No. 127584

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- JODON COLLINS, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 1-18-1746. There on appeal from the Circuit Court of Cook County, Illinois, No. 18 CR 825. Honorable Charles P. Burns, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

JAMES E. CHADD
State Appellate Defender

DOUGLAS R. HOFF
Deputy Defender

SAMUEL B. STEINBERG
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLEE

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CYNTHIA A. GRANT
SUPREME COURT CLERK

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ISSUE PRESENTED FOR REVIEW

Whether Jodon Collins was denied a fair trial where Officer Hernandez's multiple hearsay statements, captured on body camera audio, were admitted at Collins's jury trial and argued for their truth, namely, that Collins possessed and then dropped a gun during a police pursuit.

STATUTES AND RULES INVOLVED

This brief interprets the Illinois Law Enforcement Officer-Worn Body Camera Act, 50 ILCS 706/10-1 *et seq*. (2017) and the Illinois Rules of Evidence. Due to the length of these provisions, pursuant to Illinois Supreme Court Rule 341(h)(5) and (i), an appendix to this brief will include the relevant provisions of the statutes and rules. *See* (A-3, A-4). This brief also includes the necessary citations and texts of the statute and rules of evidence.

STATEMENT OF FACTS

At Jodon Collins's jury trial for unlawful use of a weapon and armed habitual criminal, the State's primary witness was tactical officer Martin Hernandez, who initiated a narcotics investigation upon seeing Collins and two other men standing in a vacant lot. (R. 190, 212). As Hernandez opened the door of the squad car, Collins ran away and the officer chased him. (R. 190-91). During the pursuit, Hernandez claimed, Collins dropped a gun in a vacant lot. (R. 193). At Collins's jury trial, over defense objection, the State played Hernandez's body camera recording that included several statements made by Hernandez after the chase. (R. 207)

A. Motion in *limine* to exclude recorded body camera statements.

Collins moved *in limine* to exclude Hernandez's body-camera recorded statements, specifically the ones after the foot chase, on the basis that they were hearsay and prior consistent statements that would bolster Hernandez's in-court testimony. (Sup. C. 13); (R. 263-64). These statements include:

> Joel, go back to go back to the lot. Go back to the lot over there we ran through. (PE 3, 0:49)
>
> *****
>
> I got him detained squad. Joel, go back to where we started. (PE 3, 1:06).
>
> *****
>
> Get to that lot dude, hurry up. He dropped it there. (PE 3, 1:27).
>
> *****

> I got him..Go back to the lot where he ran through, dude. It's right in the middle of the lot. It's a black. (PE 3, 1:45).
>
> *****
>
> It's a pistol, squad. He dropped a pistol right there in the middle of the lot where we started. (PE 3, 1:58).
>
> *****
>
> That lot in the middle of Walnut about 3320 maybe? I am going back there right now. (PE 3, 4:22).

Collins's counsel argued, "If there was no video, the officer would never be able to get up in court and say at the time, 'I told my partner he dropped a gun.'" (R. 263-64). The State responded that the audio was "important," "not hearsay," and that the statements were admissible as excited utterances. (R. 263-64). The trial court denied Collins's motion, ruling that Hernandez's recorded statements were "not a prior consistent statement," but "a statement made at that time." (R. 264-65).

B. Jury Trial

Officer Martin Hernandez testified that he had worked for the Chicago Police Department for five years and was a member of the Eleventh District Tactical Team. (R. 188). On December 16, 2017, at approximately 1:00 a.m., he and officer Joel Lopez were on vehicle patrol around 3300 West Walnut, a "target patrol area[] for our tactical teams," and "a hot spot for high gang narcotics sales . . . and violence." (R. 190, 199, 218). Hernandez saw no signs of illegal activity, yet decided to conduct a "narcotics investigation" when he saw Collins and two other men standing in

a vacant lot. (R. 190, 211-12). As Hernandez opened the front passenger door, one of the three men, whom Hernandez later identified as Collins, looked at the officers, then turned around and ran. (R. 190-92, 210, 212). Hernandez got out of the vehicle without activating his body camera and chased Collins. (R. 190, 192, 210). Hernandez admitted that he failed to comply with a Chicago Police Department special order that required him to activate his body camera at the start of the chase. (R. 214-15).

Hernandez testified that he was at least five feet behind Collins when he saw Collins drop a black gun from his left hand. (R. 193-94). Hernandez momentarily slowed down and then continued the chase. (R. 194). He saw Collins scale two fences before running across Fulton Street and jumping another fence. (R. 196-97).

Hernandez lost sight of Collins for a few seconds before turning a corner, where he found Collins crouched down against a building. (R. 197-98). Hernandez handcuffed and arrested him. (R. 198). He then escorted Collins from behind the building and to a fence by Fulton Street. (R. 198). At the fence, Hernandez used his flashlight to attract the attention of passing officers, who assisted Hernandez and Collins over the fence. (R. 198-99).

Hernandez handed Collins to the backup officers and radioed his partner to go to an empty lot, "where everything it started, pretty much where [Collins] ran through the first time." (R. 198-99). Hernandez then "immediately went to the empty lot where I saw him drop the gun" and found a loaded black handgun. (R. 199). The State introduced the gun as evidence. (R. 202). Hernandez retraced the chase and recovery of the gun on a map, marking the spot where he had found

the gun. (R. 203-06); (PE 2).

Over the defense's objection, the State played the body camera recording. (R. 207), (PE 3). The video shows Hernandez running with his flashlight through a lot, to a partially broken fence. (PE 3). Hernandez climbs over the fence, runs across Fulton Street, and hops another fence before continuing on. (R. 207); (PE 3, 0:03). Shortly thereafter, Hernandez finds Collins squatting against a wall and orders him to show his hands. Collins complies and does not resist. (PE 3, 0:30). Hernandez handcuffs Collins without incident. (PE 3, 1:00).

As Hernandez handcuffs Collins, he radios, "Joel, go back to the lot. Go back to the lot over there [that] we ran through." (PE 3, 0:49). Shortly thereafter, he states, "I got him detained squad. Joel, go back to where it started." (PE 3, 1:06). Hernandez then says, "Get to that lot dude, hurry up. He dropped it there." (PE 3, 1:26).

While Hernandez walks Collins toward a nearby fence, he receives a radio call asking if he is alright. (PE 3. 1:42). He responds, "Hey hey, I got him . . . Go back to the lot where he ran through, dude. It's right in the middle of the lot. It's a black. (PE. 3, 1:45). When dispatch ("squad") asked Hernandez to describe the black object, Hernandez clarified, "It's a pistol, squad. He dropped a pistol right there in the middle of the lot where we started." (PE 3, 1:58).

Hernandez used his flashlight to signal some nearby officers, who walked over and helped Collins over the fence. Hernandez then climbs over the fence and transfers custody of Collins to the assisting officers. (PE. 3. 2:40-3:50). Hernandez then jogs a few blocks and is heard saying, "That lot in the middle of Walnut about

3320 maybe? I am going back there right now." (PE 3, 4:00-22). Five minutes into the recording, he finds a gun. (PE 3, 5:00).

Forensic analyst Robert Franks visually inspected the gun and performed fuming, powder, and Rhodamine tests, but found no suitable fingerprints on the gun, magazine, or ammunition. (R. 301-16, 319-21, 323-24). The gun was not tested for DNA. (R. 323).

The State introduced certified copies of Collins's predicate convictions for the armed habitual criminal charge. (R. 330), (PE 4). After the State rested, the defense made a motion for a directed verdict that was denied. (R. 332-33).

The defense called Officer Joel Lopez, who testified regarding his search efforts. Lopez's body camera recording showed Lopez and other officers looking for a gun in a different lot from where the gun was found. (R. 339), (DE 2, 0:30). Lopez and the other officers walked during their search. (DE 2, 0:30). Lopez testified that Hernandez told him to search the lot where the chase started. (R. 339-49). Lopez testified that there were approximately eleven vacant lots in the area. (R. 347-48); (PE 6).

