claim on appeal that he is entitled to a new trial because was prejudiced by the alleged discovery violation. *See*, *e.g., People v. Hood*, 213 Ill. 2d 244, 262 (2004) (collecting cases); *People v. Robinson*, 157 Ill. 2d 68, 78-79 (1993) (same). This requirement is based on simple, straightforward reasoning: (1) the potential prejudice created by a prosecutor relying on previously undisclosed evidence is that the defense did not have the opportunity to investigate the evidence and prepare to address it; (2) such prejudice can be cured by a continuance to allow the defense to investigate the evidence and prepare a response; (3) a defendant who did not seek that remedy at trial cannot complain of prejudice on appeal and seek the drastic remedy of a new trial. *E.g.*, *Hood*, 213 Ill. 2d at 262-63 (defendant was not entitled to a 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); *Robinson*, 157 Ill. 2d at 78-79 (defendant was not entitled to a new trial because he could have requested a continuance to provide "time to investigate the new evidence"). Here, defendant did not request a continuance in response to the prosecution's alleged discovery violation and, therefore, he may not claim on appeal that he was prejudiced and request a new trial.

Second, even setting that aside, defendant cannot prove that he was prejudiced by Wong's allegedly "new" testimony. It is defendant's burden to

show he was prejudiced based on factors such as the strength of the other evidence against him, the importance of the undisclosed evidence, and whether advance notice would have allowed defendant to discredit the undisclosed evidence. *E.g.*, *Lovejoy*, 235 Ill. 2d at 120. Here, those factors show that defendant was not prejudiced.

To begin, as discussed, the evidence against defendant was very strong, as it included eyewitnesses who identified defendant as the shooter, undisputed evidence that defendant fled the scene, and undisputed evidence that the car he attempted to flee in contained a gun that matched the description of the murder weapon. *Supra* pp. 40-41. Next, Wong's challenged testimony cannot be considered of great importance, *i.e.*, it cannot reasonably be said to have been the cause of defendant's conviction, because it did not directly implicate defendant as the shooter; to the contrary, Wong repeatedly testified that defendant's GSR test was negative. *Supra* pp. 42-44. And, as to the final factor, to the extent defendant were to argue that advance notice would have allowed him to discredit Wong because more time would have allowed him to prepare a better response, it would only reinforce the People's point that, under this Court's longstanding precedent, defendant should have requested a continuance (and, thus, additional time), rather than later seeking the drastic remedy of a new trial. Accordingly, defendant is not entitled to a new trial because he cannot establish that he was prejudiced by any alleged discovery violation.

CONCLUSION

This Court should reverse the appellate court's judgment and affirm defendant's conviction.

May 21, 2024

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, the certificate of service and those matters to be appended to the brief under Rule 342(a), is 48 pages.

/s/ Michael L. Cebula
MICHAEL L. CEBULA
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TABLE OF CONTENTS TO THE APPENDIX

People v. Smith

Appellate Court of Illinois, First District, Fourth Division

June 29, 2023, Filed

No. 1-18-1070

Reporter
2023 IL App (1st) 181070 *; 227 N.E.3d 45 **; 2023 Ill. App. LEXIS 238 ***; 470 Ill. Dec. 542 ****

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MATTHEW SMITH, Defendant-Appellant.

Notice: THIS ORDER WAS FILED UNDER *SUPREME COURT RULE 23* AND MAY NOT BE CITED AS PRECEDENT BY ANY PARTY EXCEPT IN LIMITED CIRCUMSTANCES ALLOWED UNDER *RULE 23(e)(1)*.

Subsequent History: Appeal granted by *People v. Smith, 2024 Ill. LEXIS 103 (Ill., Jan. 24, 2024)*

Prior History: **[***1]** Appeal from the Circuit Court of Cook County. No. 12 CR 16555. Honorable Michele Pitman, Judge, Presiding.

Disposition: Reversed and remanded.

Case Summary

Overview
HOLDINGS: [1]-Where defendant was convicted of first degree murder, the circuit court's exclusion of his mother, over his objection, from the courtroom failed to satisfy the Waller test to justify her exclusion and violated defendant's right to a public trial particularly because she should not have been treated as a potential witness, and excluded on this basis, since it was highly improbable that the State would have called her to testify; [2]-As violation of the public trial right was a structural error, defendant was not required to show prejudice, but automatic reversal and remand for a new trial was required.

Outcome
Reversed and remanded for a new trial.

Counsel: Steven A. Greenberg, of Greenberg Trial Lawyers, of Chicago, for appellant.

Kimberly M. Foxx, State's Attorney, of Chicago (Enrique Abraham, Douglas P. Harvath, Hareena Meghani-Wakely, and Tasha-Marie Kelly, Assistant State's Attorneys, of counsel), for the People.

Judges: JUSTICE MARTIN delivered the judgment of the court, with opinion. Presiding Justice Lampkin and Justice Hoffman concurred in the judgment and opinion.

Opinion by: MARTIN

Opinion

[50]** **[****547]** JUSTICE MARTIN delivered the judgment of the court, with opinion.

Presiding Justice Lampkin and Justice Hoffman concurred in the judgment and opinion.

OPINION

[*P1] Following a jury trial, Matthew Smith was convicted of first degree murder for the 2012 shooting death of Kevin Guice outside of a nightclub in Harvey, Illinois, and was sentenced to 30 years in prison. In his appeal, he argues that (1) his right to a public trial was violated when his mother was excluded from the courtroom, (2) evidence of lineup identifications should have been suppressed since lineups were unduly suggestive, (3) the State elicited improper testimony on gunshot residue testing, **[***2]** (4) closing statements were prejudicial, and (5) a photograph provided to the jurors during deliberation deprived him of a fair trial. We reverse and remand for a new trial.[1]

[1] In adherence with the requirements of *Illinois Supreme Court Rule 352(a)* (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

[*P2] I. BACKGROUND

[*P3] Prior to jury selection, the trial court ruled on pending motions *in limine*. Both the State and defense moved for witnesses to be barred from the courtroom while they were not testifying. Defense counsel indicated that Smith's mother, Trae[2] Smith, was present and requested that she be permitted to remain in the courtroom throughout the proceedings. Counsel acknowledged that Trae Smith was included on the State's witness list, but explained:

> "She was at the police station with Matthew when he asserted his right to counsel, which the police respected. So there is no issue at issue in this case. As far as I can tell, that is the start and finish of her involvement in the case itself."

