No. 127535

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- JAMES A. PACHECO, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-15-0880. There on appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, No. 12-CF-1799. Honorable Carla Alessio-Policandriotes, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

JAMES E. CHADD
State Appellate Defender

THOMAS A. KARALIS
Deputy Defender

ADAM N. WEAVER
Assistant Appellate Defender
Office of the State Appellate Defender
Third Judicial District
770 E. Etna Road
Ottawa, IL 61350
(815) 434-5531
3rddistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLEE

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS AND POINTS AND AUTHORITIES

A. The trial court abused its discretion when it prevented defense counsel from cross-examining Adam Stapleton about his bias, interest, or motive to testify falsely in order to avoid negative consequences.

B. The trial court's restriction of defense counsel's cross-examination of the State's key witness was not harmless, but resulted in a manifest prejudice that requires reversal.

ISSUES PRESENTED FOR REVIEW

I. Whether the trial court abused its discretion and violated James Pacheco's sixth amendment right to confront witnesses against him when it prevented defense counsel from inquiring into Adam Stapleton's bias, interest, and motive to testify falsely in order to protect his employment.

II. Whether the trial court abused its discretion when it barred James Pacheco from cross-examining police officers about the Joliet Police Department's policy that prevented them from authoring written incident reports about the officer-involved shooting for union and legal protection.

III. Whether the State has forfeited its argument regarding reinstatement of defendant's convictions for aggravated fleeing or attempting to elude a police officer and driving under the influence by failing to raise the issue in the appellate court, in its petition for leave to appeal, and by failing to fully develop the issue in this Court.

ARGUMENT

I. The trial court abused its discretion and violated James Pacheco's sixth amendment right to confront witnesses against him when it prevented defense counsel from inquiring into Adam Stapleton's bias, interest, and motive to testify falsely in order to protect his employment.

As a threshold matter, there appears to be an issue in need of clarification regarding how to procedurally address questions on the constitutional right to cross-examination vis-à-vis the common law or evidentiary right to cross-examination. See *People v. Coles*, 74 Ill. 2d 393, 396 (1979); *People v. Averhart*, 311 Ill. App. 3d 492, 497-98 (1st Dist. 1999) (explaining that the constitutional and common law rights to cross-examinations are separate).

The State asks this Court first to address whether the trial court violated defendant's constitutional right of confrontation before it considers whether the trial court abused its discretion by limiting cross-examination (St.Br.19-22). This procedure is understandable as it is supported by language from cases, such as *People v. Blue*, 205 Ill. 2d 1, 13-14 (2001), which direct reviewing courts to address whether a defendant has been denied the constitutional right to cross-examination by considering what a defendant has been allowed to do rather than looking to what he or she has been prevented from doing. The trial court's "discretionary authority arises only after the court has permitted sufficient cross-examination to satisfy the confrontation clause." *Id.* (citing *Averhart*, 311 Ill. App. 3d at 497).[1]

Yet, this format appears to conflict with this Court's long-standing rule to decide cases on nonconstitutional grounds whenever possible and to reach constitutional issues only as a last resort. *People v. Bass*, 2021 IL 125434, ¶ 30.

[1] Defendant recognizes that he adopted this format in the appellate court briefs (Defendant's Appellate Court Brief at 12-19). *People v. Pacheco*, No. 3-15-0880 (Nov. 9, 2017).

In reaching its decision in *Coles*, for example, this Court recognized the sixth amendment right to cross-examination, but found "no need to elevate our decision beyond the general evidentiary principles upon which it is based." *Coles*, 74 Ill. 2d at 396.

This Court has provided the "analytical 'flow chart' " needed to address constitutional questions on nonconstitutional grounds. *In re E.H.*, 224 Ill. 2d 172, 179-80 (2006). The first step is to determine whether the trial court erred in ruling as an evidentiary matter. Only once an issue "has first been found admissible as an evidentiary matter should constitutional objections–including *Crawford*-based confrontation clause claims–be dealt with." *Id.*

If the trial court's ruling was erroneous, the next step is to decide whether the error was harmless. If the error was not harmless, the case ends and the defendant must be awarded a new trial. *Id.* at 180; see, *e.g.*, *People v. Hines*, 94 Ill. App. 3d 1041, 1047-48 (1st Dist. 1981) (explaining "our inquiry into whether defendants' right of confrontation was violated begins rather than ends with" finding the court erred in granting the State's motion *in limine*); *Quinn v. Neal*, 998 F.2d 526, 529-30 (7th Cir. 1993) (explaining, where defendant raised right of confrontation issue, that "an appellate court first examines the trial court's governance of cross-examination under the abuse of discretion standard" and then analyzes for harmless error).

Courts will only turn to the constitutional challenge if the trial court's ruling was not error or the error was harmless. *E.H.*, 224 Ill. 2d at 180 (noting, under the differing standards for harmlessness, it is possible that a harmless evidentiary error could still be a reversible constitutional violation). This format supports this Court's instructions that reviewing courts should not decide moot or abstract

questions, review cases only to establish precedent, or render advisory opinions. *Bass*, 2021 IL 125434, ¶ 29.

Averhart illustrates this Court's admonishments against unnecessarily deciding constitutional questions and rendering advisory opinions. In *Averhart*, the court initially found the restriction of defense counsel's cross-examination violated the defendant's constitutional right of confrontation. *Averhart*, 311 Ill. App. 3d at 499. The court then went on to find the trial court's restriction was an abuse of discretion that resulted in a manifest prejudice. *Id*.

On one hand, it was unnecessary for the court to reach the constitutional issue because it found a reversible evidentiary error. On the other hand, because the court had already found that a constitutional violation had occurred, that conclusion rendered the court's subsequent abuse of discretion analysis essentially an advisory opinion. *Averhart*, 311 Ill. App. 3d at 499 (commenting, after finding a constitutional violation had occurred, "[w]e need not review the discretionary authority of the trial court to restrict cross-examination, since defendant's constitutional right to witness confrontation has not been satisfied. However…").

In this case, the appellate court majority found the trial court's restrictions on cross-examination violated defendant's constitutional right to confrontation and therefore explicitly refused to consider whether the trial court abused its discretion. *People v. Pacheco*, 2021 IL App (3d) 150880-B, ¶ 49. When the appellate court reverses on a constitutional violation instead of deciding the matter on evidentiary grounds, this Court routinely vacates the appellate court's judgment and remands the cause with instructions to first consider whether reversible error occurred on nonconstitutional grounds. See *People v. Melchor*, 226 Ill. 2d 24 (2007) (vacating and remanding where appellate court held that the admission of witness

testimony violated defendant's sixth amendment right of confrontation and did not consider if the court abused its discretion by admitting the testimony under 725 ILCS 5/115-10.4). However, this procedure is not inflexibly required.

In *In re Haley D.*, 2011 IL 110886, a termination of parental rights case where the appellate court reversed the denial of a father's section 2-1401 motion to vacate default judgment (735 ILCS 5/2-1401(a)) based only on constitutional due process grounds, this Court did not remand for the appellate court to consider nonconstitutional grounds for reversal. Instead, this Court found that remand would serve no purpose because the undisputed facts and law dictated that the trial court abused its discretion by denying the father's motion. *Id.* ¶ 68.

This Court agreed with the appellate court's disposition of the case; however, on its own nonconstitutional grounds. *Id.* ¶ 54. This Court explained that the father's motion was actually raised under 735 ILCS 5/2-1301(e), that it was reversible error for the trial court to consider the motion under section 2-1401(a) rather than section 2-1301(e), and that the father's section 2-1301(e) motion should have been granted because the father did not receive notice as required by section 2-15(3) of the Juvenile Court Act (705 ILCS 405/2-15(3) (2008)) and Illinois Supreme Court Rule 11 (eff. Dec. 29, 2009)–which is to say, the trial court abused its discretion by denying the motion. *Id.* ¶¶ 55-91.

In this case, the appellate court essentially found that the trial court abused its discretion in barring counsel from appropriate cross-examination to show a prototypical form of bias. *Pacheco*, 2021 IL App (3d) 150880-B, ¶¶ 56-59. It is therefore unnecessary to remand to the appellate court for it to address whether the trial court's restriction was reversible error on nonconstitutional grounds.

Regardless of the correct "analytical flow chart" to be used in this case, the trial court's restrictions on counsel's cross-examination of Adam Stapleton was both an abuse of discretion that manifestly prejudiced the defendant and a violation of defendant's constitutional right to confront the witnesses against him.

Standard of Review.

Defendant agrees that the trial court's decision to exclude matters which would show a witness's bias, motive, or willingness to testify falsely is reviewed for an abuse of discretion. *People v. Kitchen*, 159 Ill. 2d 1, 37 (1994). Whether the trial court violated a defendant's constitutional right to confront the witnesses against him is a question that is reviewed *de novo*. *People v. Hari*, 218 Ill. 2d 275, 291 (2006); *Blue*, 205 Ill. 2d at 13.

A. The trial court abused its discretion when it prevented defense counsel from cross-examining Adam Stapleton about his bias, interest, or motive to testify falsely in order to avoid negative consequences.

The trial court abused its discretion when it found that defense counsel could not tie perjury to employment consequences. Defense counsel's questions sought to address Stapleton's bias, interest, and motive to testify falsely by exploring whether Stapleton believed that he could face negative consequences for improperly shooting defendant. Stapleton was a key witness whose testimony was critical to State's theory of aggravated assault. Accordingly, the trial court's restriction was an abuse of discretion which resulted in a manifest prejudice that requires reversal. This Court should affirm the decision of the appellate court.

It is well-settled that a defendant is entitled to question a witness about any matter which seeks to explain, modify, or discredit the witness's testimony on direct examination. *People v. Pelletri*, 323 Ill. 176, 182 (1926); *Kitchen*, 159

Ill. 2d at 37; Ill. R. Evid. 607 (eff. Jan. 1, 2001); Ill. S. Ct. R. 238(a) (eff. Apr. 11, 2001). The scope of cross-examination rests in the discretion of the trial court, but a defendant should be allowed the widest latitude in order to attack the credibility of a witness. *People v. Mason*, 28 Ill. 2d 396, 403 (1963). The court abuses its discretion when its "decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *People v. Rivera*, 2013 IL 112467, ¶ 37. And the court's decision will only be overturned where an abuse of discretion resulted in a manifest prejudice to the defendant. *Kitchen*, 159 Ill. 2d at 37.

In this case, defense counsel wanted to explore whether Stapleton believed that he could face negative consequences for improperly shooting defendant (R829, 1071-73, 1076-79). The question of whether defendant committed aggravated assault was based on Stapleton's testimony that defendant placed him in a reasonable apprehension of receiving a battery when defendant drove his vehicle at Stapleton (R714-16, 765). 720 ILCS 5/12-1(a), 12-2(b)(4), 12-2(c)(8) (2012). Stapleton said he was standing in the path of defendant's car and fired his weapon multiple times to stop defendant from hitting him (R885-86). Thus, establishing whether Stapleton believed that he could have faced negative consequences for unjustifiably shooting defendant would have tended to show his motive to lie about whether or not he was standing in the path of defendant's car when he decided to shoot.

Courts commonly conclude it is proper for defense counsel to cross-examine police officers regarding whether they were motivated to testify falsely in order to protect their jobs or avoid disciplinary action. See *Averhart*, 311 Ill. App. 3d at 502 (finding abuse of discretion where defendant was barred from demonstrating that officer's "bias and interest to color his testimony was directly connected to his fear of losing his job"); *People v. Phillips*, 95 Ill. App. 3d 1013 (1st Dist. 1981)

(rejecting State's argument that officer would not have been motivated to testify falsely in order to avoid disciplinary action or other negative consequences if it were found that he abused his power by improperly brandishing his weapon); *People v. Lenard*, 79 Ill. App. 3d 1046 (1st Dist. 1979) (reversing where court barred defendant from cross-examining officers and presenting evidence that officers were biased and motivated to testify falsely in order to cover up that they had beaten the defendant); *People v. Robinson*, 56 Ill. App. 3d 832 (5th Dist. 1977) (finding error in barring cross-examination where officer's testimony was possibly influenced by his desire to return to active duty and to avoid further suspension or other disciplinary measures). Consequently, the trial court abused its discretion when it held that defense counsel could not tie perjury to employment consequences and barred defense counsel from exploring whether Stapleton believed that he could be fired or worse if he improperly shot defendant (R830).

The trial court's abuse of discretion was based on its misunderstanding of People v. Adams, 2012 IL 111168.

The root of the trial court's error was its misinterpretation of *People v. Adams*, 2012 IL 111168, ¶ 20 (R829-30, 1067-79). During an objection while defense counsel was cross-examining Adam Stapleton, the prosecutor claimed it would be improper for defense counsel to argue Stapleton was motivated to testify falsely out of a desire to protect his job (R829-30). The court responded that it was unfortunately too familiar with a Third District case from the same courtroom in Will County which held the State "cannot tie perjury or sworn testimony to employment in a criminal case. That is what the Third District says" (R830).[2] The court commented

[2] Judge Carla Alessio-Policandriotes was the trial court judge in this case and in *People v. Adams*, 403 Ill. App. 3d 995 (3d Dist. 2010), *rev'd* 2012 IL 111168.

that it is improper to tie perjury to employment; "[j]ust like the truth being tied to employment is not proper" (R830). Although the court could not remember the name of the case, it was later confirmed to be *Adams* (R830, 1067).

After the State rested its case, defense counsel renewed his request to ask if Stapleton believed that improperly firing his weapon could have a negative impact on his employment (R1067-79). The court reiterated that *Adams* prevented defense counsel from inquiring into employment consequences and concluded defense counsel could not argue that Stapleton was so concerned about losing his job that he would lie to the jury (R1077-78). The court commented that "[m]aybe the Appellate Court will see it different" (R1079). It did.

As the appellate court majority explained, *Adams* does not apply in this situation because defense counsel was not attempting to baselessly speculate during closing argument that Stapleton was lying to protect his job. *Pacheco*, 2021 IL App (3d) 150880-B, ¶ 59. At the outset of *Adams*, this Court indicated that "[t]he primary issue in this appeal is whether a prosecutor may properly argue to a jury that a police officer's testimony should be believed because he would not risk 'his credibility, his job, and his freedom' by lying, when no evidence that those consequences would occur was introduced at trial." *Adams*, 2012 IL 111168, ¶ 1. In this case, to the contrary, defense counsel was trying to introduce evidence through cross-examination in order to argue that Stapleton was motivated to testify falsely to avoid being fired or worse. *Pacheco*, 2021 IL App (3d) 150880-B, ¶ 59. *Adams* is inapplicable and the trial court erred by relying on it to bar legitimate cross-examination of the State's key witness.

The question in this case is whether Adam Stapleton's subjective beliefs affected his testimony.

The State suggests the trial court correctly barred defense counsel from asking Stapleton if he could be fired for the improper use of force in order to avoid conducting a mini-trial about disciplinary policies and whether Stapleton's conduct warranted termination or other consequences (St.Br.21) The State concludes that the trial court prudently prevented the trial from devolving into an exploration of collateral issues, but makes no effort to explain how this evidence was a collateral matter (St.Br.21). The failure to argue the merits of a claim in an opening brief waives consideration of the merits on appeal. *Vancura v. Katris*, 238 Ill. 2d 352, 369-70 (2010); Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020) (directing that "[p]oints not argued are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing").

Regardless, the State on appeal, as it did at trial, incorrectly focuses on proving whether Stapleton could have been fired for improperly shooting defendant instead of focusing on how Stapleton's subjective beliefs may have affected his testimony (R1074-76). Courts, including this one, have held that "[i]nquiries of a witness as to his relations with the accused, his interest in the results of the case, and his feelings of bias, are never collateral." *People v. Garrett*, 44 Ill. App. 3d 429, 437 (5th Dist. 1976); *People v. McGovern*, 307 Ill. 373, 377 (1923).

This issue is not a question of proving whether Stapleton *actually* would have faced any negative consequences such as termination of employment or worse. The true question is whether Stapleton was motivated to fabricate his testimony because he *believed* that he could face negative consequences if he told the truth. Through cross-examination, defense counsel is entitled to inquire into a witness's

expectations or motivations to testify falsely whether the witness's beliefs "are based on fact or are simply imaginary." *People v Ramey*, 152 Ill. 2d 41, 67-68 (1992).

In *Ramey*, this Court held the trial court erred by preventing defense counsel from questioning an incarcerated witness about whether his testimony was influenced by his hope that the State would favorably consider his testimony during sentencing for his own convictions. *Id.* at 66-67. This Court explained that defense counsel does not need to show that any promises of leniency actually have been made, or that the witness expects the State to show favor, before questioning the witness about his possible bias. *Id.* at 67-68. Rather, defense counsel "is entitled to inquire into such promises or expectation whether they are based on fact or are simply imaginary." *Id.*; see also *Alford v. United States*, 282 U.S. 687, 692 (1931) (noting that "[c]ounsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply").

In this case, defense counsel was entitled to explore whether Stapleton believed that he could be terminated or worse if he had improperly shot defendant whether those beliefs were "based on fact" or were "simply imaginary." *Ramey*, 152 Ill. 2d at 67-68. Contrary to the dissent, no witness was required to testify that Stapleton's shooting was unjustified in order for defense counsel to inquire about Stapleton's interest and motive to lie. *Pacheco*, 2021 IL App (3d) 150880-B, ¶ 88 (Schmidt, J., dissenting). Counsel did not need to show that the shooting actually would have resulted in termination; only that the testimony gave "rise to the inference that the witness has something to gain or lose by testifying." *People v. Davis*, 185 Ill. 2d 317, 337 (1998). Stapleton's subjective beliefs about whether

he could be disciplined for improperly shooting defendant could have affected his willingness to tell the truth about what actually occurred. *Ramey*, 152 Ill. 2d at 67-68. The trial court erred by preventing the jury from hearing about Stapleton's potential bias, interest, or motive to testify falsely.

Defendant did not argue that police officers are inherently untrustworthy because of professional consequences attached to their office.

Lastly, the State invokes *Adams* for the proposition that "a prosecutor may not 'imply that a police officer has a greater reason to testify truthfully than any other witness with a different type of job' " (St.Br.22 (quoting *Adams*, 2012 IL 111168, ¶ 20)). According to the State, defendants should not be allowed to make "the inverse argument: that police officers are inherently untrustworthy because of professional consequences attached to their office" (St.Br.22).

Again, *Adams* continued the well-settled law that the State may not baselessly imply in closing argument that a police officer has a greater reason to tell the truth that another witness with a different job. *Adams*, 2012 IL 111168, ¶ 20. More importantly, though, the State cannot argue that police officers are incapable of lying. *People v. Hawkins*, 243 Ill. App. 3d. 210, 222 (1st Dist. 1993) (collecting cases). That assertion is demonstrably false. Unfortunately, some police officers, like witnesses with other jobs, are capable of acting outside of their authority and lying to protect their own interests. See, *e.g.*, *United States v. Hicks*, 15 F. 4th 814, 815 (7th Cir. 2021) (noting Chicago police officer found guilty of forging search warrants in order to steal drugs and guns from drug dealers for resale); *United States v. Burge*, 711 F. 3d 803, 806 (7th Cir. 2013) (affirming obstruction of justice and perjury convictions for former Chicago police officer who lied about using interrogation tactics where suspects were suffocated, electrocuted, held down against

radiators, and had loaded guns pointed at their heads); *Burley v. Baltimore Police Department*, 422 F. Supp. 3d 986 (D. Maryland 2019) (noting that officers pleaded guilty to authoring false reports, engaging in warrantless stops and seizures, making false arrests, creating false charging documents, and planting evidence in order to cover up an illegal traffic stop that ended in a death of passenger). Yet, the bad deeds of *some* police officers does not make the testimony of *all* police officers "inherently untrustworthy." And defendant did not argue so.

The State suggests that defendants should not be able to address the "professional consequences" that come from being a police officer (St.Br.22). But defendants and courts routinely address and scrutinize the veracity of police officers' actions and statements made in the course of their employment. See *People v. Caro*, 381 Ill. App. 3d 1056, 1067 (1st Dist. 2008) (affirming *Franks* hearing finding officer acted with reckless disregard for truth or falsity of information); *People v. Campbell*, 2019 IL App (1st) 161640, ¶¶ 20-26 (discussing so-called "dropsy" testimony where police officers falsely testify that they observed a defendant drop contraband in plain view in order to avoid the exclusion of evidence); *People v. Lopez*, 229 Ill. 2d 322, 361 (2008) (recognizing the need to consider objective evidence in "question-first, warn-later" cases because "police officers will generally not admit on the record that they deliberately withheld *Miranda* warnings from a suspect in order to obtain a confession").

What the State is really suggesting is that the testimony of police officers "should be cloaked with a presumption of veracity." See *People v. Barney*, 176 Ill. 2d 69, 73-74 (1997) (allowing the State to argue that a defendant's testimony is inherently biased because he is interested in acquittal). But it has long been held there is no legal presumption that police officers are more likely to tell the

truth than any other witness. *Crook v. Crook*, 329 Ill. App. 588, 597-98 (1st Dist. 1946). The *Crook* court explained, "[w]hen a man becomes a police officer he is either an honest or a dishonest individual, and the mere fact that thereafter he wears a uniform does not change his character." *Id.*

As the appellate court majority reasoned in this case, "[d]efense counsel was not trying to tie Stapleton's credibility to his *status as a police officer*; rather, defense counsel sought to elicit evidence that Stapleton was motivated to testify falsely out of fear of negative consequences for *specific actions he had taken*." (Emphasis added) *Pacheco*, 2021 IL App (3d) 150880-B, ¶ 59. Adam Stapleton made a decision to draw his firearm and shoot at defendant. A police officer's use of a firearm "is fraught with risk and repercussions." *People v. Mandarino*, 2013 IL App (1st) 111772, ¶ 1. Defense counsel should have been able to explore whether Stapleton believed that he would suffer negative consequences if his decision was found to be improper so that the jury could assess his credibility. This Court has, in other circumstances, commented that "[n]othing can undermine public confidence in the ability and good judgment of police officers more than the misuse of firearms." *Walsh v. Bd. of Fire & Police Com'rs of Vill. of Orland Park*, 96 Ill. 2d 101, 106 (1983). Defendant's attempt to cross-examine Stapleton on prototypical forms of bias, interest, or his motives to testify falsely based on specific actions he had taken should not be misconstrued as a generalized attack on the trustworthiness of police officers as a profession (St.Br.22).

B. The trial court's restriction of defense counsel's cross-examination of the State's key witness was not harmless, but resulted in a manifest prejudice that requires reversal.

To determine whether the trial court's error in restricting cross-examination of a witness's bias, interest, or motive to testify falsely is reversible error, reviewing

courts examine whether the credibility of the witness was crucial. If the witness's testimony was crucial, then the trial court's restriction was a manifest prejudice that requires reversal. *Phillips*, 95 Ill. App. 3d at 1023.

The State argues that any error was harmless and makes several points in its harmless-error analysis: (1) the evidence for aggravated assault was overwhelming; (2) defense counsel was allowed to extensively cross-examine Stapleton's motive to lie and asked the jury to find that he had been protecting his own interests; and (3) that defendant failed to make an offer of proof which rendered Stapleton's proposed testimony speculative and uncertain (St.Br.21-25).

The trial court's error was not harmless because the evidence was not overwhelming.

Defendant was prejudiced because Adam Stapleton's testimony was crucial to the State's case for aggravated assault. Proof of the State's theory of the case hinged on Stapleton's testimony that he was standing in the way of defendant's car (R712-16, 765). The State could not prove aggravated assault beyond a reasonable doubt without Stapleton's testimony. Because Stapleton's credibility "was the key to the case, this error cannot simply be dismissed as harmless." *People v. Wilkerson*, 87 Ill. 2d 151, 157-58 (1981) (holding that the other evidence was not overwhelming where the accounts varied from each other).

The State argues that any error was harmless because the evidence for aggravated assault was strong. It claims that Stapleton's account was corroborated by the testimonies of Eric Zettergren and Michael McAbee as well as the audio, video, and photographic evidence admitted at trial, which support that defendant's car was moving when Stapleton began to fire at it (St.Br.24-25).

To the contrary, the evidence for aggravated assault was not overwhelming. The State incorrectly focuses its argument on whether defendant's car was moving before Stapleton fired at it rather than focusing on the evidence necessary to prove that Stapleton was standing in the way of the vehicle. To convict defendant of aggravated assault, the State had to prove that he placed Officer Stapleton in a reasonable apprehension of receiving a battery (C10). 720 ILCS 5/12-1(a), 12-2(b)(4), 12-2(c)(8) (2012). Based on the facts at trial, Stapleton's testimony was the only evidence that defendant placed him in a reasonable apprehension of a receiving a battery by accelerating toward Stapleton who was in the path of the car. No other evidence corroborated Stapleton's location in front of the car.

The State claims that Eric Zettergren and Michael McAbee corroborated Stapleton's testimony. However, neither witness testified that Stapleton was standing in the path of the car in order to support Stapleton's belief that he would be struck by the car. 720 ILCS 5/12-1(a), 12-2(b)(4),(c)(8) (2012).

Zettergren did not corroborate Stapleton's claim that he was standing in the path of defendant's vehicle. Zettergren did not know where Stapleton was standing when defendant drove by the police car. When Stapleton stopped the police car, Zettergren, who was the front passenger, "just opened the door and stood in the open doorway" (R903-04). As Zettergren stood in the doorway, defendant reversed his car at an angle and stopped the car directly facing Zettergren from about 30 feet away (R904-05, 934).

At that point, the vehicle began to "roll forward" toward Zettergren, who was still standing inside the front passenger side door of the police car (R906-07, 932). Zettergren could not say if the car moved from defendant letting his foot off of the brake or if defendant had pressed the accelerator (R907). As the car rolled

toward Zettergren, he observed defendant steer the car to the left toward the rear of the police car and the open eastbound lane behind it (R907-08, 932-33).

Zettergren could not see Stapleton at this time and did not know exactly where Stapleton was standing, but he could hear that Stapleton was somewhere behind him giving commands to defendant (R908-09, 911-12, 933-34, 960-61). Although Zettergren was focused on defendant's car in front of him, he believed that Stapleton was moving from the front of the police car toward the rear because he could hear Stapleton's voice moving in that direction (R909). However, Zettergren clarified that he did not know "how those events [correlate] in time" and admitted that he did not know if the car was turning toward the open lane at the same time that he heard Stapleton's voice moving from left to right behind him (R934).

Zettergren only heard Stapleton shoot at the car as it moved behind the police car (R910, 912-13, 936, 939-40). Zettergren did not see Stapleton when he fired at the car, did not know Stapleton's exact position, and did not know the situation that Stapleton was in at the time he fired at the car (R936, 960-61). Zettergren did not see Stapleton fire any of the shots from the rear of the police car because he "was still transfixed on the driver in the vehicle" (R912-13, 938-39). Although Zettergren watched defendant's vehicle pass behind the police car, he did not see Stapleton because he "wasn't looking around" and Stapleton was not in his field of vision at the time of the shooting (R939). Thus, Zettergren did not corroborate Stapleton's story that he was standing in the path of defendant's car.

The State also claims that Michael McAbee corroborated Stapleton's story because he testified that defendant's car was moving when Stapleton began to shoot (St.Br.24). Crucially, McAbee did not testify that Stapleton was standing in the path of defendant's car in order for him to be in a reasonable apprehension of receiving a battery. 720 ILCS 5/12-1(a), 12-2(b)(4), (c)(8) (2012).

McAbee saw defendant's car stop at the railroad tracks and turn around (R623). The police car pulled up at an angle to defendant and two police officers got out of the car (R623). The officers were yelling for defendant to stop the car (R623-24). An officer got back into the police car to try to block defendant's car from leaving, but did not succeed (R628). That officer got out of the police car with his gun drawn and was still yelling at defendant to stop the car (R629).

When the prosecutor asked McAbee if he could see the officer that had been driving the car, McAbee said that he could only see the officer "a little bit" and that he "didn't pay too much attention" because he was afraid for his life and his son's life (R629-30). McAbee could hear the officer yelling to stop the car or he was going to shoot (R630-31). Defendant did not stop, but, instead, "acted as an old person" and "drove easy" in the direction that they had come (R631). McAbee took cover when he heard gun shots (R631). The cars were gone when he looked up again (R631-32).

Michael McAbee did not corroborate Stapleton's testimony that he was standing in the way of defendant's vehicle. Although McAbee did say that defendant was driving "as an old person" before shots were fired, his testimony did not address whether or not Stapleton was standing in the path of defendant's vehicle.

On the other hand, Jamie Kirk's testimony contradicted Stapleton's account. According to Kirk, the officer was standing behind the trunk on the driver's side of the police car when he fired across the police car into defendant's car (R647-50, 671-72). Defendant's car did not start moving until after Stapleton fired the shots (although Kirk admitted that the car could have been moving) (R650-52, 674-76). It did not appear that defendant intended to hit the officer with his car (R663)–a contention that the jury apparently believed when it acquitted defendant of attempt

aggravated battery of Stapleton (C12, 344; R1307). 720 ILCS 5/8-4(a), 12-3(a), 12-3.05(d)(4) (2012).

The State attempts to discredit Kirk's testimony by calling it inconsistent with the other evidence, but that is, in fact, the point (St.Br.24-25). The State attacks the credibility of Kirk's testimony because he witnessed the events from the top bunk of McAbee's truck (St.Br.25). However, Kirk explained that he was able to clearly observe the shooting from the top bunk of the truck. He could see defendant's car and the officer standing beside the driver's side of the police car (R646-47, 673-74). The State does not contend that Kirk's testimony was so lacking in credibility that no reasonable person could believe it. *People v. Cunningham*, 212 Ill. 2d 274, 280-82 (2004). Whether Kirk had an adequate opportunity to see the events from inside the truck was a credibility determination for the jury to make and does not invalidate his testimony. *Id.*

The State claims the audio and video recording revealed that the officers told defendant to stop the car before the shooting and showed that Stapleton was moving away as defendant drove by him (St.Br.24; People's Exhibit 6).[3] Neither of these pieces of evidence prove that Stapleton was standing in the path of defendant's vehicle.

The State argues that the officers could be heard shouting for defendant to stop the car before firing shots (St.Br.24). But all of the witnesses agreed that the officers began telling defendant to stop the car as soon as Stapleton stopped

[3] Defendant notes that the DVD of People's Exhibit 6 in the record is cracked and inoperable. Appellate counsel contacted the Will County State's Attorneys Office to seek another copy. It responded that the file had already been destroyed. However, the video can be found in the record in Appellate Exhibit 7 ("Def 7+15") on the DVD marked "surv. video from outside cameras of filtration group" under the video marked as "ND_D01_C03_1207300120."

the police car (R623-24, 648, 709, 904). That does not prove that Stapleton was standing in the way of the vehicle. Similarly, the State claims that defendant shouted for Stapleton to get out of his way, therefore proving that Stapleton was standing in front of the car (St.Br.30). However, it was just as reasonable that defendant was referring the police car that was blocking the street, not Stapleton.

The State also claims that the surveillance video showed Stapleton retreating out of the way of defendant's car as he drove away (St.Br.24). However, the video, although grainy, does not show that Stapleton was standing in front of the vehicle when defendant drove away. The video is, at best, inconclusive as to where Stapleton was standing before moving to fire seven shots into defendant's car (People's Exhibit 6; Defense Exhibit 7–05:07).

Finally, the photographic evidence does not prove that Stapleton was standing directly in front of defendant's vehicle or that he fired into the center of defendant's windshield (St.Br.24). All but one of the bullet holes identified at trial are on the passenger's side of the windshield (People's Exhibit 18). This pattern supports the surveillance video that appears to show Stapleton fire at the passenger side of defendant's vehicle as it passed him (People's Exhibit 6; Defense Exhibit 7).

But, again, the photos do not prove that Stapleton was standing in the path of defendant's vehicle as to reasonably put him in the apprehension of a battery. The pattern of the bullet holes on the passenger side of the vehicle is the same pattern that would occur if Stapleton had been shooting from behind his police car and continued to fire at defendant as he passed behind the police car. The photographs do not support the State's contention that Stapleton fired from in front of the car or corroborate Stapleton's testimony that he was standing in the way of defendant's car. In sum, the evidence was not overwhelming.

Defense counsel's cross-examination and comments in closing argument did not cure the trial court's restriction of Stapleton's cross-examination.

The State argues that the error was harmless because defense counsel was allowed to extensively cross-examine Stapleton about his motive to lie. Counsel also told the jury in closing argument that it should not believe Stapleton's testimony, and urged the jury to find that Stapleton had been out of control and was lying to protect his own interests (St.Br.23-24; R1233-59).

This type of error does not result in a manifest prejudice when defense counsel was afforded a considerable opportunity to establish a witness's lack of credibility and there was ample evidence from which to assess credibility. *People v. Kline*, 92 Ill. 2d 490, 504-05 (1982). However, as the appellate court majority held, the remaining cross-examination did not allow defendant to present his theory of the defense. Although defense counsel was able to cross-examine Stapleton about his actions on the night of the shooting, "the defense was not able to present any *motivation* Stapleton may have had to testify falsely." (Emphasis in original) *Pacheco*, 2021 IL App (3d) 15080-B, ¶ 62.

The State argues that any error is harmless because defense counsel told the jury in closing argument that it should find Stapleton had been out of control and was lying to protect his own interests (St.Br.23-24; R1233-59). Yet, the purpose of closing argument is "to review the *admitted evidence*, to explain the relevant law, and to assert why *the evidence* and the law compel a favorable verdict." (Emphasis added) *People v. Williams*, 2022 IL 126918, ¶ 40. "That is why juries are told that closing arguments are not evidence and 'any statement or argument made by the attorneys which is not based on the evidence should be disregarded.'" *Id.* (quoting Illinois Pattern Jury Instructions, Criminal, No. 1.03 (2011)).

During closing arguments in this case, the court repeatedly told the jury that the attorneys' arguments were not evidence, that it should rely on its own recollection of the evidence at trial, and that it should disregard any argument not based on the evidence (R1210, 1217, 1220-21, 1241, 1244-45, 1260, 1277, 1285-86; C367). The jury is presumed to follow the trial court's instructions. *People v. Taylor*, 166 Ill. 2d 414, 438 (1995). Although defense counsel told the jury that Stapleton was "acting to protect his own interests," there was no *admitted evidence* to explain what interests Stapleton was allegedly protecting. Counsel was prevented from entering evidence to argue that Stapleton was acting to avoid negative consequences of an improper shooting. In assessing Stapleton's credibility, the jury "could consider only admissible evidence." *People v. Swaggirt*, 282 Ill. App. 3d 692, 706 (2d Dist. 1996). If Stapleton's responses were admitted, it could have changed the jury's assessment of his credibility. *Id.* The error was not harmless.

No greater offer of proof was necessary.

Finally, the State makes a passing suggestion that this issue has been forfeited for failing to make an offer of proof at trial (St.Br.24). It merely cites the dissent's conclusion that Stapleton's proposed testimony was "speculative and uncertain" because defendant did not make an offer of proof as to how Stapleton would have answered the question (St.Br.24 (citing *Pacheco*, 2021 IL App (3d) 150880-B , ¶ 87 (Schmidt, J., dissenting)).

The State did not argue in the appellate court that defendant forfeited review of this issue for failing to provide a sufficient offer of proof. Rather, the State argued that any error would be harmless, that there was no evidence Stapleton was worried about losing his job, and it decided that Stapleton would have answered the question in the negative (State's Appellate Court Brief at 9-10). *People v. Pacheco*, No. 3-15-

0880 (Dec. 19, 2017). The State cannot now suggest that defendant has forfeited this issue because the excluded evidence was unclear and a greater offer of proof is needed for this Court to review the issue. *People v. Andrews*, 146 Ill. 2d 413, 420-22 (1992).

Nonetheless, no greater offer of proof was necessary. Generally, for the purposes of review, a defendant must provide a formal or informal offer of proof at trial to show "that the evidence he sought to introduce was positive and direct on the issue of bias or motive to testify falsely." *People v. Phillips*, 186 Ill. App. 3d 668, 678 (1st Dist. 1989). Although formal offers of proof are usually required, an informal offer of proof may be sufficient to preserve an issue if counsel sufficiently summarizes the proposed testimony and it is not based on speculation or conjecture. *Id.* at 679.

In this case, defense counsel said that he wanted to ask Stapleton if, in his mind after he shot defendant, he was concerned that the shooting could have a detrimental impact on his employment (R1076). Counsel explained, "[a]nd if he says no, fine. If he says yes, fine. But I am asking him did your actions on that day give you a reason to lie. And that is just good 'ol fashion [*sic*] cross examination" (R1076). Counsel's informal offer of proof was sufficiently specific to show what the evidence would be and to allow a reviewing court to assess the prejudice of the trial court's ruling. *Phillips*, 186 Ill. App. 3d at 679.

The dissent seems to misinterpret the rule to mean that Stapleton's testimony was "speculative and uncertain" because it did not know what Stapleton would have said (St.Br.24 (citing *Pacheco*, 2021 IL App (3d) 150880-B, ¶ 87 (Schmidt, J., dissenting)). Instead, it is the connection between the proposed testimony and the potential bias that cannot be remote or uncertain. The evidence of potential

bias must give rise to the inference that the witness has something to gain or lose by his or her testimony. *People v. Bull*, 185 Ill. 2d 179, 207 (1998).

Here, the nexus between Stapleton's proposed testimony and potential bias was not remote or uncertain. If Stapleton answered, "yes," that he believed that he could be fired if his shooting was improper, then it would give rise to an inference that he could be lying to save his job. See *Lenard*, 79 Ill. App. 3d at 1050 (holding that defendant should have been allowed to explore officers' bias by questioning officers about how their testimony was an attempt to cover up beating the defendant after his arrest). If Stapleton answered, "no," that he believed there would be no negative consequences for improperly shooting someone, then the jury would be able to assess Stapleton's credibility based on that answer, as well. See *People v. Cunningham*, 333 Ill. App. 3d 1045, 1049-50 (1st Dist. 2002), *rev'd*, 212 Ill. 2d 274 (2004) (finding officer's description of events to be "incredible, unbelievable, uncorroborated and bordering on the fiction from which fairytales are made"). No greater offer of proof was required in this case.

The trial court's error was not harmless. The trial court's restriction on cross-examination was an abuse of discretion that resulted in a manifest prejudice to the defendant. Accordingly, this Court should affirm the appellate court's decision.

C. The trial court violated James Pacheco's constitutional right to confront the witnesses against him when it barred defense counsel from adequately cross-examining Adam Stapleton.

The trial court violated defendant's constitutional right to confront witnesses when it restricted defense counsel "from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986). The sixth amendment

guarantees the accused in a criminal prosecution the fundamental right to confront the witnesses against him. U.S. Const., amends IV, XIV; Ill. Const. 1970, art. I, § 8. A "primary interest secured by [the Confrontation Clause] is the right of cross-examination." *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). The constitutional question under the sixth amendment therefore asks whether the jury was made aware of adequate factors to determine if a witness was worthy of belief, "not whether any particular limitation has been placed upon defendant's ability to cross-examine a witness or whether the jury has knowledge of any specific fact." *Hines*, 94 Ill. App. 3d. at 1048.

There is no reason to depart from the appellate court majority's decision in this case. The majority concluded that the cross-examination allowed by the court did not allow defendant to adequately present his theory that Stapleton was motivated to lie in order to protect his employment. *Pacheco*, 2021 IL App (3d) 150880-B, ¶ 62. The "tandem effect" of restricting counsel from addressing Stapleton's belief that he could be disciplined for an improper shooting and barring any questions about the policy of not writing incident reports for legal protection (Issue II) deprived defendant of his potential defense that the officers were motivated to lie about their actions to insulate themselves from negative consequences if the shooting was found to be unjustified. *Pacheco*, 2021 IL App (3d) 150880-B, ¶¶ 56, 68. Although defendant was able to question Stapleton about his actions before and after the shooting, "the defense was not able to present any *motivation* Stapleton may have had to testify falsely." (Emphasis in original) *Id.* ¶ 62.

Defendant's theory was that Stapleton was not worthy of belief because he was motivated to protect himself from the negative consequences of what could have been an improper shooting. What evidence could defense counsel have elicited

as to Stapleton's bias, interest, or motives to lie without at least tying perjury to employment consequences? (R830). See *People v. Gonzalez*, 104 Ill. 2d 332, 338 (1984) (rejecting State's argument that defendant was not prevented from adequately cross-examining gang member's motive where gang affiliation and activity was the basis for the defense theory and he was barred from addressing gangs entirely). Therefore, the trial court violated defendant's constitutional right to cross-examination when it prevented counsel "from presenting a theory as to what Stapleton's interests were and why he might be motivated to protect his interests." *Pacheco*, 2021 IL App (3d) 150880-B, ¶ 62.

The State aptly notes it has the burden to prove that the denial of the constitutional right to cross-examine a witness for bias was harmless beyond a reasonable doubt (St.Br.22-23), which is to say that "the State must prove beyond a reasonable doubt that the jury verdict would have been the same absent the error." *People v. Thurow*, 203 Ill. 2d 352, 363 (2003); *Van Arsdall*, 475 U.S. at 684; *Blue*, 205 Ill. 2d at 14.

To determine whether defendant's confrontation right has been violated, this Court's focus "must be on the particular witness, not on the outcome of the entire trial." *Van Arsdall*, 475 U.S. at 680. Stapleton's testimony that he was standing in front of defendant's car and was afraid that he would be struck by defendant was vital to the State's case. The State could not prove aggravated assault beyond a reasonable doubt without Stapleton's testimony. This specific point was not corroborated by any other evidence at trial. On the other hand, Jamie Kirk testified that Stapleton was not standing the in way of defendant's vehicle. Moreover, the State was allowed to ask Kirk–its own witness who contradicted the police officer's testimony–whether he liked police, had a problem with police, if police

had ever "done [him] wrong down in South Carolina," directly asked if he was biased against police, and concluded Kirk's damaging direct examination by sardonically asking him, "but you like the police?" (R655, 658). Accordingly, the State has failed to prove that the error was harmless beyond a reasonable doubt. *Van Arsdall*, 475 U.S. at 684; *Blue*, 205 Ill. 2d at 18-19.

In sum, the trial court abused its discretion by finding that Stapleton's truthfulness could not be tied to employment consequences. By barring defense counsel from exploring whether Stapleton believed that he could be punished for improperly shooting defendant, the trial court prevented defendant from effectively confronting a key witness against him. The State's case for aggravated assault could not be proven beyond a reasonable doubt without Stapleton's testimony. The error was not harmless and requires reversal. Additionally, the trial court violated defendant's constitutional right to confront witnesses by preventing defense counsel from adequately cross-examining Stapleton about his motives to lie. Accordingly, this Court should affirm the judgment of the appellate court.

II. The trial court abused its discretion when it barred James Pacheco from cross-examining police officers about the Joliet Police Department's policy that prevented them from authoring written incident reports about the officer-involved shooting for union and legal protection.

The trial court abused its discretion when it barred defense counsel from inquiring into the Joliet Police Department's policy that prevented police officers from writing routine incident reports when they were involved in a shooting. The jury should have been allowed to hear the department requires its officers to follow a special procedure for union and legal protection after a shooting because it could reasonably be inferred to show bias, interest, or a motive to testify falsely. Defendant forfeited this issue by not preserving it in his post-trial motion, but the matter may be reviewed under the plain-error doctrine because the evidence for aggravated assault was closely balanced. Accordingly, this Court should affirm the judgment of the appellate court.

Standard of Review.

The trial court's decision to grant a motion *in limine* will not be disturbed on review absent an abuse of discretion. *People v. Williams*, 188 Ill. 2d 365, 369 (1999). "[W]hether a forfeited claim is reviewable as plain error is a question of law that is reviewed *de novo*." *People v. Johnson*, 238 Ill. 2d 478, 485 (2010).

A. The trial court improperly prevented the jury from hearing that the Joliet Police Department prevents officers from writing routine reports on officer-involved shootings because of union and legal protection.

During the motion to suppress hearing, Adam Stapleton testified that it was customary to write incident reports, but he was told that he could only give a recorded statement after this incident because he was involved in a shooting (R195-96). Stapleton explained that the policy was different "[b]ecause of the protection by our union, legal protection, things of that nature" and believed that

"it is in our department's policy also" (R196). Eric Zettergren testified that it is customary to write incident reports, but believed that it was the department's policy to only give a statement if there is an officer-involved shooting–which apparently applied to him. He did not know if he was specifically ordered to not write a report in this case, "but that's just the way it has been done" (R207).

Before trial, the State filed a "Motion in Limine to Bar Absence of Police Reports Authored by Officers Stapleton and Zettergren" (C156-57). The prosecutor believed that defense counsel at trial would inquire into the department's policy on writing reports. It argued that Stapleton and Zettergren followed Joliet Police Department regulations that prohibit officers involved in a shooting from writing incident reports. Therefore, any evidence or testimony about not writing reports was irrelevant to the charges and prejudicial to the State (C156-57). At a hearing on the motion, the State argued that "getting into the why's of the Joliet Police Department policy" after the shooting was irrelevant to the charges, prejudicial, and unnecessary for the jury to hear (R339-40).The State also pointed out that the officers gave videotaped statements (R345).

The trial court held that defense counsel could not ask the witnesses about the department's policy of not writing incident reports after an officer-involved shooting. The court explained that police reports were only an issue for the jury when used to refresh a witness's recollection. The contents of a police report are not evidence (R344-45).

Defense counsel responded that there was an aspect of bias or interest in this situation where officers always write police reports except for when he or she discharges a weapon. The court agreed (R345-46, 348). However, after further discussion, the court ultimately found that, if the officer was told that he was not

to make a report, then it is "a non-issue for this jury, because it doesn't make a difference, because what's in that report is not evidence" (R349). According to the court, not writing a report was not an officer's bad act, and did not show an officer's bias, because the officer did not have any discretion to write a report (R351).

Defendants are entitled to question a witness about any matter which seeks to explain, modify, or discredit the witness's testimony on direct examination. *People v. Pelletri*, 323 Ill. 176, 182 (1926); *People v. Kitchen*, 159 Ill. 2d 1, 37 (1994); Ill. R. Evid. 607 (eff. Jan. 1, 2001); Ill. S. Ct. R. 238(a) (eff. Apr. 11, 2001). The scope of cross-examination rests in the discretion of the trial court, but a defendant should be allowed the widest latitude in order to attack the credibility of a witness. *People v. Mason*, 28 Ill. 2d 396, 403 (1963). The court abuses its discretion when its "decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *People v. Rivera*, 2013 IL 112467, ¶ 37.

Initially, the State argues that the appellate court majority's conclusion rests on the misconception that the Joliet Police Department's policy was ambiguous as to whether the officers were prevented from making a written report (St.Br.28 (citing *Pacheco*, 2021 IL App (3d) 150880-B, ¶ 65, n.2)). The majority noted that defense counsel called the policy into question by presenting part of the policy manual. *Pacheco*, 2021 IL App (3d) 150880-B, ¶ 65, n.2. However, the record reflects that defense counsel attempted to argue there was an ambiguity in the police department's policies based on a memorandum addressing potential policy changes (R341-43, 346-51). The trial court explained that the memorandum did not show what the policy actually stated, and gave counsel the opportunity to find and present the policy from the Joliet Police Department manual (R350-51). Counsel did not address the policy manual again.

To be clear, it is still unknown what the Joliet Police Department policy manual *actually* instructed officers to do after a shooting. Both officers only testified that they *believed* it was the department's policy to not write reports if an officer is involved in a shooting and that they were instructed to not write reports in this case (R195-96, 207). However, the officers' cursory description was sufficient for the trial court to find the existence of a police policy preventing the officers from writing reports because evidence of the written policy was not required and the court gave defense counsel an opportunity to find out what the policy manual actually stated. See *People v. Gipson*, 203 Ill. 2d 298, 307-08 (2003) (holding that officer's description of police policy was sufficient and unchallenged by the defendant).

Assuming the Joliet Police Department had a special rule for making statements after an officer-involved shooting, the court abused its discretion when it prevented defense counsel from asking the officers about it. The State simply sought to insulate the police witnesses from scrutiny and the trial court barred defendant from pursuing standard cross-examination of the witnesses. *Pacheco*, 2021 IL App (3d) 150880-B, ¶ 67.

The officers in this case should have been able to testify that, although they typically write incident reports, a department policy prevents them from doing so when they are involved in a shooting. It is proper for defense counsel to cross-examine officers about the policies under which they have acted. See *Gipson*, 203 Ill. 2d 304-08; *People v. Garner*, 2018 IL App (5th) 150236, ¶¶ 23-24 (holding court erred by barring defense from cross-examining officer about Illinois State Police Crime Lab's policy on testing guns for DNA). Stapleton explained that they are directed to not write reports based on union and legal protection (R196). There

was no valid reason to prevent the officers–and the Joliet Police Department–from being transparent about a legitimate policy designed for protection after a shooting.

The State argues that defendant's questioning would not have produced relevant testimony because the evidence showed that they were prohibited from writing reports (St.Br.27). However, "[t]he credibility of a witness is always an issue–more correctly, in issue." *People v. Van Zile*, 48 Ill. App. 3d 972, 977 (4th Dist. 1977). The credibility of the officers' testimonies was the heart of the State's case against defendant, and questioning the State's witnesses about a special policy for officer-involved shootings reasonably could have indicated a bias or interest "in a favorable outcome for the side calling him." *Id*.

The State claims that a special policy preventing officers from writing reports does not affect the officers' credibility or indicate a lack of transparency because the officers provided video recorded statements, which were a sufficient impeachment tool in this case (St.Br.28-29). But the existence of the policy itself would have called the credibility of the officers into questions. By preventing officers from issuing written reports, and directing that they follow different procedures for union and legal protection, the jury could have inferred that the officers were following a "code of silence" or that the police department advised its officers to keep quiet in order to insulate the officers and the department from civil liability. See generally *Abbate v. Ret. Bd. of Policemen's Annuity & Benefit Fund of City of Chicago*, 2022 IL App (1st) 201228 (noting jury found "moving force" of officers' conduct to be department's "code of silence" or a widespread practice of failing to adequately investigate or discipline officers where former Chicago police officer abused authority in attempt to cover up his involvement in bar battery, conspired with other officers to avoid arrest, and responding officers deliberately omitted

inculpatory details from incident report); *Franko v. Police Bd. of City of Chicago*, 2021 IL App (1st) 201362 (explaining that several Chicago police officers and their supervising sergeant made and approved false, misleading, or inaccurate statements following the shooting of Laquan McDonald including falsely reporting McDonald attacked officers with a deadly weapon).

The policy directed at legal protection after a shooting showed that officers and the department had an undeniable interest in the case: avoiding a future section 1983 claim for excessive use of force by shooting defendant multiple times. 42 U.S.C. § 1983 (2012). Helping to secure defendant's convictions for attempt aggravated battery and aggravated assault upon Stapleton would suggest that Stapleton's force was reasonable and greatly reduce Stapleton's and the police department's exposure to section 1983 litigation, which generally "requires the plaintiff to prove the 'termination of the prior criminal proceeding in favor of the accused.'" *Lieberman v. Liberty Healthcare Corp*., 408 Ill. App. 3d 1102, 1111 (4th Dist. 2011) (quoting *Heck v. Humphrey*, 512 U.S. 477, 484 (1994)); *VanGilder v. Baker*, 435 F.3d 689, 692 (7th Cir. 2006) (explaining that petitioner must show an officer's excessive use of force was objectively unreasonable). The Joliet Police Department's special policy for "union" and "legal" protection was evidence of the officers' and department's interest in defendant's guilty verdict, which in turn affected the officers' credibility at trial.

Finally, the State quotes the dissent's conclusion that, even if the policy was designed to protect the department from civil liability, " 'such a policy does not support an inference that *in this particular* case the department feared civil liability or that the officers were testifying untruthfully.' " (St.Br.29 (quoting *Pacheco*, 2021 IL App (3d) 150880-B, ¶ 94 (Schmidt, J., dissenting) (emphasis

in original)). On the contrary, the mere fact that the department orders officers to follow a special rule preventing them from making otherwise-routine reports in officer-involved shootings because of "union" and "legal" protection shows that the department fears civil liability *in every case* where an officer fires a weapon (R196). The trial court abused its discretion by precluding the jury from learning that Stapleton and Zettergren did not follow the routine of writing incident reports because the Joliet Police Department policy prevents them from writing reports for union and legal protection.

B. This Court should review this forfeited issue under the first prong of the plain-error doctrine because the evidence of aggravated assault was closely balanced.

Defendant recognizes that he has forfeited this issue by failing to preserve it in his post-trial motion (St.Br.29-30). *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Forfeiture, however, is only a limitation on the parties, and this Court may relax the rule to address issues although they have been forfeited. *People v. Carter*, 208 Ill. 2d 309, 318 (2003).

Forfeited issues may be reviewed under a plain-error analysis. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The plain error rule allows clear or obvious errors that have been forfeited or procedurally defaulted to be considered on appeal if one of two conditions applies:

> (1) when a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) when a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.

(Internal quotation marks omitted.) *People v. Sebby*, 2017 IL 119445, ¶ 48 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)). Review under the plain-error

rule is appropriate in this case because the evidence for aggravated assault was closely balanced.

As defendant argued in the previous issue, the evidence for aggravated assault was not overwhelming. Whether defendant placed Stapleton in the apprehension of receiving a battery hinged on Stapleton's own testimony that he was standing in the path of defendant's accelerating car. Stapleton's location in front of defendant's vehicle was not corroborated by any of the other evidence.

The credibility of Stapleton's and Zettergren's testimonies–or the lack thereof–was critical evidence as to where Stapleton was standing at the time defendant drove around the police car. For example, Zettergren claimed to not be able to see Stapleton standing behind the police car even though he watched from the passenger side of their car as defendant's car passed behind it (R912-13, 936, 938-39, 960-61). Similarly, Stapleton, who had to look over the police car to observe defendant's car, said that he could not see Zettergren after he got out of the car although Zettergren testified that he was standing in the passenger doorway of the police car the entire time (R711). Because the jury needed to assess closely-balanced evidence, the trial court's restriction of cross-examination on the credibility of the officers' testimonies unfairly "[tipped] the scales of justice against the defendant." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

In sum, the officers in this case should have been able to tell the jury that, although they typically write incident reports, a department policy prevents them from doing so when they are involved in a shooting for their legal protection. This evidence reasonably could have led the trier of fact to infer that the witnesses had a bias, interest, or motive to testify falsely. Accordingly, the trial court abused its discretion and this Court should affirm the judgment of the appellate court.

III. The State has forfeited its argument regarding reinstatement of defendant's other convictions by failing to raise the issue in the appellate court, in its petition for leave to appeal, and by failing to fully develop the issue in this Court.

For the first time on appeal, the State asks this Court to reverse the appellate court's judgment and reinstate defendant's convictions for aggravated fleeing or attempting to elude a police officer and driving under the influence. It argues that the evidence of those convictions was overwhelming and unchallenged by defendant. Therefore, any error on the cross-examination of witnesses would not have affected those convictions (St.Br.30-32).

Standard of Review.

The State does not propose a standard of review to direct this Court's examination of its argument as required by Illinois Supreme Court Rule 341(h)(3) (eff. Oct. 1, 2020) (St.Br.16). However, the question of whether the State has forfeited the ability to raise this argument by failing to raise it in the appellate court, in its petition for leave to appeal, and in this Court is reviewed *de novo*. *People v. Custer*, 2019 IL 123339, ¶ 17.

The State's argument has been forfeited and should not be addressed by this Court.

The State's argument has been forfeited for failing to raise it in the appellate court, present the issue in its petition for leave to appeal (PLA), and for failing to cite authority in its opening brief in this Court. *People v. Carter*, 208 Ill. 2d 309, 318-19 (2003). First, the State has forfeited its ability make this argument by failing to raise it in the appellate court. Supreme Court Rule 341 requires that parties must raise arguments in the briefs or they are waived. Ill. S. Ct. R. 341(h)(7),(i) (eff. Nov. 1, 2017) (directing that points not argued by the appellee are waived). In the appellate court, defendant focused his argument on how the

trial court's abuse of discretion affected his aggravated assault conviction, and asked the court to reverse all of his convictions and remand for a new trial (Def.App.Ct.Br. 19, 28). Defendant's closely-balanced analysis was also limited to addressing the evidence of the aggravated assault conviction (Def.App.Ct.Br. 26-27). However, the State did not argue, as it attempts in its opening brief in this Court, that the appellate court should affirm the DUI and fleeing to elude convictions because the evidence for those convictions was overwhelming and defendant did not argue otherwise (St.App.Ct.Br. 5-11, 12-15).

Second, the State has forfeited review of this question for failing to include it in its PLA. Supreme Court Rule 315 requires a petitioner to provide a short argument with authorities as to why review is warranted and why the appellate court's decision should be reversed or modified. Ill. S. Ct. R. 315(c)(5) (eff. Oct. 1, 2020). The failure to raise an issue in a PLA results in the forfeiture of that issue. *Carter*, 208 Ill. 2d at 318-19. The State filed two PLAs in this matter; neither asked this Court to reinstate the other convictions because the appellate court erred in reversing all of the convictions. *People v. Pacheco*, No. 125191 (Aug. 21, 2019); *People v. Pacheco*, No. 127535 (Aug. 9, 2021).

Finally, the State has forfeited the question of how many convictions may or may not be reversed for failing to support its assertions with any relevant legal authority. Supreme Court Rule 341 requires argument and citation to relevant authority. *Vancura v. Katris*, 238 Ill. 2d 352, 369-70 (2010); Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020). Even if the State's arguments on overwhelming and closely-balanced evidence in other parts of its brief could be considered in this section, it fails to even cite any previous cases that have decided to separately affirm or reverse individual convictions based on overwhelming evidence–under plain error

or otherwise. See *People ex rel. Illinois Dept. of Labor v. E.R.H. Enterprises*, 2013 IL 115106, ¶ 56 (explaining that this Court "is not simply a depository into which a party may dump the burden of argument and research"). Consequently, this Court should not ignore three layers of forfeiture to address the State's belated argument. This question is not properly before this Court to decide.

If this Court reverses the judgment of the appellate court, it should remand the cause to the appellate court to address defendant's remaining contention.

Defendant notes that an issue remains pending in the appellate court. When this Court reverses the judgment of the appellate court, it will remand the cause to the appellate court to consider any remaining issues on appeal. *People v. Givens*, 237 Ill. 2d 311, 339 (2010). Defendant argued in the appellate court that his convictions should be reversed based on prosecutorial misconduct due to the prosecutor's many improper comments made during closing arguments (Def.App.Ct.Br. 35-45). Defendant acknowledged that the issue had been forfeited for failing to raise the argument in the trial court and asked the court to review the issue under either prong of the plain-error doctrine (Def.App.Ct.Br. 44-45).

The appellate court majority did not reach the issue because it reversed on other grounds. However, it noted that several of the prosecutor's comments were improper and cautioned the State to avoid such improper comments in closing arguments if there was a new trial. *Pacheco*, 2021 IL App (3d) 150880-B, ¶¶ 71-74. Therefore, if this Court reverses the appellate court's judgment, it should remand the cause to the appellate court to determine if the prosecutor's improper comments amount to reversible error. *Givens*, 237 Ill. 2d at 339.

CONCLUSION

For the foregoing reasons, James A. Pacheco, defendant-appellee, respectfully requests that this Court affirm the judgment of the appellate court, which reversed defendant's convictions and remanded for further proceedings. Alternatively, if this Court reverses the judgment of the appellate court, defendant requests that this Court remand to the appellate court for it to consider defendant's remaining arguments on appeal.

Respectfully submitted,

THOMAS A. KARALIS
Deputy Defender

ADAM N. WEAVER
Assistant Appellate Defender
Office of the State Appellate Defender
Third Judicial District
770 E. Etna Road
Ottawa, IL 61350
(815) 434-5531
3rddistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLEE

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in 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, is 39 pages.

/s/Adam N. Weaver
ADAM N. WEAVER
Assistant Appellate Defender

No. 127535

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- JAMES A. PACHECO, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-15-0880. There on appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, No. 12-CF-1799. Honorable Carla Alessio-Policandriotes, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@ilag.gov;

Mr. David J. Robinson, Deputy Director, State's Attorney Appellate Prosecutor, 725 South Second Street, Springfield, IL 62704, 4thdistrict@ilsaap.org;

James Glasgow, Will County State's Attorney, 121 N. Chicago St., Joliet, IL 60432;

Mr. James A. Pacheco, 124 1/2 W. South Street, Dwight, IL 60420

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 August 29, 2022, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellee in an envelope deposited in a U.S. mail box in Ottawa, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Esmeralda Martinez
LEGAL SECRETARY
Office of the State Appellate Defender
770 E. Etna Road
Ottawa, IL 61350
(815) 434-5531
Service via email will be accepted at
3rddistrict.eserve@osad.state.il.us