No. 127670

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	Appeal from the Appellate Court of Illinois, First District,
Plaintiff-Appellant,	No. 1-17-2090
v.	There on Appeal from the Circuit Court of Cook County, No. 15 CR 19055
JASON CONWAY,	The Honorable Charles P. Burns,
Defendant-Appellee.	Judge Presiding.

REPLY BRIEF AND CROSS-APPEAL RESPONSE OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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ARGUMENT

The People's opening brief established that the appellate majority erred when it sua sponte reversed defendant's conviction based on a theory — judicial bias — that defendant never raised. Peo. Br. 9-12.[1] Defendant's primary response — that the majority instead resolved his appeal based on an evidentiary claim, not judicial bias — is rebutted by the record, and his alternative responses are premature and meritless. *See infra* Sections I-III. In addition, defendant's cross-appeal arguments, asserting a sufficiency of the evidence claim, are meritless as well. *See infra* Section IV.

I. The Majority's Judgment Overturning Defendant's Conviction Must Be Vacated Because It is Based on a Judicial Bias Claim that Defendant Did Not Raise.

A. The Majority Improperly Reversed Defendant's Conviction Based on a Claim Defendant Did Not Raise.

The People's opening brief established that the appellate majority's judgment reversing defendant's conviction must be vacated because (1) a reviewing court may not overturn a conviction based on a claim that the defendant did not raise, (2) defendant never claimed that the trial judge was biased, (3) yet the majority overturned his conviction because it concluded that the trial judge had a "pronounced bias" in favor of the police because he credited Officer Story's testimony that he could identify defendant. Peo. Br. 9-12. In his response brief, defendant does not dispute that he never raised a

[1] The parties' briefs are cited as "Peo. Br." and "Def. Br." All citations to the record are the same as in the People's opening brief.

judicial bias claim or that it would be error for the appellate majority to overturn his conviction on that basis. *See* Def. Br. 33-39, 59-60. Therefore, the parties' dispute centers on the third point: the basis for the majority's decision. Specifically, the People contend that the majority overturned defendant's conviction because it concluded that the trial judge was biased; by contrast, defendant contends that the majority overturned his conviction because the judge made a simple trial error of failing to recall the evidence, *i.e.*, the judge supposedly believed prosecutors had presented evidence about Story's training as a police officer, when they had not. Def. Br. 33-39.

There are significant differences between a claim that a judge is biased and a claim that the judge failed to recall the evidence. Most importantly, it is settled that trial before a biased judge, such as a judge who believes police officers are inherently credible, is structural error that automatically requires a new trial regardless of the evidence against the defendant. *E.g., People v. Thompson*, 238 Ill. 2d 598, 608-09 (2010). By contrast, as defendant notes, a claim that a judge failed to recall the evidence involves a simple trial error that does not automatically result in a new trial, but instead requires an analysis of whether the error was harmless or prejudicial. Def. Br. 46 (collecting cases).

The appellate majority's opinion clearly states that it found the trial judge was biased, not that the judge merely failed to recall the evidence. According to the majority, only a person with a "pronounced bias" would

credit Story's account that he could identify defendant because expert testimony provided in a case outside of Illinois (which was not introduced in this trial) asserted that the probability of accurately identifying someone is "essentially zero" at "about 150 feet away." *People v. Conway*, 2021 IL App (1st) 172090, ¶¶ 23, 29. Rather than finding that the judge "misrecollected" the evidence concerning Story's training (as defendant claimed in his appellate briefs), the majority instead concluded that no impartial factfinder could credit Story's testimony that he could identify defendant from 150 feet away because it "belies the reality of human cognition." *Id.* ¶ 27. And the majority repeatedly stated that the judge's decision to credit Story's testimony despite that supposed scientific fact proved that

- "[D]efendant was not afforded a fair and impartial trial." *Id.* ¶ 28 (internal quotations omitted);
- The judge violated the rule against crediting a witness "solely because of his status as a police officer." *Id.* ¶ 26;
- "[T]he judge used an underlying presumption favoring the exercise of government power, and worked under the principle that police officers are presumptively trustworthy." *Id.* (internal citations and quotations omitted);
- "[T]he judge harbored preconceived notions regarding the veracity of the prosecution witnesses which led him to reject the defense without due consideration." *Id.* ¶ 28 (internal quotations omitted); and
- The judge had a "pronounced bias in favor of police testimony." *Id.* ¶ 29.

Therefore, it is clear that the appellate majority concluded that the trial judge was biased, even though defendant never alleged that he was.

Further demonstrating that the majority's ruling was based on a finding of judicial bias is its assertion that the "relevant principles" governing the appeal are provided by *People v. McDaniels*, 144 Ill. App. 3d 459 (5th Dist. 1986) (cited in *Conway*, 2021 IL App (1st) 172090, ¶ 25). *McDaniels* provides that an "'unbiased'" judge is a "'fundamental'" right and held that the defendant was automatically entitled to a new trial because the trial judge was biased against him. *Id.* at 462. Defendant fails to acknowledge the majority's reliance on *McDaniels*, yet that reliance makes clear that the majority reversed defendant's conviction based on a theory of a judicial bias.

Defendant did not cite *McDaniels* or any related cases in his appellate briefs. That is unsurprising because he did not claim that the judge was biased. Def. App. Ct. Brief at 38-41. Thus, defendant is incorrect to say that the appellate majority decided his case based on "*exactly* the argument that [defendant] raised" in his appellate briefs. Def. Br. 36 (emphasis by defendant). To the contrary, defendant's appellate briefs never used the word "bias" or otherwise argued that the judge was not impartial, which automatically would have entitled him to a new trial. Instead, as noted, defendant argued that the decision to credit Story was an ordinary trial error (not structural error) because it was based on a "misrecollection" of evidence. Def. App. Ct. Brief at 38-39; *see also id.* (arguing that it is error where judge "fails to recall evidence").

Indeed, the majority's finding that the judge had a pro-police bias is *contrary* to the arguments defendant raised. Specifically, defendant's appellate briefs emphasized that the record was "clear" that when the trial judge credited Story's account, he "was *not* applying a 'general'" notion about police officers but instead was making "a finding that was 'specific to' Officer Story." *Id.* at 39-40 (emphasis by defendant). Defendant fails to address this direct contradiction even though the People pointed it out in their opening brief. Peo. Br. 16-17.

True, the majority did say that "no evidence" supported the trial judge's decision to credit Story. Peo. Br. 35-36. However, that does not mean the majority ordered a new trial based on defendant's evidentiary claim, rather than a finding of judicial bias. When the majority referred to the lack of evidence, the majority meant that *only* bias could explain the judge's decision to credit Story given the majority's belief that there was no evidence *anywhere*, such as expert testimony presented in other cases or scientific studies, that a human being can make an identification from 150 feet away.

In particular, the majority believed that Story's testimony "belie[d] the reality of human cognition," and thus proved the trial judge was biased, because an expert opinion provided in a different case asserted that the probability of accurately identifying someone is "essentially zero" at "about 150 feet away." *Conway*, 2021 IL App (1st) 172090, ¶¶ 23, 27. Similarly, in finding that the judge had a pro-police bias the majority also said

> No evidence supports the assertion that police officers have any advantage over other witnesses in identifying strangers they have seen once or that officers are less prone to false identifications. *See United States v. Veal*, 182 F.3d 902 (2d Cir. 1999) (expert's proffered testimony that "police officers are not superior eye witnesses" properly excluded as a matter of common sense).

Id. ¶ 22. Thus, the majority's references to a lack of evidence do not mean it decided the case based on defendant's "misrecollection" claim; rather, the majority concluded that the judge was biased, and a new trial was required, because the judge believed police had "special perceptual powers" that allow them to see farther than ordinary people, and courts and expert witnesses in other cases had opined that they do not. *Id.* ¶¶ 1, 22-31. Defendant does not address this context but instead selectively quotes portions of the majority's opinion to emphasize the references to "no evidence" while failing to include the majority's explanation of its finding of bias. Def. Br. 35-36.

Perhaps more importantly, had the appellate court decided defendant's evidentiary claim, there would have been no need for the majority to cite *McDaniels's* holding that trial before a biased judge is structural error. Rather, as noted, to decide his evidentiary claim, the appellate court would have had to address additional issues, including whether the judge's "misrecollection" of the evidence was harmless or prejudiced defendant. *Supra* p. 2. Given that the majority concluded that the evidence was sufficient to uphold defendant's conviction due to the array of evidence proving that defendant was the shooter, it is likely that the majority would have concluded that the judge's "misrecollection" about a minor issue such as

Story's training did not prejudice defendant. *Conway*, 2021 IL App (1st) 172090, ¶ 20 (denying defendant's sufficiency of the evidence claim). At the very least, the majority would have had to explain why the evidence was sufficient to sustain defendant's conviction, yet the judge's misrecollection of Story's training nevertheless affected the outcome of trial. Yet, rather than addressing that issue, the majority instead concluded that retrial was automatically required, which shows the majority was deciding the case on the basis of judicial bias.