The State's initial closing argument argued that Hernandez's statements from the body camera, his testimony, and the map of the chase supported the conclusion that Collins had a gun and that he was "running away from responsibility of that gun." (R. 354). The State repeated, "He may be sitting here right in front of you but in reality he is still running. He is still running away from his responsibility and he is still running away from that gun." (R. 367)

The State replayed Hernandez's body camera footage and argued, "That

piece of evidence shows everything that Officer Hernandez said, everything he did, and everything he saw after this defendant dropped that handgun in that vacant lot." (R. 359). The prosecutor pointed out multiple instances on both videos in which Hernandez described the gun and its location. (R. 360-63, 366) ("He was able to describe that firearm to his partners.").

Defense counsel argued that Hernandez's testimony and his failure to timely activate his body camera to capture the whole pursuit cast doubt on the State's evidence. (R. 369-71, 376-77). Counsel suggested the possibility of misidentification, as two other individuals were in the area, and also argued the possibility that someone else stashed the gun in the lot in the high-crime neighborhood. (R. 370, 373-74, 376).

The State's rebuttal pointed out Collins's nonreaction after his arrest:

> [THE STATE]: . . . You also know he ran because the gun – because of his reaction. When he is caught he is not 'I didn't do anything, I didn't do anything.' He is resigned to his fate. He is out of breath, puts his hands behind his back. He is resigned to his fate.
>
> When the officer said, 'It's a black gun, you dropped a black gun', 'I didn't drop anything," you didn't hear that. He knew he was caught. That's why you get no reaction.

(R. 380-81). The State ended its argument by asking the jurors to "[h]old this defendant responsible for his actions and find him guilty." (R. 383-84).

The jury found Collins guilty of armed habitual criminal and unlawful possession of weapon by a felon. (R. 407). The defense filed a motion for new trial arguing that Hernandez's recorded statements were inadmissible hearsay and prior consistent statements. (Sup. C. 9-10). The trial court denied the motion for new trial, stating that that the audio was admissible because it was created

contemporaneously with the video recording. (R. 423-34). The court merged the unlawful use of a weapon felon count into the armed habitual count and sentenced Collins to 7 years, 6 months for the greater offense. (C. 83). Collins filed a timely notice of appeal. (C. 89).

C. Direct Appeal

On direct appeal, Collins raised four issues: 1) trial court error in admitting Hernandez's recorded hearsay statements, 2) prosecutorial misconduct where the State repeatedly argued that Collins was "running away" from responsibility by going to trial, misrepresented evidence, and improperly commented on Collins's post-arrest silence, 3) ineffective assistance of trial counsel for failing to request an adverse inference jury instruction based on Hernandez's untimely activation of his body camera, and 4) cumulative error. Collins Op. Br. 38-39[1]; Collins Rep. Br. 18-19.

The State argued that Hernandez's recorded statements were admissible as course of investigation evidence and made a one-sentence argument that the statements "may have been admissible as excited utterances." St. App. Ct. Br. 20-24. The State also argued that any error in admitting Hernandez's statements was harmless. *Id.* at 26-27. The State did not argue that the Law Enforcement Officer-Worn Body Camera Act designates body camera-recorded audio as non-hearsay or that recorded audio is not hearsay. *Id.*

[1]Certified e-filed, stamped copies of the parties' appellate court briefs, the petition for rehearing, answer, and reply have been filed in this Court pursuant to Ill. S. Ct. Rules 318(c) and 612(b).

D. Original opinion

A unanimous appellate court ordered a new trial, holding that Hernandez's out-of-court, recorded statements were prejudicial hearsay that did not qualify as course of investigation evidence. *People v. Collins*, 2020 IL App (1st) 181746, ¶¶ 26-28, 37-41, *superseded on denial of rehearing* July 26, 2021. (A-1). In so doing, the appellate court commented that the Law Enforcement Officer-Worn Body Camera Act (the "Body Camera Act" or the "Act") (50 ILCS 706/10-1 *et seq*. (2016), contains no express limitation on admission of recordings. Thus, "at least theoretically, the Act's grant of the limitless use of body camera recordings would mean that there is no need for the contents of those recordings to comply with the rule against admitting hearsay." *Id.* ¶ 21. The court also cited Illinois Rule of Evidence 101, which provides that "a statutory evidentiary rule governs 'unless in conflict with a rule or a decision of the Illinois Supreme Court.'" *Id.* ¶ 22. The court concluded that where "[n]either party has suggested that the Act provides admission of body camera recordings without limitation, and so we will assume—without deciding—that the Act allows the trial court to admit body camera recordings subject to the rules of evidence, including the hearsay rule." *Id.* ¶ 22.

E. State's petition for rehearing

In response to the appellate court's *sua sponte* remarks, the State petitioned for rehearing, arguing for the first time that Hernandez's properly authenticated audio statements, by virtue of being recorded, were not hearsay. The State further argued that the language of the Act places no limitation on the use of body camera audio. St. PRH. 4-9. The State also argued the statements were admissible to

explain course of investigation, and that the appellate court incorrectly concluded that any error in admitting the video was not harmless. *Id.* at 9-15. The appellate court ordered supplemental briefing on the petition for rehearing and Collins filed an answer, followed by the State's reply.

F. Modified opinion after denial of rehearing

On July 26, 2021, the appellate court denied the petition for rehearing with a split opinion. *People v. Collins*, 2020 IL App (1st) 181746*, as modified upon denial of reh'g*, July 26, 2021. The majority reaffirmed the initial determination that Officer Hernandez's statements were inadmissible hearsay and again rejected the State's assertion that the statements were introduced for the limited purpose of showing course of investigation. *Id.* ¶¶ 30-36.

The majority stated that because neither party addressed the applicability of the Body Camera Act during initial briefing, this became an issue when the court "hypothesized about its scope" in its original opinion. *Id.* ¶ 21. The court analyzed the language of the Act, which provides that body-worn camera "recordings may be used as evidence in any administrative, judicial, or disciplinary proceedings." *Id.* ¶ 21 (citing 50 ILCS 706/10-30 (2016)). The majority held that the statute's use of "may" "permits trial courts to exclude body-worn camera recordings where appropriate." *Id.* ¶ 24. The court also observed that the admissibility of evidentiary material differs, depending on the type of proceeding in which it is used. *Id.* ¶ 25. Thus, held the court, the General Assembly's use of the word evidence "allows the presiding officer in each type of proceeding—judicial, administrative, or disciplinary—to employ the word "evidence" as it is used in that specific context

without creating a conflict with the Act's language." *Id.* ¶ 26. The court further noted that the General Assembly did not expressly exempt body camera evidence from the rules of evidence and opined that "limitless introduction" of recorded statements would create absurd results and conflict with evidentiary rules barring irrelevant, speculative, unfairly prejudicial or misleading evidence. *Id.* ¶¶ 22, 28. The court held that body camera evidence offered at a criminal trial is "subject to the Illinois Rules of Evidence applicable to criminal cases." *Id.*

The majority rejected the State's argument -- based upon *People v. Theis*, 2011 IL App (2d) 091080, and *People. v. Griffin*, 375 Ill. App. 3d 564 (1st Dist. 2007) -- that recorded statements are not hearsay. *Collins,* 2020 IL App (1st), ¶¶ 38-40. The court noted that this argument was not raised during initial briefing and "admonish[ed] the State that a petition for rehearing does not present an opportunity to raise old cases or new theories." *Id.* ¶ 38. The court nonetheless addressed the argument and held that any suggestion in *Theis* and *Griffin* that recorded statements are admissible non-hearsay was *dicta* because "the relevant statements in each [case] were admissible under an exception to the hearsay rules." *Id.* ¶ 40. The court noted that the so-called mechanical eavesdropping rule stemmed from *Belfield v. Coop*, 8 Ill. 2d 293 (1956), a case which did not involve a hearsay issue. *Id.* ¶¶ 41-42.