[*P4] The State opposed the defense's request. The court excused Smith's mother from the courtroom while the matter was argued. The State informed the court that Smith's mother was a possible witness but stated it would be unlikely that the State would call her to testify. The assistant state's attorney (ASA) explained that Smith's **[***3]** mother was present at a police station while he was questioned and, since Smith was a juvenile at the time, his mother was permitted to accompany him during **[****548]** **[**51]** questioning. The ASA further explained that an electronic recording (ERI) of Smith's interview depicts an interaction between Smith and his mother before he decided whether to speak with police officers. The ASA continued:

> "[T]here was some interaction on that ERI between the mother and the defendant and the police officer. It's not just a clear, like, [']no, I don't want to talk.[']
>
> *** [T]here was some interaction between the defendant and his mother as to what should be done, should [he] talk to the police, should [he] not talk to the police. It's unlikely that she would be called by the State even if the defendant testifies, but there is a potential that, yes, if the defendant said something different that what's on that ERI, we may call the mother to testify to impeach the defendant as to the circumstances of what was happening at the police department during that questioning."

This was the only circumstance in which the State anticipated possibly calling Trae Smith to testify.

[*P5] Defense counsel countered that Smith's mother **[***4]** should be permitted to remain in the courtroom since the State was unlikely to call her and Smith's entire interview, including the interaction with his mother, was video recorded. Counsel further indicated that Smith was 16 years old at the time of the offense, his mother was very interested in his trial, and she had attended most of his prior court appearances.

[*P6] The court ruled that since Smith's mother was present for his questioning, she was a possible witness and, for that reason, would be excluded from the courtroom. The court instructed the State, however, to inform the court once it decided that it would not call Smith's mother so she could return to the courtroom.

[*P7] The record indicates that Smith's mother was excluded from the courtroom during jury selection, opening statements, and the State's case-in-chief. She was permitted in the courtroom only after Smith informed the court that he would not testify.

[*P8] At trial, the State presented evidence establishing that Guice was killed by a gunshot to the left side of his head. Several witnesses testified that they had attended a party at the Press Box, a bar in Harvey, on the night of August 10, 2012. From the DJ booth, Guice asked **[***5]** those present to recognize a moment of silence to honor someone who had recently died. Music stopped playing and the Press Box became quiet. Moments later, someone shouted, "f*** [them], play the music!" A large fight then broke out. A security guard deployed pepper spray, prompting many patrons to exit. Three witnesses testified that they observed Smith—who they described as having a Mohawk hairstyle and wearing a red and white shirt—produce a silver revolver and fire shots at Guice in the parking lot. One witness testified that Smith was the person who shouted the obscenity that interrupted the moment of silence. These same four witnesses identified Smith in a lineup the next day and again in court at trial.

[*P9] Two Harvey police officers testified that they responded in their respective squad cars to a dispatch about the fight at the Press Box. Upon arrival, both observed bystanders point toward a silver Buick, which quickly sped away from the parking lot. Both officers pursued the Buick until it jumped a curb and stopped near a gas station. Smith ran from the front passenger seat and was quickly apprehended. Smith was wearing a white undershirt when arrested. A silver .357 **[****549]** **[**52]** Magnum revolver **[***6]** and a red and white shirt were recovered from the floor of the silver Buick. At trial, a police officer identified the shirt as

[2] The record gives various spellings of Ms. Smith's first name. We adopt the spelling used in defendant's brief.

the one recovered from the silver Buick, and an eyewitness to the shooting identified it as the same shirt that they observed Smith wearing.

[*P10] The jury found Smith guilty of first degree murder and made special findings that Smith was armed with a firearm and personally discharged a firearm.

[*P11] In a motion for new trial, Smith claimed, among other issues, that his mother's exclusion violated his right to a public trial. In responding to this claim, the State indicated that Smith invoked his right to counsel when he was interviewed at the police station. Defense counsel asserted:

> "[I]t's disingenuous to say that [the State] needed to call Matthew Smith's mother for any purpose even if Matthew Smith had taken the stand and said that some things that happened at the police station didn't happen. They would not have to call his mom. *** [T]hey would have had to have admitted the ERI into evidence."

[*P12] The court denied Smith's motion for new trial. On this issue, the court stated:

> "Concerning the defendant's mother, I do agree. The defendant's mother - - the Court would **[***7]** certainly allow her to remain in the courtroom. This is a public trial. However, she was a witness to the defendant's statements. Therefore, she possibly could be a witness. I can't say that the State would not have called her.
>
> If I had heard that there was no basis to call the mother, the Court would have absolutely allowed the mother to remain in the courtroom. However, hearing that she was present when the defendant was questioned by the police, they absolutely made her a witness to the statements that Mr. Smith gave to the police. When I heard from defense counsel that the defendant would not be testifying, the Court immediately indicated that the mother could remain in the courtroom, and she was allowed to remain in the courtroom."

[*P13] The court sentenced Smith to a term of 30 years' imprisonment but declined to apply a discretionary firearm enhancement based on the jury's special findings. Smith filed a timely notice of appeal.

[*P14] II. ANALYSIS

[*P15] A. Right to a Public Trial

[*P16] We first address Smith's claim that his right to a public trial was violated when his mother was excluded from the courtroom.