That the majority's decision was based on a finding of judicial bias is further evidenced by Justice Pierce's dissent, which noted that "the majority orders a retrial based on a finding, with no persuasive explanation, that an experienced trial judge is biased in favor of a police officer witnesses merely because the witness is a police officer." *Conway*, 2021 IL App (1st) 172090, ¶ 35 (Pierce, J., dissenting). Justice Pierce criticized the majority for "find[ing] judicial bias where there is none." *Id.* ¶¶ 43-44 (Pierce, J., dissenting). And Justice Pierce concluded by saying: "I do not agree with the majority that the record supports a finding that the trial judge exhibited any bias. Therefore, I would find that defendant is not entitled to a new trial on this basis." *Id.* ¶ 46 (Pierce, J., dissenting). To accept defendant's argument that the majority did not decide this case on the basis of judicial bias would therefore require this Court to conclude, contrary to common sense and the normal process for writing appellate opinions, that Justice Pierce

misunderstood the basis for the majority's decision and the majority chose not to correct that misunderstanding.

Defendant also argues that the majority concluded that the trial judge was biased *only* to decide that the trial judge should be disqualified on remand, and *not* as a basis for overturning defendant's conviction. Def. Br. 36-37. For the reasons explained above, the text of the opinion does not support that argument. Moreover, defendant's argument is illogical. Simply put, defendant is asking this Court to believe that (1) the appellate majority repeatedly said that the trial judge had a pronounced bias and denied defendant an impartial trial, yet (2) the majority did not find that this was a basis to overturn defendant's conviction. Thus, this Court would need to conclude that the appellate majority ignored basic principles of law, such as that a trial before a biased judge is structural error that is anathema to the judicial process and automatically requires a new trial. *Thompson*, 238 Ill. 2d at 608-09. But courts are presumed to know and follow the law, absent clear evidence to the contrary. *E.g., In re Snapp*, 2021 IL 126176, ¶ 22. And, as noted, defendant can point to no such evidence because the appellate majority relied on precedent holding that a trial before a biased judge is a structural error that automatically requires a new trial. *Supra* p. 4.

Defendant's final argument — that the majority decided the case based on his forfeited evidentiary claim because it found the evidence of defendant's guilt closely balanced — mischaracterizes the majority's opinion. Def. Br. 37-

38. As defendant notes, to succeed on this forfeited claim, he would have to demonstrate plain error, *i.e.,* that there was a clear or obvious error and the evidence was closely balanced. *Id.* Defendant contends that the majority opinion's reference to "closely balanced" evidence proves the majority resolved his appeal based on his evidentiary claim. *Id.* at 38. But defendant fails to note that the reference to the evidence being "closely balanced" was in the section of the opinion identified as addressing defendant's sufficiency of the evidence claim; the majority was not discussing plain error there, but merely saying that the evidence was sufficient to sustain defendant's conviction, even if it was a close case. *Conway*, 2021 IL App (1st) 172090, ¶ 20. By contrast, in the section of the opinion identified as addressing the trial court's decision to credit Story, the majority did not discuss whether the evidence was closely balanced; instead, the majority cited authority holding that trial before a biased trial judge is a structural error that automatically requires a new trial regardless of the evidence against the defendant. *Id.* ¶¶ 22-28.

In sum, the record is clear that the majority granted defendant a new trial because it believed that the trial judge had a "pronounced bias," a claim that defendant admits he did not raise. Thus, this Court should vacate the portion of the majority's opinion that overturns defendant's conviction. *See, e.g., People v. Givens*, 237 Ill. 2d 311, 330 (2010) (vacating portion of appellate court's opinion that ordered a new trial based on an unraised claim).

B. This Court Also Should Reaffirm Its Longstanding Precedent and Hold That the Majority's Reasoning Is Meritless.

Ordinarily, when an appellate court errs by addressing an unraised claim, it is sufficient to merely vacate that portion of the court's opinion. *E.g., Givens*, 237 Ill. 2d at 330. However, more is required here because the majority not only decided the case on an unbriefed issue, it ignored this Court's settled precedent regarding judicial bias claims and stated in a published opinion that a fellow jurist has a "pronounced" "pro police bias." As this Court has long observed, a finding that a judge was biased "is not, of course, a judgment to be lightly made" because it will be viewed "as reflecting unfavorably upon the judge, and it tends to disrupt the orderly functioning of the judicial system." *People v. Vance*, 76 Ill. 2d 171, 179 (1979); *see also Eychaner v. Gross*, 202 Ill. 2d 228, 280 (2002) (similar). Given the seriousness of the majority's charge of bias, and the importance of reaffirming this Court's precedent, the People respectfully request that, in addition to vacating the bias portion of the majority's decision, this Court also explain that the majority's reasoning was meritless.

It is settled that trial judges are "presumed to be impartial," *Eychaner*, 202 Ill. 2d at 280, and this Court has cautioned that appellate courts "should be chary of condemning as motivated by prejudice those actions of trial judges which may represent only a difference of opinion," *Vance*, 76 Ill. 2d at 181. As this Court has explained, "[a]llegedly erroneous findings and rulings by the trial court," including credibility determinations, "are insufficient

reasons to believe that the court has a personal bias," absent extreme circumstances proving the judge has "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Eychaner*, 202 Ill. 2d at 280-81 (rejecting claim that comments on witness's credibility established bias); *see also In re Estate of Wilson*, 238 Ill. 2d 519, 555 (2010) (similar).

As the People's opening brief demonstrated, the majority's holding that the trial judge was biased in favor of police because he credited Story's testimony ignores those principles. Peo. Br. 13-26. To begin, the record is clear that the trial judge did not credit Story simply because he was a police officer, as the majority believed. Instead, the trial judge noted a number of reasons he believed Story's testimony that were unrelated to his status as an officer, including that: (1) Story had a truthful demeanor, as he "testified very clearly and unequivocally" under examination that he could identify defendant; (2) it was undisputed that the shooting occurred in in broad daylight and nothing obstructed Story's view; and (3) there was corroborative evidence of Story's identification, including that defendant was found next to the distinctive sweatshirt the shooter wore and the gun used in the shooting was recovered in the same house where defendant was found. R154-59. Moreover, the appellate majority failed to consider, among other things, that (1) even the defense told the trial judge that it was possible to believe Story's testimony and (2) defendant said in his appellate briefs that the record was "clear" that in crediting Story's account the judge "was *not* applying a

'general'" view of police officers but instead made "a finding that was 'specific to' Officer Story." Peo. Br. 13-36. Thus, there is no merit to the majority's conclusion that the trial judge had a pro-police bias merely because he believed Story's testimony.

The majority opinion also reflects fundamental misunderstandings of how judicial bias claims should be decided and shows that the lower courts could benefit from this Court reiterating certain longstanding principles. For example, contrary to this Court's precedent, the majority found bias simply because it disagreed with a credibility determination an experienced trial judge made after hearing live testimony. Further, the majority's decision is illogical, and ignored this Court's warnings not to presume bias, because it found that the judge's decision to believe Story evidenced "pronounced bias," yet it rejected defendant's sufficiency claim because the physical evidence "suffices as corroboration of the eyewitness identification." *Conway*, 2021 IL App (1st) 172090, ¶ 20. The majority also ignored basic principles of appellate review because it relied on inadmissible testimony from out-of-state cases to hold that it is impossible to identify someone from 150 feet away, even though no such evidence was presented in this trial. Peo. Br. 21-23. And in finding bias, the majority neither created nor applied a workable rule; that is to say, if a judge is necessarily biased because he credits a witness's testimony that he could identify someone from 150 feet away, what about different conditions such as 125 feet away, or 85 feet at dusk, or any other

myriad possibilities? Judicial bias claims must be based on clear rules and strong evidence, and the majority's opinion has neither.

Tellingly, defendant acknowledges that the People have raised "significant concerns about the reasoning found in the appellate court's published opinion insofar as it addressed the question of bias, and this Court may share some or all of those concerns." Def. Br. 57. And, defendant also acknowledges that "this Court might be understandably reluctant to leave [the majority's] opinion standing untouched." *Id.* at 58. Defendant suggests that the Court could "disavow the appellate court's reasoning" with regard to bias while granting defendant a new trial on other grounds. *Id.* It is thus apparent that even defendant does not dispute that the majority's faulty reasoning should be repudiated.

Therefore, in addition to vacating the appellate court's finding of judicial bias because that claim was never raised by defendant, this Court also should (1) hold that there was no merit to the majority's decision that the trial judge has a pro-police bias; (2) reiterate that, except for extreme cases clearly showing deep-seated bias, disagreements about credibility determinations cannot support a judicial bias claim; and (3) hold that the majority erred by relying on testimony from other cases that was not introduced in this trial.

II. Defendant's Counter-Argument that the Trial Judge May Be Substituted on Remand Is Meritless.

Although defendant concedes that he is not entitled to a new trial due to judicial bias, he half-heartedly argues that, should this case ever be remanded for another reason (such as due to other claims the appellate court has not yet addressed), this Court can preserve the appellate court's order that a new trial judge be assigned to the case. Def. Br. 50-51. The People agree that, in certain limited cases, an appellate court can order that a trial judge be substituted on remand. But this is not one of those rare cases.

Defendant's argument that this Court may preserve the majority's substitution order fails at the start because defendant admits that he never argued that the judge was biased, let alone asked that the judge be replaced on remand. Def. Br. 50. Appellate courts may not reach unbriefed issues unless there is "clear and obvious error" that is "controlled by clear precedent." *Givens*, 237 Ill. 2d at 325 (cited in Def. Br. 54). And defendant cites no clear, controlling precedent that compels the majority's substitution order, nor have the People found any. Rather, the People's opening brief established that there is no merit to the majority's conclusion that the judge was biased and defendant has declined to defend the appellate court's reasoning. Peo. Br. 12-26; *see also supra* Section I.B.

Defendant's assertion that the majority's substitution order was not sua sponte because it was "simply a logical extension" of defendant's claim that the trial judge had a "misrecollection" of the evidence is incorrect. Def.

Br. 50. It does not logically follow that a judge is necessarily biased (and in need of substitution) when the judge failed to recall certain evidence any more than it necessarily means a judge is biased if the judge incorrectly excluded evidence or made any other trial error. Moreover, defendant fails to acknowledge that his appellate arguments were directly *contrary* to a bias claim (and, thus, the majority's substitution order), because he emphasized that it was clear that the trial judge "was *not* applying a 'general'" notion about police officers but instead was making "a finding that was 'specific to' Officer Story." Def. App. Ct. Brief at 39-40 (emphasis by defendant). In light of that unequivocal statement of the judge's impartiality, defendant's observation that he included a boilerplate sentence in his brief that prosecutors and judges cannot rely on a witness's job as a police officer to bolster his credibility is irrelevant; defendant did *not* claim that prosecutors improperly bolstered Story's testimony or that the judge was biased, but instead he took precisely the opposite position. Def. Br. 50. Thus, the majority erred by sua sponte ordering substitution of the trial judge.

Even setting that aside, there is no merit to the majority's substitution order. As noted, the People's opening brief identified multiple reasons why the majority's conclusion that the trial judge was biased is meritless. Peo. Br. 12-26. Rather than attempting to the defend the substance of the majority's reasoning (which defendant has effectively disclaimed), defendant instead argues that a reviewing court may order that a judge be replaced to avoid the

"appearance of bias" or "any suggestion of unfairness," even if there is no showing of actual bias. Def. Br. 51. That argument fails for several reasons.

To begin, defendant misstates the evidence that is required to justify an order that a new trial judge be assigned on remand. Trial judges are "presumed to be impartial" and "the burden of overcoming this presumption rests on the party" seeking to replace the judge on remand. *Eychaner*, 202 Ill. 2d at 280. To overcome the presumption of impartiality, the party seeking to replace the trial judge "must present evidence of prejudicial trial conduct and evidence of the judge's personal bias." *E.g., id.* Thus, evidence of actual bias is necessary to order that a judge be substituted on remand; defendant is incorrect to argue that substitution is justified merely to avoid the "appearance of bias" or "any suggestion of unfairness."

Indeed, two cases that defendant relies on undermine his argument that a lesser standard applies. *See* Def. Br. 54. In *People v. Hayes*, the appellate court stated that it was not holding that the judge was biased yet it ordered that a new judge be reassigned on remand "out of an abundance of caution" and "to avoid even the appearance" of impropriety. 2021 IL App (1st) 190881, ¶¶ 52-53. But this Court made clear that was an insufficient basis to replace the judge, as it summarily vacated that substitution order. *Hayes*, 2022 Ill. LEXIS 219. Similarly, in defendant's second case, *Raintree*, this Court overturned an appellate court's substitution order because the

plaintiff failed to overcome the "presumption" that the judge was "impartial." *Raintree Homes, Inc. v. Vill. of Long Grove*, 209 Ill. 2d 248, 263 (2004).

Accordingly, *Eychaner*, *Hayes*, and *Raintree* make clear that the possibility of bias or a suggestion of unfairness is insufficient — there must be evidence of actual bias that is strong enough to overcome the presumption of impartiality. A lower standard would encourage parties to request unnecessary substitutions and engage in judge shopping, which would unfairly cast trial judges in a bad light and disrupt the orderly functioning of the judicial system. *See, e.g.*, *Vance*, 76 Ill. 2d at 179 (discussing problems created when appellate courts order trial judges to be reassigned).

Despite this controlling authority, defendant cites four appellate cases that he contends show that an order to substitute a judge on remand "does not require a showing of actual bias" but rather can be based merely on the desire "to avoid even the appearance of bias" or "any suggestion of unfairness." Def. Br. 51. The appellate court, of course, cannot overturn this Court's precedent, so defendant's appellate cases are wrongly decided to the extent that they are inconsistent with *Eychaner* and its progeny.

In any event, defendant's cases do not support his argument. The first case he relies on, *People v. McAfee*, 332 Ill. App. 3d 1091, 1097 (3d Dist. 2002), predates *Eychaner*, cites no authority at all, and rules in conclusory fashion that the trial judge should be replaced on remand. In turn, defendant's second case relies on *McAfee*. *People v. DiCorpo*, 2020 IL App

(1st) 172082, ¶ 57. In defendant's third case, there was evidence of actual bias: "the trial court changed its evidentiary rulings" to "ensure that [the defendant] was not acquitted." *People v. Rosado*, 2017 IL App (1st) 143741, ¶ 45. Similarly, in defendant's final case, *People v. Harris*, 2021 IL App (1st) 182172, ¶ 62, the appellate court held that substitution was necessary because the trial judge expressed a tendency to favor the prosecution (in other words, bias).

Defendant also is incorrect when he attempts to distinguish *Eychaner*. According to defendant, *Eychaner* holds that a judge cannot be substituted because of a credibility determination the judge made; in the present case, defendant contends, the problem is different because the judge did not recall the evidence at trial. Def. Br. 53. However, the main point of *Eychaner* is that a judge can be replaced on remand only if there is evidence of actual bias, and here defendant has not presented any. Moreover, *Eychaner* is factually analogous because here the majority concluded that the trial judge had to be replaced because of a credibility determination, *i.e.*, because he believed Story's testimony that he could identify defendant. *Supra* Section I.

Defendant's final argument is that *Eychaner* cited two appellate cases that he believes did not require a showing of actual bias. Def. Br. 53-54. However, as defendant's descriptions of those cases show, neither case is analogous nor supports his theory, because in the first case there was evidence of bias as the judge criticized the defendant for failing to "act as a

man" and provide for his family, and in the second case substitution was required because the judge had represented the defendant earlier in the proceedings before moving to the bench. *Id.* (citing *In re Marriage of Smoller*, 218 Ill. App. 3d 340 (1st Dist. 1991), and *People v. Austin*, 116 Ill. App. 3d 95 (2d Dist. 1983)). Moreover, defendant fails to note that *Eychaner* merely cited those cases in a string cite for the simple proposition that reviewing courts have the power "to reassign a matter to a new judge on remand" and did *not* cite them when explaining the evidence that is necessary to justify a substitution order. *See Eychaner*, 202 Ill. 2d at 279. Indeed, as noted, *Eychaner* held that "evidence of the judge's personal bias" is required for an appellate court to order the reassignment of trial judges. *Id.* at 280. And in announcing that standard, *Eychaner* relied on decisions that held that parties seeking to substitute a judge have the "heavy burden" to "present evidence of personal bias." *See, e.g., In re Petersen*, 319 Ill. App. 3d 325, 339-40 (1st Dist. 2001) (cited in *Eychaner*, 202 Ill. 2d at 280); *see also Vance*, 76 Ill. 2d at 178, 182 (noting that courts have "repeatedly indicated that the burden of establishing actual prejudice rests on the defendant") (cited in *Eychaner*, 202 Ill. 2d at 280).

Lastly, even if defendant were correct that an appellate court may order the substitution of a judge "to avoid even the appearance of bias," he still has failed to establish that he has met such a standard in *this* case. As noted, defendant expressly stated in the appellate court that the trial judge

was not biased and that the judge erred merely by failing to accurately recall one piece of evidence (evidence so unimportant that the alleged mistake was never addressed by trial counsel). Defendant cites no authority holding that substitution is justified when a trial judge fails to recall certain evidence, which is unsurprising because such a simple trial error is easily corrected in a retrial without the need to replace the judge. Therefore, this Court should vacate the appellate court's order that a new trial judge should be reassigned if this case is ever remanded for a new trial.

III. Defendant's Counter-Argument that the Trial Judge Made an Evidentiary Error Is Not Properly Before This Court and, Alternatively, Is Meritless.

Because the appellate majority resolved defendant's appeal based on an unraised theory of judicial bias, the appellate court did not address several claims raised by defendant, including his claim that the trial court erred by briefly referring to Officer Story's training in the final judgment because no direct evidence at trial specifically addressed Story's training. *See generally,* Peo. Br. 6-7; Def. Br. 59-60. Defendant raises that evidentiary claim in his brief in this Court, although he also notes that this Court could remand to the appellate court to rule on the claim. Def. Br. 39-50, 59-60. The People agree that this Court's precedent requires the case to be remanded for the appellate court to rule on defendant's evidentiary claim in the first instance; if this Court nevertheless chooses to address the claim, however, it should find that it is meritless.

A. This Court Should Remand for the Appellate Court to Consider Defendant's Evidentiary Claim in the First Instance.

Defendant states that if this Court agrees with the People that the appellate majority decided this case based on the unraised issue of judicial bias, then this Court could remand to the appellate court with instructions to address his claim that the trial court erred by briefly referring to Story's training "because it was not based on the evidence." Def. Br. 59-60. The People agree that, rather than addressing the merits of defendant's evidentiary claim, this Court should remand with instructions for the appellate court to rule on it instead.

This Court generally declines to reach the merits of claims that were not addressed by the appellate court because to do otherwise "would in effect constitute the allowance of a direct appeal to this court in contravention of" the normal rules of appellate practice. *Williams v. BNSF Ry. Co.*, 2015 IL 117444, ¶ 55 (collecting cases). Moreover, in addition to defendant's evidentiary claim, he has two other claims that the appellate court has not addressed: (1) that testimony from a forensic scientist regarding gunshot residue violated the Confrontation Clause; and (2) that his pro se complaints about the attorney who represented him before trial entitle him to a hearing under *People v. Krankel*, 102 Ill. 2d 181 (1984). *See Conway*, 2021 IL App (1st) 172090, ¶ 1 (describing claims). The existence of these two additional unaddressed claims (which have not been briefed in this Court) further counsels in favor of remanding the evidentiary claim for the appellate court's

consideration. *E.g., Williams*, 2015 IL 117444, ¶ 56 (judicial economy would not be served by this Court ruling on one unaddressed claim when there were other claims the appellate court needed to address).

B. Alternatively, This Court Should Hold That Defendant's Evidentiary Claim Is Meritless.

If this Court instead chooses to address defendant's evidentiary claim, it should hold that it is meritless. Because it is undisputed that defendant has forfeited his evidentiary claim, Def. Br. 45, he must satisfy the requirements of the plain-error doctrine, *People v. Aaron Jackson*, 2020 IL 124112, ¶ 81. The plain-error doctrine "is a narrow and limited exception to the general rule of procedural default" and it is defendant's burden to establish plain error. *Id.* First, he must show that "clear or obvious" error occurred, *id.*, because the judge's remark was (1) "improper," and (2) "the verdict would not have been the same" had the error not occurred, *People v. Johnson*, 218 Ill. 2d 125, 143 (2005). Second, defendant must establish either that (1) the evidence was "so closely balanced that the error alone severely threatened to tip the scales of justice" against him, or (2) the error was so serious that it "affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Aaron Jackson*, 2020 IL 124112, ¶ 81; *see also* Def. Br. 46-49 (discussing components of defendant's claim).

1. Defendant has failed to demonstrate clear or obvious error.

The trial court's brief reference to Officer Story being a trained police officer was not "clear and obvious error" but rather a reasonable inference

from the evidence that reflected common knowledge and common sense. It has long been established that the trier of fact is entitled to "draw reasonable inferences" from the evidence by relying on common knowledge and common sense. *People v. Leib*, 2022 IL 126645, ¶ 36; *see also*, *e.g.*, *People v. Smaszcz*, 344 Ill. 494, 502 (1931) (triers of fact are "authorized, in the consideration of the evidence, to take into consideration their own common knowledge"); *People v. Schaffner*, 382 Ill. 266, 279 (1943) (similar).

The parties agree that the reliability of eyewitness testimony depends in part on the witness's degree of attention to the crime. Def. Br. 13-14 (citing *People v. Slim*, 127 Ill. 2d 302, 307-08 (1989)). When explaining his judgment, the trial judge considered that factor, stating:

> I do find that the officer was not startled, he was not in a situation where his perception might have been affected or that he might have been distracted. Again, he is a professional. He is a law enforcement official, which I think is something that I can take into consideration as compared to an individual who's never had any such training and the dangers of false identification become more concerning than with a police officer.

R159. As the People noted in their opening brief, by briefly referring to Story's occupation and training, the judge meant it was reasonable to believe that Story was paying attention (*i.e.*, he was not "startled" or "distracted"), which decreased the risk of an incorrect identification. Peo. Br. 18-20.

Defendant argues in response that this inference was error because there was no evidence that Story received training. Def. Br. 41. That assertion is incorrect. Defendant does not dispute that the evidence showed

that: (1) Officer Story had been a police officer for over 15 years; (2) he was a member of the Narcotics Organized Crime Division; (3) his duties included conducting surveillance; and (4) on the day in question, he was conducting surveillance. R63-64, 77. Given that Story is a police officer — and not just any police officer but a member of the Narcotics Organized Crime Division whose responsibilities include conducting surveillance — the judge's belief that Story was "trained," and more likely to pay attention while witnessing a crime, is a reasonable inference from the evidence based on common knowledge and common sense, and did not require the prosecution to introduce testimony about Story's training.

For example, the United States Supreme Court has explained that when judging the reliability of an eyewitness identification, a "trained police officer" can be "expected" to "pay scrupulous attention to detail" when he witnesses a crime because he knows that (1) "subsequently he would have to find and arrest" the offender, and (2) his observations "would be subject later to close scrutiny and examination in any trial." *Manson v. Brathwaite*, 432 U.S. 98, 115 (1977). Notably, nothing in *Manson* requires prosecutors to introduce evidence regarding the training a police officer received; indeed, the opinion does not even state that such evidence was introduced at trial. *See id.* Rather, *Manson* demonstrates that it is reasonable to infer (based on common sense and common knowledge) that police officers, trained to fight

crime, pay attention when a crime is committed because they know they will have to apprehend the offender and possibly testify in court.

Other courts likewise have held that it is reasonable to infer that police officers are trained observers who will pay close attention when a crime is being committed, and those cases do not require prosecutors to introduce evidence of the officer's training. *See, e.g., United States v. Frink*, 328 F. App'x 183, 192 (4th Cir. 2009) (crediting officer's eyewitness identification because "as a trained police officer, his degree of attention is presumed to be higher"); *United States v. Caldwell*, No. 95-1003, 1996 U.S. App. LEXIS 8431, *10-11 (10th Cir. Apr. 17, 1996) (applying *Manson* presumption because "although not specifically stated in the record, it is apparent that [eyewitness] 'was a trained police officer'"); *United States v. Travis*, No. 12 CR 6130L, 2013 U.S. Dist. LEXIS 159733, *14 (W.D.N.Y. Nov. 6, 2013) (applying *Manson* presumption and noting that courts repeatedly have recognized "that police officers are trained observers"); *Jennings v. Beightler*, No. 10 CV 2371, 2011 U.S. Dist. LEXIS 150784, *27 (N.D. Oh. Dec. 20, 2011) (finding it reasonable for state court to conclude that officer's identification was reliable where court held that officer presumably paid close attention because "[p]olice officers are trained in handling stressful, crime situations"); *see also Alvarez v. Fischer*, 170 F. Supp. 2d 379, 385 (S.D.N.Y. 2001) (presuming that police pay attention because they are trained to catch criminals); *State v. Findlay*, 171 Vt. 594, 597 (Vt. 2000) (collecting cases).

Again, none of these cases requires the prosecution to introduce evidence about an officer's training. Rather, they are based on reasonable inferences and common knowledge: police officers are trained to fight crime, which means they are likely to pay attention when a crime is committed.

By contrast, defendant fails to cite a single case holding that prosecutors are required to introduce evidence of an officer's training. Instead, he merely cites cases from outside Illinois in which prosecutors were *allowed* to present evidence of training received by bank tellers, night club bouncers, police officers, and other professions; however, none of those cases *required* prosecutors to do so. Def. Br. 43-44. For example, one of defendant's cases, *People v. Perez*, 203 A.D.2d 123, 124 (N.Y. Sup. Ct. App. Div. 1994), merely holds that testimony about an officer's training did not "constitute unqualified expert testimony" and that the trial court "avoided any prejudice to defendant" by giving the jury a limiting instruction about police training. Similarly, another case defendant cites, *State v. McDuffie*, 450 N.J. Super. 554, 575 (N.J. Sup. Ct. 2017), holds that the trial court "did not abuse [its] discretion" by admitting testimony about a military sniper's training and the defendants were not "substantially prejudiced" by the testimony. If anything, defendant's cases show that — far from being required — testimony regarding an eyewitness's training often introduces evidentiary disputes that prompt additional litigation and create issues for appeal.