The court noted Hernandez's body camera statements were not necessary to explain the State's case and thus did not qualify as course of investigation evidence since "Hernandez was both the arresting officer and the pursuing officer who saw Collins toss the gun." *Id.* ¶ 26. The court also held that the State had

abandoned its reliance on the excited utterance exception. *Id.* ¶ 20.

The majority held that the error in admitting Hernandez's hearsay statements was not harmless "because at the end of the day, the State relies on the uncorroborated testimony of a single witness to argue harmless error in admitting the hearsay statements in Hernandez's body camera video. " *Id.* ¶ 48. The court ordered a new trial and declined to reach the remaining issues raised by Collins, including his claim that the State improperly commented on his post-arrest silence, but cautioned about "the impropriety of disparaging a defendant's exercise of his or her constitutional rights during closing argument." *Id.* ¶ 52.

The court did not rule that the video was inadmissible:

> Because we have found the hearsay statements in the body camera video inadmissible, it is unclear whether, and to what extent, the State will use the video on remand and whether counsel's strategic decisions will depend entirely on the use (or not) of the video.

Id. ¶ 53.

In a dissent, Justice Coghlan stated that the body camera recording was not hearsay evidence because it was an authenticated taped conversation. *Id.* ¶¶ 57-62 (Coghlan, J., dissenting).

G. State's Petition for Leave to Appeal

The State filed a petition for leave to appeal, arguing that the Body Camera Act provides that relevant body-worn camera recordings are admissible "without limitation," that recordings are not hearsay, and that the appellate court erred in concluding that admission of Hernandez's recorded statements was not harmless error. On November 24, 2021, this Court granted leave to appeal.

ARGUMENT

Jodon Collins was denied a fair trial where Officer Hernandez's multiple hearsay statements, captured on body camera audio, were admitted at Collins's jury trial and argued for their truth, namely, that Collins possessed and then dropped a gun during a police pursuit.

The Illinois Rules of Evidence determine whether recordings obtained pursuant to the Law Enforcement Officer-Worn Body Camera Act are admissible at a criminal trial. In this case, the trial court violated the rule against hearsay by allowing the introduction of Officer Martin Hernandez's repeated body-camera-recorded statements accusing Collins of dropping a black gun in a vacant lot during a brief foot chase. The State used Hernandez's statements to prove the truth of the matter asserted, namely, that Collins possessed a gun. As explained more fully below, the statements did not show course of investigation and were not admissible as excited utterances. Where Officer Hernandez's body camera video did not show Collins in possession of a gun, no forensic evidence connected Collins to the gun, no other witness corroborated the officer's account, and the State used Hernandez's recorded statements during closing arguments to bolster his in-court testimony, the State cannot meet its burden to demonstrate that admission of Hernandez's hearsay statements was harmless error. Therefore, this Court should affirm the appellate court's decision to order a new trial.

This case involves the interpretation of the Illinois Rules of Evidence and the Body Camera Act. While this Court generally reviews a trial court's decision to admit evidence for abuse of discretion, the interpretation of a statute and rules

of evidence are questions of law that this Court reviews *de novo*. *People v. Deroo*, 2022 IL 126120, ¶ 19; *People v. Brand*, 2021 IL 125945, ¶ 36. A "court must exercise its discretion within the bounds of the law" and thus, "where a trial court's exercise of discretion has been frustrated by an erroneous rule of law, appellate review is required to permit the exercise of discretion consistent with the law." *People v. Williams*, 188 Ill. 2d 365, 369 (1999).

A. Forfeiture

This Court should decline to address the merits of some of the State's arguments since the State failed to present them in the petition for leave to appeal or the State's response brief in the appellate court. An appellant before this Court forfeits a claim by not raising it in the appellate court brief or in petition for leave to appeal. *See People v. Sophanavong*, 2020 IL 124337, ¶ 21 ("[T]he doctrine of forfeiture applies to the State as well as to defendant.").

The State's petition for leave to appeal argued 1) the language of the Law Enforcement-Worn Body Camera Act permits admission of relevant audio and video evidence "even where noncompliant with hearsay rules," 2) Hernandez's statements, by virtue of being recorded, are not hearsay and 3) assuming admission of Hernandez's statements was error, it was harmless. St. PLA, 8, 10. The petition did not include the arguments, now presented to this Court in the State's opening brief, that Hernandez's statements were admissible to show course of investigation or were non-hearsay commands or excited utterances. St. Br., pp. 20-22. The appellate court properly held that the State abandoned its reliance on the excited utterance exception. *People v. Collins*, 2020 IL App (1st) 181746, ¶ 20. This Court

should decline to address the State's reliance on exceptions to the rule against hearsay.

B. The admissibility of Officer Martin's Hernandez's recorded body camera statements is governed by the Illinois Rules of Evidence, including the rule against hearsay. As such, the officer's repeated recorded statements, asserting that Collins dropped a gun in a vacant lot, were improperly admitted at Collins's trial.

When Chicago police officers Martin Hernandez and Joel Lopez saw Jodon Collins and two other men standing on a vacant lot, they decided to investigate, although they saw no evidence of a crime. As Hernandez got out of the squad car, Collins ran away and Hernandez instigated a chase, during which, Hernandez testified, he saw Collins drop a gun in a vacant lot. (R. 188-94, 211-12). This event was not recorded on body camera video, as Hernandez failed to timely activate the camera. (R. 213-15). The camera recorded the last moments of the pursuit, Collins's capture, and statements made by Hernandez after Collins was securely in custody. (PE 3). The camera recorded the last moments of the pursuit, Collins's capture, and statements made by Hernandez after Collins was securely in custody. Collins moved unsuccessfully *in limine* to exclude Hernandez's recorded statements as inadmissible hearsay and prior consistent statements.[2]

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[2]The State argues that the appellate court barred admission of the "visual component" of the body camera video. (St. Br. 13-16). However, the opinion addresses only the admissibility of certain audio statements and acknowledges that the State may choose to introduce at least some of the video upon retrial. *Collins*, 2020 IL App (1st) 181746, ¶¶ 48, 53 ("By admitting hearsay statements

At Collins's trial for unlawful use of a weapon and armed habitual criminal, the State played the body camera recording for the jury. As a result, the jury repeatedly heard Hernandez say that Collins dropped a black pistol in a lot during the chase. As Hernandez shined his flashlight on a squatting Collins, he radioed, "Joel, go back to the lot. Go back to the lot over there [that] we ran through." (PE 3, 0:49). While Hernandez handcuffed Collins, the officer radioed, "I got him detained squad. Joel, go back to where it started." (PE 3, 1:06). After Hernandez detained Collins, the officer said, "Get to that lot dude, hurry up. He dropped it there." (PE 3, 1:26). While Hernandez walked Collins to a nearby fence, he received a radio call asking if he is all right. (PE 3, 1:42). Hernandez cheerfully responded, "Hey hey, I got him . . . Go back to the lot where he ran through, dude. It's right in the middle of the lot. It's a black. (PE 3, 1:45). When dispatch ("squad") asked Hernandez to describe the black object, Hernandez clarified, "It's a pistol, squad. He dropped a pistol right there in the middle of the lot where we started." (PE 3, 1:58). Later, after Hernandez handed Collins to other officers he jogged a few blocks and said, "That lot in the middle of Walnut about 3320 maybe? I am going back there right now." (PE 3, 4:22).[3] The video then depicts Hernandez finding a gun. (PE 3, 5:02).

Hernandez's recorded out-of-court statements are inadmissible hearsay

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in Hernandez's body camera video, the trial court committed reversible error," and "it is unclear whether, and to what extent, the State will use the video on remand ... ."). Collins's challenge in the trial court, appellate court, and in this Court concern Officer Hernandez's recorded statements, not the video.

