No. 127810

IN THE
SUPREME COURT OF ILLINOIS

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| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>TERANZA JONES,<br><br>Defendant-Appellant. | ) | On Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 4-19-0751<br><br>There on Appeal from the the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, No. 19 CF 454<br><br>The Honorable Erick Hubbard, Judge Presiding. |

# BRIEF OF PLAINTIFF-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

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## TABLE OF CONTENTS

**Page(s)**



## POINTS AND AUTHORITIES

## NATURE OF THE ACTION

Following a jury trial in the Circuit Court of Macon County, defendant was convicted of unlawful possession of ammunition by a felon and sentenced to two years in prison. C66.[1] Defendant appeals from the Illinois Appellate Court's judgment affirming her conviction. No question is raised on the pleadings.

## ISSUES PRESENTED FOR REVIEW

1. Whether the evidence was sufficient to prove beyond a reasonable doubt that defendant committed unlawful possession of ammunition by a felon.

2. Whether defendant's trial counsel provided constitutionally adequate representation by requesting that the trial court answer the jury's question about the meaning of the term "knowingly" by instructing the jury to give the term its common meaning rather than with Illinois Pattern Jury Instruction (IPI) 5.01B.

3. Whether the doctrine of invited error bars plain-error review of defendant's claim that the trial court erred by answering the jury's question about the meaning of the term "knowingly" with an instruction to give the term its common meaning rather than with IPI 5.01B.

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[1] Citations to the common law record appear as "C__," to the report of proceedings as "R__," to the exhibits as "E__," to defendant's brief as "Def. Br. __," and to defendant's appendix as "A__."

4. Alternatively, whether the trial court plainly erred by answering the jury's question about the meaning of the term "knowingly" with an instruction to give the term its common meaning rather than with IPI 5.01B.

## JURISDICTION

On January 26, 2022, this Court allowed defendant's petition for leave to appeal. Accordingly, this Court has jurisdiction under Supreme Court Rules 315 and 612(b).

## STATEMENT OF FACTS

The evidence at defendant's trial for unlawful possession of ammunition by a felon, 720 ILCS 5/24-1.1(a), showed that on January 1, 2019, Decatur Police Officer Zachary Wakeland stopped defendant for a traffic violation. R95-96. During the course of that traffic stop, Wakeland searched defendant's car and discovered two rounds of .40-caliber ammunition in the glove compartment, under the owner's manual and some other papers. R97, R99-100. When Wakeland told defendant that she was going to be arrested for possessing the ammunition, she said that the ammunition belonged to her husband, R98, but gave no other response, R100-01.

On cross-examination, Wakeland agreed that the ammunition was not sent to the Illinois State Police Crime lab for fingerprint or DNA analysis. R99. When asked about who else arrived on the scene, Wakeland did not remember whether defendant's husband, Lee Brown, was there; he recalled

speaking to someone, but that person did not provide Wakeland any identifying information. R100-01. There were also several other officers present. R100.

After introducing a certified copy of defendant's prior felony conviction for identity theft, R102; E7-14, the prosecution rested, R102, and defense counsel moved for directed verdict, R104. The trial court denied the motion, R104-05, and defendant presented her own testimony and that of her husband, Brown, in her defense, R106, R110.

Defendant testified that when Wakeland showed her the ammunition that he found in her glove compartment, she assumed that it belonged to Brown because the two shared the vehicle, and only he owned firearms. R108. She denied having "any idea" that the ammunition was in the glove compartment before Wakeland confronted her with it. *Id.*

Brown testified that he and defendant had been married for almost ten years. R110, R114. Although the car was registered to defendant, they shared the car and Brown drove it "[b]ack and forth to East St. Louis," where he went to see his children. R110-11. Whenever he went to East St. Louis, Brown "always" took his firearm with him, putting the firearm in the trunk and the ammunition in the glove compartment. R111. Brown testified that defendant knew that he took his firearm with him whenever he drove their car to East St. Louis. R115. Brown recognized the ammunition found in defendant's glove compartment as his, R112, and testified that he did not

intentionally leave it there, R116. When Brown awoke and saw that police had stopped defendant — the traffic stop occurred in front of their house — he went outside, told an officer that the ammunition was his, and showed the officer his Firearm Owner's Identification (FOID) Card. R113-14.

In closing argument, the prosecutor argued that the evidence clearly established that defendant had been convicted of a felony and possessed the ammunition found in the glove compartment, and that the evidence supported the reasonable inference that she knew the ammunition was there because she knew Brown took his firearm and ammunition with him whenever he went to see his children and immediately identified the ammunition as his when confronted with it. R121-22. Defense counsel argued that although defendant knew Brown owned a gun and traveled to East St. Louis, she did not know that he left ammunition in her glove compartment under the owner's manual and other papers and merely deduced that the ammunition was his when Wakeland confronted her with it. R123. The court instructed the jury that to find defendant guilty, it had to find that beyond a reasonable doubt that she "knowingly possessed firearm ammunition" and had previously been convicted of identity theft. R129-30.

During deliberations, the jury asked two questions. R134-35; C51. First, the jury asked for clarification about the substance of a particular piece of testimony, R134-35; with the agreement of the parties, the trial court answered that "[e]ach juror should rely on his or her individual recollection of

the evidence and testimony of the witnesses," R139-40; C52. Second, the jury asked for the definition of "knowingly." R134; C51 ("What is the def[inition] of knowingly?"). The prosecutor and defense counsel recalled that there was an IPI concerning the definition of "knowingly," R135-36, and, after the court consulted IPI 5.01B and the related committee notes, it opined that, of the IPI's two paragraphs, only the first — the definition of "knowingly" for offenses defined in terms of prohibited conduct — applied in defendant's case, R136-37. The first paragraph of IPI 5.01B states that "[a] person . . . acts knowingly with regard to . . . the nature or attendant circumstances of his conduct when he is consciously aware that his conduct is of that nature or that those circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that the fact exists." IPI, Criminal, No. 5.01B(1).

Defense counsel responded that he was "really worried" about the second sentence of that paragraph, R137, and suggested answering the jury's question with *both* paragraphs of IPI 5.01B, R137: the first paragraph, which applies to offenses defined in terms of prohibited conduct, IPI, Criminal, No. 5.01B(1), and the second paragraph, which applies to offenses defined in terms of a prohibited result and provides that "[a] person . . . acts knowingly with regard to . . . the result of his conduct if he is consciously aware that that result is *practically certain* to be caused by his conduct," IPI, Criminal, No. 5.01B(2) (emphasis added). Counsel explained that IPI 5.01B(2) would

communicate to the jury that defendant knowingly possessed the ammunition if she knew with practical certainty that it was there. R137.

The trial court understood counsel's concern about the "substantial probability" language in IPI 5.01B(1), but believed that providing IPI 5.01B(2) would not aid the jury and, as an alternative, suggested telling the jury that the term "knowingly" holds the same meaning in the instructions as in common usage. R138. The prosecutor sympathized with defense counsel's concern that the "substantial probability" language in IPI 5.01B(1) might give the jury the impression that it could find defendant guilty under a standard akin to recklessness rather than knowledge. R138-39; *see* 720 ILCS 5/4-6 ("A person . . . acts recklessly when that person consciously disregards a substantial and unjustifiable risk that circumstances exist . . . and that disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation."). Accordingly, the prosecutor seconded the court's suggestion that the jury be instructed that "knowingly" holds its common meaning, defense counsel agreed, and the trial court drafted an instruction patterned on the Committee Note to IPI 5.01B that "[t]he word 'knowingly' should be given its plain meaning within the jury's common understanding." R138-39; C52; *see* IPI, Criminal, No. 5.01B, Committee Note (noting that "the word[ ] . . . 'knowingly' ha[s] a plain meaning within the jury's common understanding"). Defense counsel reviewed the draft instruction, agreed that it should be given to the jury,

R141 ("I agree with this, Your Honor."), and the instruction was sent to the jury, R142; C52. The jury asked no follow-up questions and found defendant guilty of knowingly possessing the ammunition. R142.

