No. 125091

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, Third District, No. 3-15-0556.
Plaintiff-Appellant,	)	
	)	There on Appeal from the Circuit Court of the Twenty-first Judicial Circuit, Kankakee County, Illinois, No. 09 CF 630
v.	)	
JOSEPH A. HOLLAHAN,	)	The Honorable Susan S. Tungate,
Defendant-Appellee.	)	Judge Presiding.

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

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I. The Trial Court Did Not Commit Clear and Obvious Error.

A. The trial court did not abuse its discretion by suspending deliberations to allow the jury to review the recording in the presence of the court and the parties.

The trial court's decision to briefly suspend deliberations and replay the video in the courtroom in the presence of non-jurors (the court, the parties, and the alternate jurors) was a reasonable exercise of the court's inherent authority and, therefore, was not clear or obvious error. *See J.S.A. v. M.H.*, 224 Ill. 2d 182, 196 (2007) (trial judge has inherent authority to manage courtroom and proceedings before it); *see also* Peo. Br. 6.[1] Defendant acknowledges that the trial court may exercise its discretion to require a deliberating jury to review video evidence "in the courtroom under court supervision with the parties present." Def. Br. 8-9. Accordingly, to establish that plain error occurred here, defendant must show that the trial court clearly and obviously abused that discretion. *See People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (first step in plain error analysis is to determine whether clear and obvious error occurred). A court abuses its discretion only where "no reasonable person would take the position adopted by the circuit court." *Peach v. McGovern*, 2019 IL 123156, ¶ 25.

Here, it cannot be said that no reasonable person would take the position adopted by the trial court, for several districts of the appellate court

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[1] Citations to the People's opening brief, defendant's appellee brief, and the People's petition for leave to appeal appear as "Peo. Br. __," "Def. Br. __," and "PLA __," respectively.

SUBMITTED - 9029511 - Criminal Appeals, OAG - 4/7/2020 8:14 AM

have taken the same position. *See People v. Rouse*, 2014 IL App (1st) 121462, ¶¶ 69 & 78 (finding no abuse of discretion in playing video recording in courtroom due to "technical difficulties"); *People v. Lewis*, 2019 IL App (4th) 150637-B, ¶ 99 ("[I]f a jury, during its deliberations, requests to see or hear a recording again, the trial court need not send the recording and equipment into the jury room but instead may, in its discretion, have the jury brought back into the courtroom for a replaying of the recording."); *see also People v. McKinley*, 2017 IL App (3d) 140752, ¶ 23 (opinion of Carter, J.).

Moreover, the trial court's decision was clearly reasonable. The jury's request to review the video created a dilemma because the jury room was not equipped to play it. RP4 at 211-12. The trial judge exercised discretion to craft a solution that allowed the jury to review the video despite the technical limitations of the jury room. She made sure that both parties were present and aware of the procedure, so that there would be no perception of bias. RP4 at 211-12. Once the jury was brought into the courtroom, the judge informed the jurors that the video would be replayed and no one would speak to them. RP4 at 212. By instructing the non-jurors to remain silent, she made sure that no one influenced the jurors or interfered with their deliberations. *Id.* at 211-12. Moreover, contrary to the appellate court's finding and defendant's assertions, the trial judge did not limit the jury to a single replay; instead she informed the jurors that someone could adjust the sound or do "anything that we can do," which jurors would reasonably

SUBMITTED - 9029511 - Criminal Appeals, OAG - 4/7/2020 8:14 AM

understand to permit a request to replay the video if desired. RP4 at 212. The jury then watched the video, and returned to the jury room to resume their deliberations without interference. RP4 at 212-13.

The court's actions were carefully tailored to the problem presented by the jury's request to review the video given the technical limitations of the jury room and conformed to the opinions of multiple panels of the Illinois Appellate Court. Thus, the trial court did not clearly and obviously abuse its discretion.

There is no merit to defendant's argument that the trial court's actions were clear and obvious error because they violated his constitutional right "to have the jury deliberate in private," Def. Br.16, for there is no constitutional right to wholly secret and private jury deliberations. Privacy and secrecy requirements are procedural tools with the "primary, if not exclusive purpose" of protecting jurors from improper influence. *United States v. Olano*, 507 U.S. 725, 737-738 (1993). Thus, because no improper influence of the jury occurred, no constitutional concerns are raised. And, in any event, the privacy and secrecy of the jury's deliberations were not broken because no deliberations took place during the video replay. The trial court exercised its discretion to briefly suspend deliberations during the viewing of the video. The record shows neither that the jury actually deliberated nor attempted to deliberate during this brief suspension. And, as noted above, defendant has

SUBMITTED - 9029511 - Criminal Appeals, OAG - 4/7/2020 8:14 AM

acknowledged that such suspensions are within the court's discretion and sometimes appropriate. *See* Def. Br. 8-9.

Defendant's related arguments that the trial court violated the statutes that govern jury deliberations, *see* Def. Br. 15-18, are similarly misplaced because no evidence exists that anyone conversed with the jury or overheard any deliberations during the brief replay.

B. The People did not forfeit their argument that no clear and obvious error occurred.

This Court should reject defendant's argument that the People forfeited their argument (that no clear and obvious error occurred) because it was not included in their petition for leave to appeal (PLA). Def. Br. 14-15. Although a party may forfeit issues omitted from the PLA, "[w]hen an issue is not specifically mentioned in a party's petition for leave to appeal, but it is 'inextricably intertwined' with other matters properly before the court, review is appropriate." *People v. Becker*, 239 Ill. 2d 215, 239 (2010) (quoting *People v. McKown*, 236 Ill. 2d 278, 310 (2010)).

The People's PLA argued that the appellate court incorrectly found the trial court's ruling constituted second prong plain error. PLA 4-9. Although the People's argument focused primarily on the appellate court's analysis under the second prong, the first step in determining whether plain error occurred is determining whether there was any clear and obvious error. *Piatkowski*, 225 Ill. 2d 565. Thus, the existence of clear and obvious error is not a separate issue, but a necessary part of the analysis of the plain error

SUBMITTED - 9029511 - Criminal Appeals, OAG - 4/7/2020 8:14 AM

issue raised in the PLA. At the very least, the clear or obvious error question is inextricably intertwined with the second prong analysis. Accordingly, the People did not forfeit their argument that no clear and obvious error occurred. However, if this Court determines that the People forfeited this issue by failing to raise it in their PLA, this Court should exercise its discretion in favor of reviewing the issue. *See In re Rolandis G.*, 232 Ill. 2d 13, 37 (2008) ("[T]his court always has the authority to review a matter not properly preserved, or may decline to do so, as a matter of discretion."); *People v. McCarty*, 223 Ill.2d 109, 142 (2006) (exercising supervisory authority to review forfeited issue partly because "rule of forfeiture is an admonition to the parties and not a limitation on the jurisdiction of this [C]ourt") (quotation omitted).

II. Even If Clear or Obvious Error Occurred, It Did Not Rise to the Level of Second Prong Plain Error.

Even if clear or obvious error did occur — and it did not — and the trial court improperly intruded upon jury deliberations, defendant fails to satisfy his burden of establishing that any error constituted second prong plain error. Review under second prong plain error is reserved for errors so serious that prejudice must be presumed. *People v. Allen*, 222 Ill. 2d 340, 352 (2006). These errors are so grave that they challenge the integrity of the judicial process and deny the defendant any chance of a fair trial. *Id.*

No established precedent teaches that an intrusion on jury deliberations may constitute such an error. To the contrary, both the United

SUBMITTED - 9029511 - Criminal Appeals, OAG - 4/7/2020 8:14 AM

States Supreme Court and this Court have held that prejudice is not presumed when an improper intrusion upon the jury's deliberations occurs. The United States Supreme Court has required defendants to show prejudice where an individual had attempted to bribe a juror and where a bailiff made "egregious" comments to a juror. *Olano*, 507 U.S. at 739. Indeed, in *Olano*, as here, at issue was whether the silent presence of non-jurors warranted a presumption of prejudice; the Court held that it did not under federal plain error doctrine. *Id.*

Looking to *Olano* and its own precedent, this Court similarly found that an intrusion on the jury's deliberations did not warrant a presumption of prejudice. *See People v. McLaurin*, 235 Ill. 2d 478, 498 (2009). In *McLaurin*, this Court considered whether a bailiff's conversation with deliberating jurors constituted plain error. *Id.* at 490. The Court held that the bailiff's actions were not clear and obvious error because the defendant failed to show that prejudice had resulted from the bailiff's comments. *Id.* at 498. The Court explained that the defendant's alleged "generalities" regarding prejudice were insufficient. *Id.* at 499. Accordingly, because second prong plain error review is reserved for errors so grave that prejudice must be presumed, *Allen*, 222 Ill. 2d at 352, and this Court has held that a claim of an intrusion upon the jury does not require a presumption of prejudice, *McLaurin*, 235 Ill. 2d at 498, it follows that such a claim cannot constitute second prong plain error.

SUBMITTED - 9029511 - Criminal Appeals, OAG - 4/7/2020 8:14 AM

Moreover, contrary to defendant's argument, *see* Def. Br. 21-22, the trial court's actions here neither undermined the integrity of the judicial process nor denied defendant a fair trial. The court briefly suspended deliberations to honor the jury's request to review the video. Both parties were present to avoid the possibility of any improper *ex parte* contacts (or even the appearance of impropriety), and the court instructed non-jurors to remain silent to avoid any influence upon the jury. RP4 at 211-12. The only words spoken to the jury were instructions by the trial judge explaining that the video would be replayed and her offer to adjust the sound or do "anything" else for the jurors. RP4 at 212. After viewing the video in the courtroom, the jurors made no further requests; they then recommenced deliberations in the privacy of the jury room. RP4 at 212-13. Defendant fails to explain how this brief suspension had any chilling effect on the jury's deliberations. Indeed, much lengthier suspensions in deliberations routinely occur when a jury is released for the night without resulting in second prong plain error. Thus, defendant fails to establish that second prong plain error occurred.

III. Defendant Cannot Establish First Prong Plain Error.

Defendant argues, for the first time in his appellee's brief before this Court, that he has established first prong plain error. A court may review an unpreserved error under the first prong of the plain error rule if defendant establishes "that the evidence was so closely balanced that the error alone

SUBMITTED - 9029511 - Criminal Appeals, OAG - 4/7/2020 8:14 AM

severely threatened to tip the scales of justice against him." *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

Defendant's argument fails because the trial evidence was not closely balanced. The People's case was strong. Officer Timothy Davis testified that he stopped defendant's car after defendant had "jerked" between lanes and committed several other traffic violations. RP4 at 125-27. Defendant had "glassy, bloodshot eyes," slurred speech, and "a strong odor of alcoholic beverage on his breath." RP4 at 129. Defendant admitted that he had drunk four beers. RP4 at 130. And during the stop, defendant failed three field sobriety tests. RP4 at 130-31, 141. A video recording of the sobriety tests corroborated Davis's testimony, including his testimony about defendant's impaired balance. *See* People's DVD Exh. 1. After his arrest, defendant became belligerent and refused to take a breathalyzer test. RP4 at 143-45.

Against the weight of the People's evidence, defendant testified that he had been at a bar for two to three hours prior to his arrest. RP4 at 170. He blamed his traffic violations on poor and confusing directions from his passenger. RP4 at 172. And he admitted that when a firetruck turned onto the street and passed him, he could not react in time. *Id.* In short, the People's evidence of defendant's guilt of aggravated driving under the influence of alcohol was strong, and defendant's testimony did not render it closely balanced.

SUBMITTED - 9029511 - Criminal Appeals, OAG - 4/7/2020 8:14 AM

Nor does defendant explain how the alleged error "alone severely threatened to tip the scales of justice against him." *Herron*, 215 Ill. 2d at 187. Nothing in the record suggests that the jury was influenced at all during the video reply, much less against defendant. Apart from the trial judge's brief instructions, no non-juror said anything to the jurors. The trial court offered to make any desired adjustments for the jury, and no juror indicated a desire to replay the video more than once. And because both parties were present, no basis exists to believe that jurors felt pressured to rule for or against either party. Simply put, nothing in the record suggests that the brief suspension of deliberations had any effect on the jury's verdict. Accordingly, defendant cannot establish first prong plain error.

SUBMITTED - 9029511 - Criminal Appeals, OAG - 4/7/2020 8:14 AM

CONCLUSION

This Court should reverse the judgment of the Illinois Appellate Court, Third District.

April 7, 2020

Respectfully Submitted,

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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 containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is ten pages.

/s/ Nicholas Moeller
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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On April 7, 2020 the foregoing **Plaintiff-Appellant's Reply Brief** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided notice to the following registered e-mail addresses:

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