[3]Contrary to the State's assertion, Collins is not challenging admission of Hernandez's recorded statement to Collins to "let me see your hands, get on the floor." (St. Br. 16)

which the State improperly used to bolster Hernandez's in-court testimony, for the specific purpose of proving that Collins illegally possessed a gun. Possession is an essential element of both charged offenses. 720 ILCS 5/24-1.7(a) (2017); 720 ILCS 5/24-1.1(a) (2017). Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ill. R. Evid. 801 (eff. Jan. 1, 2011). Hearsay is inadmissible unless another exception allows for its admission. Ill. R. Evid. 802 (eff. Jan. 1, 2011). Hernandez's statements were made outside of court. Further, his directives to fellow officers to "go back to the lot where it started", "it's right in the middle of the lot", "it's black", and "he dropped a pistol right there in the middle of the lot" went directly to the truth of the matter asserted, namely, that Collins possessed and then dropped a gun in a certain vacant lot during the police pursuit. (PE 3, 0:49, 1:05, 1:26, 1:45, 1:58, 4:22).

The State suggests that "concerns behind the hearsay rule" are not present here, because the body camera recording relayed Hernandez's own statements and he was subject to cross-examination. (St. Br. 18-19). This does not change the fact that his out-of-court statements were hearsay. In *People v. Lawler*, 142 Ill. 2d 548, 557 (1991), this Court rejected a similar State claim that "a statement from a witness as to his own prior out-of-court statement cannot violate the hearsay rule, because the witness will testify at trial with the safeguards of an oath and cross-examination, reducing the risk of perjured testimony." This Court held that "the presence or absence in court of the declarant of the out-of-court statement is ... irrelevant to a determination as to whether the out-of-court statement is

hearsay" and that "adoption of the State's rationale would essentially obliterate a good portion of the hearsay rule." *Id.* Regardless of whether Hernandez was present for trial, his recorded statements qualify as hearsay because they were made out of court and were used for the truth of the matter asserted. Ill. R. Evid.

Admission of prejudicial hearsay is reversible error. For example, in *People v. Jura*, 352 Ill. App. 3d 1080 (1st Dist. 2004), three police officers testified about police radio calls describing a man with a gun, a "male White with a tattoo with a teardrop on his face." *Id.* at 1085-86.The appellate court held that testimony recounting the police radio calls was inadmissible hearsay because the radio calls specifically identified the defendant and described the defendant's actions, and thus went to the "very essence of the dispute." *Id.* at 1086, 1088. The court further held that admission of the hearsay was not harmless because the out-of-court statements specifically identified the defendant as the offender and were relied on by the prosecutor during closing arguments. *Id.* at 1090-91.

The State argues that Hernandez's recorded statements were properly admitted, because "recordings are generally not considered hearsay." (St. Br. 11). Thus, reasons the State, because the Body Camera Act "makes no explicit reference to the rules governing hearsay," this necessarily means that the legislature "has determined that body camera recordings, including both of their components, should generally be admitted where relevant to issues at trial" as recorded non-hearsay. (St. Open. Br. 11). This argument, raised for the first time on rehearing in the appellate court, *Collins*, 2020 IL App (1st) 181746, ¶ 21, lacks merit.

This Court recently reaffirmed that the Illinois Rules of Evidence govern

the admissibility of evidence in Illinois courts. *People v. Brand*, 2021 IL 125945, ¶ 36 (citing Ill. R. Evid. 101 (eff. Jan. 6, 2015); *see also* Ill. Const. 1970, art. VI, § 16. Even where a conflict arises between the rules and a statute, the rules of evidence control. *People v. Peterson*, 2017 IL 120331, ¶¶ 29, 31. The Body Camera Act neither conflicts with the rules nor establishes a new evidentiary rule.

The Act does not include any language that would usurp the rules of evidence. One of the stated purposes of the Act is to provide "impartial evidence and documentation," including "audiovisual recordings," to settle disputes and allegations of officer misconduct" with the goals of "improving transparency and accountability, and strengthening public trust." 50 ILCS 706/10-5, 10-10. Section 10-30 of the Act states: "Evidence. The recordings may be used as evidence in any administrative, judicial, legislative, or disciplinary proceeding." 50 ILCS 706/10-30. Section 10-20 also provides: "Nothing in this Section shall limit access to a camera recording *for the purposes of complying with Supreme Court rules or the rules of evidence*." 50 ILCS 706/10-20(c) (emphasis added). Sections 10-20 and 10-30 contain no language that would supercede this Court's rules of evidence; to the contrary, section 10-20 contemplates compliance with evidentiary rules. *See also People v. Andrade*, 2021 IL App (2d) 190797-U ¶ 23 ("nothing in this section [10-30] manifests an intent to override the normal rules of evidence regarding relevancy and hearsay."); (copy of order attached to the appendix in accordance with S. Ct. Rule 23(e)).

Section 10-30 uses the word "may," which generally means the statute is directory or permissive. *People v. Robinson*, 217 Ill. 2d 43, 53 (2005). As noted by the appellate court, section 10-30 does not delineate specifically *who* may use the

evidence. The Act does not mandate, however, that any body-camera recorded evidence offered by a party is automatically admissible; rather, the "plain and ordinary meaning" of the statute contemplates that a party may, but does not have to, put forth body camera evidence. *Collins*, 2020 IL App (1st) 181746, ¶¶ 23-24. At that point, the trier of fact, the ultimate arbiter of admissibility, "may" deem the evidence admissible in a given proceeding, consistent with the language of the Act. *People ex rel. Cizek v. Azzarello*, 81 Ill. App. 3d 1102, 1107 (1st Dist.1980) (word "may" directed at trial court indicates discretion); *see also People v. Witherspoon*, 2019 IL 123092, ¶ 21 (courts must ascertain and effectuate the legislature's intent, which is best indicated by the plain and ordinary meaning of the statute's language).

The appellate court below also noted, correctly, that the definition of "evidence" varies, depending on the type of proceeding in which it is used. *Collins*, 2020 IL App (1st) 181746, ¶ 25. The rules of evidence govern most court proceedings. Ill. R. Ev. 101, 1101. In administrative proceedings, the rules of evidence for civil cases generally apply. 5 ILCS 100/10-40(a) (2017). In police disciplinary and post-conviction hearings, however, the rules of evidence are typically not rigidly applied or do not apply at all. *Kelley v. Sheriff's Merit Comm'n*, 372 Ill. App. 3d 931, 933 (2d Dist. 2007); Ill. R. Ev. 1101(b)(3) (eff. Jan. 1, 2011). This case involves a criminal trial and thus, the Illinois Rules of Evidence govern. Ill. R. Evid. 101 & 1101.

Moreover, the Act contains no language exempting audio evidence from the rule against hearsay. The word "hearsay" appears nowhere in the Act. When the General Assembly wants to create a hearsay exception, it uses clear language

deeming out-of-court statements admissible "as an exception to the hearsay rule." *See* 725 ILCS 5/115-10(a) (2018) (delineating "certain hearsay exceptions" for outcry statements made by child or certain disabled victims); 725 ILCS 115-10.2a (2018) (hearsay exception for prior statements in domestic violence prosecutions when the witness is unavailable); 725 ILCS 5/115-10.3(a) (2018) (hearsay exception in cases against disabled and elderly victims); 725 ILCS 5/115-13 (2018) (hearsay exception for statements for the purposes of medical diagnosis).

The State acknowledges, as it must, that the Act contains "no explicit reference to the rules governing hearsay," but claims this is so because the General Assembly understands, "consistent with judicial precedents," that recordings are not considered hearsay. (St. Op. Br. 11). The State relies upon the following language from *People v. Hughes*, 2013 IL App (1st) 110237 ¶ 65, *People v. Theis*, 2011 IL App (2d) 091080 ¶ 32, and *People v. Griffin*, 375 Ill. App. 3d 564, 570-71 (1st Dist. 2007), for this truly extraordinary proposition:

> It is well established that a taped conversation or recording, which is otherwise competent, material and relevant, is admissible so long as it is authenticated and shown to be reliable through proper foundation ... [A] taped conversation is not considered hearsay; instead, it is treated as a mechanical eavesdropper with an identity of its own, separate and apart from the voices recorded

The State reads *Hughes, Theis*, and *Griffin* far too broadly. To the extent these cases may be read to stand for the notion that all statements, by virtue of being recorded, are non-hearsay, they are wrong. Further, these cases are distinguishable on their facts.