Defense counsel filed a motion for a new trial on the ground that the evidence was insufficient, C54, and defendant filed a pro se motion for a new trial based on allegations that trial counsel was ineffective, C59. Specifically, defendant alleged that counsel had not told her that the charged offense was non-probationable and carried a minimum sentence of two years in prison, and that, had he done so, she would have accepted the prosecution's plea offer of a six-month term of court supervision on a lesser charge. *Id.* The court conducted a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), R160-69, and concluded that defendant's allegations were belied by the record, which showed that the court asked her before trial whether she understood that she was charged with a non-probationable Class 3 felony with a sentencing range of two to ten years and she answered that she understood. R162-65; *see* R16-17. The court denied both motions for a new trial, R168, R171, and sentenced defendant to two years in prison, R175.

On appeal, defendant argued that the evidence was insufficient to prove her guilt, trial counsel was ineffective for not objecting to the trial court's answer to the jury's question about the definition of "knowingly," and the trial court's answer to the jury's question constituted plain error. A36, ¶ 3; A51, ¶ 51. The appellate court disagreed and affirmed. A51, ¶ 53. It

found that the evidence was sufficient to prove that defendant knowingly possessed the ammunition in her glove compartment. A46, ¶ 39. The court further held that trial counsel made a reasonable strategic decision to agree that the jury's question about the definition of "knowingly" be answered with a reference to the term's common meaning rather than IPI 5.01B, A49-51, ¶¶ 47-50, and that this answer did not constitute plain error because it was not erroneous, A50-51, ¶¶ 50-51.

## STANDARDS OF REVIEW

Defendant's claim that the evidence was insufficient to support a guilty verdict is reviewed under *Jackson v. Virginia*, 443 U.S. 307 (1979), which holds that the Court "must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Jackson*, 2020 IL 124112, ¶ 64

Defendant's claim that trial counsel was ineffective is reviewed de novo. *People v. Johnson*, 2021 IL 126291, ¶ 52.

Generally, an unpreserved claim that the trial court responded erroneously to a question from the jury would be reviewed for plain error, *People v. Hartfield*, 2022 IL 126729, ¶ 42, but plain-error review is unavailable for defendant's claim because she did not merely forfeit her claim by failing to object at trial, but affirmatively agreed that the trial court should answer the jury's question with the instruction that she now

challenges, *People v. Parker*, 223 Ill. 2d 494, 508 (2006). Had defendant preserved her claim that the trial court erred in responding to the jury's question as it did, the trial court's decision to give the response would be reviewed for abuse of discretion and the legal correctness of the response would be reviewed de novo. *Hartfield*, 2022 IL 126729.

## ARGUMENT

### I. The Evidence Sufficed to Prove Beyond a Reasonable Doubt That Defendant Knowingly Possessed the Ammunition in the Glove Compartment of Her Car.

To find defendant guilty of unlawful possession of ammunition by a felon, the jury had to find beyond a reasonable doubt that she (1) knowingly possessed ammunition and (2) had been convicted of a felony. 720 ILCS 5/24-1.1(a). Defendant concedes that the evidence sufficiently proved that she had been convicted of a felony and there was ammunition in her glove compartment. *See* Def. Br. 9 (stating that "[t]here was no dispute" that defendant had a felony conviction or that there was ammunition in her glove box). Nor could she seriously dispute these elements; her prior felony conviction was established by a certified copy of the conviction and her own admission, R102, R107; E7-14, and there was no dispute that there was ammunition in her glove compartment when she was pulled over, R97-98, R112; *see* R122-23. Rather, defendant argues that the evidence was insufficient to prove that she *knowingly* possessed the ammunition in her glove compartment. Def. Br. 9 (arguing that "the state did not prove the essential element of knowledge"); Def. Br. 17 ("The issue at trial came down

to whether [defendant] had knowledge of the two small bullets in the glove box of the car."). Defendant further argues that the Court should review de novo whether the evidence was sufficient to prove that her possession was knowing. Def. Br. 9-10. But the evidence of defendant's mental state is reviewed under the same sufficiency standard as evidence of any other element — in the light most favorable to the prosecution and with all reasonable inferences drawn in the prosecution's favor — and when reviewed under that standard, it was sufficient to prove beyond a reasonable doubt that defendant knowingly possessed the ammunition in her glove compartment.

### A. The sufficiency of the evidence of defendant's mental state is reviewed under the usual standard of review for sufficiency challenges, not de novo.

"When a defendant challenges the sufficiency of the evidence, a reviewing court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 2020 IL 124112, ¶ 64; *Jackson*, 443 U.S. at 319. "The weight to be given the witnesses' testimony, the credibility of the witnesses, resolution of inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact," *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006), and "[o]nce a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all*

*of the evidence* is to be considered in the light most favorable to the prosecution," *Jackson*, 443 U.S. at 319 (emphasis in original). "Therefore, a reviewing court will not substitute its judgment for that of the trier of fact on issues involving the weight of the evidence or the credibility of witnesses." *Jackson*, 2020 IL 1302310, ¶ 64.

Defendant asserts that the sufficiency of the evidence of her mental state is reviewed de novo rather than under the *Jackson* standard because no "material facts are at issue in this case." Def. Br. 10. But defendant is both factually and legally mistaken. Defendant is factually mistaken because there *is* a material fact at issue in this case: whether she knowingly possessed the ammunition in her glove compartment. That was the fact in dispute at trial, *see* R120-25 (closing arguments regarding whether evidence showed that defendant knew ammunition was in her glove compartment), and that is the fact in dispute now, *see* Def. Br. 11-14 (arguing that evidence was insufficient to prove that defendant knew ammunition was in her glove compartment). Defendant is also legally mistaken because the sufficiency of the evidence of her mental state, like the sufficiency of the evidence proving the other elements of the offense, is reviewed under the *Jackson* sufficiency standard, not de novo. *See People v. Leib*, 2022 IL 126645, ¶¶ 36-40 (reviewing sufficiency of evidence that defendant had requisite mental state under *Jackson* standard); *People v. Wright*, 194 Ill. 2d 1, 19 (2000) (same);

*People v. Castillo*, 2018 IL App (1st) 153147, ¶¶ 28-29 (same); *People v. Rodriguez*, 2014 IL App (2d) 130148, ¶¶ 56-58 (same).

Defendant's argument that the sufficiency of the evidence of her mental state is reviewed de novo rather than under *Jackson* confuses the inquiry into what fact must be proved — that is, what mental state is required under section 24-1.1(a) — with the inquiry into whether the evidence was sufficient to prove that fact. The question of what facts must be proved to establish guilt — that is, the elements of the offense — is reviewed de novo because it is a question of statutory interpretation. *See People v. Gonzalez*, 239 Ill. 2d 471, 479 (2011). This is the inquiry conducted in the cases that defendant cites in support of her argument for de novo review. *See In re Ryan B.*, 212 Ill. 2d 226, 231-32 (2004) (reviewing de novo whether undisputed fact that respondent "asked" his victim to lift her shirt constituted "enticing, coercing or persuading as set forth in the [sexual exploitation of a child] statute"); *People v. Smith*, 191 Ill. 2d 408, 411-12 (2000) (reviewing de novo whether undisputed facts regarding defendant's possession of a firearm constituted being "otherwise armed" within meaning of armed violence statute); *People v. Howard*, 2016 IL App (3d) 130959, ¶¶ 18-19 (reviewing de novo whether undisputed facts regarding defendant's presence in school zone satisfied legal definition of "loitering" under statute prohibiting sex offenders from loitering in school zones).

But defendant's challenge to the sufficiency of the evidence that she knowingly possessed the ammunition in her glove compartment does not present a question of statutory interpretation because it does not turn on a disputed construction of a statutory term. The parties do not dispute the definition of the term "knowingly"; under 720 ILCS 5/4-5(a), a person "acts knowingly or with knowledge of . . . [t]he nature or attendant circumstances of his or her conduct, as described by the statute defining the offense, when he or she is consciously aware that his or her conduct is of that nature or that those circumstances exist," and that "[k]knowledge of a material fact includes awareness of the substantial probability that the fact exists." 720 ILCS 5/4-5(a); *see* Def. Br. 10-11 (quoting 720 ILCS 5/4-5(a)). Accordingly, what defendant asserts is the "key issue" before the Court — "whether an individual is considered to have knowledge of items not in plain sight in a shared car," Def. Br. 9 — is a red herring, for it is definitively resolved by applying the statutory definition of "knowingly." Under the statutory definition, a person has knowledge of items not in plain sight in a shared car if she is either (1) "consciously aware" that the items are in the car or (2) "aware[ ] of the substantial probability" that the items are in the car. 720 ILCS 5/4-5(a).[2]

[2] Defendant's argument that the jury was not properly instructed on the definition of "knowingly," *see* Def. Br. 15-20, is irrelevant for purposes of sufficiency review, for "[a] reviewing court's limited determination on sufficiency review . . . does not rest on how the jury was instructed." *Musacchio v. United States*, 577 U.S. 237, 243 (2016).

Whether defendant had the requisite knowledge of the ammunition in her glove compartment — that is, whether she was consciously aware that it was there or was aware of the substantial probability that it was there — is a question of fact, not statutory interpretation. *See People v. Schmalz*, 194 Ill. 2d 75, 81 (2000) ("Whether there is knowledge and whether there is possession or control are questions of fact to be determined by the trier of fact."); *People v. Faulkner*, 2017 IL App (1st) 132884, ¶ 39 ("Knowledge and possession are questions of fact to be resolved by the trier of fact[.]" (internal quotation marks omitted)); *see also United States v. Williams*, 553 U.S. 285, 306 (2008) ("[w]hether someone held a belief or intent" is a "clear question[ ] of fact"). And whether the evidence was sufficient to prove that defendant had the requisite awareness is determined by applying the usual *Jackson* sufficiency standard. *See Leib*, 2022 IL 126645, ¶¶ 36-40; *Faulkner*, 2017 IL App (1st) 132884, ¶ 39.

### B. Viewed in the light most favorable to the prosecution, the evidence was sufficient to prove that defendant knowingly possessed the ammunition in her glove compartment.

To prove that defendant knowingly possessed the ammunition in her glove compartment, the evidence had to show that she "'ha[d] knowledge of the presence of the [ammunition] and exercise[d] immediate and exclusive control over the area where the [ammunition] [wa]s found.'" *People v. Wise*, 2021 IL 125392, ¶ 25 (quoting *People v. Brown*, 2020 IL 124100, ¶ 11); *see Schmalz*, 194 Ill. at 81. Defendant had knowledge of the ammunition's

presence in her glove compartment if she was either "consciously aware" that it was there or was "aware of the substantial probability" that it was there. 720 ILCS 5/4-5(a); *see* Def. Br. 11 (prosecution had to prove that defendant was "'consciously aware'" that there was ammunition in her glove compartment or "'aware[ ] of the substantial probability" that it was there (quoting 720 ILCS 5/4-5(a)). Circumstantial evidence that supports a reasonable inference that defendant knew the ammunition was in her glove compartment is sufficient to prove her mental state. *See Leib*, 2022 IL 126645, ¶¶ 37-38.

As an initial matter, whether the evidence was sufficient to prove that defendant had the requisite knowledge of the ammunition in her glove compartment requires consideration of all of the evidence presented at trial. *Jackson*, 443 U.S. at 319 (under sufficiency review "*all of the evidence* is to be considered in the light most favorable to the prosecution." (emphasis in original)). Defendant's arguments appear to rest on inconsistent positions regarding the scope of the evidence under review. On the one hand, she argues that the evidence was insufficient because Wakeland's testimony alone did not prove her knowing possession of the ammunition, implicitly taking the position that sufficiency review is limited to the evidence presented in the prosecution's case-in-chief. *See* Def. Br. 9 (arguing that "the state's evidence, taken as true, could not prove the legal conclusion that she was in knowing possession of the two bullets"). On the other hand, she relies

on her and Brown's testimony to challenge the sufficiency of the evidence, implicitly taking the contrary position that sufficiency review is based on all of the evidence presented at trial. *See* Def. Br. 11.

The latter position is the correct one; once defendant elected to present evidence in her defense, she waived any challenge to the denial of her motion for directed verdict based on the alleged insufficiency of the prosecution's case-in-chief, and her subsequent challenge to the sufficiency of the evidence is reviewed in light of all of the evidence presented at trial. *People v. Peters*, 32 Ill. App. 3d 1018, 1019 (4th Dist. 1975) ("In considering the sufficiency of the evidence, all the testimony may be considered since in criminal, as well as civil cases, a defendant waives the right to a directed verdict when he introduces evidence after the motion is denied." (citing *People v. Gokey*, 57 Ill. 2d 433, 436 (1974)).[3] This is because a sufficiency review that allows a jury's

[3] Illinois's rule is consistent with that of other jurisdictions. *See*, *e.g.*, *State v. Dixon*, 947 N.W.2d 563, 574 (Neb. 2020) (defendant who presents evidence after denial of motion for directed verdict "waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict but may still challenge the sufficiency of the evidence"); *Murillo-Rodriguez v. Commonwealth*, 688 S.E.2d 199, 204-05 (Va. 2010) ("[W]hen a defendant elects to introduce evidence in his own behalf after the denial of a motion to strike the Commonwealth's evidence, any further challenge to the sufficiency of the evidence at trial or on appeal is to be determined from the entire record, because by putting on additional evidence, the defendant waives his ability to challenge the sufficiency of the Commonwealth's evidence in isolation."); *State v. Miller*, 765 A.2d 693, 694-95 (N.H. 2001) ("When determining the sufficiency of the evidence raised by a motion to dismiss at the close of the State's case, however, we review the entire trial record because, even though the defendant is not required to present a case, if he chooses to do so, he takes the chance that evidence presented in his case may assist in proving the State's case." (internal

verdict to be overturned without consideration of the defense evidence — evidence that the jury considered in reaching its verdict — fails to preserve "the factfinder's role as weigher of evidence." *Jackson*, 443 U.S. at 319; *see McGautha v. California*, 402 U.S. 183, 215 (1971) *vacated in part on other grounds sub nom. Crampton v. Ohio*, 408 U.S. 941 (1972) ("[A] defendant whose motion for acquittal at the close of the Government's case is denied must decide whether to stand on his motion or put on a defense, with the risk that in so doing he will bolster the Government case enough for it to support a verdict of guilty.").[4] Accordingly, this Court's sufficiency review considers *all* of the evidence presented at defendant's trial.

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quotation marks omitted)); *United States v. Velasquez*, 271 F.3d 364, 371 (2d Cir. 2001) ("[O]nce a defendant offers evidence after the denial of a motion for acquittal at the close of the Government's case in chief . . . the defendant waives any claim as to the sufficiency of the Government's case considered alone." (internal quotation marks omitted)); *State v. Kelley*, 319 N.W.2d 869, 871 (Wis. 1982) ("This court has often held that where a defendant moves for a dismissal or a directed verdict at the close of the prosecution's case and when the motion is denied, . . . the introduction of evidence by the defendant, if the *entire* evidence is sufficient to sustain a conviction, waives the motion to direct." (emphasis in original and internal quotation marks omitted)); *see also State v. Papandrea*, 26 A.3d 75, 81 (Conn. 2011) ("[B]ecause the defendant chose to present evidence after moving unsuccessfully for a judgment of acquittal at the close of the state's case, our sufficiency review encompasses all of the evidence adduced at trial, not just the evidence presented by the state.").

[4] *See also State v. Perkins*, 856 A.2d 917, 933 (Conn. 2004) ("[T]he waiver rule eliminates the bizarre result that could occur in its absence, namely, that a conviction could be reversed for evidentiary insufficiency, despite evidence in the record sufficiently establishing guilt."); *People v. Hines*, 762 N.E.2d 329, 332 (N.Y. Ct. App. 2001) ("Consistent with the overall truth-seeking function of a jury trial, the rationale underlying this rule is that a reviewing court should not disturb a guilty verdict by reversing a judgment based on insufficient evidence without taking into account all of the evidence

That evidence, viewed in the light most favorable to the prosecution and with all reasonable inferences drawn in the prosecution's favor, was sufficient for the jury to find beyond a reasonable doubt that defendant knowingly possessed the ammunition in her glove compartment. Wakeland testified that he stopped defendant, searched her car, and found ammunition in the glove compartment. R96-97, R99-100. This testimony alone was sufficient to prove that defendant knowingly possessed the ammunition. *See*, *e.g.*, *People v. McCarter*, 339 Ill. App. 3d 876, 879 (1st Dist. 2003) ("Control over the location where the weapons were found gives rise to an inference that defendant possessed the weapons."); *People v. Hammer*, 228 Ill. App. 3d 318, 323 (2d Dist. 1992) ("Although defendant's mere presence near the weapon is insufficient, control over the location gives rise to the inference that defendant possessed the weapon[.]"). The jury could have reasonably inferred that defendant knew what was in the glove compartment of the car she was driving. *Cf. People v. Sherman*, 2020 IL App (1st) 172162, ¶ 36 ("The purpose of a glove box or compartment in a vehicle is for the driver to keep

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the jury considered in reaching that verdict, including proof adduced by the defense."); *State v. Smith*, 332 So. 2d 773, 776 (La. 1976) ("[A]n erroneous denial of a motion for acquittal is nevertheless not cause for reversal if the evidence as a whole, including the defendant's case, justifies the affirmance as guilty (assuming no other reversible error). To reverse, in such an instance, is to reverse not because the evidence as a whole does not prove guilt; but because of an erroneous interlocutory ruling which was cured by subsequent evidence.").

driving gloves (hence its name), registration and insurance documents, and other necessities and accoutrements of driving within her or her reach.").

The inference was further supported by Wakeland's testimony about defendant's response when he told her that he was going to arrest her for possessing ammunition. Wakeland testified that she did not ask what he was talking about or where he had found the ammunition, but instead identified its owner, R98, R101, which supported the reasonable inference that she was consciously aware that the ammunition was in the glove compartment and was trying to avoid arrest for possessing it by explaining that it was actually owned by someone else.

To find any basis to believe that defendant was not consciously aware that the ammunition was in her glove compartment, one must turn to defendant's evidence that she shared the car with Brown, who used it to transport his firearms and ammunition. R108, R110-11, R114-15. This evidence allows (but does not compel) an inference that defendant's statement to Wakeland that the ammunition belonged to Brown was not an admission that she knew the ammunition was in the glove compartment but an assumption about how ammunition that she did not know was in the glove compartment had gotten there.

But although defendant's and Brown's testimony arguably weakened the support for the inference that defendant was consciously aware that there was ammunition in her glove compartment, it strengthened the inference

that she was aware of the substantial probability that there was ammunition in her glove compartment. Defendant and Brown testified that they shared the car, R108, R110, Brown stored his firearm in the trunk and ammunition in the glove compartment whenever he visited his children, R110-11, and defendant knew that Brown took his firearm with him when he drove the car to make those visits, R115. This testimony supports a reasonable inference that defendant was aware of the substantial probability that there was ammunition in her glove compartment when she took control of her car. Although defendant asserts that "no evidence suggested that [she] was aware of her husband's practice" of keeping ammunition in the glove compartment, the jury could reasonably infer her familiarity with the way he transported his firearms and ammunition in their car from the fact that they had been married for nearly a decade and her knowledge that he transported his firearms in their car. R110, R114-15.

Defendant argues that the "fact" that she "correctly guessed the two small bullets likely belonged to her husband" does not establish that she knew they were in her glove compartment, Def. Br. 12-13, but what defendant characterizes as "fact" is simply the inference she would have preferred the jury draw from her statement to Wakeland that the ammunition belonged to Brown. Yet "[t]he decision as to which of competing inferences to draw from the evidence is the responsibility of the trier of fact," *People v. Petermon*, 2014 IL App (1st) 113536, ¶ 43, and "the existence of

competing inferences is not a reason to upset rational findings by the jury," *People v. Cruz*, 2021 IL App (1st) 190132, ¶ 62. Here the jury discredited defendant's testimony that she did not have "any idea" that the ammunition was in her glove compartment, R108, and inferred from the evidence that she *did* know it was there. Whether that inference was the only reasonable inference that could be drawn from the evidence is irrelevant: "The jury in this case was convinced, and the only question under *Jackson* is whether that finding was so insupportable as to fall below the threshold of bare rationality." *Coleman v. Johnson*, 566 U.S. 650, 656 (2012). Viewed in the light most favorable to the prosecution, and giving due deference to the jury's determination that defendant was not credible, the evidence was sufficient to support a rational conclusion that defendant knowingly possessed the ammunition in her glove compartment.

Nor was the jury's conclusion that defendant knew the ammunition was in her glove compartment irrational because the evidence (1) showed that Brown owned the ammunition and (2) did not show that defendant had personally handled the ammunition. Def. Br. 11, 14. Although defendant notes that Brown was "a law-abiding gun owner who possessed a valid FOID Card" and owned the ammunition that Wakeland found in defendant's possession, Def. Br. 11, the legality of Brown's possession of the ammunition in the glove compartment when he drove the car earlier was and is irrelevant to whether defendant knew the ammunition was there when *she* then drove

the car. Similarly, Brown's ownership of the ammunition subsequently found in defendant's glove compartment was irrelevant to whether she knew it was there. *See People v. O'Neal*, 35 Ill. App. 3d 89, 91 (1st Dist. 1975) ("It is unnecessary to prove a defendant's ownership of a contraband article or the ownership of the place where it is kept in order to establish constructive possession."). A drug courier cannot evade liability for knowingly possessing drugs on the ground that the drugs belong to the person who entrusted them to him, nor can a felon evade liability for knowingly possessing a firearm on the ground that he merely borrowed it from a friend. And although DNA or fingerprint evidence showing that defendant had personally handled the ammunition in her glove compartment would further support the inference that she knew it was there, she did not have to physically touch the ammunition to knowingly possess it. *See Schmalz*, 194 Ill. 2d at 82 ("Actual possession does not require present personal touching of the illicit material but, rather, personal present dominion over it.").

Defendant's concern that the appellate court's decision "effectively created a strict liability criminal rule" is unwarranted. Def. Br. 13. The appellate court did not hold that a person must "search the entire contents" of any car that she wishes to drive to avoid felony liability for possession of any contraband that it may contain, Def. Br. 13; a person need only check particular areas of a particular car if she knows they are substantially probable to contain contraband. So, for example, if a person knows that there

is a substantial probability that her husband has stored ammunition in the glove compartment of their shared car, she must check the glove compartment for ammunition before taking the car. But she need not comb every crack and crevice of the car for ammunition if she has no reason to believe that there is ammunition between the cushions of the back seat or taped to the underside of the hood. If ammunition were subsequently discovered in such unlikely places, then her possession could not be considered knowing absent evidence that she was consciously aware it was there or aware of the substantial probability that it was there. *See*, *e.g.*, *People v. Ortiz*, 196 Ill. 2d 236, 259, 267-68 (2001) (defendant did not knowingly possess drugs hidden in secret compartment in trailer of truck that he had been hired to drive). Similarly, a person need not search for contraband in every car she drives, for there is no reason to believe that every rented or borrowed car has contraband hidden away in the glove compartment or anywhere else. *See*, *e.g.*, *People v. Hampton*, 358 Ill. App. 3d 1029, 1033 (2d Dist. 2005) (defendant did not knowingly possess firearm in glove compartment of car that he had borrowed from someone else only minutes earlier and that he never driven before).

Nor does the appellate court's holding that the evidence at defendant's trial was sufficient to prove that she knowingly possessed the ammunition in her glove compartment announce a rule that, "if an item belonging to one person is found in property shared between two people like a vehicle, that

second person in the shared property is automatically found to have shared knowledge of the existence of said item." Def. Br. 14. The appellate court merely held that the evidence of defendant's lack of surprise at the presence of ammunition in her glove compartment,[5] knowledge that her husband of nearly a decade regularly transported firearms in their car, and discredited denial that she knew the ammunition was in the car was sufficient to support a rational conclusion that she knew the ammunition was there. A45. This holding cannot be reasonably read as announcing a rule that everyone knowingly possesses everything found in any place shared with anyone else.

## II. Trial Counsel Provided Constitutionally Effective Representation by Agreeing That the Trial Court Answer the Jury's Question About the Definition of "Knowingly" with the Common Definition Rather Than the IPI Definition.

To show ineffective assistance of counsel, defendant must establish both that (1) counsel performed deficiently — that is, that counsel's performance fell below an objective standard of reasonableness — and (2) she was prejudiced by counsel's failings. *People v. Dupree*, 2018 IL 122307, ¶ 44 (citing *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)). Defendant cannot establish deficient performance unless she "overcome[s] the strong presumption" that counsel's challenged decision "may have been the product of sound trial strategy." *Dupree*, 2018 IL 122307, ¶ 44; *see Strickland*, 466

[5] Defendant's assertion that there was no evidence of her lack of surprise when confronted with the ammunition, Def. Br. 12, ignores Wakeland's testimony that when he confronted her with the ammunition, she said only that it belonged to her husband, R98, R101 — that is, that she expressed no surprise that Wakeland found ammunition in her glove compartment.

U.S. at 689 (explaining that "[j]udicial scrutiny of counsel's performance must be highly deferential" and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"). "This is a high bar to clear since matters of trial strategy are generally immune from claims of ineffective assistance of counsel." *Dupree*, 2018 IL 122307, ¶ 44; *see People v. Palmer*, 162 Ill. 2d 465, 476 (1994) ("[C]ounsel's strategic choices are virtually unchallengeable."). To establish prejudice, defendant must show that, but for counsel's alleged errors, there is a reasonable probability that the result of the trial would have been different. *Dupree*, 2018 IL 122307, ¶ 44. Failure to establish either *Strickland* prong — deficient performance or prejudice — is fatal to defendant's claim. *People v. Johnson*, 2021 IL 126291, ¶ 53.

Defendant's claim — that counsel was ineffective for agreeing to answer the jury's question about the definition of "knowingly" with an instruction that the jury should give the term its meaning in common usage rather with IPI 5.01B — is meritless because she cannot satisfy either *Strickland* prong. Counsel made a reasonable strategic decision to tell the jury to use the common definition because the common definition was more favorable to defendant than the IPI definition. And defendant was not prejudiced by that decision because there is no reasonable probability that the jury would have acquitted her had it been given the less favorable IPI definition.

### A. Counsel made a reasonable strategic decision to agree that the jury be directed to the common definition of "knowingly" rather than the IPI definition.

When the jury asked for the definition of "knowingly," counsel had to make a strategic decision: whether to ask the trial court to respond by directing the jury to the term's common definition or to its definition under IPI 5.01B. Both responses would provide the jury with an appropriate definition of the term. *See People v. Powell*, 159 Ill. App. 3d 1005, 1013 (1st Dist. 1987) ("the jury need not be instructed on the term[ ] knowingly . . . because [it] ha[s] a plain meaning within the jury's common understanding"); IPI, Criminal, No. 5.01B, Committee Note ("tak[ing] no position as to whether this definition should be routinely given in the absence of a specific jury question" because "'knowingly' ha[s] a plain meaning within the jury's common understanding" (citing generally *Powell*, 159 Ill. App. 3d 1105)). After considering IPI 5.01B, counsel made a strategic decision to agree that the jury should be directed to the common definition. R139, R141; *see People v. Jones*, 2021 IL App (3d) 190131, ¶ 29 ("The decision whether to request a certain jury instruction is generally a matter of trial strategy.").

Counsel's strategic decision was reasonable because the definition of "knowingly" under IPI 5.01B was less favorable to defendant than the common definition. *See People v. Runyon*, 2022 IL App (4th) 210166-U, ¶ 43 ("[I]t was a reasonable trial strategy to preclude the jury from learning the broader legal definition of 'knowingly'" under IPI 5.01B because "the layperson's understanding of the word 'knowing' is likely more onerous to

prove than the legal one[.]"); *see also People ex rel. City of Chicago v. Le Mirage, Inc.*, 2013 IL App (1st) 093547, ¶ 112 ("Because IPI Criminal 4th No. 1.05B's description of *willfully* is more favorable to the prosecution than the common meaning of the term . . . it would be reasonable for defense counsel to forego instructing the jury pursuant to that instruction."). Under IPI 5.01B, "[a] person acts . . . knowingly with regard to . . . the nature or attendant circumstances of his conduct when he is consciously aware that his conduct is of that nature or that those circumstances exist." IPI, Criminal, No. 5.01B(1). Thus, the jury could find defendant guilty if it found that she was consciously aware that there was ammunition in her glove compartment. But IPI 5.01B further provides that a person acts knowingly with respect to a fact if she acts "with awareness of the substantial probability that the fact exists," *id.*, such that the jury could *also* find defendant guilty if it found that she was aware of the *substantial probability* that there was ammunition in her glove compartment. Counsel was "really worried" about this second provision, R137, and rightly so; given the evidence that Brown regularly transported firearms in their car, that defendant knew he did, and that every time he did, he put ammunition in the glove compartment, it would be much harder for counsel to argue that defendant was unaware of even a substantial probability that there was ammunition in her glove compartment than to argue that she was not consciously aware that it was there.

In contrast, under the common definition, a person acts "knowingly" with respect to a fact if she is consciously aware of it but not if she is aware only of a substantial probability that the fact might exist. *See Webster's Third New International Dictionary* 1252 (2002) (defining "knowingly" as "in a knowing manner," and defining "knowing" as "having or reflecting knowledge, information, or insight"); *Webster's New World College Dictionary* 806 (5th ed. 2020) (defining "knowing" as "having knowledge or information," with "knowingly" as adverbial form); *American Heritage Dictionary of the English Language* 973 (5th ed. 2018) (defining "knowing" as "[p]ossessing knowledge, information, or understanding," with "knowingly" as adverbial form); *Concise Oxford English Dictionary* 789 (12th ed. 2011) (defining "knowing" as "done in full awareness or consciousness," with "knowingly" as adverbial form); *see also Black's Law Dictionary* 1042 (11th ed. 2019) (defining "knowing" as "[h]aving or showing awareness or understanding; well-informed," with "knowingly" as adverbial form). Accordingly, a jury applying the common definition of "knowingly" could acquit defendant of knowingly possessing the ammunition in her glove compartment when it would convict her if it applied the IPI definition. *See Runyon*, 2022 IL App (4th) 210166-U, ¶ 43 ("the common understanding of 'knowingly' has a 'more unequivocal meaning than the legal definition," in that "the layperson's understanding of the word 'knowingly' is likely more onerous to prove the legal [understanding]" provided in IPI 5.01B). If the jury found that

defendant was not consciously aware of the ammunition in her glove compartment but was aware of the substantial probability that it was there, then it would find her guilty under the IPI definition but not guilty under the common definition.

In addition, the common definition of "knowingly" has connotations of acting intentionally or deliberately, rather than just with knowledge. *See Webster's Third New International Dictionary* 1252 (also defining "knowingly" as "with awareness, deliberateness, or intention," and defining "knowing" as "that is done with awareness or deliberateness; that is intentional"); *see also Webster's New World College Dictionary* 806 (also defining "knowing" as "deliberate; intentional," with "knowingly" as adverbial form); *American Heritage Dictionary of the English Language* 973 (also defining "knowing" as "[d]eliberate; conscious," with "knowingly" as adverbial form); *see also Black's Law Dictionary* 1042 (also defining "knowing" as "[d]eliberate; conscious," and defining "knowingly" as "[i]n such a manner that the actor engaged in prohibited conduct with the knowledge that the social harm that the law was designed to prevent was practically certain to result; deliberately"). If the jury's understanding of the common definition of "knowingly" carried sufficiently robust connotations of intent or deliberateness, then even if the jury found that defendant was consciously aware that the ammunition was in her glove compartment, which would require a guilty verdict under the IPI definition, it could still acquit her under the common definition. Because

defendant had a better chance of being acquitted if the jury applied the more favorable common definition of "knowingly" instead of the less favorable IPI definition, counsel reasonably agreed that the jury be instructed to apply the common definition instead of the IPI definition. *See Runyon*, 2022 IL App (4th) 210166-U, ¶ 43; *Le Mirage, Inc.*, 2013 IL App (1st) 093547, ¶ 112.

### B. Defendant was not prejudiced by the jury's application of the common definition of "knowingly" rather than the IPI definition.

Defendant cannot show prejudice from counsel's decision to agree to give the jury the common definition of "knowingly" rather than the IPI definition for the same reason that counsel's decision was reasonable: the common definition was more favorable to the defense than the IPI definition. There is no reasonable probability that the jury, having found that defendant knowingly possessed the ammunition under the more favorable common definition of "knowingly," would have acquitted her had it applied the less favorable IPI definition. *See Runyon*, 2022 IL App (4th) 210166-U, ¶ 43 ("If the jury found the State had met this more exacting standard [of the common definition of "knowingly"], it is not likely it would have acquitted defendant . . . if the precise legal definition had been provided.").

Defendant asserts that the jury "could have misapplied the 'knowingly' element" because it was not provided the IPI definition, but she does not explain how it might have misapplied that element or why such potential misapplication would be prejudicial rather than advantageous given the differences between the common definition and the IPI definition. Def. Br.

28. Similarly, defendant's conclusory assertion that she was prejudiced by the instruction referring the jury to the common definition rather than the IPI definition because the evidence against her was "thin" does not explain why the jury would be less likely to convict her on that evidence if it applied the less favorable IPI definition given that it convicted her on the same evidence when it applied the more favorable common definition. Def. Br. 27-28. In sum, defendant's speculation that she may have been prejudiced by counsel's agreement to the trial court's instruction is insufficient to establish *Strickland* prejudice. *See Johnson*, 2021 IL 126291, ¶ 55 ("*Strickland* requires a defendant to affirmatively prove that prejudice resulted from counsel's errors," and so "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." (internal quotation marks omitted)).

Moreover, defendant's prejudice argument rests on an assumption that the trial court would have given the jury an incomplete IPI definition that omitted the portion of the definition that concerned counsel: that defendant knowingly possessed the ammunition in her glove compartment if she was "aware[ ] of the substantial probability" that it was there. Def. Br. 27-28 (arguing *Strickland* prejudice because IPI 5.01B would have told jury only that defendant knowingly possessed ammunition in her glove compartment if she was "consciously aware" that it was there). But there is no reason to believe that the trial court would have given the jury only half of the relevant

IPI definition. Indeed, defendant apparently recognizes in her sufficiency argument that such a partial IPI definition would have been incorrect. *See* Def. Br. 13 (arguing that evidence was insufficient because prosecution failed to prove that defendant was *either* "consciously aware" of ammunition in her glove compartment *or* "aware[ ] of the substantial probability" that it was there). Thus, even if there was a reasonable possibility that counsel could have persuaded the trial court to issue an improperly truncated version of IPI 5.01B, defendant cannot establish *Strickland* prejudice by showing that counsel's decision denied her "a windfall as a result of the application of an incorrect legal principal or a defense strategy outside the law." *Lafler v. Cooper*, 566 U.S. 156, 167 (2012); *see Strickland*, 466 U.S. at 695 ("A defendant has no entitlement to the luck of a lawless decisionmaker[.]").

The remainder of defendant's arguments rely on inapt analogies to *People v. Lowry*, 354 Ill. App. 3d 760 (1st Dist. 2004), *People v. Sperry*, 2020 IL App (2d) 180296, and *People v. Ayala*, 2022 IL App (1st) 192063. Def. Br. 21-27. These analogies are inapt because defendant's counsel agreed that the trial court should answer the jury's request for the definition of "knowingly" with the common definition, which might lead the jury to demand proof of a *more* culpable mental state than the law required, whereas, in *Lowry*, *Sperry*, and *Ayala*, counsel agreed that the trial court should give no answer at all to jury questions that demonstrated a confusion about the definition of

"knowingly" that could cause the jury to find guilt based on a *less* culpable mental state than the law required.

In *Lowry*, the jury was instructed that the defendant, who told police that he did not mean to hurt the victim, 354 Ill. App. 3d at 761, was not guilty of aggravated battery with a firearm unless he "knowingly caused injury to [the victim] . . . by discharging a firearm," *id.* at 763-64, and asked during deliberations "whether 'knowingly' implied 'that it wasn't an accident, or can it be accidental and knowing,'" *id.* at 761-62, 766. *Lowry* held that counsel was ineffective for agreeing to tell the jury only that it had received its instructions and should continue deliberating instead of requesting IPI 5.01B because the jury's question about whether a person acts "knowingly" when he does something by accident demonstrated a "confusion regarding application of" the term "knowingly" that, if not corrected, might cause the jury to find the defendant guilty of "knowingly" shooting the victim even though it believed that he shot the victim by accident. *Id.* 765-68.

The same was true in *Sperry*, where the jury was also instructed that the defendant was not guilty of aggravated battery with a firearm unless he "knowingly discharged a firearm," and asked during deliberations whether "'knowingly discharged a firearm[ ]' mean[t] he intended to discharge the gun on purpose or he knew a gun was discharged." 2020 IL App (2d) 180296, ¶¶ 7-8. Counsel there was ineffective for agreeing to tell the jury only that the instructions were sufficient and would not be supplemented instead of

requesting IPI 5.01B because, as in *Lowry*, the jury's question revealed a confusion that could lead the jury to find the defendant guilty of aggravated battery with a firearm if it believed he merely knew that the gun had been accidentally discharged. *Id.* ¶ 21.

Similarly, the jury in *Ayala*, tasked with determining whether the defendant knowingly possessed a firearm found hidden in his apartment, 2022 IL App (1st) 192063, ¶¶ 4, 7-8, asked whether "knowingly possessed . . . mean[t] he was aware that those items were in his possession," *id.* ¶ 9. In other words, the jury expressed uncertainty about whether it could still find that the defendant knowingly possessed the firearm if it determined that he was *not* aware that the firearm was in his possession. The trial court responded without objection that the jury had heard all the evidence, received all the instructions, and should continue deliberating. *Id. Ayala* held that counsel was ineffective for not requesting IPI 5.01B because, like in *Lowry* and *Sperry*, the jury's question revealed confusion about whether "knowingly" constituted a less culpable mental state than the legal definition required. *Id.* ¶ 25. Indeed, in *Ayala*, the jury's confusion about whether the defendant could knowingly possess items of which he was entirely unaware suggested that the jury could have found the defendant guilty under a misguided theory of strict liability.

Here, the jury's request for the definition of "knowingly" suggested no confusion like that evinced by the juries' questions in *Lowry*, *Sperry*, and

*Ayala*. Counsel, the prosecutor, and the trial court all reasonably understood the jury to be asking whether "knowingly" meant something different in the legal context of the jury instructions than in common usage. *See* R135-39. That understanding was confirmed when the jury, apparently satisfied with the answer that "knowingly" means the same thing in the jury instructions as it does in common usage, asked no follow-up questions about the common meaning. *See* R142. Unlike in *Lowry*, *Sperry*, and *Ayala*, counsel's decision not to ask that the jury be given IPI 5.01B did not leave a plainly confused jury wondering whether to convict defendant of "knowingly" engaging in conduct that it believed she engaged in only accidentally. To the contrary, any difference between the common definition that the jury was instructed to apply and the IPI definition inured to defendant's benefit, causing the jury to place a greater burden on the prosecution than it would have had if the jury had been given the IPI definition. Accordingly, defendant failed to establish prejudice.

## III. The Doctrine of Invited Error Bars Plain-Error Review of Defendant's Claim that the Trial Court's Answer to the Jury's Question Was Erroneous.

Defendant also faults the trial court for answering the jury's question about the meaning of the term "knowingly" with an instruction that the term held its common meaning rather than with IPI 5.01B(1). Def. Br. 15-20. Because defendant did not preserve this claim of error by objecting at trial, she seeks plain-error review. Def. Br. 17-19. But defendant's claim is not subject to plain-error review because she did not merely forfeit her claim by

failing to object to the trial court's answer; rather, she affirmatively acquiesced to that answer, repeatedly assuring the court that she agreed that it should be given to the jury. Therefore, plain-error review is unavailable.

Under the doctrine of invited error, a defendant is estopped from challenging the propriety of an action on appeal if she acquiesced to that action by requesting or agreeing to it. *Parker*, 223 Ill. 2d at 507-08; *People v. Harvey*, 211 Ill. 2d 368, 385 (2004). Accordingly, where a defendant acquiesces to a procedure in the trial court, plain-error review is unavailable for any challenge to that procedure on appeal. *Harvey*, 211 Ill. 2d at 385; *People v. Patrick*, 233 Ill. 2d 62, 77 (2009) (defendant's challenge to agreed-to jury instruction not subject to plain-error review); *see People v. Stewart*, 2018 IL App (3d) 160205, ¶¶ 19-21 ("[A]cquiescence is not subject to the plain-error doctrine."); *People v. McGuire*, 2017 IL App (4th) 150695, ¶ 29 ("Plain-error analysis applies to cases involving procedural default [*i.e.*, forfeiture], not affirmative acquiescence.").

Here, defendant's claim that the trial court erred in answering the jury's question about the meaning of "knowingly" as it did is not subject to plain-error review because defense counsel affirmatively agreed that the trial court should give the jury that answer. Although defendant now objects to the answer, Def. Br. 19, when the trial court asked counsel about instructing the jury to give the term "knowingly" its common meaning, counsel endorsed the proposal, R139. Then, after counsel reviewed the draft instruction and

the trial court asked whether he agreed with sending it to the jury, counsel responded, "I agree with this, Your Honor." R141. Because defense counsel affirmatively acquiesced to the instruction that the trial court gave to the jury, defendant may not challenge that instruction on appeal, even under plain-error review. *People v. Averett*, 237 Ill. 2d 1, 23-24 (2010) (defendant's challenge to trial court's answer to jury question not subject to plain-error review because "defense counsel and the prosecutor assisted the trial court in drafting its response to the jury's question" and counsel then "agreed to the trial court's answer"); *People v. Peel*, 2018 IL App (4th) 160100, ¶ 32 (defendant's agreement to trial court's answer to jury's question barred plain-error review of his claim that answer was erroneous); *People v. Lawrence*, 2018 IL App (1st) 161267, ¶¶ 51-54 (same); *People v. Curry*, 2013 IL App (4th) 120724, ¶¶ 87-88 (same); *People v. Hernandez*, 229 Ill. App (3d) 546, 552-53 (3d Dist. 1992) (same); *see also Parker*, 223 Ill. 2d at 507-08 (plain-error review unavailable for challenge to jury instructions because defendant "waived any jury instruction issues by affirmatively agreeing to all instructions submitted to the jury").

To be sure, *People v. Johnson*, 2013 IL App (2d) 110535, upon which defendant relies, Def. Br. 16-17, found that defense counsel's agreement to a jury instruction did not amount to invited error (and thus did not bar plain-error review of the defendant's challenge to that instruction), but the two reasons it cited to support that holding are legally incorrect. First, *Johnson*

reasoned that the invited error doctrine did not apply because the challenged instruction was initially offered by the prosecution, not defense counsel. 2013 IL App (2d) 110535, ¶ 78. But an error to which defense counsel agrees is no less invited because counsel did not initially propose it; it is counsel's endorsement of the proposed action, not the identity of the party that initially proposed it, that estops subsequent challenge to the action. *See Harvey*, 211 Ill. 2d at 385 ("To allow a defendant to use the exact ruling or action procured in trial court as a vehicle for reversal on appeal would offend all notions of fair play and encourage defendants to become duplicitous." (internal citations and quotation marks omitted)). Second, *Johnson* cited counsel's *reasons* for agreeing to the instruction as a basis for not finding the error invited. 2013 IL App (2d) 110535, ¶ 78 (finding that counsel's reasons were not "duplicitous" and instead appeared to reflect "less an invitation of error than an attempt to mitigate jury confusion that could result from a convoluted instruction"). But, again, it is the fact of counsel's endorsement of the proposed action that bars subsequent challenge; counsel's strategic reasons for endorsing the action are irrelevant. A party cannot agree that the court should take a particular action, then attack that action on the ground that the party's agreement was motivated by legitimate strategic considerations rather than a bad faith intent to sandbag.

Here, counsel made a strategic decision to request that the court answer the jury's question about the meaning of "knowingly" by directing it

to the common definition rather than IPI 5.01B because he believed that answer was more favorable to the defense. *See supra* § II.A. Defendant cannot now wield her own trial strategy as a weapon against her conviction simply because it was ultimately unsuccessful.

## IV. In the Alternative, the Trial Court's Answer to the Jury's Question Did Not Constitute Plain Error Because It Was Not Clearly Erroneous.

Even if defendant had merely forfeited her challenge to the trial court's instruction in response to the jury's question by failing to object to the instruction rather than agreeing to it, her forfeiture could not be excused under plain-error review. Under Illinois Supreme Court Rule 451(c), forfeited challenges to jury instructions exhibiting "'substantial defects'" may be reviewed under "a limited exception" to the forfeiture rule that is "coextensive" with plain-error review under Illinois Supreme Court Rule 615(a). *People v. Radford*, 2020 IL 123975, ¶ 46 (quoting Ill. S. Ct. Rule 451(c)). "The first analytical step under the plain error rule is to determine whether there was a clear or obvious error," *People v. Moon*, 2022 IL 125959, ¶ 22, for "[a]bsent reversible error, there can be no plain error," *People v. McDonald*, 2016 IL 118882, ¶ 48. If defendant clears this initial hurdle, then her forfeiture may be excused if she shows that (1) "the evidence was so closely balanced the error alone severely threatened to tip the scales of justice" or (2) "the error was so serious it affected the fairness of the trial and challenged the integrity of the judicial process." *Moon*, 2022 IL 125959, ¶¶ 23-24 (internal quotation marks omitted). "The two prongs are two

different ways to ensure the same thing — namely, a fair trial." *Id.* ¶ 20 (internal quotation marks omitted). Accordingly, under either prong of plain-error review, "a jury instruction error rises to the level of plain error only when it creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial." *Hartfield*, 2022 IL 126729, ¶ 50.

Defendant's claim fails at the first step because the trial court did not clearly and obviously commit reversible error when it answered the jury's request for the definition of "knowingly" with an instruction that the term has the same meaning as in common usage. The Committee Notes to IPI 5.01B establish that, although the common definition of "knowingly" is not identical to the IPI definition, *see supra* pp. 26-30, it is sufficiently similar that a jury generally need not be provided IPI 5.01B. In other words, a jury need never learn the IPI definition of "knowingly" and may properly rely on the common definition of "knowingly" in determining whether that element has been satisfied. Therefore, the trial court did not commit reversible error merely because it confirmed that the jury should use the common definition of the term "knowingly." *See People v. Goodman*, 347 Ill. App. 3d 278, 290 (1st Dist. 2004) (trial court did not abuse discretion by giving non-pattern instruction that accurately stated the law); *People v. Finley*, 49 Ill. App. 3d 26, 29-30 (5th Dist. 1977) (trial court did not abuse discretion by giving non-pattern instruction "solely on the fact that the instructions were not

contained in the Illinois Pattern Jury Instructions to be given in criminal cases" where defendant "d[id] not specify any inaccuracy or other erroneous or misleading matter that was contained in the instructions").

Nor, as defendant argues, did the trial court err by not answering the jury's question at all. Def. Br. 17, 23. Although "'a trial court may exercise its discretion to refrain from answering a jury question under appropriate circumstances,'" the trial court generally "'has a duty to provide instruction to the jury when the jury has posed an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion.'" *Hartfield*, 2022 IL 126729, ¶ 47 (quoting *People v. Millsap*, 189 Ill. 2d 155, 160 (2000)). "The failure to answer or the giving of a response which provides no answer to the particular question of law posed has been held to be prejudicial error." *People v. Childs*, 159 Ill. 2d 217, 229 (1994). But the trial court answered the jury's question: the jury asked for the defining of "knowingly," C51, and the trial court answered that question by instructing the jury that the term carried the same meaning as in common usage, C52. Thus, the trial court did not "tell the jury to define a legal term for itself," Def. Br. 17, nor was the court's instruction "effectively [an] instruction[ ] for the jury to continue with no guidance from the court," Def. Br. 23. *Compare* C52, *with Lowry*, 354 Ill. App. 3d at 762 (responding to jury's question by stating, "You have heard the evidence and been instructed on the law. Please keep deliberating."); *Sperry*, 2020 IL App (2nd) 180296,

¶ 8 (responding to jury's question by stating, "I[n] my discretion I am not giving you further instructions on this issue. The instructions you received are sufficient."); *Ayala*, 2022 IL App (1st) 192063, ¶ 9 (responding to jury's question by stating, "You have all of the evidence and all of the instructions. Please continue to deliberate."). Rather, the trial court directly answered the jury's question, and did so in a manner that the jury apparently found helpful, for the jury asked no follow-up questions and the trial court's response, unlike the responses given in *Lowry*, *Sperry*, and *Ayala*, had not discouraged it from doing so.

Because the trial court's instruction answered the jury's question and did not misstate the law, defendant's reliance on *Johnson* is misplaced. Def. Br. 16-17. Although defendant cites *Johnson* for the proposition that it is plain error not to give "an applicable tailored version of IPI definitions to the jury," Def. Br. 16, *Johnson* did not hold that any instruction other than an applicable IPI instruction is necessarily reversible error. Rather, *Johnson* held that the trial court committed reversible error because it gave the jury the substantively incorrect instruction that evidence of the defendant's prior felony conviction could be "used by [the jury] like any other evidence in this case to come to [its] verdict," rather than providing the applicable IPI limiting instruction (or indeed any limiting instruction). 2013 IL App (2d) 110535, ¶¶ 71, 73-75. No similar error occurred here, for the trial court's instruction to the jury that it should give "knowingly" its common meaning

did not mislead the jury and cause it to improperly consider the evidence. C52.

Even if the court erred by directing the jury to the common definition of "knowingly" rather than the IPI definition, that error did not rise to the level of plain error because any error in proving the more favorable common definition was to defendant's benefit. There could be no "serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law" when the jury's misunderstanding of the applicable law would cause it believe that the prosecution must prove *more* than necessary. *Hartfield*, 2022 IL 126729, ¶ 50 (internal quotation marks omitted); *see People v. Durr*, 215 Ill. 2d 283, 301 (2005) (trial court's error in giving non-pattern instruction in place of pattern instruction is not plain error where "there is no doubt that the error is *de minimis* and did not result in fundamental unfairness or cause a severe threat to the fairness of defendant's trial" (internal quotation marks omitted)). In other words, an error in defendant's favor cannot have "tip[ped] the scales of justice against [her]," no matter how closely balanced the evidence, nor could an error in her favor have rendered the trial fundamentally unfair to her. *Moon*, 2022 IL 125959, ¶ 20. Thus, even if the trial court clearly and obviously erred by answering the jury with defendant's requested instruction rather than IPI 5.01B, the error inured to defendant's benefit and therefore cannot have rendered her trial fundamentally unfair under either prong of the plain-error

test. *See People v. Herron*, 215 Ill. 2d 167, 175-77 (2005) (fairness is the foundation of the plain-error doctrine).

Defendant argues that the trial court committed second-prong plain error by not providing the jury with IPI 5.01B because the trial court "must fully instruct the jury on all the elements of the offense." Def. Br. 19 (citing *People v. Williams*, 181 Ill. 2d 297, 318 (1998)). "It is the trial court's burden to insure the jury is given the essential instructions as to the elements of the crime charged, the presumption of innocence, and the question of burden of proof." *Williams*, 181 Ill. 2d at 318. But there is no question that the trial court provided all these essential instructions. *See* C37 (instruction as to elements of unlawful possession of ammunition by a felon), C41 (instructions as to presumption of innocence and burden of proof). That the trial court did not also provide the jury with the IPI definition of "knowingly" does not constitute a failure to instruct the jury on an element of the offense. *See* IPI, Criminal, No. 5.01B, Committee Note ("tak[ing] no position on whether this definition should routinely be given in the absence of a specific jury request"). When a trial court "instructed the jury regarding the elements" of charged offense, it does not commit plain error by "err[ing] only in refusing to define" the mental state because "[a] defendant's right to have a term defined — even a term describing a requisite mental state — does not raise to the same level of importance as instructing the jury on the elements of the offense." *Le Mirage, Inc.*, 2013 IL App (1st) 093547, ¶ 108. "This is especially true where

instructing a jury pursuant to IPI Criminal 4th No. 5.01B . . . would have presented a lower threshold for the [prosecution] than the common meaning of the term[.]" *Id.*

Because a trial court does not commit second-prong plain error by supplementing a proper instruction on the elements of the charged offense with an accurate non-pattern definition of a term used in one of the elements, none of the cases that defendant cites in support of that proposition is apposite. *See* Def. Br. 19; *Williams*, 181 Ill. 2d at 319-20 (no plain error where jury did not receive written instructions until during deliberations because error was not "so substantial that it reflected on the fairness of the trial"); *People v. Reddick*, 123 Ill. 2d 184, 194-95 (1988) (finding plain error where jury instructions misstated burden of proof); *People v. Ogunsola*, 87 Ill. 2d 216, 222-23 (1981) (same where instruction omitted element of "intent to defraud" in deceptive practices case); *People v. Hurtado-Rodriguez*, 326 Ill. App. 3d 76, 86-89 (2d Dist. 2001) (same where jury instructed that defendant committed witness harassment if he threatened injury to any "individual" rather than to any "witness . . . , or family member of the witness"). Indeed, *Ogunsola* expressly distinguished between a failure to instruct the jury on the elements of an offense and a failure to define a term used in one of those elements. 87 Ill. 2d at 223 ("Jury instructions that incorrectly define the offense cause prejudice to a criminal defendant far more serious than instructions that do not include a definition of a term[.]"). In sum, it cannot

undermine the fairness of the trial or undermine the integrity of the judicial process for the jury to apply the common definition of a term that the Supreme Court Committee on Jury Instructions in Criminal Cases determined was generally appropriate. *See* IPI, Criminal, No. 5.01B, Committee Note (not requiring that definition of "knowingly" be provided in all cases because the term has "a plain meaning within the jury's common understanding"); IPI, Criminal, No. 5.01A, Committee Note (same with respect to definition of "intentionally").

## CONCLUSION

For these reasons, the People of the State of Illinois respectfully request that this Court affirm the judgment of the appellate court.

September 7, 2022

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**RULE 341(c) 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(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 11,995 words.

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## PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On September 7, 2022, the foregoing **Brief of Plaintiff-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the Court's electronic filing system, which provided service to the following:

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