[*P17] The State argues that Smith forfeited this issue by failing to object on the express basis **[***8]** of his public trial right. Instead, the State contends, Smith only objected on the basis that it was unlikely that Smith's mother would be called to testify. We are unpersuaded that Smith forfeited this claim. When initially objecting, defense counsel did not use the words "public trial." The issue was necessarily implied, however, and the substance of counsel's arguments pertained to whether an overriding interest justified Trae Smith's exclusion—the standard applicable to warrant a courtroom closure over a defendant's right to a public trial. See *People v. Radford, 2020 IL 123975, ¶ 27, 450 Ill. Dec. 78, 181 N.E.3d 78*. Further, the court's treatment of the issue evinces that it understood Smith's right to a public trial was implicated. The court found, however, that Trae Smith's potential as a witness was reason to exclude her but limited her exclusion to such time as she remained a potential witness. When the issue was raised in a motion for new trial, Smith's **[****550]** **[**53]** right to a public trial was explicitly asserted.

[*P18] We recognize that a defendant can forfeit review of their right to a public trial by failing to object. "Th[e need to lodge a contemporaneous objection to a courtroom closure *** prevents a defendant from potentially remaining silent about a possible **[***9]** error and waiting to raise the issue, seeking automatic reversal only if the case does not conclude in his favor." *Id. ¶ 37*. Additionally, "if there is no objection at trial, there is no opportunity for the judge to develop an alternative plan to a partial closure or to explain in greater detail the justification for it." *Id.* But these concerns are not present here. The record refutes that Smith purposefully remained silent so he could retain an issue for appeal in case he lost. To the contrary, defense counsel prompted argument on the issue. In addition, the court explained its ruling and made a plan that the court believed best accommodated the interests at stake. Ultimately, to preserve an issue for appeal, a defendant must object at trial and raise the issue in a posttrial motion. *People v. Galarza, 2023 IL 127678, ¶ 45*. The record reveals that Smith did both. Accordingly, we find that he did not forfeit this issue, and we will address his claim without resorting to plain error analysis. See *id.* (forfeited claims may only be reviewed for plain error).

[*P19] The *sixth amendment to the United States*

Constitution guarantees the accused the right to a public trial and trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials. Radford, 2020 IL 123975, ¶ 25. **[***10]** The right to a public trial acts both " 'as a safeguard against any attempt to employ the courts as instruments of persecution' " and as " 'an effective restraint on possible abuse of judicial power.' " People v. Goods, 2016 IL App (1st) 140511, ¶ 61, 407 Ill. Dec. 246, 62 N.E.3d 1168 (quoting In re Oliver, 333 U.S. 257, 270, 68 S. Ct. 499, 92 L. Ed. 682 (1948)). It aims to (1) ensure fairness of the trial, (2) remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, (3) encourage witnesses to come forward, and (4) discourage perjury. Radford, 2020 IL 123975, ¶ 25 (citing Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). To further these interests, all criminal trials are presumed to be open to the public. People v. Taylor, 244 Ill. App. 3d 460, 468, 612 N.E.2d 543, 183 Ill. Dec. 891 (1993). That presumption is not absolute, however, and may yield to an overriding interest that is specifically articulated. *Id.* (citing People v. Holveck, 141 Ill. 2d 84, 100, 565 N.E.2d 919, 152 Ill. Dec. 237 (1990)). Any closure, over the objection of the accused, is permissible if (1) the party seeking the closure advances an overriding interest that is likely to be prejudiced, (2) the closure is no broader than necessary to protect that interest, (3) the trial court considers reasonable alternatives, and (4) the court makes findings adequate to support the closure (Waller test). Radford, 2020 IL 123975, ¶ 27 (citing Waller, 467 U.S. at 47-48). This test applies at any stage of a criminal trial (*id.* (citing Presley v. Georgia, 558 U.S 209, 214, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010)) and must be satisfied for even a partial closure of the courtroom. Taylor, 244 Ill. App. 3d at 466. The exclusion **[***11]** of a single person can constitute a partial closure. See People v. Evans, 2016 IL App (1st) 142190, ¶ 1, 410 Ill. Dec. 97, 69 N.E.3d 322 (finding that murder defendant's right to a public trial was violated when his step-grandmother **[****551] [**54]** was excluded from the courtroom during jury selection because of the room's small size).

[*P20] The State argues that we should not examine Trae Smith's exclusion as an alleged deprivation of the right to a public trial, but simply determine whether the circuit court abused its discretion in exercising the well-established power to exclude witnesses from the courtroom.

[*P21] To be sure, a trial court generally does not impinge upon a defendant's right to a public trial when it excludes witnesses from the courtroom. People v. Revelo, 286 Ill. App. 3d 258, 266, 676 N.E.2d 263, 221 Ill. Dec. 742 (1996). This long-recognized power "prevent[s] witnesses from tailoring their testimony to previously introduced evidence" and "allow[s] the trier of fact to compare individual and independent accounts of the facts of the case." (Internal quotation marks omitted.) *Id.* A trial court's decision to exclude witnesses is reviewed for an abuse of discretion. In re M.W., 2013 IL App (1st) 103334, ¶ 23, 986 N.E.2d 737, 369 Ill. Dec. 424.

[*P22] Smith's contention, though, is that Trae Smith should not have been treated as a potential witness, as it was highly improbable that the State would call her to testify. And by excluding **[***12]** her, the State violated his right to a public trial. We agree that this issue does not merely concern a decision on whether to exclude witnesses, but whether Trae Smith was properly deemed one to justify her exclusion. Viewing the issue this way, it implicates Smith's right to a public trial. In general, the standard of review for determining if an individual's constitutional rights have been violated is *de novo*. People v. Hale, 2013 IL 113140, ¶ 15, 996 N.E.2d 607, 374 Ill. Dec. 912. When the issue involves questions of both law and fact, we will not disturb a trial court's findings of fact unless against the manifest weight of the evidence, but we review the court's application of the facts to the law and ultimate determination *de novo*. People v. Simpson, 2015 IL App (1st) 130303, ¶ 22, 390 Ill. Dec. 614, 29 N.E.3d 546; see State v. Ndina, 2009 WI 21, ¶ 45, 315 Wis. 2d 653, 761 N.W.2d 612 ("the issue whether the Sixth Amendment right to a public trial was violated presents the application of constitutional principles to historical facts").

[*P23] In our view, the interests underlying the exclusion of witnesses provided only a facially valid reason for excluding Smith's mother. A facially valid reason alone is insufficient. See Taylor, 244 Ill. App. 3d at 467-68 (finding that exclusion of defendant's family members during *voir dire* to prevent juror contamination was facially valid but defendant's right to public trial was violated since the record failed **[***13]** to show likelihood of such); People v. Willis, 274 Ill. App. 3d 551, 554, 654 N.E.2d 571, 211 Ill. Dec. 109 (1995) (same). Therefore, the trial court's inherent power to exclude witnesses is not, by itself, dispositive of the issue. Rather, when the defense objected that Trea Smith was not a probable witness, we believe Smith's right to a public trial was implicated and that the circuit court was required to apply the overriding interest test set forth in

Waller. The court made no explicit reference to the *Waller* test, but its ruling indicates that the court found that ensuring Trae Smith's untailored, independent testimony, as a potential witness, was an overriding interest that would be prejudiced if she were permitted to remain in the courtroom. The court's ruling further implies that it found that Trae Smith's exclusion until the State decided whether it would call her was necessary to protect the overriding **[****552]** **[**55]** interest and no reasonable alternative was better.

[*P24] Here, the State failed to show that there was any reasonable probability that Trae Smith would actually testify. By the State's own admission, it was unlikely to call her. The State merely represented that it considered Trae Smith a potential witness to impeach any testimony Smith might give "as to the circumstances of **[***14]** what happened at the police department." This was a vague explanation that failed to indicate whether anything occurred during Smith's questioning that could be probative to the issues at trial. Yet, the State further explained that Smith and his mother had some interaction before he decided whether he would answer police questions and "[i]t's not just a clear, like no, I don't want to talk." That representation implied that Smith gave a statement when he was questioned and that the State intended to introduce evidence of the statement. Smith, then, could be expected to try to impeach or rebut the statement through his own testimony. But the record reveals, as defense counsel first indicated before trial and the State acknowledged after trial, that this was not the case. At the police station, Smith invoked his right to counsel and made no statement. Thus, it is not apparent that the "circumstances of what happened at the police department" would have been relevant at trial, and it was unreasonable to expect that either party would elicit evidence concerning it. Indeed, such evidence would likely have been inadmissible—either as irrelevant or improper evidence of Smith's exercise of **[***15]** his *fifth amendment* rights. We believe that the State's posited circumstances in which Trae Smith might have been called to testify were so far-fetched that she could not be deemed a potential witness. Therefore, the interests underlying the exclusion of witnesses was not likely to be prejudiced by her presence in the courtroom during trial. Thus, we conclude that the record fails to support findings that would satisfy the *Waller* test for the court's exclusion of Trae Smith.

[*P25] In addition, even if the circumstances of Smith's questioning were to become relevant somehow, the State had ample competent evidence at its disposal: the entire interview was video recorded and, presumably, there were police officers present who could authenticate the recording and testify to what occurred.

[*P26] Further, to the extent that the court wished to prevent Smith's mother from tailoring her testimony to his, the court could have excluded her only during his testimony, if Smith were to testify. As the State represented, it only anticipated calling Smith's mother to testify in rebuttal, conditional on whether he testified about the circumstances of his questioning. Thus, a limited exclusion consistent with the State's representation **[***16]** about her expected testimony was an available alternative.

[*P27] We further observe that trial courts should carefully apply the *Waller* test in circumstances like this case and not rely on the representation that family members are potential witnesses. This would prevent the State from naming the defendant's family members as witnesses, without a *bona fide* expectation of calling them, as a pretext to exclude them from the courtroom for whatever advantage the State believes it gains by doing so. Illinois courts have recognized that a defendant's family members have a direct interest in the proceedings and must be permitted in the courtroom absent a showing that a compelling overriding interest is likely to be prejudiced by their presence. *Radford, 2020 IL 123975, ¶ 34*; *Revelo, 286 Ill. App. 3d at 266*.

[*P28] **[****553]** **[**56]** For these reasons, we find that the circuit court's exclusion of Smith's mother, over his objection, failed to satisfy the *Waller* test to justify her exclusion and violated his right to a public trial.[3]

[*P29] A violation of the public trial right is recognized as structural error. *Evans, 2016 IL App (1st) 142190, ¶ 8, 410 Ill. Dec. 97, 69 N.E.3d 322*. A structural error " 'erode[s] the integrity of the judicial process' " and " 'undermine[s] the fairness of the defendant's trial.' " *Id.* (quoting *People v. Thompson, 238 Ill. 2d 598, 608, 939 N.E.2d 403, 345 Ill. Dec. 560 (2010)*). As such, a defendant deprived of their **[***17]** right to a public trial is not required to show resulting prejudice. *Id.* Additionally, the error cannot be considered harmless. *People v. Averett, 237 Ill. 2d 1, 14, 927 N.E.2d 1191,*

[3] It was proper, however, to exclude Trae Smith for the brief, limited time when this issue was being argued. At that point, the court lacked sufficient information to assess whether she was likely to be called as a witness and, thus, her presence during the argument could prejudice the potential overriding interest.

340 Ill. Dec. 180 (2010) (structural errors are not subject to harmless error review). Rather, automatic reversal is required. *Id.*. Accordingly, we reverse Smith's conviction and remand for a new trial. Although he does not challenge the sufficiency of the evidence, we note that the State presented evidence upon which a rational factfinder could find Smith guilty of first degree murder beyond a reasonable doubt. Double jeopardy will not bar his retrial. *People v. Harris, 2015 IL App (1st) 132162, ¶¶ 45-46, 394 Ill. Dec. 26, 35 N.E.3d 995*.

[*P30] Smith raises other contentions of error, but our resolution of his public trial claim is dispositive. "[C]ourts should refrain from deciding an issue when resolution of the issue will have no effect on the disposition of the appeal presently before the court." *Pielet v. Pielet, 2012 IL 112064, ¶ 56, 978 N.E.2d 1000, 365 Ill. Dec. 497*. We may, however, address additional issues that are likely to recur on remand to provide guidance to the lower court and expedite the ultimate termination of the litigation. *Id.* We find that some of the other issues Smith raises are likely to recur and address them accordingly.

[*P31] B. Motion to Suppress Lineup Identifications

[*P32] In a pretrial motion, Smith alleged that lineups **[***18]** were unduly suggestive and asked the court to suppress evidence of the identifications for trial. Smith argued that the lineups were unduly suggestive because the fillers substantially differed from him in age, weight, and hairstyle. Additionally, witnesses had described the shooter as having a Mohawk hairstyle and wearing a red and white shirt. Smith wore a red and white shirt in the second lineup he appeared in but not the first. None of the fillers in either lineup wore a similarly colored shirt or had a Mohawk hairstyle. Smith reiterates these arguments on appeal.

[*P33] At an evidentiary hearing on Smith's motion to suppress, Harvey Police Department Detective Jason Banks[4] testified that he administered the lineups and described the procedures he used. Detective Banks was aware that witnesses had described the shooter as having a Mohawk hairstyle and wearing a red and white shirt. One witness, Arlanza Townsend, viewed a lineup at approximately 1:30 pm on August 11, 2012. Smith wore a tank-top undershirt during the lineup. The four fillers **[****554]** **[**57]** ranged from 5 to 13 years older than Smith, each outweighed him—the most by 55 pounds—and none had a Mohawk hairstyle. Townsend selected Smith from **[***19]** the lineup as the person he observed shoot Guice.

[*P34] About eight hours later, five other witnesses viewed a lineup. This time, Smith wore the red and white shirt that was recovered from the Buick. Detective Banks testified that the shirt was among Smith's personal property and Smith chose to put it on sometime between the two lineups. Different individuals from the earlier lineup participated as fillers. Three fillers were between 5 and 14 years older than Smith, and the fourth was 30 years older. None had a Mohawk hairstyle. Each witness identified Smith.

[*P35] The circuit court denied Smith's motion to suppress the identifications. The court explained:

> "[I]n hearing the ages of the people who were a part of the composition of the lineup, you would think that people would look much older based on hearing the ages and the dates of birth. However, when 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. Everyone is dressed different. The Mohawk that I'm hearing about, it is not very pronounced. **[***20]** It's not spiky or dyed a different color or anything that you see with people with Mohawks. It is a very subtle raise, I will say, in the middle of the defendant's head, but when you think of a Mohawk, when you're hearing [']Mohawk[], you would think of something much more pronounced.
>
> So the majority of the people in here all have short hair and a natural hairstyle. There is one person in the first lineup that has braids. There is a weight discrepancy also with one person in the first lineup. However, viewing these lineups, the Court does not find there's anything suggestive with a witness looking at these lineups. There's nothing that would jump out at that witness that would cause an improper identification."

[*P36] When challenging a lineup identification, the defendant bears the initial burden to show it was impermissibly suggestive. *People v. Clifton, 2019 IL App (1st) 151967, ¶ 60, 437 Ill. Dec. 396, 144 N.E.3d 508*. If the defendant makes such a showing, the burden shifts to the State to show by "clear and convincing evidence that the witness is identifying the defendant based on his or her independent recollection of the incident."

[4] Detective Banks was deputy chief of the Harvey Police Department at the time of his testimony.

People v. Brooks, 187 Ill. 2d 91, 126, 718 N.E.2d 88, 240 Ill. Dec. 607 (1999). When reviewing a trial court's ruling on a motion to suppress a lineup identification, we adopt the trial court's factual findings unless **[***21]** they are against the manifest weight of the evidence and review the ultimate legal determination *de novo*. Clifton, 2019 IL App (1st) 151967, ¶ 61, 437 Ill. Dec. 396, 144 N.E.3d 508.

[*P37] "Evidence of an identification, and any subsequent identification, must be excluded under the due process clause of the fourteenth amendment only where the pretrial encounter resulting in an identification was unnecessarily or impermissibly suggestive so that a very substantial likelihood exists that the offender was irreparably misidentified." People v. Ayoubi, 2020 IL App (1st) 180518, ¶ 29, 444 Ill. Dec. 99, 163 N.E.3d 224. In determining whether an identification violated due process, courts must examine the totality of the circumstances. Id. ¶ 31. Courts **[****555]** **[**58]** have found lineups impermissibly suggestive when, "[t]hrough some specific activity on the part of the police, the witness is shown an individual who is more or less spotlighted by the authorities." People v. Johnson, 149 Ill. 2d 118, 147, 594 N.E.2d 253, 171 Ill. Dec. 401 (1992). Spotlighting has been found when the police effectively " 'all but hung a sign saying "pick me" around defendant's neck.' " Clifton, 2019 IL App (1st) 151967, ¶ 71, 437 Ill. Dec. 396, 144 N.E.3d 508 (quoting People v. Maloney, 201 Ill. App. 3d 599, 607, 558 N.E.2d 1277, 146 Ill. Dec. 943 (1990)). In other words, due process is offended when the procedure by design strongly suggests to the witness to select the defendant. Johnson, 149 Ill. 2d at 147.

[*P38] Photographs of the two lineups Smith appeared in are included in the record on appeal. They were also admitted as exhibits at the suppression hearing and at trial. We agree with the circuit court's **[***22]** assessment that the age, weight, and hairstyle differences between Smith and the fillers do not appear as stark in the photos as the verbal description might lead one to expect. In appearance, the fillers are not grossly dissimilar from Smith in these respects. See People v. Ortiz, 2017 IL App (1st) 142559, ¶ 25, 411 Ill. Dec. 542, 73 N.E.3d 626 ("The participants in a lineup or photo array should not appear grossly dissimilar to the suspect."). We also agree that Smith's Mohawk is not so pronounced as to amount to spotlighting. Illinois courts have repeatedly found that a defendant's differing hairstyle, such as braids, does not render a lineup impermissibly suggestive. People v. Joiner, 2018 IL App (1st) 150343, ¶ 44, 423 Ill. Dec. 162, 104 N.E.3d 1251; People v. Love, 377 Ill. App. 3d 306, 311, 878 N.E.2d 789, 316 Ill. Dec. 67 (2007); People v. Kelley, 304 Ill. App. 3d 628, 638, 710 N.E.2d 163, 237 Ill. Dec. 740 (1999); People v. Simpson, 172 Ill. 2d 117, 140, 665 N.E.2d 1228, 216 Ill. Dec. 671 (1996); People v. Trass, 136 Ill. App. 3d 455, 463, 483 N.E.2d 567, 91 Ill. Dec. 221 (1985). Ultimately, the variation shown in the photos is consistent with what we ordinarily see in admissible lineups and these factors fail to establish that the lineups were unduly suggestive. The law does not require that participants in a lineup be identical or near identical. People v. Faber, 2012 IL App (1st) 093273, ¶ 57, 974 N.E.2d 337, 362 Ill. Dec. 816. Differences in age, size, and appearance go to the weight of an identification, not necessarily its admissibility. Ayoubi, 2020 IL App (1st) 180518, ¶ 29, 444 Ill. Dec. 99, 163 N.E.3d 224.

[*P39] The red and white shirt Smith is wearing in the second lineup, however, stands out more noticeably. Among the four fillers, two are wearing plain white T-shirts, one is wearing a gray sweatshirt with **[***23]** a logo, and the fourth, a black or dark blue and gray patterned button-down shirt. Smith's collared, short-sleeved shirt is white from the chest up with some dark logos. From the chest down, it is bright red with white lettering. The lineup participants are sitting with their backs to a dull white wall. For a witness viewing this lineup, the red in Smith's shirt stands out against otherwise neutral colors.

[*P40] This court has consistently maintained that "one distinct feature, standing alone, is not sufficient to render a lineup suggestive where the participants in the lineup otherwise have substantially similar appearances." Clifton, 2019 IL App (1st) 151967, ¶ 69, 437 Ill. Dec. 396, 144 N.E.3d 508. "[T]he mere fact that a suspect appears in the lineup with one article of clothing or distinctive feature that matched his or her description does not render a lineup suggestive." Id. ¶ 82. Insofar as the shirt stood out and was consistent **[****556]** **[**59]** with witness descriptions, the lineup was not unduly suggestive. However, Smith was not merely wearing a red shirt that happened to be consistent with witness descriptions. He was wearing *the* red shirt that police recovered from the silver Buick that fled from the Press Box just after the shooting. Presumably, police recovered the shirt **[***24]** with the expectation that it was evidence that might link Smith to the shooting. Indeed, the State introduced the shirt into evidence at trial where a witness identified it as the shirt worn by the shooter. Additionally, the officer administering the lineup was aware that witnesses

described the shooter as wearing such a shirt before the second lineup took place. It should have been obvious to police that Smith's shirt not only made him stand out but that this distinctive feature was significant evidence by itself. A lineup where " 'only the suspect [is] required to wear distinctive clothing which the culprit allegedly wore' " has long been recognized as suggestive. *Ayoubi, 2020 IL App (1st) 180518, ¶ 30, 444 Ill. Dec. 99, 163 N.E.3d 224* (quoting *United States v. Wade, 388 U.S. 218, 233, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)*). We believe this occurred in the second lineup.

[*P41] We acknowledge, as the State points out, that police did not compel Smith to wear the red shirt in the second lineup. A sidebar discussion at trial indicated that, at some unspecified point in between the two lineups, police gave Smith the shirt because he told them he was cold. But police could have easily addressed the problem by having Smith remove the shirt for the brief time witnesses were viewing the second lineup, providing him with a T-shirt or sweatshirt, **[***25]** or allowing his mother to bring a different shirt. Smith had been in police custody for nearly 20 hours by the time of the second lineup. *Cf. Clifton, 2019 IL App (1st) 151967, ¶ 78, 437 Ill. Dec. 396, 144 N.E.3d 508* (describing "relatively easy" fixes for a lineup's suggestiveness). The second lineup may not have been suggestive by purposeful design but allowing Smith to wear the shirt under these circumstances amounted to the same.

[*P42] Taking together that the shirt was recovered as evidence, witnesses described Smith wearing such a shirt prior to the lineup, and its stark contrast to the fillers, Smith was spotlighted in the second lineup. Accordingly, we find that the second lineup was unduly suggestive.

[*P43] The trial court did not find that Smith met his burden to show that the second lineup was unduly suggestive. Thus, the burden never shifted to the State to show by clear and convincing evidence that the witnesses identified Smith based on their independent recollections. We can make this determination when the record is sufficiently developed. *Id. ¶ 84* (citing *Brooks, 187 Ill. 2d at 129*). Three of the five witnesses who identified Smith in the second lineup testified at trial. Each witness testified about their observations that led them to identify Smith. It is not clear to us, however, **[***26]** that the trial testimony is sufficient for us to make an informed decision as to whether the witnesses identified Smith based on their independent recollections. Plus, the other two witnesses who identified Smith in the second lineup could potentially testify on retrial. The record, at present, tells us nothing about the basis of their identifications since they did not testify. Ultimately, the trial court is better suited for this inquiry. Thus, we vacate the trial court's order denying Smith's motion to suppress in part, only as to identifications made in the second lineup. On remand, the State may have the opportunity to show by clear and convincing evidence that the witnesses identified Smith based on their independent recollections before the trial court rules on the motion to suppress **[****557]** **[**60]** as to identifications made in the second lineup.

[*P44] C. Gunshot Residue Testimony

[*P45] We next consider Smith's challenges to the gunshot residue expert's testimony. Mary Wong, an Illinois State Police (ISP) crime lab forensic scientist, was qualified as an expert in primer gunshot residue (PGR) analysis. She testified that she conducted PGR analysis of the red and white shirt recovered from the silver Buick **[***27]** and swabs of Smith's hands collected after he was arrested. Based on her analysis, Wong opined that Smith "may not have discharged a firearm with either hand." She added that "[i]f he did then the particles were either removed by activity, were not deposited or not detected by the procedure." Wong went on to explain that, to make a positive finding for the presence of PGR, the standards of the ISP crime lab require that she find at least three "tri-partite particles" consisting of lead, barium, and antimony. In her analysis here, Wong found only one particle in a sample obtained from a swab of Smith's right hand.

[*P46] The State asked Wong whether a finding of only one particle would be sufficient for a positive PGR finding under the standards of other labs. Defense counsel objected to the question, and the court heard arguments in a sidebar. Defense counsel contended that the question was irrelevant since Wong had already testified that three particles were necessary to make a positive finding. The State countered that testimony concerning other labs would not change Wong's ultimate conclusion and, based on her knowledge of the standards of other labs, she should be permitted to testify, **[***28]** "even though where I work we require three[,] in our field, one is used." Defense counsel protested that this testimony differed from the report tendered in discovery, which only indicated that Wong did not make a positive finding for PGR. Defense counsel further argued that testimony about a one-particle standard at other labs would amount to

expressing a positive finding in this case; in other words, Wong would essentially testify that she would have made a positive finding for PGR on Smith's right hand, had she worked for a different lab. Adding to her argument, defense counsel posited that the State's question would be appropriate on cross-examination had the defense called Wong to testify, but, since the State bore the burden of proof, it was improper for the State to elicit expert testimony contradicting that expert's disclosed opinion.

[*P47] The court likened testimony about differing PGR standards to expert testimony on fingerprint comparison. In the court's experience, it explained, fingerprint experts have testified to different standards to reach an opinion on whether compared prints are a match.

[*P48] The court overruled the objection, and the State continued the line of questioning **[***29]** about the standards of other labs. Wong testified that she was aware from her research that some other labs require only one particle to make a positive finding for the presence of PGR. She further testified that particles are removed when a person runs, sweats, wipes their hands, or removes clothing. Particles also disappear after the passage of time, and she would not expect to find PGR if a sample was collected after six hours following a gunshot. Wong added that 34% of analyzed samples yield a positive finding.

[*P49] On cross examination, defense counsel asked Wong if accuracy was ISP's basis for its three-particle standard. Wong explained that ISP set its standard at three particles following a study it conducted that found one false positive in a sample size of 80. Based on that study, **[****558]** **[**61]** ISP determined that one particle is the baseline and, for scientific validity, set its standard at triple the baseline, three particles.

[*P50] In closing arguments, the State insisted that the jury should consider that one PGR particle was present on Smith's hand, despite Wong's testimony that three particles were required for her to make a positive finding. The State asserted, "[t]hat in no way means that **[***30]** he did not fire a gun." The State also suggested that Smith likely removed PGR by rubbing his hands and removing his shirt.

[*P51] On appeal, Smith claims this testimony should not have been allowed for two reasons. First, he argues that the testimony was not admissible because a one-particle standard is not generally accepted in the relevant scientific community. Second, he argues that the testimony amounted to a discovery violation since the expert's report tendered before trial only disclosed her opinion that she detected an insufficient number of particles to make a positive finding. We reject the first argument but agree with the latter.

[*P52] Illinois follows the standard established in *Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)*, that evidence based on a new or novel scientific technique is only admissible if the technique is generally accepted among the relevant scientific community. *Donaldson v. Central Illinois Public Service Co., 199 Ill. 2d 63, 76-77, 767 N.E.2d 314, 262 Ill. Dec. 854 (2002)*. "The purpose of the *Frye* test is to exclude new or novel scientific evidence that undeservedly creates a perception of certainty when the basis for the evidence or opinion is actually invalid." (Internal quotation marks omitted.) *In re Detention of New, 2014 IL 116306, ¶ 26*. However, this issue does not involve a new or novel scientific technique. Evidence of gunshot residue analysis has long been **[***31]** accepted in courts. Rather, Smith's challenge concerns the expert's testimony about differing standards to make a positive finding for the presence of PGR and the effect that testimony had on her conclusion. "[T]he *Frye* test does not concern an expert's ultimate conclusion but, instead, focuses on the underlying scientific principle, test, or technique used to generate that conclusion." *Id. ¶ 28*. We do not find that testimony about differing PGR standards was inadmissible. Smith offers no authority to show that a one-particle standard is not generally accepted or that any court has found such testimony inadmissible. The number of particles goes to the weight of the evidence, not its admissibility.

[*P53] Nevertheless, we find that the State violated its discovery obligation by eliciting testimony that contradicted the expert's disclosed report. Our conclusion is guided by our supreme court's decision in *People v. Lovejoy, 235 Ill. 2d 97, 919 N.E.2d 843, 335 Ill. Dec. 818 (2009)*. There, a 16-year-old murder victim was found in a bathtub in her home. *Id. at 106*. Investigators identified a footprint on a bathroom tile matching the victim's stepfather, who she had accused of sexually assaulting her a few weeks earlier. *Id. at 108*. A report from the State's DNA expert tendered in discovery stated that **[***32]** a swab taken from the footprint was " 'negative to a presumptive test for the presence of blood.' " *Id. at 113*. Despite that, the expert testified at trial that the result was a "false negative" (*id. at 108*) since, she reasoned, the initial test used up all the hemoglobin so the second, more sensitive testing method, could not yield any reaction (*id. at 114*). The expert's trial testimony **[****559]** **[**62]** implied that

the defendant's footprint was made in the victim's blood, but the State had not disclosed anything to that effect to the defense before trial. *Id. at 114-15*.

[*P54] The defendant argued that the State was required to disclose the expert's finding that the test for the presence of blood was a false negative. Our supreme court agreed. The court rejected the State's claim that it complied with discovery since the expert's testimony was a logical inference from the information in the disclosed report. *Id. at 119*. The court remarked, "[t]here is nothing 'logical' about an expert testifying to a conclusion that stands in complete opposition to the conclusion stated in her own official report." *Id.* The court also observed that the expert's testimony was not spontaneous, as the State elicited it through direct questions. *Id.* The court found that the report **[***33]** was misleading, since it omitted relevant information and failed to disclose that the expert would interpret a test contrary to its reported result. *Id.* Under those circumstances, the defendant was unfairly surprised and not afforded sufficient opportunity to prepare a rebuttal. *Id. at 120*.

[*P55] We find the circumstances similar here. Wong's report indicated a negative result for the presence of PGR. Yet, the overall effect of her testimony was, despite the negative result, Smith likely fired a gun. The tacit message of testifying that other labs would find a single particle a positive result is that Wong believes her detection of one particle on Smith was a positive result—she is only prevented from saying so explicitly due to an ISP regulation. Wong also gave multiple reasons why a person who fired a gun would nonetheless produce a negative result—sweating, wiping hands, passage of time, and so on. Considering the entirety of her testimony then, Wong's wiggle-worded opinion that "Smith may not have discharged a firearm" is hardly consistent with the disclosed negative result. To be sure, her testimony sent the opposite message. And, just as in *Lovejoy*, it was not spontaneous as the State elicited this **[***34]** testimony through direct questions.

[*P56] The State is free to argue that a defendant may have fired a gun despite a negative or insufficient PGR finding and elicit expert testimony to support that theory. See, *e.g.*, *People v. Meyers, 2018 IL App (1st) 140891, ¶ 66, 430 Ill. Dec. 285, 126 N.E.3d 11* (finding prosecutor's comment that the presence of two particles was " 'hardly a negative' " was a reasonable inference from the evidence); *People v. Balfour, 2015 IL App (1st) 122325, ¶ 41, 391 Ill. Dec. 503, 30 N.E.3d 1141* (finding prosecutor's argument that particles detected on defendant's clothing connected him to the crime was a reasonable inference based on the expert's testimony even though it did not conclusively establish that he had fired a gun). But we believe the State must disclose that it will do so, with specifics, before trial to prevent unfair surprise evidence. The State failed to do so here.

[*P57] D. Closing Argument

[*P58] Smith takes issue with several remarks the prosecutor made in closing argument and a sustained objection during his, which he claims, taken together, deprived him of due process. Since we have already determined that Smith is entitled to a new trial, reviewing this claim under the ordinary standard—whether remarks were so egregious as to warrant a new trial (*People v. Wheeler, 226 Ill. 2d 92, 121, 871 N.E.2d 728, 313 Ill. Dec. 1 (2007)*)—would be redundant.

[*P59] **[**63]** **[****560]** Nevertheless, the State twice posited that the jury **[***35]** could only find Smith not guilty if they believed the eyewitnesses had all "lied to your face" or "were all liars." This court has found the proposition that a defendant is only not guilty if the witnesses lied to be improper: it is a "misstatement of law and a serious error which shifts the burden of proof." *People v. Miller, 302 Ill. App. 3d 487, 497, 706 N.E.2d 947, 236 Ill. Dec. 73 (1998)*. A defendant is never required to prove the State's witnesses were untruthful, as the statement implies. In this case, the proposition also misstates the evidence because the jury could find Smith not guilty if they believed the witnesses were simply mistaken, not lying. Ultimately, the statement is improper and risks denying a defendant a fair trial. *Id.*

[*P60] E. Photo Given to Jury

[*P61] During its deliberation, the jury sent the court a note that read, "Photo taken inside bar?" The question was interpreted to refer to a photograph that was included among Smith's belongings, which were inventoried when he was booked. A Harvey police officer authenticated those items, and they were admitted into evidence as a group exhibit. The photo was not published to the jury, and no further testimony was elicited about it. The photo appears to show Smith, wearing the same red and white shirt described **[***36]** and identified by witnesses, with other people making gestures.

[*P62] Before trial, the defense requested that the

photo be barred from evidence, arguing that the photo was prejudicial because the depicted gestures were gang signs or could be interpreted as such. The defense also represented that the photo was taken at the Press Box the night of the shooting. The court ruled that the photo was admissible since it was probative of the shooter's identity, according to the State's proffer of expected witness testimony. But the court barred any reference to gangs.

[*P63] After the jurors adjourned to deliberate, the parties argued which exhibits should be provided to the jury. The court ruled that the photo would not be given to the jury since no testimony was given as to when it was taken. The matter was reopened after the court received the jury's note. The defense argued that it was unclear which photo the jury was requesting, the photo was prejudicial, and the State failed to provide a foundation that the photo was taken at the Press Box the night of the shooting. The court ruled that the photo would be provided to the jury, finding that the photo was probative of identification and had been properly **[***37]** admitted into evidence.

[*P64] On appeal, Smith argues that providing the photo in response to the jury question was error. We agree. Although the photo was properly admitted into evidence, responding with it to the jury's question as phrased supplied additional evidence than was presented at trial. This answered a factual question and filled in an evidentiary blank left by the State. See *People v. Maldonado, 402 Ill. App. 3d 411, 434, 930 N.E.2d 1104, 341 Ill. Dec. 590 (2010)* (observing that no authority permits a court, after the close of evidence, "to fill in evidentiary blanks left by a party"). The State failed to provide evidence that the photo was taken at the Press Box the night of the shooting. The jury may have surmised so but giving them the photo in response to "Photo taken inside bar?" told them, with the court's imprimatur, that it was. Moreover, it places Smith at the scene wearing the distinctive shirt described by witnesses, though he was not wearing it when he was later arrested. In turn, this bolstered witness identifications **[****561]** **[**64]** of Smith as the shooter. The jury was free to connect these dots but answering the jury's question in this way connected a few for them. The photo should not have been provided to the jury in response to their question.

[*P65] III. CONCLUSION **[***38]**

[*P66] Based on the foregoing, we reverse Smith's conviction and remand this matter to the circuit court for a new trial.

[*P67] Reversed and remanded.

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Index to the Record on Appeal

Trial Record: *People v. Matthew Smith*, No. 2012 CR 16555 (Cir. Ct. Cook Cnty.)

Common Law Record

Secured Common Law Record

Supplemental Common Law Record

Report of Proceedings

Supplemental Report of Proceedings

PROOF OF 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 May 21, 2024, the foregoing **Brief and Appendix 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 thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

/s/ Michael L. Cebula

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