Hughes, *Theis,* and *Griffin* state that a taped conversation involving a defendant and other witnesses may be admissible if is "otherwise competent." Hearsay

is not competent evidence. *People v. Simpson*, 2015 IL 116512, ¶ 27. Further, the mere fact that a recorded conversation is properly authenticated does not mean that it is not hearsay. Even where the authenticity of a document or other proffered evidence is established, it must nevertheless comply with other rules of evidence, such as the hearsay rule. Ill. R. Evid. 901 (eff. Jan. 1, 2011); *People v. Hauck*, 2022 IL App (2d) 191111, ¶ 53. For example, in *People v. Kraybill*, 2014 IL App (1st) 120232, the appellate court held that "the mere fact that Kraybill's 2004 statements were recorded and that he could lay a foundation for the recording does not render his proposed use of otherwise inadmissible hearsay statements proper." Id. ¶ 64; *see also* Michael H. Graham, Handbook of Illinois Evidence § 901.0 (2021 ed.) (noting authentication "does not guarantee that the evidence is admissible" since it "may still be excluded because of some other bar to admission, such as hearsay or lack of relevancy.").

Further, these three cases address "competent" evidence. *Hughes* and *Theis* involved recorded conversations between the defendant and interrogating detectives. Thus, the statements from law enforcement were not hearsay as they were admissible to show the effect on the listener (the defendant) and explain the defendant's responses, admissible as statements of a party-opponent. *Theis*, 2011 IL App (2d) 091080, ¶ 33, *Hughes*, 2013 IL App (1st) 110237, ¶ 65, *see also* Ill. R. Ev. 801(d)(2). *Griffin* involved a taped conversation between the defendant and a confidential informant and the central dispute was whether the informant's statements were hearsay. *Griffin*, 375 Ill. App. 3d at 570. Although the appellate court held that defendant waived a hearsay challenge, the informant's statements to the defendant

were admissible to show their effect on the defendant. *Id.*

Hernandez's statements, by contrast, directing his fellow officers to "go back to the lot where it started," "right in the middle of the lot," to collect a black pistol Collins "dropped ... right there in the middle of the lot" were not part of any conversation with Collins. Hernandez's words were not admissible to show their effect on another or as necessary investigative background information because Hernandez recovered the gun himself. (PE 3, 0:49, 1:05, 1:26, 1:45, 1:58, 4:22); *infra.* pp. 31-33. Rather, they were admitted for their truth and used to bolster Hernandez's in-court testimony.

Theis, Griffin, and *Hughes* may have reached the right result based on the specific facts of each case, but their observations on the admissibility of recordings, as a general matter, was unnecessary, overbroad, and simply incorrect. Further, because the challenged conversations in *Theis, Griffin*, and *Hughes* involved nonhearsay statements, any commentary discussing the general admissibility of a recorded conversation was *obiter dictum* since it was a nonessential part of the holdings. *See Lebron v. Gottlieb Mem'l Hosp.*, 237 Ill. 2d 217, 236 (2010) *("obiter dictum* is not essential to the outcome of the case, is not an integral part of the opinion, and is generally not binding authority or precedent within the *stare decisis* rule.")*.* Moreover, as noted by the appellate court, the above-quoted passage on recorded statements stems from a misreading of *Belfield v. Coop*, 8 Ill. 2d 293 (1956), which had nothing to do with hearsay. *Collins*, 2020 IL App (1st) 181746, ¶¶ 38-42.

There is no "recording exception" to the hearsay rule. Indeed, this Court has previously analyzed recorded statements to determine if they contain

inadmissible hearsay, or were admissible as non-hearsay. *See, e.g, People v. Edwards*, 144 Ill. 2d 108, 124, 170 (1991) (holding a recorded telephone conversation "was purely a hearsay statement, tending to prove defendant's guilt of the crimes charged," and should not have been admitted); *People v. Williams*, 181 Ill.2d 297, 312-13 (1998) (applying "course of investigation" and "state of mind" exceptions to hearsay rule to determine whether tape of a 911 call was properly admitted), *People v. Britz*, 112 Ill. 2d 314, 320–21 (1986) (tape recording of conversation between counselor and defendant, used to coax a confession, admissible to show defendant's state of mind; "hearsay is not involved here, as the stimulating language of [the counselor] is admissible not for its truth, but for its effect on the listener.").

Similarly, the appellate court has consistently, and correctly, applied conventional rules of evidence, including the hearsay rule and its exceptions, to determine the admissibility of body-camera recorded evidence. In addition to *Collins*, the appellate court in *People v. Andrade*, 2021 IL App (2d) 190797-U, ¶ 23, held that certain body-camera statements were not excited utterances. In *People v. Norris*, 2022 IL App (1st) 200375-U, ¶ 31-34, the State conceded, and the appellate court agreed, that some of the officer's body camera statements were hearsay. Similarly, in *People v. Winston*, 2021 IL App (4th) 190288-U, ¶¶ 20-22, the appellate court held that an officer's body-camera recorded statements, "She took off on me," and "[I]t's gonna be a black, female driver" were hearsay, but that their admission was harmless. (Copies of unpublished orders attached in accordance with S. Ct. Rule 23(e)).

The rules of evidence complement the Body Camera Act's purpose of providing

"impartial evidence and documentation to settle disputes" by establishing judicial safeguards to prevent the admission of unfairly prejudicial or unreliable hearsay evidence, including a police officer's out-of-court narrative. 50 ILCS 706/10-5. Illinois's limited public records hearsay exception in Rule 803(8)(b) bars the State from introducing statements "in criminal cases . . . [of] *matters observed by police officers and other law enforcement personnel*" contained in public records. Ill. R. Evid. 803(8)(B) (eff. Jan. 1, 2011).

Accordingly, this Court recognizes that "writings or records relating to a police investigation are generally excluded from the business records exception to the rule against hearsay" because "[t]he information contained in such reports or records may well call into question the motivation, the recall, or the soundness of conclusions of the author of the report or the person providing the information contained in the report." *People v. Smith*, 141 Ill. 2d 40, 72-73 (1990). This exclusion "extends to reports or records of observations of police officers or other law enforcement personnel at the scene of a crime or apprehension of the accused," because such records "generally lack the earmarks of trustworthiness and reliability which are the true basis for the business records exception to the rule against hearsay." *Id.* at 73; *see also* Rule 803(8)(b).

Body cameras capture all manner of images and sounds, including gory crime scenes, highly-charged emotional encounters or, as in this case, out-of-court statements which were used to bolster the State's case on an essential element of the offense. While a body camera recording may be a valuable tool, it is also "a rich opportunity for police officers to generate evidence in criminal prosecutions,"

and "may pose significant risks to the defendant's right to a fair trial." *See, e.g.*, *Morgan v. State*, 838 S.E.2d 878, 897-900 (Ga. 2020) (holding that trial court erred in admitting disturbing video of an officer's unsuccessful efforts to revive a dead child and warning about the dangers of unfettered admission of body camera evidence). Allowing limitless introduction of recorded statements from a body camera would result in the admission of unreliable, irrelevant evidence, reputation evidence, speculation without personal knowledge, or unfairly prejudicial evidence**.** *Collins*, 2020 IL App (1st) 181746, ¶¶ 27-28 (citing Ill. R. Evid. 402, 403, 602). The unchecked admission of statements and other material from a body camera would nullify the role of Illinois trial judges and jeopardize the fairness of the courts. *Id.* ¶ 28; *Morgan*, 838 S.E.2d at 897-900. This Court should avoid these problematic and absurd results by holding that the rules of evidence, including the rule against hearsay, apply to body-camera recorded audio sought to be introduced at trial. *Evans v. Cook Cnty. State's Att'y*, 2021 IL 125513, ¶ 27 ("statutes must be construed to avoid absurd or unjust results").

The Illinois Rules of Evidence govern the admissibility of body camera-generated in the courts of Illinois and warrant the exclusion of hearsay evidence here. *People v. Brand*, 2021 IL 125945 ¶ 36. Hernandez's out-of-court, recorded statements that Collins "dropped a pistol right there in the middle of the lot where we started" were rank hearsay, admitted to bolster Hernandez's testimony that Collins possessed a gun. Because the Body Camera Act contains no language deeming these statements to be non-hearsay, and recorded statements are not, by virtue of being recorded, non-hearsay, Hernandez's out-of-court statements should not

have been admitted at Collins's trial.

C. The State introduced Hernandez's recorded statements for the hearsay purpose of asserting that Collins possessed and dropped a gun in a vacant lot, and not merely to show "course of investigation," which needed no additional explanation in this case.

The State then concedes, assuming that the rule against hearsay applies to the recorded statements at issue here (as it certainly does), that Hernandez's body camera-recorded statements telling fellow officers that Collins dropped a black gun in a lot near the start of the chase are "potentially subject to exclusion as hearsay." (St. Br. 16). The State argues, however, that Hernandez's on-the-scene statements captured on body camera audio were offered to explain the course of Hernandez's investigation and not for a hearsay purpose. (St. Br. 17). The State never asserted this basis in the trial court and, as argued *supra*, it appears nowhere in the State's petition for leave to appeal. (R. 263-65). Regardless, the State's argument is unpersuasive because "hearsay testimony identifying the defendant as the one who committed the crime cannot be explained away as "police procedure," even where the trial judge limits the evidence to a non-hearsay purpose," which was not done here. *Jura*, 352 Ill. App. 3d at 1087. Further, Hernandez's statements served no "course of investigation" purpose because Hernandez himself recovered the gun from the vacant lot and there was no need to explain this aspect of the investigation to the jury.

Police course-of-investigation evidence is generally limited to information

that a fact-finder needs to know to understand an investigation and generally, under the course-of-investigation exception, an officer may not testify to a statement's content. *People v. Gacho*, 122 Ill.2d 221, 248 (1988) (holding that an officer's testimony crosses into inadmissible hearsay when it recounts the substance of a conversation). Illinois courts have repeatedly warned about the potential "misuse" of the "course of investigation" evidence and have held generally held that an officer should not reveal the substance of a conversation when explaining investigative steps. and that an officer's testimony "that he acted 'upon information received,' or words to that effect, should be sufficient." *People v. Sample*, 326 Ill.App.3d 914, 921 (1st Dist. 2001), *Gacho*, 122 Ill.2d at 248.

Course of investigation testimony is deemed not to be hearsay when it is used solely to show the course of a police investigation and is necessary and important to fully explain the background to the trier of fact. *People v. Simms*, 143 Ill. 2d 154, 174 (1991); *Williams*, 181 Ill.2d at 313. Such testimony must be offered strictly for that purpose, and "the trial court must carefully assess such testimony to ensure that it does not include more than is necessary to explain police conduct." *People v. Cameron*, 189 Ill. App. 3d 998, 1003–04 (1st Dist. 1989). When an out-of-court statement is admitted for the limited purpose of showing police procedure "the court must specifically *instruct the jury* that the statement is introduced for a limited purpose and that the jury is not to accept the statement for the truth of its contents." *People v. Armstead*, 322 Ill. App.3d 1, 12 (1st Dist. 2001) (emphasis added).

The State's reliance on the "course of investigation" exception fails here for much the same reasons it failed in *Jura*. In that case, the appellate court held that

there was no legitimate "course of investigation" basis for admitting the contents of a police radio call describing a man with a gun as a "male White with a tattoo with a teardrop on his face." *Jura*, 352 Ill. App. 3d at 1085-86. The court held that "[h]earsay testimony identifying the defendant as the one who committed the crime cannot be explained away as 'police procedure,' even where the trial judge limits the evidence to a nonhearsay purpose." *Id.* at 1087. Further, testimony about the radio calls was not admissible to show investigative steps because "there was no issue regarding the reason" the police went to the location where defendant was found. *Id.* at 1088; *see also People v. Edgecombe*, 317 Ill. App. 3d 615, 627 (1st Dist. 2000) (content of police radio message went beyond what was necessary to show steps of the police investigation).

The timing of the State's introduction of Hernandez's recorded statements and tenor of the State's closing argument further refutes the State's reliance on the course of investigation exception. When the State played the recorded statements, the jury already knew the details of Hernandez's investigation, as Hernandez had already testified that Collins dropped a gun during a foot chase. He also recounted how and where he found a gun after Collins had been detained and even traced the events on a map. (R. 188-206, PE 2). This is not a case in which another responding officer testified to Hernandez's out-of court statements to explain how he or she came to recover a weapon. *Compare People v. Banks*, 237 Ill. 2d 154, 181 (2010) (out-of-court statement admissible to explain how officer "who was not part of the initial investigation" pursued and arrested defendant). Here, Hernandez recovered the weapon *himself* after Collins was taken into custody. Thus, Hernandez's

body camera audio, conveying to other officers that Collins dropped a black pistol in a certain vacant lot, was not "necessary and important" to explain the course of investigation. *See e.g.*, *People v. Warlick*, 302 Ill. App. 3d 595, 600 (1st Dist. 1998) (observing that "[I]t would have been enough for the officer to testify he received a radio message, then went to the recycling center"). His statements are akin to statements from a police report. *People v. Burnside*, 133 Ill. App. 3d 453, 457 (3rd Dist. 1985) (police reports are not admissible as substantive evidence in criminal trials.)

The State's closing argument likewise proves that the purpose behind introducing Hernandez's recorded statements was not to explain any aspect of the investigation, but to emphasize Hernandez's hearsay prior consistent statements as evidence of Collins's guilt. *Jura*, 352 Ill. App. 3d at 1087 (closing argument refuted State's assertion of course of investigation purpose); *People v. Singletary*, 273 Ill.App.3d 1076, 1085 (1st Dist. 1995) (State's remarks in closing argument exceeded what was necessary to explain investigative procedures and were used to prove defendant's guilt). During closing arguments, the State replayed Hernandez's body camera recording and argued, "That piece of evidence shows everything that Officer Hernandez *said*, everything he did, and everything he saw after this defendant dropped that handgun in that vacant lot." (R. 359) (emphasis added). The State further relied on Hernandez's hearsay statements by arguing, *"Even then he is trying to direct his partners to go back and get that gun, but he goes further*." (R. 360) (emphasis added). The State repeatedly urged jurors to focus upon Hernandez's radio calls describing the gun, its location, and Collins's actions to find Collins

guilty. (R. 362-63).

There was no limiting instruction given or requested here, undoubtedly because the State did not assert "course of investigation" as a basis for admission and the trial court did not admit the statements on those grounds. Ill. R. Evid. 105 (limited purpose jury instruction rule) (eff. Jan. 1, 2011). However, should this Court conclude that Hernandez's out-of-court statements repeating his in-court testimony were somehow admissible to explain the steps of the police investigation, Collins should nonetheless receive a new trial due to lack of a limiting instruction directing the jury not to consider the body camera statements for their truth. Absent a limiting instruction, it cannot be presumed the jury's use of hearsay evidence is limited to nonhearsay purposes. *Jura*, 352 Ill. App. 3d at 1093; *see also People v. Simms*, 143 Ill. 2d 154, 174 (1991) (presuming that information was used for a limited purpose where the jury received a limiting instruction regarding police investigative steps); *People v. Ochoa*, 2017 IL App (1st) 140204, ¶ 57 ("Because no limiting instruction was given here, we do not presume that the jury's use of the evidence was limited to a non-hearsay purpose.").

The closing argument also undercuts the State's argument that Hernandez's statement to Officer Lopez, to "go back to the lot ... we ran through" was a command, not admitted for its truth. (St. Br. 16). This particular theory was never argued at trial, in the appellate court, or in the petition for leave to appeal. Nonetheless, the argument fails. "Joel, go back to the lot. Go back to the lot we ran through" communicates the "truth" that Lopez should go back to the lot Hernandez and Collins ran through because Collins dropped something there. As in *Jura*, this statement,

as well as the others challenged here, went "to the very essence of the dispute" and their admission was not harmless beyond a reasonable doubt. *Jura,* 352 Ill. App. 3d at 1088. In summary, the State cannot use course of investigation as a post-hoc justification for the introduction of Hernandez's hearsay statements.

D. Hernandez's recorded statements claiming that Collins dropped a black pistol during a foot chase, made after Collins was securely in custody, were not excited utterances.

The State's reliance on the excited utterance hearsay exception fails for two reasons. As noted *supra*, this argument was not raised in the State's petition for leave to appeal is unsurprising, as the appellate court held that the State had abandoned the "excited utterance" argument on direct appeal, and during trial court proceedings, the State did not proffer any reasons why this exception should apply. (R. 263-65), *People v. Collins*, 2020 Ill App (1st) 181746, ¶ 6 (PLA 1-10);(Peo. App. Ct. Br. 24). This Court should therefore decline to address the State's contentions regarding excited utterance.

On the merits, the excited utterance hearsay exception is inapplicable because Officer Hernandez's recorded statements were made in the course of a routine arrest for gun possession, after Collins (who submitted peacefully) was safely in custody. As a veteran tactical officer on routine patrol in what he described as a "high-crime neighborhood," (R. 188. 217-18).Hernandez's statements on Collins's possession of a gun, in the aftermath of Collins's detention, do not qualify as excited utterances.

Illinois Rule of Evidence 803(2) provides for admission of statements that "relate to a startling event or condition" and are "made while the declarant was

under the stress of excitement caused by the event or condition." Ill. R. Evid. 803(2) (eff. Jan. 1, 2011). "The excited utterance exception allows the substantive admission of an otherwise inadmissible hearsay statement where the proponent of that statement is able to demonstrate (1) the occurrence of an event or condition sufficiently startling to produce a spontaneous and unreflecting statement; (2) absence of time to fabricate; and (3) a statement relating to the circumstances of the occurrence." *People v. Lerma*, 2016 IL 118496, n. 1.

Application of the excited utterance exception requires a totality of the circumstances analysis. *People v. Sutton*, 233 Ill. 2d 89, 107 (2009). While time is one factor, it is "an elusive one, whose significance will vary with the facts of each case." *People v. House*, 141 Ill. 2d 323, 381–82 (1990). Other factors include "the nature of the event, the mental and physical condition of the declarant, and the presence or absence of self-interest." *Id.* at 382. Critically, "simply because a situation may cause some level of excitement does not mean that it rises to the level of a startling event capable of stilling the capacity for reflection." *People v. Abram*, 2016 IL App (1st) 132785, ¶ 75 (collecting cases).

For instance, in *People v. Simon*, 2011 IL App (1st) 091197, the defendant sought to admit his statement, in support of a self-defense claim, that shortly after the shooting, he told a witness that he thought the armed victim was going to shoot him. The victim's gun was in his waistband at the time. *Id,* ¶ 82. The appellate court rejected the defendant's reliance on the excited utterance exception, holding that the statement did not occur during a sufficiently startling event. The court acknowledged that while "being threatened with a gun could be a sufficiently startling

event to produce a spontaneous statement," merely seeing a person with a gun in a waistband is less so. *Id.* The court also noted that the lapse of time – three minutes from the alleged confrontation with the victim – gave the defendant ample time to concoct a self-defense claim. *Id.* The excited utterance exception is not a catchall for allowing all statements that follow sight of a gun or other contraband.

By contrast, in *People v. Abram*, 2016 IL App (1st) 132785, the court found statements from a police call out tape during a high-speed car chase qualified as excited utterances because they were made contemporaneously during a dangerous chase in which the defendant drove the wrong way and up onto sidewalks. *Id.* ¶ ¶ 72-74. Despite its holding, the court cautioned that "simply because a situation may cause some level of excitement does not mean that it rises to the level of a startling event capable of stilling the capacity for reflection." *Id.* ¶ 75; *see also People v. Evans*, 373 Ill. App. 3d 948, 965 (4th Dist. 2007) (a fistfight between individuals engaged in earlier altercations was not "the sort of dramatic, startling event capable of generating an excited utterance").

While the chase here may have increased the officer's heart rate, it was hardly a "startling event capable of stilling the capacity for reflection." *Abram*, 2016 IL App (1st) 132785, ¶ 75. When Hernandez made the statements, the chase was over and Hernandez was in complete control of Collins, who was squatting against a wall with his hands up. (PE 3, T. 7:15:53). Hernandez had collected himself as he shined the flashlight at Collins. Collins complied with the officer's directions and did not resist. Hernandez did not radio for backup due to a threat of danger. Rather, Hernandez cuffed Collins while calmly directing his fellow officers to a

lot where, he said, Collins had dropped a gun. At least a minute and 20 seconds had elapsed between the time he allegedly saw a gun and made the remarks challenged here. (PE 3, T. 7:15:53). Hernandez's statements were clear, measured, and responsive to questions from his fellow officers. (PE 3, 0:50). Further, Hernandez admitted that even before he decided to chase after Collins, he expected to find some kind of contraband since he was conducting a narcotics investigation and was aware that drug dealers sometimes carry guns. (R. 212, 218-19).

The State relies on *U.S. v. Campbell*, 782 F. Supp. 1258, 1262 (N.D. Ill. 1991), for the notion that Hernandez's statements qualify as excited utterances: "Even for a police officer who presumably is trained to react in potentially dangerous situations, involvement in a chase with an armed suspect would be an exciting and startling event." *Campbell* is easily distinguishable. In that case, an officer heard a radio description of a suspect wanted for a shooting, and then came upon an individual who matched that description. The man attempted to flee, and the officer saw that the suspect was carrying a gun, which he dropped during the chase. The court held that the officer's recorded statements describing the progress of the pursuit were admissible as excited utterances because they were made "while under the stress and excitement of the startling event ... *as the events unfolded* ... relating to the startling events he was witnessing." *Id.* at 1262 (emphasis added).

Here, by contrast, Hernandez was not actively narrating a rapidly-unfolding series of events involving a known violent suspect. The chase was over and Hernandez was in complete control of Collins when the officer radioed his fellow officers. Collins did not fire the gun during the pursuit, or even point it at Hernandez. Hernandez

was not overcome with shock by the sight of a gun; he had five years of experience and was a member of the Eleventh District Tactical Team. In the officer's own words, the police department designated his patrol area "as a hot spot for high gang narcotics sales ... and violence too." (R. 218). The discovery of a gun during a brief foot chase was hardly cause for surprise – even the two officers who eventually took custody of Collins as Hernandez went to search for the gun walked casually to the fence, hands in pockets, as Hernandez patiently waited. (PE 3, 2:59-3:07). Similarly, Officer Lopez's body camera shows him and two other officers calmly walking through a lot with their flashlights before more backup officers arrive. (DE 2, 1:18-5:05). While the State's brief asserts that the gun posed an "immediate danger to public safety," (St. Open. Br. 22), both videos prove that for the officers involved, including Hernandez, this was a routine investigation, not an unusual high-stress situation. Simply put, this investigation was not a startling event that would cease all reflective thoughts for an investigating officer. For these reasons, *Campbell* is not persuasive and the excited utterance exception does not apply.

E. The State's extensive reliance on Hernandez's hearsay statements requires reversal in this single witness case with neither recorded footage nor forensic evidence connecting Collins to the gun.

Since the hearsay issue was preserved by Collins's pretrial, trial and posttrial challenges, this Court reviews this case to see if any error was harmless was beyond a reasonable doubt. *People v. King*, 2020 IL 123926, ¶ 40 (holding that erroneous admission of an expert's testimony was not harmless beyond a reasonable doubt).

This Court recognizes "three approaches to determine whether an error such as this is harmless beyond a reasonable doubt: (1) whether the error contributed to the defendant's conviction, (2) whether the other evidence in the case overwhelmingly supported the defendant's conviction, and (3) whether the challenged evidence was duplicative or cumulative." *Id.*

The State cannot meets its burden in this case of proving that the admission of the repeated hearsay statements did not impact the jury's verdict beyond a reasonable doubt. It is well-established that admission of a statement used to bolster a witness' credibility is reversible error when the witness's in-court testimony is crucial. *People v. Randolph*, 2014 IL App (1st) 113624, ¶ 21; *People v. Smith,* 139 Ill. App. 3d 21, 34 (1st Dist. 1985). Further, when inadmissible hearsay goes to the central question of a defendant's guilt and becomes a focus of the trial, presentation of hearsay evidence is not harmless beyond a reasonable doubt. *People v. Smith*, 141 Ill. 2d 40, 79 (1990) (finding a trial court's error in admitting hearsay prison reports, coupled with the prosecutor's remarks, required reversal); *Jura*, 352 Ill. App. 3d at 1091 ("repeated admission of hearsay, "together with the use of the hearsay by the State" in closing argument held to be reversible error); *Randolph*, 2014 IL App (1st) 113624, ¶¶ 20-21 (reversible error for State to elicit statements from police report consistent with officer's in-court testimony); *People v. Smith,* 139 Ill. App. 3d 21, 34 (1st Dist. 1985) (introduction of officer's prior statements not harmless); *Ochoa*, 2017 IL App (1st) 140204, ¶¶ 58-60 (finding the admission of hearsay evidence from a detective not harmless). The appellate court's observation here is well-taken: "At the end of the day, the State relies on

the uncorroborated testimony of a single witness to argue harmless error in admitting the hearsay statements in Hernandez's body camera video." *Collins*, 2020 IL App (1st) 181746, ¶ 48.

In this single witnesses case, the evidence was anything but overwhelming. No other witnesses corroborated Hernandez's testimony. This officer even failed to timely activate his body camera and there is no video of Collins in possession of a gun. The forensic expert who performed at least five tests on the gun and ammunition was unable to find any evidence connecting Collins to the gun or ammunition. (R. 301-16, 319-21, 323-24). The gun was not tested for DNA. (R. 323). By Hernandez's own admission, this was a high crime and violent neighborhood, plagued by the narcotics trade and guns. (R. 217-18). Collins made no statement and the State never located the two other people who had been with Collins. Hernandez's in-court testimony was crucial to proving the State's case and admission of his out-of-court statements which served to bolster his testimony was reversible error. *Smith,* 139 Ill. App. 3d at 34.

Given the lack of evidence, the State's closing argument dooms its harmless error analysis. The State's closing remarks emphasized the hearsay statements as substantive proof of Collins's guilt and the jury received no limiting instruction regarding the "true" purpose of the statements, not that there was any. *See supra,* at pp. 33-34. Right from the start, the prosecutor made Hernandez's hearsay statements the centerpiece of its case. The State began:

> [T]he rest of the circumstantial evidence we have comes from Officer Hernandez's body worn camera. That piece of evidence shows everything that Officer Hernandez *said*, everything he did, and everything he saw after this defendant dropped that handgun in that

> vacant lot." But the video goes further. It shows you that not only did Officer Hernandez *describe where this was* he also went to where the gun was dropped, where he saw the defendant drop that gun.
>
> (R. 359-60) (emphasis added)

During the State's initial closing argument, the State replayed the body camera video and continued:

> Officer Hernandez even before he takes the defendant into custody is directing his partner to go back to where his chase started, to go back to the lot where we started. That's where he dropped it. Even then he is trying to direct his partners to go back and get that gun, but he goes further. In the second video he goes out to all of his assisting officers to be even more specific.
>
> He becomes even more specific. He corrects his squad leader when they come over the transmission to him. It's not something black. It's a black pistol that I saw him drop in that lot, and he gets more specific about the location. It's in the middle of that lot. Go back to the middle of that lot. That's where he drops a black pistol.
>
> You know the defendant dropped that handgun in that vacant lot because Officer Hernandez is unequivocal when he describes it. He is unequivocal when he describes where it is. He doesn't say to his partners I think I saw him drop something, it could have been a dark object or he doesn't say to his partners I'm pretty sure it was over here or maybe it was over in this other location. He tells his fellow officers exactly what he saw the defendant drop and exactly where he saw the defendant drop it.
>
> Officer Hernandez never equivocates when he is describing exactly what he saw the defendant do. He is directing his fellow partners to go back to where he saw the defendant run, where he saw the defendant holding his side, and where he saw the defendant pull out a gun and drop it to the ground. That's what this evidence tells you that at this time Officer Hernandez already knew what he had seen. *He was unequivocal then and he was unequivocal here when he sat on the stand in front of you*.
>
> But the video goes further. It shows you that not only did Officer Hernandez describe where this was he also went to where the gun was dropped, where he saw the defendant drop that gun.
>
> (R. 360-61) (emphasis added).

The State concluded its discussion of the body camera footage:

> It makes you ask a question in this situation. If Officer Hernandez didn't see the defendant drop that gun in that lot then *how is he able to describe it so accurately to his partners? When he gets to this location what does he recover? A black in color pistol sitting right there where he saw it dropped.*
>
> *If he didn't see that gun drop there how is he able to describe it? If he didn't see the defendant drop it at that location how is he able to tell his fellow officers exactly where it was dropped*? And more importantly if he didn't see it dropped at that location how was he able to go back to exactly where the spot was where the gun was recovered?
>
> Are these all just lucky guesses on behalf of Officer Hernandez? Are these all just coincidences or does it show you that when Officer Hernandez testified here before you that he was telling you the exact truth? Because all of the circumstantial evidence supports what he told you here in court.

(R. 362-63) (emphasis added).

In summary, for about four pages of the trial transcript, the State argued that Hernandez's testimony was credible because it was corroborated by his statements on the body camera audio. Admission of Hernandez's hearsay statements, coupled with the State's closing argument emphasis establishes that any error was not harmless beyond a reasonable doubt. The State's emphasis on the veracity of the hearsay statements makes this case akin to *Jura*, *Randolph*, *Smith* (1985), and *Ochoa*, where the State relied upon hearsay and offered no limiting instruction restricting the jury's consideration of hearsay evidence. Given the State's emphasis of the hearsay evidence and the lack of any evidence to corroborate Hernandez's claim, this Court cannot say beyond a reasonable doubt that the introduction of hearsay did not impact the jury's verdict.

The State also claims that Hernandez's hearsay statements, even if erroneously

admitted, were merely "cumulative" as they "duplicated Hernandez's live testimony under oath," (St. Br. 23), but this is inaccurate. Prior to the publication of the body camera audio, the jury heard Hernandez testify, without embellishment, regarding his chase of and arrest of Collins, and recovery of the gun. (R. 188-208). Hernandez's only testimony regarding his radio calls was when, "I was going over the radio to give instructions to my partner to go to the empty lot where everything it started, pretty much where he ran through the first one." (R. 198-99). Hernandez's testimony regarding his radio communications was very limited since he he did not describe the gun or repeatedly emphasize the accusation that Collins dropped the gun. The multiple hearsay statements and video footage went well above and beyond the detail of Hernandez's testimony by repeatedly accusing Collins of illegally possessing a black firearm and dropping it in a specific lot. *Compare* (PE 3, 0:53, 1:07, 1:26, 1:45, 1:58, 4:22) *with* (R. 188-07); s*ee Collins*, 2020 IL App (1st) 181746, ¶ 37

The repetition of these statements and the State's closing argument magnified the harm and prejudice, as "[p]eople tend to believe that which is repeated most often, regardless of its intrinsic merit, and repetition lends credibility to testimony that it might not otherwise deserve." *People v. Johnson*, 2012 IL App (1st) 091730 ¶ 60. Hernandez's repeated hearsay statements were the focus of the State's case against Collins. