No. 128805

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal from the Appellate Court of Illinois, Second Judicial
Plaintiff-Appellant,	)	District, No. 2-20-0195
	)	There on Appeal from the
v.	)	Circuit Court of Nineteenth Judicial Circuit, Lake County, Illinois, No. 16 CF 1655
OLVAN QUEZADA,	)	The Honorable James K. Booras,
Defendant-Appellee.	)	Judge Presiding.

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

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

KATHERINE M. DOERSCH
Criminal Appeals Division Chief

JOSHUA M. SCHNEIDER
Assistant Attorney General
115 South LaSalle Street
Chicago, Illinois 60603
(773) 590-7123
eserve.criminalappeals@ilag.gov

Counsel for Plaintiff-Appellant
People of the State of Illinois

ORAL ARGUMENT REQUESTED

E-FILED
1/3/2024 8:16 AM
CYNTHIA A. GRANT
SUPREME COURT CLERK

TABLE OF CONTENTS

Page(s)

ARGUMENT

The People established in their opening brief that the appellate court cannot review a due process claim of cumulative error *de novo* unless the component errors are properly before the court, either because they were preserved for review or because they are reviewable as plain error. *See* Peo. Br. 16-21.[1] Otherwise, a defendant could obtain *de novo* review of an unpreserved claim of error simply by pairing it with a second error, no matter how trivial, rendering the forfeiture doctrine and its narrow exception for plain errors a dead letter. *See id.* at 19-21. If the components of a cumulative-error claim are not properly before the court, then the cumulative-error claim is not properly before the court and may be reviewed only for plain error.

Accordingly, because the two component errors that comprise defendant's due process claim of cumulative error were neither preserved nor reviewable as plain error, the appellate court erred by granting relief based on *de novo* review of the cumulative-error claim. And because the two component errors do not cumulatively constitute plain error, defendant's cumulative-error claim does not entitle him to relief on plain-error review. Therefore, this Court should reverse the appellate court's judgment granting relief on defendant's cumulative-error claim.

---

[1] The People apply the citation convention from their opening brief, but with citations to the opening brief, petition for leave to appeal, and defendant's brief appearing as "Peo. Br. __," "PLA at __," and "Def Br. __," respectively.

I. A Due Process Claim of Cumulative Error Is Not Properly Before the Court and Subject to *De Novo* Review Unless Its Component Errors Are Themselves Properly Before the Court, Either Because They Are Preserved or Reviewable as Plain Error.

The appellate court cannot review a due process claim of cumulative error *de novo* (as the appellate court did below, *see* A38-39, ¶¶ 75-76) unless the components of that cumulative-error claim are themselves subject to review, either because they were preserved for review or are reviewable as first- or second-prong plain error. *See* Peo. Br. 16-21.

Contrary to defendant's assertion, Def. Br. 5-6, the appellate court may never review *de novo* a forfeited error that does not satisfy the plain-error test. Defendant's contrary argument — that forfeited errors may be reviewed *de novo* so long as they are clear or obvious and raised as part of a cumulative-error claim — mistakes the limited procedural review of a forfeited error *for* plain error with the substantive review of a forfeited error that satisfies the plain-error test *as* plain error. *Cf. Kaczmarek v. Rednour*, 627 F.3d 586, 592 (7th Cir. 2010) (recognizing that when Illinois courts review forfeited claim "for plain error . . . , that limited review does not constitute a decision on the merits").

Any forfeited claim of error may be reviewed *for* plain error — that is, to determine whether the forfeiture may be excused because the error satisfies one of the two prongs of the plain-error test. But the appellate court "may review [a forfeited] claim of error only if defendant has established

plain error" under one of those two prongs. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010); *see People v. Jackson*, 2022 IL 127256, ¶ 19 (plain-error rule "permits review of a forfeited error only if the error falls under the purview of one of [its] two alternative prongs"); *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005) ("the plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either" first- or second-prong plain error is shown); *People v. Hall*, 194 Ill. 2d 305, 335 (2000) ("Under the plain error rule, issues not properly preserved may be considered by a reviewing court under two limited circumstances:" when they constitute first- or second-prong plain error). If a forfeited error satisfies neither prong of the plain-error test, then it is not reviewable as plain error and the forfeiture must be enforced. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008).

Accordingly, this Court has consistently declined to consider unpreserved errors as part of its *de novo* review of a cumulative-error claim unless the unpreserved errors were individually reviewable *as* plain error. *See People v. Graham*, 206 Ill. 2d 465, 474-76 (2003) (reviewing *de novo* claim that errors cumulatively denied defendant due process, but reviewing unpreserved component for plain error under first and second prong); *People v. Caffey*, 205 Ill. 2d 52, 117 (2001) (rejecting cumulative-error claim because preserved components were harmless and unpreserved components "did not rise to the level of plain error"); *Hall*, 194 Ill. 2d at 351 (rejecting cumulative-error claim where preserved errors were harmless and unpreserved errors

"were not plain error"); *People v. Scott*, 148 Ill. 2d 479, 545-46 (1992) (considering unpreserved component errors offered in support of cumulative-error claim "only [to] consider whether they amounted to plain error").

Defendant cites only one decision from this Court — *People v. Mitchell*, 155 Ill. 2d 344 (1993) — to support his assertion that courts "frequently consider unpreserved errors that are not reversible on their own in cumulative error analysis." Def. Br. 9-10. But *Mitchell* is inapposite because it did not address a cumulative-error claim. Rather, *Mitchell* reversed the defendant's conviction because some testimony was clearly or obviously admitted in error and the evidence was closely balanced — that is, on the basis of first-prong plain error. 155 Ill. 2d at 354-55. *Mitchell*'s only mention of anything being "cumulative" was in its discussion of the People's argument that the error in admitting the testimony was harmless because it was "merely cumulative" of other evidence at trial. *Id.* at 351, 355.

Moreover, only when a cumulative-error claim based on unpreserved components is *itself* reviewable as plain error has the Court considered unpreserved components that were not individually reviewable as plain error. *See People v. Blue*, 189 Ill. 2d 99, 138-39 (2000). *Blue* reviewed the defendant's cumulative-error claim under "the same test that this [C]ourt uses whenever it applies the second prong of the plain error test," *id.* at 138 (citing Ill. S. Ct. R. 615(a)), and granted relief because the cumulative effect of the component errors so undermined the integrity of the judicial process

that "a new trial [wa]s necessary in order to preserve the trustworthiness and reputation of the judicial process," *id.* at 139. *See Herron*, 215 Ill. 2d at 187 (citing *Blue* as second-prong plain-error case). In other words, because the defendant's cumulative-error claim relied on unpreserved components not reviewable as plain error, *Blue* did not review the cumulative-error claim *de novo*, like the appellate court here did, but for plain error.

Federal courts take the same approach when reviewing cumulative-error claims that rely on unpreserved components. *See*, *e.g.*, *United States v. Caraway*, 534 F.3d 1290, 1302 (10th Cir. 2008). As *Caraway* explained, when a cumulative-error claim relies on "both preserved and unpreserved errors," the first step is to conduct *de novo* review of the preserved errors to determine whether they cumulatively entitle the defendant to relief. *Id.* at 1302. If they do not, then the next step is to add the unpreserved errors and consider whether the accumulation of preserved and unpreserved errors "are sufficient to overcome the hurdles necessary to establish plain error." *Id.* This requires that the errors cumulatively "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings," *id.* at 1298 — that is, that the evidence was closely balanced, or the errors cumulatively undermined the integrity of the judicial process, *see Herron*, 215 Ill. 2d at 184-86 (explaining that federal and Illinois plain-error standards are "the same standard").

At bottom, defendant's argument mistakes a cumulative-error claim as a means for the appellate court to ignore forfeiture and review unpreserved errors that would not be reviewable as plain error. But an unpreserved error may be reviewed only as plain error or a basis for an ineffective-assistance claim. *See People v. Byron*, 164 Ill. 2d 279, 295 (1995); *People v. Denson*, 2013 IL App (2d) 110652, ¶ 10. Although defendant takes issue with the People's citation to *Byron* and *Denson* for this proposition, Def. Br. 7-8, both decisions state it directly, *see Byron*, 164 Ill. 2d at 295 ("Where an alleged error has been [forfeited], the threshold inquiry must rise to the level of plain error or ineffective assistance of counsel"); *Denson*, 2013 IL App (2d) 110652, ¶ 10 ("Where an issue is forfeited, [the appellate court] may review it only for plain error or ineffective assistance.").

Defendant's argument that cumulative-error claims are another way to review forfeited errors rests on the mistaken belief that forfeiture is not a limitation on the appellate court. *See* Def. Br. 3, 10. Forfeiture *is* a limitation on the appellate court, which in criminal cases may not "notice[]" forfeited errors unless they are reviewable as plain error. Ill. S. Ct. R. 615(a); *Jackson*, 2022 IL 127256, ¶¶ 18-19 (error not reviewable under Rule 615(a) unless reviewable as first- or second-prong plain error). The maxim that forfeiture is a limitation on the parties, not the court, refers to *this* Court, which has supervisory authority to overlook forfeiture when necessary to ensure "a just result" and maintain "a sound and uniform body of precedent."

Vill. of Lake Villa v. Stokavich, 211 Ill. 106, 121 (2004); *see also People v. Custer*, 2019 IL 2019 IL 123339, ¶ 19 ("Forfeiture is a limitation on the parties, not *the* court. In the exercise of our discretion, *we* may address even forfeited issues." (emphasis added)).

But those same considerations do not permit the appellate court to ignore the limits of Rule 615(a). This Court may excuse forfeiture whenever it determines that justice so requires, but, under Rule 615(a), the appellate court may excuse forfeiture in the interest of justice only when an error constitutes plain error. *See People v. Whitfield*, 228 Ill. 2d 502, 521 (2007) (appellate court lacks supervisory authority and cannot disregard Rule 615 "in a misguided attempt to reach a 'fair' outcome"); *see also Mitchell*, 155 Ill. 2d at 354-55 (affirming appellate court's judgment because "justice require[d] that the defendant receive a new trial" where forfeited error was clear or obvious and evidence was closely balanced); *cf. People v. Hartfield*, 2022 IL 126729, ¶ 49 (exception for forfeited instructional errors when "justice requires" under Rule 451(c) is "coextensive" with plain-error exception under Rule 615(a)). Similarly, this Court may excuse forfeiture to maintain a uniform body of precedent, but the appellate court may not because it has no authority to unify the body of precedent. *See O'Casek v. Children's Home & Aid Soc'y of Ill.*, 229 Ill. 2d 421, 440 (2008) ("[T]he opinion of one district, division, or panel of the appellate court is not binding on other districts, divisions, or panels.").

Accordingly, if the components of a cumulative-error claim are properly before the appellate court, then the cumulative-error claim is properly before the court and may be reviewed *de novo*. But if its components are not properly before the appellate court, then a cumulative-error claim is not properly before the court and may be reviewed only for plain error.

II. Defendant's Cumulative-Error Claim Was Meritless Under *De Novo* Review Because It Contained No Cognizable Component Errors, and It Was Not Reviewable as Plain Error.

As the appellate court correctly held, neither of the two errors that defendant alleged as components of his cumulative-error claim — the admission of Longmire's videorecorded statement and Amaro's expert testimony regarding defendant's gang membership — constituted plain error under either prong of the plain-error test. *See* Peo. Br. 21-23; A30-31, ¶¶ 57-58; A35-36, ¶¶ 65-66. This holding was correct because neither alleged evidentiary error was clear or obvious; the evidence was not closely balanced; and the alleged errors did not constitute structural error, either individually or cumulatively. Therefore, neither alleged error could be considered *de novo* as part of defendant's claim of cumulative error, and defendant's cumulative-error claim was unreviewable as plain error. *See supra* § I.

A. Defendant failed to show any clear or obvious error.

1. The People did not forfeit their arguments in support of the appellate court's judgment that the alleged errors were not reviewable as plain error.

Contrary to defendant's contention, Def. Br. 12-13, the People did not forfeit their arguments that the component errors were not clear or obvious.

The People did not forfeit these arguments by not raising them in the appellate court because, when this Court grants leave to appeal from an appellate court judgment reversing the trial court's judgment, the appellant before this Court "may raise any issues properly presented by the record to sustain the judgment of the trial court, even if those issues were not raised in the appellate court." *People v. Wells*, 2023 IL 127169, ¶ 29 (internal quotation marks omitted).

Nor did the People forfeit their arguments that the errors were not clear or obvious when they argued in their petition for leave to appeal (PLA) that the errors "did not individually constitute plain error." *See* PLA at 3; *see id.* at 8. Parties forfeit issues, not arguments, and the People consistently disputed the issue of whether the component errors amounted to plain error, in both the appellate court and their PLA. *See Brunton v. Kruger*, 2015 IL 117663, ¶ 76 (party did not forfeit waiver argument raised for first time on appeal where he "disputed the issue of waiver" below). Moreover, because an error cannot constitute plain error unless it is clear or obvious, *see Jackson*, 2022 IL 127256, ¶ 21, the People's arguments that the errors were not clear or obvious are inextricably intertwined with the issue of whether the errors constitute plain error, *see Wells*, 2023 IL 127169, ¶ 30 (arguments not forfeited if inextricably intertwined with issue in PLA).

Accordingly, the People did not forfeit their arguments that the trial court did not clearly or obviously err in its evidentiary rulings.

2. The trial court did not clearly or obviously err by admitting Longmire's videorecorded statement.

The trial court did not clearly or obviously err by admitting Longmire's statement for two reasons. First, defendant invited any error in admitting the statement by assuring the court that he had "[n]o objection" to its admission. *See* Peo. Br. 23-25. Second, the record shows that counsel made a strategic decision to present the statement to the jury. *See id.* at 25-29. Accordingly, the trial court did not clearly or obviously err by declining to thwart counsel's strategy by *sua sponte* excluding Longmire's statement. *See id.*

a. Defendant waived any objection to Longmire's statement by acquiescing to its admission.

Defendant insists that he did not waive his objection to the admission of Longmire's statement by telling the trial court, "No objection, Judge," because this Court "has [n]ever held that simply not objecting to evidence is an affirmative acquiescence to [its] admission." Def. Br. 18. But defendant did not "simply not object[]" to the admission of Longmire's statement; he assured the court that he did not object to its admission. This is quintessential waiver. *See Caffey*, 205 Ill. 2d at 113-14 (defendant waived objection to admission of evidence when he told trial court "No Objection, Judge").

Defendant cannot factually distinguish *Caffey* and similar decisions cited in the People's opening brief. Defendant argues that none of the cited

cases concerned whether "improper evidence was admitted," so his express statement that he had no objection to the admission of the challenged evidence cannot be viewed as acquiescence. Def. Br. 20-22. But this distinction is immaterial. When a defendant expressly states that he has no objection to the trial court taking a particular action — whether the action is admitting certain evidence, not providing a limiting instruction, providing an incomplete verdict form, or some other action — he waives any appellate claim that it was erroneous. *See People v. Harvey*, 211 Ill. 2d 368, 385 (2004); *see also Caffey*, 205 Ill. 2d at 114 ("When a party procures, invites, or acquiesces in the admission of evidence, even though the evidence is improper, that party cannot contest the admission on appeal."); *People v. Schmidt*, 131 Ill. 2d 128, 137 (1989) (where "party acquiesces in proceeding in a given manner, he is not in a position to claim he was prejudiced thereby"). In other words, the nature of the action is irrelevant to the legal consequence of a defendant's statement that he has no objection to the action; when a defendant assures a court that he has no objection to the court taking a particular action, he waives any objection to that action, whatever it may be. Accordingly, when defendant here assured the trial court that he had no objection to the admission of Longmire's statement, he waived any objection to the admission of that statement.

Finally, defendant's assurance to the trial court that he had no objection to the admission of Longmire's statement does not "arguably show[]

less acquiescence" than that of the defendant in *Harvey*, as defendant contends. Def. Br. 19. According to defendant, Harvey was found not to have acquiesced to being impeached with the fact of his prior convictions even though he "stipulated to the improper evidence." Def. Br. 19. But Harvey did not stipulate to anything.

Instead, the prosecution sought to impeach Harvey with evidence of prior convictions, he objected, and the trial court admitted the evidence but *sua sponte* limited it to the fact that the defendant had been convicted of unspecified felonies. *Harvey*, 211 Ill. 2d at 374-75. The prosecution then told the jury that "the State would stipulate" that the defendant was convicted of unspecified felonies. *Id.* at 375. Harvey argued on appeal that "he did not stipulate or agree to the use of mere-fact impeachment," *id.* at 376, and this Court found the claim forfeited, not waived, because Harvey had "failed to object to the use of the mere-fact method of impeachment," *id.* at 384, but did not agree to it, *id.* at 386. In other words, when the allegedly improper evidence was introduced at trial, Harvey remained silent and thus merely "failed to object." Def. Br. 19. In contrast, when the allegedly improper evidence was introduced at defendant's trial, he affirmatively assured the court that he did not object to its admission. He cannot now reverse course and challenge its admission as erroneous.

b. The trial court did not clearly or obviously err by admitting Longmire's statement in accordance with counsel's presumptively strategic decision not to object.

Even had counsel not acquiesced to the admission of Longmire's videorecorded statement, the trial court would not have clearly and obviously erred by admitting it because "[i]t would have been entirely reasonable for a trial judge to assume that [counsel's lack of objection] was part of the defense's strategy." *People v. Precup*, 73 Ill. 2d 7, 17-18 (1978). Counsel had made the videorecording the centerpiece of his opening statement, explaining at length how the videorecording would show that the jury should not credit Longmire. *See* R397-402. Thus, the decision not to object was plainly strategic.

Notwithstanding counsel's reliance on the videorecording in his opening statement, defendant argues that counsel did not make a strategic decision to present that videorecording because he "could not have known that the State was going to admit [it]." Def. Br. 22. But counsel's opening statement shows that his pre-trial investigations gave him reason to believe that Longmire's statement would be presented at trial, either by the prosecution (if Longmire recanted) or by counsel himself (to impeach Longmire in all the ways described in counsel's opening statement).

Moreover, even if counsel did not know that the prosecution would seek to introduce the videorecording, counsel's decision not to object still "must be presumed to be a product of sound trial strategy and not

incompetence." *People v. Steidl*, 142 Ill. 2d 204, 240-41 (1991). Defendant's argument to the contrary rests on the erroneous assumption that attorneys cannot respond strategically to unexpected events at trial. But trial practice by its nature entails responding to the unexpected, requiring constant adjustment as evidence is unexpectedly excluded or admitted and even the best-prepared (or prepared-for) witnesses give unexpected answers. Accordingly, "'decisions such as what matters to object to and when to object'" presumptively fall within the realm of trial strategy. *People v. Jackson*, 2020 IL 124112, ¶ 106 (quoting *People v. Pecoraro*, 144 Ill. 2d 1, 13 (1991)). Thus, even if counsel had not affirmatively disavowed any objection to Longmire's videorecorded statement, the trial court could have reasonably concluded that counsel's lack of objection was strategic and declined to *sua sponte* intervene.

Defendant's arguments that "[t]here is nothing in the record to suggest that defense counsel's strategy was to admit this improper evidence or that [he] agreed] on the record to the improper evidence" ignores that counsel (1) expressly relied on Longmire's videorecorded statement in his opening statement as support for the defense and (2) later told the court that he had no objection to the admission of the statement. Therefore, as in *Precup*, the trial court here could have reasonably interpreted the alleged error as the product of a strategic decision by defense counsel, 73 Ill. 2d at 17-18, and the trial court did not clearly or obviously err by admitting Longmire's videorecorded statement in accordance with counsel's presumptive strategy.

3. The trial court did not clearly or obviously err by admitting Amaro's expert opinion that defendant was a gang member.

Defendant argues that it was clearly or obviously erroneous to allow Amaro to testify to his expert opinion that defendant was a gang member. Def. Br. 24. But defendant did not object that Amaro was unqualified, or his opinion lacked an adequate foundation, R752-54, and decisions whether to object to testimony are presumptively strategic, *Steidl*, 142 Ill. 2d at 240-41. And defense counsel may reasonably decline to insist on a full presentation of an expert's qualifications and the basis of his opinion, for doing so may bolster the witness's credibility. Counsel may know that the witness is qualified to testify as an expert and prefer a perfunctory presentation of the witness's qualifications rather than a lengthy presentation of all the education, specialized training, and experience that the witness has accrued. Similarly, counsel may prefer that the expert's opinion not be presented with a detailed explanation of its basis, which would potentially render it more credible to the jury. Accordingly, the trial court could have reasonably concluded that counsel decided to let Amaro testify without objection.

Moreover, as now explained, counsel could not have objected to the admission of Amaro's opinion on either of the grounds that defendant now offers: that the opinion lacked an adequate foundation because the prosecution did not present its underlying facts, *see* Def. Br. 26-27, and that

its risk of unfair prejudice substantially outweighed its probative value, *id.* at 28-29.

a. Amaro's opinion was not clearly or obviously inadmissible for lack of foundation.

Amaro's opinion was not clearly or obviously inadmissible on the ground that the prosecution did not present its underlying facts. Under this Court's long-standing precedent, "'an expert may give an opinion without disclosing the facts underlying that opinion,'" and "'the burden is placed upon the adverse party during cross-examination to elicit facts underlying the expert opinion.'" *People v. Williams*, 238 Ill. 2d 125, 137 (2010) (quoting *Wilson v. Clark*, 84 Ill. 2d 186, 194 (1981)).

That is what happened here. The trial court accepted Amaro as an expert in gangs without objection. R752. Amaro then testified that he was familiar with some of defendant's associates, observed defendant, and reviewed the reports in the case, R753, and that it was his opinion that defendant was a member of the Spanish Gangster Disciples, R753-54. Defense counsel then cross-examined Amaro on the basis for that opinion, choosing to focus on establishing that Amaro did not consider any information provided by defendant himself. R754-56.

Defendant's arguments about the unexplored bases of Amaro's opinion go to the opinion's weight, not its admissibility. As this Court recently reiterated in *People v. Pingleton*, once a witness has been accepted as an expert, "any vulnerability relating to an expert's qualifications, experiences,

or basis for opinion may be explored on cross-examination and will affect the weight of that testimony rather than its admissibility." 2022 IL 127680, ¶ 58.

Defendant is incorrect that *Pingleton* is factually distinguishable because it concerned only a challenge to the experts' qualifications, not their opinions. Def. Br. 27. *Pingleton* addressed challenges to both the experts' qualifications *and* their opinions. 2022 IL 127680, ¶¶ 57, 59. Indeed, it rejected the challenge to the experts' opinions as lacking foundation because the defendant "was able to cross-examine [the experts] regarding the underlying bases for their opinions," and therefore "any weakness in the foundations for those opinions would go only to the weight of that evidence and not its admissibility." *Id.* ¶ 59. Only if cross-examination is effectively impossible — for example, where an expert cannot recall the bases for his opinion or simply refuses to provide them — does a lack of foundation bar admission of the opinion. *See id.* (rejecting challenge to opinions for lack of foundation where experts did not testify "that they could not recall the underlying basis for their opinions"); *see also People v. Safford*, 392 Ill. App. 3d 212, 227 (1st Dist. 2009) (expert's opinion was inadmissible where he "claimed to base his opinion upon facts personally known to him, but he was unable to testify to those facts," rendering cross-examination "an [in]adequate test of the substance of [the expert's] opinion"). Here, Amaro answered the questions that counsel chose to ask about the bases for his

opinion, *see* R754-56, so there was no error in admitting that opinion for lack of foundation, much less clear or obvious error.

b. Amaro's opinion was not clearly or obviously substantially more prejudicial than probative.

As explained in the People's opening brief, the trial court could not have excluded Amaro's testimony that defendant was a gang member on the ground that its probative value was substantially outweighed by the risk of unfair prejudice because it was highly probative of defendant's gang membership, which was an element of one of the charges. Peo. Br. 32-39. Defendant suggests that Amaro's opinion cannot have been highly probative if it "did not even prove gang membership beyond a reasonable doubt," Def. Br. 29, but evidence may be highly probative of a fact without being independently sufficient to prove the fact beyond a reasonable doubt, *see generally People v. Bush*, 2023 IL 128747, ¶ 62 ("Relevant evidence is 'evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'").

Defendant also argues that Amaro's opinion was clearly or obviously substantially more prejudicial than probative based on the various weaknesses that the appellate court identified in its foundation. Def. Br. 28. But evidence is unfairly prejudicial if it "cast[s] a negative light upon a defendant for reasons that have nothing to do with the case on trial," *People*

v. Prather, 2012 IL App (2d) 111104, ¶ 24 (internal quotation marks omitted), not because it is poorly explained. The testimony that the appellate court identified as "arguably more prejudicial than probative" was Amaro's explanation of why he interpreted someone introducing defendant as "Shorty Folks" to mean that defendant was a member of a gang. A34, ¶ 64. But the probative value of that explanation — that "Folks" was a reference to the Folks nation, which was one of two associations of gangs, and that "Shorty" meant "a young gang member," R761-62 — was not clearly and obviously substantially outweighed by a risk of unfair prejudice.[2]

B. The evidence was not closely balanced, nor did the admission of either Longmire's prior statement or the evidence of defendant's gang membership constitute structural error.

1. The evidence was not closely balanced.

Defendant's argument that the evidence was closely balanced because "it is plausible that Quezada was not the shooter," Def. Br. 37, and "it is far from a fanciful notion that Quezada was misidentified as the shooter," *id.* at 38, disregards the governing standard. Evidence is closely balanced for purposes of first-prong plain error if it is "so closely balanced that the error

[2] Defendant's passing assertion that the appellate court held that "counsel should have moved to sever the sole gang charge," Def. Br. 28, is incorrect. The appellate court did not reach the performance prong of defendant's ineffective-assistance claim, rejecting the claim because there was no prejudice "even if the introduction of the gang evidence was clear error, such that counsel's failure to move for severance or object was unreasonable." A35-36, ¶ 65.

alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error." *People v. Moon*, 2022 IL 125959, ¶ 20. In other words, the evidence must be in equipoise, such that any error, no matter how seemingly inconsequential, was "'actually prejudicial.'" *People v. Sebby*, 2017 IL 119445, ¶ 51 (quoting *Herron*, 215 Ill. 2d at 193).

The evidence here was not closely balanced. Unlike *Sebby*, upon which defendant relies, Def. Br. 30-31, this is not a case where the prosecution and defense both offered equally plausible version of events supported by testimony that was equally credible and equally uncorroborated by extrinsic evidence, *see Sebby*, 2017 IL 119445, ¶ 63. Rather, defendant presented no evidence at all, and the prosecution's evidence showed that he left Cardona's apartment with a gun, fired the gun once near the shed, then walked toward the parking lot with Longmire, fired the gun multiple times at officers in the parking lot, and fled to Longmire's apartment, where he was apprehended with the gun. The gun appeared to be the gun he had earlier that evening, and forensic analysis showed that it had fired both the single shot by the shed and the multiple shots at police. This evidence was not so closely balanced that any error, no matter how trivial, could have caused the jury to find defendant guilty of shooting at police where it otherwise would have acquitted him.

Defendant argues that the evidence was closely balanced because Longmire, in an apparent attempt to minimize defendant's culpability,

claimed that defendant fired the gun only once and only into the air, which was inconsistent with the forensic evidence and police eyewitnesses' testimony that multiple shots were fired at police. Def. Br. 32. But the evidence as a whole is not closely balanced merely because the testimony of one witness is contradicted by other evidence with respect to certain details.

Nor is the evidence closely balanced because the black and white surveillance footage at the shed does not alone conclusively establish that defendant was the man depicted in the footage. Def. Br. 32-37. To be sure, the footage is of poor quality, but the appearance of the man in the footage — holding a gun and wearing light shoes and a dark shirt with a lighter marking across the chest — is consistent with defendant's appearance on the night of the shooting, when he was seen with a gun and wore white sneakers and a dark shirt with a lighter Nike swoosh across the chest. *Compare* Peo. Exh. 89 at 2:09:10-9:58, 2:09:53-2:09:55 (horizontal white slash consistent with Nike swoosh visible across man's chest), *with* E78 (picture of defendant in Nike shirt).

Defendant argues that the video shows a man wearing a shirt that is "closer to white than black" and has no logo across the chest, Def. Br. 33, but the two screenshots that he offers from People's Exhibit 89 do not fairly represent the video, for one depicts the man from a great distance and the other with his back turned, *see* Def. Br. 35. Screenshots do not do the video justice, but a few additional screenshots illustrate the error in defendant's

argument that the man in the video is wearing an unmarked white, rather than a marked black, shirt.

First, defendant's argument that the man is wearing a light rather than dark shirt rests on an artifact of the black and white footage taken at night. The man is shown walking on the asphalt road north of the shed. *See* R456-58, 460-61 (camera pointed northward from shed next to swimming pool); A42 (aerial photograph showing dark asphalt roadway north of shed next to swimming pool). When the man crosses the asphalt directly under the shed's light, both the asphalt and his shirt appear a similar dark shade:

And when the man crosses the asphalt where it is directly under the shed's light, both the asphalt and his shirt appear a similar light shade:

Thus, the man's shirt appears to be a similar shade as the dark asphalt, with any apparent change as he moves through the frame the product of the poorly lit black and white footage.

Defendant's argument that the footage shows no logo across the man's shirt is also dependent on the particular screenshots he has selected, for other screenshots reveal a light-colored slash across the man's chest, consistent with the Nike swoosh on defendant's shirt, *see* E78 (picture of defendant in Nike shirt); R542-43:[3]

[3] Because still shots do not fully represent the video, the People direct the Court's attention to People's Exhibit 89 at 2:09:53-2:09:55.

Thus, the footage corroborates the other evidence showing that defendant fired his gun once near the shed before he was joined by Longmire and went to shoot at the officers in the parking lot.

In sum, the evidence was not so closely balanced that any error could have caused the jury to find defendant guilty of shooting at police where it otherwise would have acquitted him.

2. The two alleged evidentiary errors do not constitute structural error, either individually or cumulatively.

Contrary to defendant's assertion, Def. Br. 11, second-prong plain error is limited to structural errors, *Jackson*, 2022 IL 127256, ¶ 26 ("The Second Prong of the Plain Error Rule Requires a Showing of Structural Error[.]"); *Moon*, 2022 IL 125959, ¶ 26 ("Second Prong Plain Error Equals Structural Error[.]"). To be sure, structural errors are not limited to errors recognized as

structural by the United States Supreme Court, but an error is not structural unless it is like those errors, in that it "affect[s] the framework within which the trial proceeds, rather than mere errors in the trial process." *Moon*, 2022 IL 125959, ¶¶ 29-30. Such errors defy harmless-error analysis, *Jackson*, 2022 IL 127256, ¶ 49, because their "consequences are necessarily unquantifiable and indeterminate," *Pingleton*, 2022 IL 127680, ¶ 44 (internal quotation marks omitted). Accordingly, due process claims (such as due process claims of cumulative error) generally do not allege structural errors, for the effects of due process violations usually can be evaluated for harmlessness. *See id.* ¶¶ 43-46 (due process violation not structural error because its effect could be reviewed for harmlessness).

Neither of the evidentiary errors alleged by defendant are structural, either individually or cumulatively. On the contrary, such errors are routinely reviewed for harmlessness, for their effects are not unquantifiable. *See, e.g.*, *People v. King*, 2020 IL 123926, ¶ 40 (reviewing erroneous admission of expert's testimony for harmlessness); *In re Brandon P.*, 2014 IL 116653, ¶ 49 (reviewing erroneous admission of witness's prior statement for harmlessness). Accordingly, the errors are not reviewable as second-prong plain error, either individually or cumulatively.

* * *

Defendant's due process claim of cumulative error was not subject to *de novo* review because the two component evidentiary errors were neither

preserved nor individually reviewable as plain error. And defendant's cumulative-error claim was not itself reviewable as a plain error because the two evidentiary errors comprising it did not cumulatively constitute of second-prong plain error. Therefore, the appellate court erred by granting relief on defendant's cumulative-error claim.

CONCLUSION

The People of the State of Illinois respectfully request that this Court reverse the judgment of the appellate court.

January 3, 2024

Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

JOSHUA M. SCHNEIDER
Assistant Attorney General
115 South LaSalle Street
Chicago, Illinois 60603
(773) 590-7123
eserve.criminalappeals@ilag.gov

Counsel for Plaintiff-Appellant
People of the State of Illinois

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 5,952 words.

/s/ Joshua M. Schneider
JOSHUA M. SCHNEIDER
Assistant Attorney General

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 January 3, 2024, the foregoing **Reply Brief of Plaintiff-Appellant 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 notice to the following registered email address:

Andrew Thomas Moore
Assistant Appellate Defender
Office of the State Appellate Defender
Second Judicial District
One Douglas Avenue, Second Floor
Elgin, Illinois 60120
2nddistrict.eserve@osad.state.il.us

Counsel for Defendant-Appellee

/s/ Joshua M. Schneider
JOSHUA M. SCHNEIDER
Assistant Attorney General