

NOTICE

Decision filed 09/25/26. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2026 IL App (5th) 241274-U

NO. 5-24-1274

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	White County.
	)	
v.	)	No. 21-CF-116
	)	
RONALD E. HOWELL,	)	Honorable
	)	Thomas J. Dinn III,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BARBERIS delivered the judgment of the court.
Justices Boie and Vaughan concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm defendant's conviction and sentence where defendant agreed to a juror's removal constituting invited error, the State's arguments were not improper, and counsel rendered effective assistance.

¶ 2 Defendant, Ronald E. Howell, was convicted of six counts of predatory criminal sexual assault (720 ILCS 5/11-1.40(a)(1) (West 2020)) and one count of attempt to commit predatory criminal sexual assault (*id.* § 8-4(a)) following a jury trial in the circuit court of White County. Defendant was subsequently sentenced to 54 years followed by 3 years to life of mandatory supervised release (MSR). Defendant raises several contentions on appeal, arguing (1) his due process rights under both the Illinois and United States Constitutions were violated when the trial court removed a juror from the jury panel, (2) the State violated defendant's rights to be presumed innocent and remain silent by making improper arguments in both its opening statements and

closing argument, and (3) defense counsel rendered ineffective assistance of counsel. For the following reasons, we affirm.

¶ 3

I. BACKGROUND

¶ 4 On January 5, 2023, the State filed a third amended information¹ charging defendant with six counts of predatory criminal sexual assault of a child (*id.* § 11-1.40(a)(1)), all Class X felonies, and one count of attempted predatory criminal sexual assault of a child (*id.* § 8-4(a)), a Class 1 felony. The State alleged defendant, who was 17 years of age or older, committed an act of sexual penetration with the victim, R.K., defendant's stepdaughter at the time, who was under the age of 13 years old, at defendant's home. The State alleged that defendant, from February 24, 2012, to October 31, 2016, intentionally placed his penis in the mouth of R.K. in (1) R.K.'s bedroom (count I); (2) a bedroom in their residence (count II); (3) the kitchen of their residence after defendant asked R.K. "if she wanted vanilla ice cream" (count III), (4) the living room (count IV), and (5) the laundry room (count V). The State also charged defendant with attempted predatory criminal sexual assault of a child, alleging defendant, during the same time frame, tried to place his penis in R.K.'s vagina in R.K.'s bedroom after she bathed (count VI). In addition, the State charged defendant with predatory criminal sexual assault of a child, alleging defendant, from January 1, 2016, to February 17, 2017, placed his penis in R.K.'s mouth in defendant's bedroom in defendant's mother's home (count VII).

¹On August 16, 2021, the State filed a two-count information charging defendant with predatory criminal sexual assault of a child from August 24, 2012, to August 23, 2017. On September 1, 2022, the State filed an amended information charging defendant, from February 24, 2012, to October 31, 2016, with five counts of predatory criminal sexual assault of a child, one count of aggravated criminal sexual abuse, and two counts of attempted predatory criminal sexual assault of a child. On October 19, 2022, the State filed a second amended information charging defendant with one count of predatory criminal sexual assault of a child from January 1, 2016, to October 31, 2016, as well as four counts of predatory criminal sexual assault of a child, one count of aggravated criminal sexual abuse, and two counts of attempted predatory criminal sexual assault of a child from February 24, 2012, to October 31, 2016.

¶ 5 On January 17, 2023, the trial court held defendant's five-day jury trial. Following *voir dire*, the State presented their opening statement. The State stated defendant and R.K.'s mother, Destiny, met and married in 2010 when R.K. was two or three years old. R.K. and Destiny moved into defendant's residence at some point, and Destiny gave birth to R.K.'s younger sister, defendant's daughter, in 2011. After staying home with her children for some time, Destiny returned to work for 13 hours per week in July 2012 until 2015. The State asserted that while Destiny worked, defendant regularly instructed R.K., who was five and until she was nine years old, to place her mouth on his penis on multiple occasions around their residence. The State argued that the jury would see defendant's demeanor during a police interview following R.K.'s disclosure of defendant's alleged abuse. The State contended:

“Was he vigorously opposing the accusations and proclaiming his innocence in the interview? Was he direct in his responses proclaiming that anyone who would accuse him of such a thing was a liar that was lying? Or was he giving misdirection half-denial denials?

You're going to hear what he had to say about the allegations and what he said about [R.K.] as a person. You're going to have to decide which one of them is telling the truth. Is it her or is it him? It has to be one or the other. And you're going to be able to view both of them and consider which one has the reason and a reason to lie and not open up about the whole truth, and ultimately you have to decide which one you believe is telling the truth.”

¶ 6 The State proceeded to argue that defendant confirmed he separated from Destiny in 2016, at which time defendant lived in his mother's home, prior to their divorce in 2019. The State highlighted that defendant attempted to continue visitation with R.K., “including trying to get [R.K.'s biological] dad to give up his visitation time.” Despite his desire to have visitation with

R.K., defendant maintained with police that he never had alone time with R.K. for six years. The State continued to argue:

“When confronted with the fact that [R.K.] had said he had made her suck on his penis and touched her, aside from misdirection denials, more importantly is that he won’t even say that she’s lying or a liar for saying these things about him that have led to him being in jail with [Illinois State Police] investigators.”

Following the State’s opening statement, defense counsel reserved their opening statement for the beginning of their case.

¶ 7 The testimony elicited at defendant’s jury trial demonstrated that R.K. informed her best friend, L.S., in sixth grade over Facetime that defendant, R.K.’s stepfather at the time, “forced [her] to suck his private parts, and she got touched inappropriately.” L.S. testified that R.K. said this happened for about three years when defendant and R.K. were alone and her mother was not in the home. R.K. informed L.S. that defendant touched her in a bedroom, a bathroom, and at defendant’s house. Another friend of R.K.’s, J.W., testified that R.K. told her in 2021 that defendant had sexually abused her, and no one knew about it. J.W. testified that R.K. vocalized suicidal thoughts, which prompted J.W. to tell her family about the alleged sexual abuse. The court heard evidence from Andrew Grider, Destiny’s stepfather, that R.K. informed both he and Destiny that defendant raped her after receiving a text message from J.W.’s father, Doug Wagner, on May 11, 2021. Following this disclosure, Doug arrived at Andrew and Destiny’s home to share J.W.’s disclosure concerning R.K. R.K.’s maternal grandmother, Candance Dale, testified that she watched R.K. and her younger sister when Destiny worked and defendant or his mother were unavailable.

¶ 8 Next, R.K., who was 15 years old at the time, testified that defendant “regularly,” starting when she was five years old, “made [her] suck on his private, and he, like, touched my private.” She testified that defendant made her do this from the age of five to nine years old when she was alone with him while her mother worked. R.K. testified that defendant first touched her in her bedroom after she bathed. After she took a bath, she put on pajamas and sat on her bed to watch television when defendant walked in and laid across her bed. After defendant laid down, he asked R.K. to “suck on his two fingers and, like, had his fingers down by his, like, waist area.” R.K. then “started, like, sucking on his fingers, but then he, like, moved it away, and then I started, like, sucking on his private part,” referring to defendant’s penis. R.K. confirmed that defendant had exposed himself. R.K. stated that she trusted defendant and “didn’t want to say, like, no and make him mad at me.”

¶ 9 Next, R.K. testified to an incident that occurred in her mother and defendant’s bedroom. R.K. sat on her mother and defendant’s bed on the covers watching television, when defendant, with half of his body under the covers on his bed, lifted up the covers and “looked at me, and [she] just, like, knew what he wanted me to do” because “it happened, like, so often.” She stated that she “went under the covers and started sucking on his private.” During this incident, R.K.’s younger sister and defendant’s biological daughter, K.H., walked in. Once defendant saw K.H., he “put his hand on [R.K.’s] head and made [her], like, stop, and [she] was like down there, and [she] remember[s] him telling [K.H.] to, like, go away and stuff.” K.H. then left defendant’s bedroom.

¶ 10 Next, R.K. testified to an incident that occurred in the kitchen of their residence when she was home alone with defendant. While in the kitchen, defendant asked R.K. if she “wanted vanilla ice cream.” After R.K. said yes to defendant’s question, she testified that he started to walk back and forth in the hallway with “his hand on his private, like moving it back and forth—like jerking

it off.” R.K. proceeded to state that defendant put her “mouth on his private, and this, like, stuff came out, and it was gross.” R.K. denied that defendant ever put chocolate syrup on his fingers and put them in her mouth.

¶ 11 R.K. also testified to an incident in the living room, where defendant had R.K. sit on her knees while defendant sat in a black leather chair. R.K. then sucked on defendant’s private. During that incident, defendant also flipped R.K. upside down and held her by her ankles while she sucked on his private. R.K. stated that she did not fully understand what she was doing at that time but did not feel she had a choice to say no. R.K. also testified to two incidents in the laundry room where defendant had R.K. suck on his private—the first incident while R.K. was on her knees and the second incident when defendant picked up R.K. and flipped her upside down. During the second incident, R.K. testified that defendant moved his chin around her vagina over her shorts. R.K. also testified to an incident after she bathed. She recalled taking a bath and then putting on a yellow robe. She then walked into her bedroom and was “leaning up against [her] bed watching the TV” when defendant asked to rub her shoulders. R.K. recalled feeling defendant’s “private part, like, up against [her] butt and like my private part area.” Defendant unsuccessfully attempted to penetrate R.K. with his penis. R.K. also testified to an incident when she was younger when defendant washed her private area with his two fingers and tried to insert his fingers into her vagina.

¶ 12 R.K. testified that when her mother and defendant were getting divorced, defendant lived with his mother in a home located behind R.K.’s mother’s home. R.K. testified that she would sometimes go to defendant’s mother’s home with her younger sister, K.H. During one incident in a spare bedroom, defendant sat on the bed while R.K. sat on her knees and sucked on his private. R.K. testified that defendant instructed her not to tell anyone about their sexual encounters.

Although defendant told her that she did not have to engage in this behavior with him anymore, R.K. testified that she continued to do it because she did not want to make him mad. R.K. testified that she did not realize the severity of defendant's requests until she told L.S., her best friend, when R.K. was 11 or 12 years old. R.K. then told another friend, J.W., who told her family. J.W.'s father then called R.K.'s mother and new stepfather, explaining that he needed to share something with them in person. When R.K.'s mother asked why J.W.'s father was coming over, R.K. shared that defendant had raped her.

¶ 13 The State also called Destiny, R.K.'s mother, who testified that she worked at Doug's Food Mart, her parents' business, off and on since 2012. Destiny testified that defendant watched R.K. a majority of the time when she worked. She also left R.K. alone with defendant when she ran errands and visited her horse. Destiny testified that she would spend at least two hours at the barn with her horse, and defendant watched R.K. during this time. Destiny testified that defendant paid attention to other women more than her, sharing that "[their] sex life was nothing besides giving him blow jobs."

¶ 14 After the State had presented most of its case-in-chief, the trial court announced outside the presence of the jury that Juror Alexis Schmittler had "apparently been discussing the case at length with a number of people *** in her circle of *** [c]heerleading." The court informed the State and defense counsel that they would bring in Juror Schmittler first to inform her the court would hold her in contempt and also excuse her as a juror. The court then asked if the State and defense counsel "agree that that's the plan?" Both the State and defense counsel answered in the affirmative. The following colloquy took place between the trial court and Juror Schmittler:

"THE COURT: *** It's come to my attention that there's been an allegation made that you have discussed this case with friends of yours in contradiction of the rule that I put in place at the beginning of this trial that I've advised you to not do every time that you've left this courtroom.

Do you understand this?

JUROR MS. SCHMITTLER: (Nodding).

THE COURT: Okay. Do you understand the nature of the allegation?

JUROR MS. SCHMITTLER: Yes.

THE COURT: All right. So I'm going to tell you this, I'm not going to deal with this today. I'm going to have you come back next Tuesday. Now, we can handle this a number of ways. You can either admit to me now that, in fact, you foolishly talked about this case to some of your friends, and if that's the case, I can guarantee you, I will go lightly on you. But if I have to further investigate this matter, call people in here as witnesses, and then find out, in fact, that the allegations are true, I can guarantee you, I will put you in jail.

Do you understand that?

JUROR MS. SCHMITTLER: Yes.

THE COURT: Yes?

JUROR MS. SCHMITTLER: Yes.

THE COURT: Are the allegations true that you discussed this case?

JUROR MS. SCHMITTLER: I told them that I was on the jury.

THE COURT: But you discussed nothing else about the case, your impressions about it?

JUROR MS. SCHMITTLER: No. I never said if I thought anyone was guilty or anything.

THE COURT: Who did you discuss it with?

JUROR MS. SCHMITTLER: I told my work. I told my cheer coach and team.

THE COURT: Okay. What else did you say about it to your cheer coach and team? Did you comment on any of the witnesses?

JUROR MS. SCHMITTLER: On what?

THE COURT: On any of the witnesses. Now is the time to be honest about it. If you did something foolish, fine. Okay? Everybody does something foolish. If I have to—I'm telling you right now—if I have to call other people in here to establish what exactly was said—

JUROR MS. SCHMITTLER: Uh-huh.

THE COURT:—and if that matches up to what I've heard—because the allegation alone is sufficient to excuse you from this case. So you're being excused as a juror today. Now, whether or not I hold—well, I'm going to hold you in contempt if I find the allegations to be true. All right? And I'm going to tell you right now, if I have to go and have an investigation on it—which I am certainly capable of doing and I'm telling you right now I'm going to do—unless you tell me right now that what I've heard is true that you discussed aspects of this case with people that you know.

JUROR MS. SCHMITTLER: Uh-huh.

THE COURT: Did you do that?

JUROR MS. SCHMITTLER: I told them that I didn't know who was guilty or if it was a lie or if it was the truth. I didn't say what I thought that anyone was lying.

THE COURT: Did you discuss your impressions of the witnesses with these people?

JUROR MS. SCHMITTLER: That I thought that somebody was lying or?

THE COURT: I'm not going to put words in your mouth. Did you discuss any aspect of the witnesses with these people?

JUROR MS. SCHMITTLER: I said that I didn't know that if I believed them or not.

THE COURT: Okay. I'm going to have you come up here. This is your notice. You'll be here next Tuesday at 9:00."

After instructing the remaining jurors that Juror Schmittler had been excused, the trial court moved the alternate juror, Juror Mr. Schular, to the jury panel. Following the close of the State's case-in-chief, defense counsel made an oral motion for a directed verdict, which the trial court denied.

¶ 15 Following defense counsel's opening statement, defendant testified on his own behalf. Defendant testified that he met Destiny through her family. R.K. was "[a]bout two-and-a-half-ish" years old when Destiny and R.K. moved in with defendant. Destiny became pregnant early on in their relationship and the two got married quickly. However, the marriage relationship rapidly declined because of "numerous arguments" and "jealousies." The couple separated during the divorce proceedings, but R.K. and K.H. would still visit defendant.

¶ 16 Defendant denied ever being home alone with R.K. He denied ever molesting or having sexual contact with R.K. He first learned of R.K.'s allegations when he received a call that his parenting time with K.H. was temporarily suspended, but he did not know the full scope of the allegations until his later arrest. When asked in his police interview whether he thought R.K. was a liar, defendant recalled saying, "I'm not calling her a liar." Defendant explained that he answered this way because "everything that was being told to [him] was not directly coming from [R.K.]." He testified that he only heard the accusations "directly from [R.K.'s] mouth" the week leading up to the trial. Defendant said he would answer the question differently after seeing R.K.'s video-recorded forensic interview.

¶ 17 During cross-examination, defendant denied ever being alone with R.K., and further denied that the two of them were ever lying together on a bed or a couch without anyone else present. The State then introduced defendant's last Facebook cover photo: a selfie-style picture of defendant

and R.K. lying next to each other. The State asked why defendant still had this cover photo despite not seeing R.K. for six years and why he testified that he never laid alone with R.K. Defendant rebutted that K.H. was in the picture but just cropped out. Defense counsel did not object to the introduction of the Facebook photo. Defendant acknowledged that he may have been alone with R.K. and K.H. when Destiny was at work. Defendant's divorce and custody arrangement with Destiny did not provide visitation time with R.K. Defendant testified that he attempted to reach an agreement with R.K.'s biological father where R.K.'s biological father gave up his visitation time to defendant. After further testimony, the State sought to admit the Facebook photo. Defense counsel stated she had not seen the exhibit yet. Following an off-the-record discussion, the trial court admitted the photo.

¶ 18 During closing statements, the State asserted that the jurors heard of "regular and continuous sexual conduct from a father-figure towards his stepdaughter," specifically that defendant "plac[ed] his penis in [R.K.'s] mouth on a weekly basis." After going through each count charged against defendant and the specifics associated with each count and discussing the evidence elicited from each witness, the State argued:

"But ask yourself, do you think he reacted as an innocent man when he was interviewed? Does an innocent man not ask questions for an hour? Does an innocent man who's been arrested, told that he has this bond and he's got this—he doesn't know what the charges are he says? Does he not want to find out what the details are about what he's alleged to have done? Or whenever the questions do come up, why is he quick to go to another subject?

* * *

Does an innocent man not call someone who falsely accused him of putting his penis in her mouth over and over a liar? Absolutely, an innocent man does. Absolutely. Yeah, that's a lie. Of course I didn't do that. Let me see the stuff. What are they saying? There's no way I did that."

The State further argued that defendant lacked emotion when police told him that he was alleged to have fondled R.K. Instead, the State argued that defendant showed more emotion discussing Destiny deleting photos off his phone. The State claimed that defendant "tried to manipulate all of us." Regarding defendant's testimony, the State contended that it confirmed R.K.'s testimony about what defendant normally wore, the television in his bedroom, and Destiny and defendant regularly having oral sex. The State called defendant's claim that he and R.K. were never alone "outlandish" and "ridiculous." The State contended that R.K. was "not sophisticated enough to pull off a lie of this magnitude." The State told the jury that they "do have to choose. One of them is lying. One of them is lying." The State further argued that if R.K. was lying then she would also exaggerate beyond her allegations. In closing arguments, defense counsel contended that R.K. testified inconsistently with her video-recorded forensic interview.

¶ 19 Following the close of evidence and closing arguments, the jury found defendant guilty of six counts of predatory criminal sexual assault and one count of attempt to commit predatory criminal sexual assault.

¶ 20 On March 7, 2023, defendant filed a motion for judgment notwithstanding the verdict and, in the alternative, a motion for a new trial. Defendant, represented by new counsel, subsequently filed an amended motion for judgment notwithstanding the verdict and, in the alternative, a motion for a new trial. In his amended motion, defendant incorporated by reference each ground stated in his original posttrial motion, as well as arguing, *inter alia*, that defense counsel rendered

ineffective assistance of counsel, the trial court erred by removing a juror, claiming “representatives of the State prompted said juror to comment on the pending case,” and the State violated defendant’s due process rights by making improper burden-shifting arguments in both opening statements and closing arguments in violation of the protections under the Illinois and United States Constitutions.

¶ 21 On July 24, 2023, the trial court held defendant’s sentencing hearing. At the hearing, defense counsel called character witnesses on behalf of defendant who read statements into the record. The State then argued that defendant abused his trusted position as a stepfather to abuse R.K. The State requested that the court consider factors in aggravation and sentence defendant to 10 years on count VI and 36 years per count on counts I to V and VII. Defense counsel then argued that defendant maintained his innocence and had many character witness letters attesting to his good character. Defense counsel asked that the court sentence defendant to the minimum possible sentence. The court then heard victim impact statements from Candance Dale, Destiny, and R.K. Defendant declined to speak in allocution. The court sentenced defendant to 54 years in prison followed by three years MSR.²

¶ 22 Following several continuances, on March 15, 2024, the trial court held a hearing on defendant’s motion for judgment notwithstanding the verdict and, in the alternative, a motion for a new trial. Defense counsel called Juror Schmittler to testify. Juror Schmittler testified that she was on defendant’s jury until being dismissed by the trial court after she “told my work and my cheer coach and cheer team” that she “had not heard enough about the case to make a decision.” She denied speaking about specific witnesses or evidence. When asked what her verdict would

²The trial court sentenced defendant to nine years in prison on each of the six counts of predatory criminal sexual assault to be served consecutively, and nine years on the one count attempt to commit predatory criminal sexual assault to be served concurrently.

have been considering what she had heard so far, Juror Schmittler stated that she “probably would have had some doubt.” On cross-examination, Juror Schmittler acknowledged she discussed her “feelings about the case” with people outside the courtroom.

¶ 23 Defense counsel then called defendant’s original defense counsel, Attorney Paige Strawn. Attorney Strawn testified that she represented defendant at his trial. Attorney Strawn stated that the parties were informed about a potential juror issue during a break. An employee with the State’s Attorney’s office had a daughter on the cheer team that Juror Schmittler co-coached. Attorney Strawn testified that “an opinion had been given” but stated she did not inquire because she felt it was more appropriate for the court to do so. She declined to request that the parties’ discussion with the court be placed on the record because she “was very concerned about what had potentially been said that was going to harm my client, and I certainly didn’t want it to be highlighted or given any[]more power than it already had.” Attorney Strawn further explained that she did so because the alleged juror’s disclosure occurred at the school attended by R.K. When asked if there was a strategic reason for not objecting to the juror’s removal, Attorney Strawn replied in the affirmative because she thought “that was enough attention that was potentially very harmful, and it needed to be excised from the entire operation.”

¶ 24 Attorney Strawn next testified to a discovery issue. Defendant’s video-recorded interview with police was broken into separate clips and “[i]t wasn’t until the very last minute that we didn’t know that there was another chunk at the end of the videos.” Attorney Strawn clarified that she did not discover the missing video until the first day of trial. She did not believe the State intentionally withheld it from defendant. She did not object to the video’s admission or request a continuance because she was provided with the missing segment, given the opportunity to review it, and determined that it “didn’t have any impact whatsoever” and “didn’t change anything.”

¶ 25 Attorney Strawn then testified that the State did not initially provide defendant’s Facebook cover photo to defendant. The State provided the photo to defendant about a week prior to trial. While she believed she should have received the photo sooner to potentially retrieve the original uncropped version, Attorney Strawn testified that defendant’s testimony that the original version contained both children would have been the same either way. Attorney Strawn also indicated that defendant was aware of the photo because it originated from his own Facebook.

¶ 26 On October 28, 2024, the trial court entered an order denying defendant’s motions. Defendant filed a timely notice of appeal.

¶ 27 II. ANALYSIS

¶ 28 Defendant argues on appeal that the trial court violated his due process rights under both the Illinois and United States Constitutions by removing juror Alexis Schmittler from the jury panel. Next, defendant contends the State violated his rights to be presumed innocent and remain silent by making improper arguments in both its opening statement and closing argument. Lastly, defendant argues that defense counsel rendered ineffective assistance of counsel by failing to object to the admission of defendant’s recorded interview and defendant’s Facebook cover photo and by failing to request a “reasonable inquiry into the prosecution’s request to remove [J]uror Schmittler or to object to her removal or to move for a mistrial.”

¶ 29 As an initial matter, the State asks that, pursuant to Illinois Supreme Court Rule 341(h)(6) (eff. Oct. 1, 2020), we strike defendant’s statement of facts contained in his brief because it is “impermissibly argumentative,” “contains material omissions,” and “mischaracterizes evidence.” Rule 341(h)(6) does indeed require a brief’s statement of facts to be “stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal.” Ill. S. Ct. R. 341(h)(6) (eff. Oct. 1, 2020). We agree with the State that defendant’s

statement of facts does not comport with the requirement. However, striking a brief or a portion of a brief is within this court's discretion. *McCann v. Dart*, 2015 IL App (1st) 141291, ¶ 12. We find that defendant's violations do not hinder this court's ability to review the matter. Therefore, we will not strike defendant's statement of facts but will take into account the presentations of the parties and our own extensive review of the record on appeal. *McMackin v. Weberpal Roofing, Inc.*, 2011 IL App (2d) 100461, ¶ 3. We admonish defendant to adhere to the briefing requirements of our supreme court rules.

¶ 30

A. Removal of Juror Schmittler

¶ 31 First, defendant argues that his due process rights under both the Illinois and United States Constitutions were violated when the trial court removed Juror Schmittler from the jury panel. Defendant contends the trial court removed Juror Schmittler "based solely upon the second-hand rumors" from the prosecution and that the court "already made the decision to remove the juror *before* the inquiry took place." (Emphasis original.). Defendant further argues that, although defense counsel failed to object to Juror Schmittler's removal, the removal affected the fundamental fairness of the trial and tipped the scales of justice against defendant. Therefore, defendant seeks this court's review of this issue for plain error.

¶ 32 The State responds that plain error does not apply because defense counsel assented to Juror Schmittler's removal, thereby inviting the alleged error. The State further contends that the trial court did not abuse its discretion in removing Juror Schmittler because the court conducted an adequate inquiry before removing Juror Schmittler for admitted juror misconduct. We agree that this issue is precluded by invited error.

¶ 33 A defendant waives the right to raise an issue on appeal if the defendant fails to object at trial and to raise the issue in a posttrial motion. *People v. Harvey*, 211 Ill. 2d 368, 385 (2004). A

defendant may escape the harshness of the strict application of the waiver rule via the plain error. *Id.* However, “[p]lain-error review is forfeited when a defendant invites the error.” *People v. Johnson*, 2013 IL App (2d) 110535, ¶ 77. Under the invited-error doctrine, a defendant may not request that the trial court proceed in one manner and then later contend on appeal that the course of action was in error. *Id.* The doctrine is sometimes referred to as one of estoppel. *Harvey*, 211 Ill. 2d at 385. To allow a defendant to use a procured ruling as a later vehicle for reversal on appeal would “offend notions of fair play, encourage defendants to become duplicitous [citation], and deprive the State of the opportunity to cure the alleged defect.” *Johnson*, 2013 IL App (2d) 110535, ¶ 77.

¶ 34 Here, defendant’s claim is precluded by invited error. Upon learning that Juror Schmittler discussed the case outside the courtroom, the court informed the State and defense counsel that they would bring in Juror Schmittler first to inform her the court would hold her in contempt and also excuse her as a juror. The court then asked if the State and defense counsel “agree that that’s the plan?” Both the State and defense counsel answered in the affirmative. Defense counsel expressly acquiesced to the actions taken by the trial court and never objected. Further, at the March 15, 2024, motion hearing, Attorney Strawn explained the decision to agree to Juror Schmittler’s removal. Attorney Strawn testified that “an opinion had been given” but stated she did not inquire because she felt it was more appropriate for the court to do so. She declined to request that the parties’ discussion with the court be placed on the record because she “was very concerned about what had potentially been said that was going to harm my client, and I certainly didn’t want it to be highlighted or given any[] more power than it already had.” When asked if there was a strategic reason for not objecting to the juror’s removal, Attorney Strawn replied in

the affirmative because she thought “that was enough attention that was potentially very harmful, and it needed to be excised from the entire operation.”

¶ 35 Defendant acknowledges that the issue of Juror Schmittler’s removal was not preserved for appeal and asks us to review under plain error. However, the record demonstrates that Juror Schmittler’s removal constitutes invited error, and therefore, even plain error is precluded. *Id.* Defense counsel acquiesced to the trial court’s actions and later explained the purposeful, strategic nature of that choice. We therefore find that defendant is barred from raising this issue on appeal.³

¶ 36 B. The State’s Opening Statement and Closing Argument

¶ 37 Second, defendant contends the State violated defendant’s rights to be presumed innocent and remain silent by making improper arguments in both its opening statements and closing argument. Specifically, defendant points to the prosecution’s comments that defendant failed to explicitly deny the allegations or call R.K. a liar in his police interview. The State rebuts that defendant forfeited the issue by failing to object to the comments. The State further argues that the prosecution’s comments were proper because they addressed defendant’s voluntary statements after he waived his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)), and the comments did not shift the burden of proof because the prosecution “properly asked the jury to make necessary credibility determinations based on the evidence presented at trial.”

¶ 38 Defendant forfeited this issue by failing to object to the prosecution’s comments at trial. Defendant does not expressly ask this court to review the issue under plain error, however, defendant does cite several cases in which courts have reviewed prosecutorial comments under plain error despite a lack of objection. See *People v. Yonker*, 256 Ill. App. 3d 795 (1993), *People*

³We note defendant also raises this issue via ineffective assistance of counsel. We address this *infra*.

v. Wilson, 199 Ill. App. 3d 792 (1990), *People v. Ridley*, 199 Ill. App. 3d 487 (1990). Therefore, we will review defendant’s contentions under plain error.

¶ 39 A defendant forfeits a claim unless he both objected at trial and raised it in a posttrial motion. *People v. Sebby*, 2017 IL 119445, ¶ 48. Forfeiture can be excused under the plain error doctrine. *Id.* Illinois courts have identified two instances—or prongs—where forfeiture is excused under plain error: “(1) 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 when “(2) 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.” *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 40 “The initial analytical step under either prong of the plain error doctrine is determining whether there was a clear or obvious error at trial.” *Sebby*, 2017 IL 119445, ¶ 49 (citing *Piatkowski*, 225 Ill. 2d at 565). Prejudice is presumed under the second prong of plain-error review due to the importance of the right involved. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Our supreme court has “equated the second prong of plain-error review with structural error,” noting that “ ‘automatic reversal is only required where an error is deemed “structural,” i.e., a systemic error which serves to “erode the integrity of the judicial process and undermine the fairness of the defendant’s trial.” ’ ” *Id.* at 613-14 (quoting *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009) (quoting *People v. Herron*, 215 Ill. 2d 167, 186 (2005))).

¶ 41 “Prosecutors are afforded wide latitude in closing argument.” *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). A prosecutor’s improper comments will result in reversal only if they were so prejudicial that they constitute a material factor in the defendant’s conviction. *Id.* Prosecutors may

not use a defendant's postarrest, post-*Miranda* silence against them. *Doyle v. Ohio*, 426 U.S. 610 (1976). But prosecutors may comment on a defendant's statements, demeanor, or omissions during a voluntary police interview or after the defendant waived his *Miranda* rights. *Anderson v. Charles*, 447 U.S. 404, 408 (1980). If a defendant voluntarily speaks to police, the prosecution may comment on what a defendant says or omits. See *People v. Hart*, 214 Ill. 2d 490, 514-16 (2005) (collecting cases). It is impermissible for the prosecutor to attempt to shift the burden of proof to the defendant. *People v. Phillips*, 127 Ill. 2d 499, 527 (1989). However, "[n]ot every prosecutorial statement questioning relevance or credibility rises to an impermissible shifting of the burden." *Id.* Even if the prosecutor's comments are improper, the verdict will not be disturbed unless the remarks cause substantial prejudice to the defendant. *People v. Williams*, 192 Ill. 2d 548, 573 (2000). The content and context of the comments, their relationship to the evidence, and their effect on the defendant's right to a fair and impartial trial must be considered. *Id.* Whether statements made by a prosecutor were so egregious that they warrant a new trial is reviewed *de novo*. *Wheeler*, 226 Ill. 2d at 121 (citing *People v. Graham*, 206 Ill. 2d 465 (2003)). To constitute plain error, a prosecutor's comments must have affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *Herron*, 215 Ill. 2d at 187. Because defendant forfeited this claim, we review it for plain error, the first step of which is to determine whether a clear or obvious error occurred at all. Whether the prosecutor's comments were improper is a question of law that we review *de novo*; if the comments were proper, there was no error and our inquiry ends.

¶ 42 Here, the prosecution made comments regarding defendant's failure to explicitly deny the allegations or call R.K. a liar in his police interview. In opening, the State argued that the jury would see defendant's demeanor during a police interview following R.K.'s disclosure of defendant's alleged abuse. The State argued:

“Was he vigorously opposing the accusations and proclaiming his innocence in the interview? Was he direct in his responses proclaiming that anyone who would accuse him of such a thing was a liar that was lying? Or was he giving misdirection half-denial denials?

You’re going to hear what he had to say about the allegations and what he said about [R.K.] as a person. You’re going to have to decide which one of them is telling the truth. Is it her or is it him? It has to be one or the other. And you’re going to be able to view both of them and consider which one has the reason and a reason to lie and not open up about the whole truth, and ultimately you have to decide which one you believe is telling the truth.”

¶ 43 The State later argued in its opening:

“When confronted with the fact that [R.K.] had said he had made her suck on his penis and touched her, aside from misdirection denials, more importantly is that he won’t even say that she’s lying or a liar for saying these things about him that have led to him being in jail with [Illinois State Police] investigators.”

¶ 44 In its closing argument, the State argued:

“But ask yourself, do you think he reacted as an innocent man when he was interviewed? Does an innocent man not ask questions for an hour? Does an innocent man who’s been arrested, told that he has this bond and he’s got this—he doesn’t know what the charges are he says? Does he not want to find out what the details are about what he’s alleged to have done? Or whenever the questions do come up, why is he quick to go to another subject?

* * *

Does an innocent man not call someone who falsely accused him of putting his penis in her mouth over and over a liar? Absolutely, an innocent man does. Absolutely. Yeah, that's a lie. Of course I didn't do that. Let me see the stuff. What are they saying? There's no way I did that."

¶ 45 We disagree with defendant that these comments were improper. We find that the prosecutor's comments neither improperly commented upon defendant's silence nor shifted the burden to defendant. First, the prosecutor did not improperly use defendant's constitutional right to remain silent against him. Instead, the prosecutor highlighted defendant's demeanor, omissions, and inconsistencies in a voluntary, post-*Miranda* interview with police. *Hart*, 214 Ill. 2d at 514-16. Such comments are permissible. We agree with the State that defendant's reliance on *Ridley*, 199 Ill. App. 3d 487, is misplaced. In *Ridley*, the prosecution commented on the defendant's post-arrest silence in his police interview. *Id.* at 492. The *Ridley* court found that the prosecution's comment was intended to invite the jury to infer from the defendant's silence that his alibi defense was a fabrication. *Id.* In contrast, here, the prosecutor commented upon defendant's statements, omissions, and demeanor while freely speaking to police in a voluntary interview. We do not find that the prosecution's comments in this regard were improper.

¶ 46 Second, the prosecutor did not improperly shift the burden of proof to defendant by telling the jury they would have to decide which witness to believe and suggesting that defendant would explicitly call R.K. a liar if he were innocent. A prosecutor may not tell a jury that "in order to believe the defense witnesses the jury must find that each of the State's witnesses were lying." *People v. Cole*, 80 Ill. App. 3d 1105, 1108 (1980). A prosecutor may comment on the evidence and any fair, reasonable inferences drawn therefrom (*People v. Nicholas*, 218 Ill. 2d 104, 121

(2005)) and may question the credibility of a defendant where the defendant's testimony directly contradicted that of a significant state witness. *People v. Pegram*, 152 Ill. App. 3d 656, 664 (1987).

¶ 47 Here, the prosecutor did not inform the jury that in order to believe defendant they must find that all the State's witnesses were lying. Instead, the prosecutor told the jury that they would have to make a credibility determination between conflicting testimonies of two witnesses: R.K. and defendant. The prosecution placed the two conflicting testimonies before the jury and argued that they, as fact finders, must determine which testimony was credible. Additionally, the prosecution also permissibly commented that the jury could make inferences from defendant's refusal to call R.K. a liar—both in his interview and when questioned on the witness stand. The prosecution's comments were based on the evidence and testimony before the jury and did not improperly shift the burden to defendant. We do not find defendant's use of *Yonker*, 256 Ill. App. 3d 795, persuasive. In *Yonker*, the prosecutor argued that "the only way that you [the jury] can return a verdict of anything other than guilty of first degree murder is if you believe [the defendant]. That's the only way." (Internal quotation marks omitted.) *Id.* at 798. The *Yonker* court found that this "went beyond questioning the credibility or the relevance of the defendant's evidence and directly misstated the burden of proof." *Id.* at 800. Such a misstatement is not seen here. The prosecution in defendant's case did not suggest to the jury that defendant bore any burden to prove his innocence. Instead, the prosecutor invited the jury to make inferences and credibility determinations from the evidence and testimony before them. Finally, we note that a court may cure the prejudicial effect of improper comments made in closing arguments by instructing the jury that closing arguments are not evidence. See *People v. Simms*, 192 Ill. 2d 348, 396 (2000). To reiterate, we do not find that the prosecution's comments were improper. Even still, the jury was properly instructed that closing arguments are not evidence, thus further protecting defendant's

right to a fair and impartial trial. Because we do not find that the prosecution’s arguments and comments were improper, we consequently find that no clear or obvious error occurred. *Sebby*, 2017 IL 119445, ¶ 49.

¶ 48

C. Effectiveness of Defense Counsel

¶ 49 Lastly, defendant argues that defense counsel rendered ineffective assistance of counsel by failing to object to the admission of defendant’s recorded interview and defendant’s Facebook cover photo, and by failing to request a “reasonable inquiry into the prosecution’s request to remove [J]uror Schmittler or to object to her removal or to move for a mistrial.”⁴ The State rebuts that defendant received effective assistance of counsel where defense counsel made strategic choices.

¶ 50 Claims of ineffective assistance of counsel are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668, (1984). “A defendant must show that his counsel’s performance fell below an objective standard of reasonableness and that there is a reasonable probability that the result of the proceeding would have been different but for counsel’s unprofessional errors.” *People v. Jones*, 2023 IL 127810, ¶ 51 (citing *Strickland*, 466 U.S. 668 at 694). Strategic choices or matters of trial strategy are “virtually unchallengeable,” (*Strickland*, 466 U.S. 668 at 690) and are “generally immune from ineffective assistance of counsel claims.” *Jones*, 2023 IL 127810, ¶ 51 (citing *People v. Manning*, 241 Ill. 2d 319, 327 (2011)). We review a claim of ineffective assistance of counsel *de novo*. *People v. Hale*, 2013 IL 113140, ¶ 15.

¶ 51 Defendant received effective assistance of counsel where defense counsel permitted the admission of the video-recorded interview, Facebook cover photo, and removal of Juror Schmittler

⁴Despite our ruling, *supra*, that defendant’s claim regarding Juror Schmittler’s removal is precluded for invited error, we acknowledge that claims of ineffective assistance of counsel are not barred by the invited error doctrine. *People v. Drew*, 2024 IL App (5th) 240697, ¶ 31. Therefore, we will address defendant’s ineffective assistance of counsel claim on this issue.

as part of a sound trial strategy. Attorney Strawn testified that defendant's video-recorded interview with police was broken into separate clips and "[i]t wasn't until the very last minute that we didn't know that there was another chunk at the end of the videos." Attorney Strawn clarified that she did not discover the missing video until the first day of trial when one of the video clips ended abruptly. She did not believe the State intentionally withheld it from defendant or acted in bad faith. She did not object to the video's admission or request a continuance because she was provided with the missing segment, given the opportunity to review it, and determined that it "didn't have any impact whatsoever" and "didn't change anything."

¶ 52 Regarding defendant's Facebook cover photo, Attorney Strawn testified that the State did not initially provide defendant's Facebook cover photo to defendant. The State provided the photo to defendant about a week prior to trial. While she believed she should have received the photo sooner to potentially retrieve the original uncropped version, Attorney Strawn testified that defendant's testimony that the original version contained both children would have been the same either way. Attorney Strawn also indicated that defendant was aware of the photo because it originated from his own Facebook. Attorney Strawn testified that "[she did not] think defendant's explanation would have changed" regardless of when the photo was disclosed.

¶ 53 Lastly, Attorney Strawn testified as to her strategic decision-making regarding the removal of Juror Schmittler. Attorney Strawn testified that "an opinion had been given" but stated she did not inquire because she felt it was more appropriate for the court to do so. She declined to request that the parties' discussion with the court be placed on the record because she "was very concerned about what had potentially been said that was going to harm my client, and I certainly didn't want it to be highlighted or given any[] more power than it already had." When asked if there was a strategic reason for not objecting to the juror's removal, Attorney Strawn replied in the affirmative

because she thought “that was enough attention that was potentially very harmful, and it needed to be excised from the entire operation.”

¶ 54 We decline to revisit or question Attorney Strawn’s strategic choices “through the lens of hindsight.” *People v. Perry*, 224 Ill. 2d 312, 344 (2007). Attorney Strawn thoroughly explained her reasoning as to why she chose not to object to the admission of evidence and the removal of a juror. Those decisions are trial strategy in its purest form: “decisions regarding ‘what matters to object to and when to object’ are matters of trial strategy.” *Id.* (quoting *People v. Pecoraro*, 175 Ill. 2d 294, 327 (1997)). Because defense counsel chose not to object to the removal of Juror Schmittler and the admission of defendant’s video-recorded interview and Facebook cover photo as a matter of trial strategy, we find that defense counsel did not render deficient performance or ineffective assistance of counsel.

¶ 55 III. CONCLUSION

¶ 56 For the foregoing reasons, we affirm the judgment of the White County circuit court.

¶ 57 Affirmed.