Another case defendant relies on, *United States v. Bothwell*, 465 F.2d 217 (9th Cir. 1972) (cited in Def. Br. 43), further undermines his argument. Rather than requiring prosecutors to introduce evidence of police training, *Bothwell* notes that "courts have accorded deference to the special identification training and abilities possessed by law enforcement officers," *id.* at 220, and for that proposition cites *United States v. Ganter*, 436 F.2d 364, 372 (7th Cir. 1970), which holds that it "must also be borne in mind" that "the normal training" of police officers "includes identification of individuals in a sense not needed by the ordinary lay person."

Defendant also misses the mark when he argues that the presumption a police officer pays close attention to an offender applies only to "undercover drug purchases" where an officer was "*specifically tasked* with paying close attention to the defendants." Def. Br. 41 (emphasis by defendant). To begin, defendant cites no authority limiting *Manson* to undercover drug cases. That is unsurprising because the logic underlying *Manson* — that police officers are trained to fight crime and can be presumed to pay close attention when a crime is being committed because they know they will have to apprehend the offender — is not limited to undercover drug cases. And, indeed, courts have applied the presumption in a variety of contexts. *E.g.*, *United States v. Stevens*, 935 F.2d 1380, 1391 (3d Cir. 1991) (identification of attacker by off-duty officers walking home from a movie theatre); *Jennings*, 2011 U.S. Dist. LEXIS 150784, *27 (identification of robber by retired officer).

Defendant's remaining argument is that the presumption a police officer pays attention when a crime is committed "is tantamount to crediting that officer's testimony based merely on his or her status as a police officer." Def. Br. 44. But, as the People noted in their opening brief, the *Manson* presumption does not mean that officers are inherently credible, but merely that it is reasonable to infer that a police officer will pay close attention when witnessing a crime, which is just one of several factors relevant to judging the credibility of an eyewitness identification. Peo. Br. 20; *see also In re M.W.*, 232 Ill. 2d 408, 435 (2009) (listing the factors courts consider when judging an eyewitness identification, including the opportunity to witness the crime and the time between the crime and the identification). For example, while a court may presume that an officer paid close attention to a shooting, the court could ultimately find the identification unreliable if the officer saw the offender for only a few seconds at dusk and the identification occurred a week after the crime. Defendant fails to respond to that argument. And the case he cites is inapposite, as it involves a prosecutor who vouched for a police officer in closing argument by telling the jury that the officer would not plant drugs on a suspect because he would lose "his job and his freedom" if he did so. Def. Br. 43 (citing *People v. Adams*, 2012 IL 111168, ¶¶ 16-20).

Lastly, even if the judge erred by briefly mentioning Story's training, that error did not prejudice defendant. *See* Def. Br. 46 (noting that a component of his claim is whether the alleged error affected the outcome of

trial). Lack of prejudice can be shown where the judge's verdict thoroughly summarized the trial evidence, and the challenged comment did not form the basis for the final judgment. *E.g., People v. Jenk*, 2016 IL App (1st) 143177, ¶ 53 (judge's reference to evidence outside the record was not reversible error because the judge summarized the trial evidence and the challenged comment "did not form the basis" of his verdict) (cited in Def. Br. 39).

Defendant was not prejudiced here because the record shows that the trial judge would have convicted defendant even if he did not consider that Story received training as a police office, as that was not the basis for his verdict. As discussed in the People's opening brief, the trial judge's ruling spanned seven transcript pages, and his reference to Story being trained was very brief and made only at the end, in the midst of a discussion of other evidence. R154-60; Peo. Br. 4-5, 14-15. Indeed, the bulk of the judge's ruling emphasized multiple other reasons he found Story to be credible, and those reasons were completely unrelated to Story being a trained officer, including: (1) Story's demeanor under examination and cross-examination evidenced his credibility, as he testified "clearly and unequivocally" that he could identify defendant; (2) the shooting occurred in the middle of the day, in broad daylight, and nothing obstructed Story's view, all of which supported Story's testimony that he could identify defendant; (3) the shooting and the shooter's subsequent walk to the residence (including stopping at the Pontiac) took enough time to allow for an identification; and (4) there was "corroborative

evidence" of Story's identification, including the distinctive sweatshirt worn by the shooter that contained gunshot residue and was found next to defendant, and the gun used in the shooting that was recovered in the house where defendant was found. R154-60. Thus, even assuming that the judge erred by mentioning Story's training, that error did not prejudice defendant.

2. Defendant cannot establish either first or second prong plain error.

Even if defendant could prove clear or obvious error, his conviction must be affirmed because he cannot prove either prong of plain error, *i.e.*, that (1) the evidence was "so closely balanced that the error alone severely threatened to tip the scales of justice" against defendant or (2) the error was so serious that it "affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Adams*, 2012 IL 111168, ¶ 21.

To determine whether a defendant has established the "closely balanced" prong, the Court must "make a 'commonsense assessment' of the evidence." *Id.* ¶ 22; *see also People v. Belknap*, 2014 IL 117094, ¶ 50 (same). In *Adams*, the only evidence that the defendant was guilty of drug possession was testimony from two police officers that they found a small bag of cocaine in his pocket while arresting him for a traffic offense. 2012 IL 111168, ¶¶ 5, 12. No physical evidence tied the defendant to the drugs, and he testified that (1) the drugs were not his, and (2) the officers found the drugs on the ground near their vehicle, not in his pocket. *Id.*, ¶¶ 7-11. This Court noted that the defendant's version of events required certain coincidences (such as

being stopped for a traffic offense next to where someone left a small bag of drugs), and held that the evidence was not closely balanced because "defendant's explanation of events, though not logically impossible, was highly improbable." *Id.*, ¶ 22.

Defendant's contention that he did not possess the gun is equally improbable because it requires the factfinder to believe that

- Defendant coincidentally happened to be in the same house that it is undisputed the shooter ran into and where the gun was found;
- Defendant coincidentally happened to have the keys to the Pontiac sedan that it is undisputed the shooter opened up;
- Defendant coincidentally happened to be next to the sweatshirt that it is undisputed the shooter wore;
- The sweatshirt coincidentally had gunshot residue; and
- Officer Story, a member of a police surveillance unit, was mistaken in his identification even though he steadfastly testified under oath that defendant was the shooter.

Simply put, if the evidence was not closely balanced in *Adams* — where the prosecution's case rested solely on testimony from two police officers that was uncorroborated by physical evidence — then defendant cannot credibly argue that it is closely balanced here, especially given that in this case, unlike in *Adams*, defendant presented no exculpatory testimony. *Adams*, 2012 IL 111168, ¶ 22; *see also Belknap,* 2014 IL 117094, ¶¶ 54-62 (evidence not closely balanced even though no physical evidence inculpated defendant, there were no eyewitnesses, and the prosecution's case rested largely on jailhouse informants); *People v. White*, 2011 IL 109689, ¶¶ 17-121,

134-44 (evidence not closely balanced even though eyewitnesses' testimony was recanted or inconsistent, some eyewitnesses exculpated defendant, and defendant presented alibi witnesses). The sole case defendant cites is unavailing, because there the prosecution's case rested solely on eyewitness testimony (without corroborating physical evidence), the eyewitnesses did not pay close attention to the shooting, and there were discrepancies between their description of the shooter and the defendant's appearance, race, and age. *People v. Piatkowski,* 225 Ill. 2d 551, 567-70 (2007) (cited in Def. Br. 48).

Nor may defendant's forfeiture of his evidentiary claim be excused as second prong plain error. This Court has explained that second prong plain error applies only where an error is deemed "structural," *i.e.*, a systemic error that "erodes the integrity of the judicial process and undermines the fairness of the defendant's trial." *People v. Brandon Jackson,* 2022 IL 127256, ¶ 28 (collecting cases). These errors "are rare," so a defendant seeking to invoke second prong plain error "is asking us to excuse his forfeiture under a narrow and limited rule and under a prong of the limited rule that rarely applies." *Id.*, ¶ 27 (collecting cases); *see also, e.g.*, *Thompson*, 238 Ill. 2d at 613-14 (second prong plain error applies "only in a very limited class of cases," such as the denial of counsel).

As defendant's authority shows, claims that a trial court did not correctly recall the evidence or based its decision on facts not in evidence are treated as implicating first prong plain error, not second prong. *People v.*

Williams, 2013 IL App (1st) 111116, ¶ 106 (cited in Def. Br. 46); *see also People v. Bever*, 2019 IL App (3d) 170681, ¶¶ 46-47 (trial judge's reference in his final judgment to facts not in evidence was not second prong plain error). That is consistent with this Court's precedent holding that neither a prosecutor's misstatement of the evidence nor the admission of inadmissible evidence is second prong plain error. *See, e.g.*, *Adams*, 2012 IL 111168, ¶ 24 (prosecutor's "improper" comments about police officers who were eyewitnesses, while unsupported by the evidence, was not second prong plain error); *People v. Harris*, 182 Ill. 2d 114, 136 (1998) (improperly admitting inadmissible evidence is not second prong plain error).

Further, to hold that it is second prong plain error (*i.e.*, structural error that automatically requires a new trial) for a judge to consider information not presented at trial would also lead to absurd results. For example, here the trial judge credited Story's account in part because it was broad daylight when he observed the shooting, even though no evidence was introduced regarding the effect of light on human vision; under defendant's theory, that reference to broad daylight is structural error that automatically requires a new trial even though it is common knowledge that it is easier to see in good lighting. *See* Def. Br. 48-49. Similarly, the trial judge also noted that the shooter fired seven shots; if he had instead said (incorrectly) that the shooter fired eight shots, then under defendant's theory that failure to recall the evidence would be structural error even though such a minor mistake cannot

reasonably be said to have denied defendant a fair trial. The more sensible approach is to continue to allow triers of fact to rely on common sense and common knowledge, and if a factfinder strays too far (such as by incorrectly treating something as common knowledge when it is not) or incorrectly recalls the evidence, then the case should be reviewed under first prong plain error. *E.g., Williams*, 2013 IL App (1st) 111116, ¶ 106 (cited in Def. Br. 46); *Bever*, 2019 IL App (3d) 170681, ¶ 45.

The three cases defendant relies on for his argument that second prong review applies are inapposite. *See* Def. Br. 48-49. In *People v. Lewis*, 234 Ill. 2d 32, 47-49 (2009), this Court held that second prong plain error review applied where the defendant was punished "in contravention of the statute" that required the trial court to hear evidence about the current street value of the drugs the defendant possessed before imposing a fine. This Court has described *Lewis* as holding that second prong plain error review applies to "the imposition of a fine in contravention of the statute" because an "unauthorized sentence" may be reviewed on appeal even if the defendant did not preserve his claim. *People v. Fort*, 2017 IL 118966, ¶ 19. Here, of course, there is no such statute or sentencing challenge. Defendant's next case, *People v. Blue*, 189 Ill. 2d 99, 120-41 (2000), is likewise inapt, as it is a cumulative error case that involved widespread errors by both the trial court and the prosecution, including the display of the victim's "bloodied and brain-splattered" police uniform on a mannequin throughout trial, and prosecutors

who harassed witnesses and cursed defense counsel, among other improper conduct. And defendant's final case, *People v. Johnson*, 208 Ill. 2d 53, 72-85 (2003), is another case of wide-ranging prosecutorial misconduct, including the display (once again) of the victim's "bloodied and brain-splattered" police uniform, eliciting testimony designed only to inflame the jury, suggesting that defense counsel was deceptive, and misstating the law.

Lastly, defendant makes a perfunctory argument that the People forfeited any arguments about plain error (or prejudice) by not raising them in their opening brief in this Court. Def. Br. 45-46. That assertion is meritless, as it fails to consider the procedural history of this case. Specifically, the People demonstrated in their opening brief that the appellate court did not address defendant's evidentiary claim but instead reversed his conviction on the unraised theory of judicial bias. Peo. Br. 9-12. As discussed, the proper remedy in such circumstances is to remand to the appellate court to consider the unaddressed claim (*i.e.*, the evidentiary claim), not for this Court to consider that claim on the merits. *Supra* Section III.A. Therefore, the People were following this Court's precedent and conserving judicial resources by not addressing defendant's evidentiary claim in their opening brief (including the issues raised by his admitted forfeiture of that claim). And, in any event, forfeiture is "a limitation on the parties and not the court." *People v. Sophanavong*, 2020 IL 124337, ¶ 21. Therefore, if this Court chooses to address defendant's forfeited evidentiary claim, it should

conclude that he cannot establish plain error, as defendant has had a full opportunity to present his arguments with respect to that doctrine.

IV. Defendant's Cross-Appeal Argument that the Evidence Was Insufficient to Convict Is Meritless.

The trial court held that the evidence proved beyond a reasonable doubt that defendant was guilty of armed habitual criminal and the appellate court found that the evidence sufficient to sustain his conviction. In his cross-appeal, defendant claims that the evidence was insufficient to support his conviction, but he relies on a new argument and evidence not presented at trial: that scientific studies prove "as a matter of law" it was "not possible" for Story to identify him from 150 feet away. Def. Br. 10-28. The evidence presented at trial was clearly sufficient to sustain defendant's conviction, and his arguments based on new evidence are barred and meritless.

A. The Trial Evidence Was Sufficient to Convict Defendant of Armed Habitual Criminal.

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 v. Virginia*, 443 U.S. 307, 319 (1979). "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). Thus, "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." *Aaron Jackson*, 2020 IL 124112, ¶ 64. A reviewing court may reject testimony as "insufficient under the *Jackson* standard" only where the defendant proves that "the record evidence *compels* the conclusion that no reasonable person could accept it beyond a reasonable doubt." *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004) (emphasis added). Defendant has failed to carry his burden.

To prove defendant guilty of armed habitual criminal, the evidence at trial had to prove that he (1) possessed a firearm and (2) had two prior qualifying convictions. *See* 720 ILCS 5/24-1.7. It is undisputed that defendant has two prior felony drug convictions that fulfill the second element of the offense. R143. Defendant also conceded that Officer Story observed a shooting on the day in question. R150. Thus, the only question at trial was whether defendant was the shooter. The evidence was clearly sufficient to prove that he was.

To begin, the trial judge expressly credited Officer Story's testimony that defendant was the shooter. R156-59. The judge's decision to credit Story was reasonable (indeed, it was correct), and must be upheld because defendant has failed show that the "record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *Cunningham*, 212 Ill. 2d at 280. As relevant here, the reliability of an identification is judged by four factors: (1) the witness's opportunity to view

the offender during the offense; (2) the witness's degree of attention; (3) the witness's level of certainty; and (4) the length of time between the offense and the identification. *In re M.W.*, 232 Ill. 2d at 436.[2] All of those factors support Story's identification.

Story had ample time and opportunity to observe defendant (the first factor) because defendant fired seven shots, walked to his car, opened it up, stopped there for a few moments, then walked into the house. R65-68. Moreover, the shooting occurred in the middle of the day, in broad daylight, and nothing obstructed Story's view. R65-66, 101-02. In addition, Story testified that he paid attention to the shooter (the second factor), which is credible given that he is a police officer who witnessed a violent crime and who knew he would have to apprehend the shooter to protect the public. R65-68. It is also undisputed that Story had a high degree of certainty in his identification (the third factor), as the judge noted he "testified very clearly and unequivocally" that defendant was the shooter. R157. And the last factor — the length of time between the offense and identification — also supports Story's identification because he identified defendant within minutes after the shooting. *E.g., In re M.W.*, 232 Ill. 2d at 435 (crediting identification because there was no meaningful delay between witnessing the

[2] A fifth factor — the accuracy of the witness's prior description of the offender — is used when there is a gap between the witness observing the offense and confronting (and identifying) the offender; it has no application here because the time between the shooting and defendant's arrest was only a few minutes. *See In re M.W.*, 232 Ill. 2d at 436.

offense and the arrest). Thus, defendant cannot show that the record compels the conclusion that no reasonable trier of fact could believe Officer Story.

That is especially true because other evidence corroborated that defendant was the shooter, including:

- Several minutes after the shooting, defendant was arrested in the same house the shooter ran into, R70-71;
- The gun that forensics confirmed was used in the shooting was found in the basement of that house, R71-73, 139-40;
- Defendant (who was wearing a t-shirt at the time of his arrest) was found next to the distinctive multi-colored sweatshirt that Officer Story said the shooter was wearing, R70-71;
- That sweatshirt contained gunshot powder residue, R129; and
- Defendant possessed the keys to the Pontiac sedan that the shooter stopped at and opened up a few moments after the shooting, R72.

In sum, the prosecution presented strong evidence that defendant was the shooter through eyewitness testimony and other corroborating evidence. When viewed in the light most favorable to the prosecution, this evidence is clearly sufficient to prove defendant's guilt.

B. Defendant's Argument That "As A Matter of Law" It Is Impossible to Identify Someone 150 Feet Away Is Barred and Meritless.

Against the foregoing evidence, defendant's sufficiency claim essentially rests on a single argument: he contends that "as a matter of law" it is "not possible" for Story to have identified him 150 feet away because that exceeds the limits of human vision. Def. Br. 10-20. Defendant's argument — which is based on evidence not presented at trial — is barred and meritless.

1. Defendant's argument is impermissibly based on new evidence not presented at trial.

At trial, the defense never presented evidence (or argued) that it was impossible for Story to identify a person 150 feet away because that exceeds the limits of human vision. Peo. Br. 3-4. Indeed, the defense only briefly referred to the distance in closing argument and admitted that it was possible to credit Story's testimony. R150 ("You can believe Story or you can doubt him."). Rather than arguing that identification is impossible at that distance, the defense asserted at trial that "reasonable doubt" existed because (1) the shooter would have been walking at an angle to Story, so Story would have seen only the side of his face; (2) there was insufficient physical evidence to prove defendant possessed the gun; and (3) the shooting did not last a particularly long time. R146-51.

By contrast, in this Court defendant contends that "as a matter of law," it "is not possible" to make an identification 150 feet away due to the limits of human vision. Def. Br. 10-20. And, contrary to what he told the trial court, defendant asks this Court to hold that "no rational trier of fact" could credit Story's identification at 150 feet. *Id.* at 14. In support of these arguments, defendant relies on scientific studies, none of which were presented (or even mentioned) at trial. *Id.* at 16-20. In doing so, defendant ignores that he may not rely on new evidence or scientific studies that were not presented at trial.

The United States Supreme Court has long held that "the sufficiency of the evidence review authorized by *Jackson* is limited to 'record evidence'" and "does not extend to nonrecord evidence, including newly discovered evidence." *Herrera v. Collins*, 506 U.S. 390, 402 (1993) (quoting *Jackson*, 443 U.S. at 318). Thus, defendant cannot rely on scientific studies in support of his sufficiency claim, because he did not present them at trial.

Indeed, this Court reiterated that longstanding principle just one year ago in *People v. Cline*, 2022 IL 126383. The defendant in *Cline* was convicted of burglary but the only evidence tying him to the crime was a fingerprint found inside the victim's residence. *Id.* ¶ 1. On appeal, the defendant argued that the evidence was insufficient to convict because the prosecution's fingerprint examiner did not follow the accepted methodology for identifying latent fingerprints. *Id.* ¶ 29. In making that argument, the defendant asked this Court to take notice of the ACE-V method of examination as "the standard analytical procedure followed by forensic fingerprint examiners." *Id.* This Court rejected the defendant's arguments and stated:

> Defendant is now asking this court to take judicial notice of extra-record materials for the purpose of evaluating the evidence presented at trial. Our review of the sufficiency of the fingerprint evidence in this case, however, must be limited to evidence actually admitted at trial, and judicial notice cannot be used to introduce new evidentiary material not considered by the fact finder during its deliberations.

Id. ¶ 32. This Court further stated that the defendant's argument "wholly ignore[d] the role of a reviewing court in considering the sufficiency of the evidence." *Id.* ¶ 33. The Court explained that a reviewing court may not

"take judicial notice of material not considered by the trier of fact" when evaluating a witness's credibility. *Id.* Accordingly, this Court rejected the defendant's argument that it could rely on the extra-record evidence and denied his sufficiency claim. *Id.* ¶¶ 32-33, 42.[3]

Not only is the bar against presenting new evidence on appeal to support a sufficiency claim well established, it also makes sense. The *Jackson* analysis asks whether the evidence *at trial* was sufficient to sustain a conviction. *Herrera*, 506 U.S. at 402; *Jackson*, 443 U.S. at 318. Moreover, the purpose of trial is to introduce evidence and test it through cross-examination, then allow the trier of fact to determine its credibility and weight. Permitting new evidence to be introduced on appeal eliminates the opportunity for that critical testing and obviates these crucial steps in the adversarial process. That defendant is attempting to rely on expert studies does not change those principles, because experts are not inherently credible — instead, it is for the factfinder to determine their credibility. *E.g., People v. Baez*, 241 Ill. 2d 44, 123 (2011) (even unrebutted expert testimony "does not necessarily establish" a particular fact because "the credibility and weight given to the testimony is determined by the trier of fact").

[3] *See also, e.g., People v. Magee*, 374 Ill. App. 3d 1024, 1030 (1st Dist. 2007) (striking the defendant's citation to expert studies not offered at trial that were critical of eyewitness reliability); *People v. Peters*, 2018 IL App (2d) 150650, ¶ 51 (reviewing courts may not second guess credibility determinations based on evidence not presented in trial court).

Allowing a defendant to introduce new evidence to undermine the sufficiency of the trial evidence can unfairly disadvantage the People in additional ways, as this case shows. For example, defendant treats it as definitively established that Story was 150 feet away from the shooter; in reality, the precise distance is unknown. At trial, Story testified that the shooter was "[a]proximately maybe 150 feet" away and, at a pre-trial hearing, he testified it was between 100 to 150 feet. R66, SCR18. Because defendant did not argue that it was impossible to identify someone 150 feet away, there was no need to precisely determine the actual distance at trial; but had defendant raised such an argument, then the actual distance could have been measured and conclusively determined. Given Story's estimates, it is possible the actual distance might have been closer to 100 feet, rendering defendant's studies about the ability to make identifications at 150 feet irrelevant.

Defendant does not consider these concerns or address the foregoing case law, including *Cline*, though it is directly on point. Instead, he argues that a party may introduce, for the first time on appeal, evidence of what he calls "legislative facts," which he vaguely describes as "common-sense notions of how the world works" that have "relevance" to a reviewing court's decision. Def. Br. 20. The People agree that courts may rely on common sense, but that is a far cry from saying that a defendant may introduce, for the first time on appeal, scientific studies to support a sufficiency claim.

A critical problem with defendant's suggested approach is that there does not appear to be a limit to his theory that a party can introduce any evidence that has "relevance" to an appellate court's "reasoning." *Id.* For example, if defendant can introduce on appeal scientific studies about human vision, could the People respond by retaining an expert to test Story's vision at 150 feet and then introduce those results on appeal? After all, if a defendant can introduce general scientific studies about the visual acuity of an average person, no one could dispute that it would be better for the reviewing court to have information about the vision of the actual eyewitness. Or could the People respond on appeal by introducing newly obtained affidavits from the shooting victims identifying defendant as the shooter? Such evidence clearly fits within defendant's definition of evidence that has "relevance" to the reviewing court's decision. If defendant's view were adopted, therefore, an appeal would turn into a second trial.

It is thus unsurprising that the cases defendant cites do not support his argument that a defendant may base a sufficiency challenge on new evidence. *See* Def. Br. 21-23. As a general matter, in defendant's cases it is often unclear whether the reports cited in the opinions were introduced in the trial court or for the first time on appeal and, tellingly, there is no suggestion that a party objected to the reviewing court considering the materials in question. *See id.* But the bigger flaw is that 12 of the 13 cases defendant cites are flatly irrelevant as they do not involve introducing new evidence on

appeal to resolve *sufficiency of the evidence claims* but instead to address issues such as the constitutionality of life sentences for juveniles or desegregation cases. *See id.* (describing cases). And the sole case defendant cites addressing a sufficiency claim, *People v. Rivera*, 2011 IL App (2d) 091060, ¶ 40, is unavailing because, as defendant notes, it merely involves an appellate court's citation to a law journal article for the point that innocent people sometimes "confess to crimes they did not commit," Def. Br. 23. *Rivera* does not hold that a defendant may introduce scientific studies regarding a disputed factual point to support a sufficiency claim on appeal, nor, obviously, could it overrule precedent from this Court and the United States Supreme Court regarding the limits of review of sufficiency claims.

Lastly, defendant states that "[i]n this Court, the State does not specifically criticize the appellate court for relying on scientific studies." Def. Br. 19. The reason for that is obvious: the appellate court did not rely on scientific studies when considering defendant's sufficiency of the evidence claim. Rather, the appellate court correctly limited its analysis of defendant's sufficiency claim to the evidence at trial, and found the claim to be meritless. *Conway*, 2021 IL App (1st) 172090, ¶¶ 18-20.[4]

[4] When discussing the unraised issue of judicial bias, the majority cited testimony from an unpublished Indiana case opining that the ability to make an identification "falls to essentially zero" at 150 feet. *Conway*, 2021 IL App (1st) 172090, ¶ 23. The People's opening brief explained that doing so was improper for multiple reasons, Peo. Br. 21-23, and defendant apparently agrees as he has expressly disclaimed reliance on such testimony, Def. Br. 19-20, n.8.

In sum, defendant's sufficiency claim is based on evidence never presented to the trial court. However, it is settled that such evidence may not be considered on appeal, so defendant's claim must be denied.

2. Even if defendant's new evidence were considered, his sufficiency claim is meritless.

Even if, for the sake of argument, defendant could introduce his scientific studies for the first time on appeal, his sufficiency claim is still meritless. The trial court's determination that Story was credible "is entitled to great deference." *People v. Gray*, 2017 IL 120958, ¶ 35; *see also Cunningham*, 212 Ill. 2d at 280 (same). To discredit Story's testimony on appeal, defendant would have to show that "the record evidence *compels* the conclusion that no reasonable person could accept it beyond a reasonable doubt." *Gray*, 2017 IL 120958, ¶ 36 (emphasis added). Evidence that is "contradictory" is not enough. *Id.* Rather, defendant must show that there is "only one conclusion" that can be drawn from the record: that it was not possible for Story to identify defendant. *See, e.g., Cunningham*, 212 Ill. 2d at 280-84 (declining to overturn factfinder's credibility determination, despite flaws in witness's testimony); *Gray*, 2017 IL 120958, ¶¶ 38-48 (similar).

Defendant fails to carry that heavy burden because his studies do not support his contention that it "is not possible" to make an identification from 150 feet away. Def. Br. 15. Defendant begins by citing a survey of studies compiled by Ruth Horry for the unremarkable proposition that it is harder to identify someone "as the distance between the witness and the suspect

increases," but that general observation is insufficient to carry defendant's burden of proving that it was not possible for Story to have identified defendant. *Id.* at 16. More importantly, defendant fails to note that Horry's survey ultimately concludes that "very little" is known about the actual effect of distance on vision and that "[i]t is very important, therefore, to resist the temptation to search for convenient cut-off points above which a witness would be considered reliable and below which a witness would be considered unreliable." Ruth Horry, *et al.*, *Archival Analyses of Eyewitness Identification Test Outcomes: What Can They Tell Us About Eyewitness Memory?*, at 27 (2014).[5] Thus, defendant's own survey directly undermines his argument that courts should adopt a cut-off distance for witness reliability.

Defendant next cites the Loftus and Harley study and asserts that "by about 110 feet" the ability "to make out a familiar face" is "essentially" zero. Def. Br. 17. However, the Loftus and Harley study did not use live subjects but instead relied on photographs altered electronically by a computer in an attempt to mimic the presumed effects of distance; notably, another study cited by defendant calls such methodology into question. *See* Thomas J. Nyman *et al.*, *The Distance Threshold of Reliable Eyewitness Identification*, 43 Law & Hum. Behav. 527 (2019) ("Whether these results [using altered photographs] are applicable to real-life settings is, therefore, uncertain.")

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[5] Available at https://www.researchgate.net/publication/257837385_Archival_Analyses_of_Eyewitness_Identification_Test_Outcomes_What_Can_They_Tell_Us_About_Eyewitness_Memory.

(cited in Def. Br. 18).[6] Given the dubious value of the Loftus and Harley study, it cannot be said that the study proves that the only conclusion is that Story could not identify defendant.

Defendant next cites the Lindsay study, which found that participants could identify an unfamiliar face up to 164 feet away 37% of the time. *See* R.C.L. Lindsay, *et al.*, *How Variations in Distance Affect Eyewitness Reports and Identification Accuracy*, 32 Law & Hum. Behav. 526 (2008), Table 3.[7, 8] And that number includes participants who were "unsure" and declined to attempt an identification; when considering only participants who were confident enough to attempt an identification (like Officer Story), the percentage of correct identifications rose to over 41%. *Id.*[9] Judged by either number, therefore, the Lyndsay study supports the fact that it was possible for Story to identify defendant, as roughly 2 in 5 participants made accurate identifications up to 164 feet away (a longer distance than Story to the shooter). That is especially true because the study participants saw the

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[6] Available at https://psycnet.apa.org/fulltext/2019-38765-001.html.

[7] Available at https://www.researchgate.net/publication/5598065_How_variations_in_distance_affect_eyewitness_reports_and_identification_accuracy.

[8] Defendant describes this data as applying to participants "65 or more feet" away from the target; the report states that the participants were up to 50 meters (*i.e.*, approximately 164 feet) away. *See* Lindsay, 32 Law & Hum. Behav., at 528.

[9] Of the 94 participants, 9 declined to attempt an identification; 35 of the remaining 85 (41.2%) correctly identified the target.

target for only a few seconds after being told to look in the distance, they were "*not warned that they would have to identify the target*," then they were asked to fill out forms answering questions about themselves and shown a photo array. *Id.* at 528 (emphasis added). Officer Story faced much more favorable conditions, as he saw the shooter for a longer period of time, he clearly knew he would have to identify and apprehend the shooter, and he identified defendant in-person immediately after the shooting.

Further, defendant fails to note that the Lyndsay study concluded that the data showed that "[e]ven at 43 m [nearly 150 feet] identification evidence has some diagnostic value, and therefore probative value as well," and identifications at that distance should not be per se rejected by courts. *Id.* at 534. Accordingly, the Lindsay study does not compel the conclusion that no reasonable person could believe Officer Story.

Defendant's final study, the Nyman study, does not compel that conclusion either. To begin, defendant notes that the study found that it was possible for some people to make accurate identifications up to 300 feet away, *i.e.*, at least *twice* the distance between Story and defendant. Def. Br. 18. In addition, as defendant notes, at a distance of approximately 150 feet, the study found that in the 18-44 age group, 47 participants felt confident enough to make an identification and 32% of those 47 people correctly identified the target. *Id*. at 18-19.[10] Given that 1 in 3 participants who were willing to

[10] The record does not state Story's age; defendant is relying on the study's largest group.

attempt to make an identification were able to do so accurately at 150 feet, and given that other participants were able to make correct identifications at 300 feet, it cannot be said that Lyman study compels the conclusion that no reasonable person could credit Officer Story's identification of defendant.

In sum, defendant's studies show that it is possible to make accurate identifications from 150 feet away. Moreover, the studies expressly reject defendant's argument that courts should adopt a cutoff distance for finding identifications credible. Accordingly, defendant has failed to prove that "as a matter of law" no reasonable person could convict him. And that is especially true because in this case (unlike in defendant's studies) there is additional corroboration of defendant's guilt, including his presence in the same house the shooter ran into, his possession of the keys to the car the shooter opened, and his presence next to the distinctive sweatshirt the shooter wore.

C. Defendant's Remaining Sufficiency Arguments Are Meritless.

The only case that defendant relies on in support of his sufficiency claim is inapposite. *See People v. Hernandez*, 312 Ill. App. 3d 1032 (1st Dist. 2000) (cited in Def. Br. 16-17). The witness in *Hernandez* saw only the shooter's "profile" and only "momentarily" at that. *Id.* at 1036. His identification of the shooter was "not corroborated by other evidence" and the description of the shooter he gave to police "conflicted" with the description he gave at trial. *Id.* at 1036-37. Moreover, the witness told police he was "unsure" whether he could identify the shooter, and the first time he viewed a

photo array he failed to identify the defendant; it was only when he viewed another photo array (months after the shooting), which contained the defendant's photo for a second time, that he claimed the defendant was the shooter. *Id.* Plainly, *Hernandez* is far different than the present case, where Officer Story's identification was unequivocal, was made minutes after the shooting, did not change over time, and was corroborated by other evidence.

In defendant's remaining arguments, he attempts to retry the case by arguing that (1) it is hypothetically possible that someone else in the house was the shooter or that the shooter ran out the back door; (2) there are hypothetical innocent explanations for why defendant possessed the keys to the Pontiac and was found next to the shooter's sweatshirt; (3) although the gun was found in the basement of the house defendant was arrested in, there was no direct evidence he was ever in the basement; and (4) defendant's hands did not have gunshot residue. Def. Br. 28-31.

However, "it is not the function of the reviewing court to retry the defendant," and, therefore, a reviewing court "will not substitute its judgment for that of the trier of fact." *Aaron Jackson*, 2020 IL 124112, ¶ 64 (collecting cases); *see also Cline*, 2022 IL 126383, ¶ 33 (similar). As this Court has explained, resolving a sufficiency claim "'does not necessitate a point-by-point discussion of every piece of evidence as well as every possible inference that could be drawn therefrom. To engage in such an activity would effectively amount to a retrial on appeal.'" *E.g., Aaron Jackson*, 2020 IL 124112, ¶ 71

(citations omitted). Moreover, "it is not necessary that the trier of fact find beyond a reasonable doubt as to each link on the chain of circumstances," and the court "is not obligated to 'accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt.'" *People v. Evans*, 209 Ill. 2d 194, 209, 212 (2004) (collecting cases); *see also Cline*, 2022 IL 126383, ¶ 41 (similar); *Aaron Jackson*, 2020 IL 124112, ¶ 70 (similar). Defendant's discussion of the evidence ignores these settled principles and therefore his arguments must be rejected.

The bottom line is that after observing the shooting in broad daylight, Officer Story unequivocally testified that defendant was the shooter, and defendant's own studies demonstrate that an accurate identification was possible at that distance. Moreover, defendant was arrested minutes after the shooting in the same house it is undisputed the shooter ran into, he was arrested next to the sweatshirt it is undisputed the shooter wore, and he possessed the keys to the Pontiac sedan it is undisputed the shooter opened. This is strong evidence that, viewed in the light most favorable to the prosecution, is clearly sufficient to convict defendant of armed habitual criminal.

CONCLUSION

This Court should (1) vacate the appellate majority's judgment that the trial judge was biased, hold that that judgment was meritless, and reiterate this Court's longstanding principles regarding judicial bias claims; (2) affirm the appellate court's judgment that defendant's sufficiency claim is meritless; and (3) remand for consideration of defendant's remaining claims.

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RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 13,722 words.

/s/ Michael L. Cebula
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PROOF OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On January 17, 2023, the foregoing 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 email addresses:

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

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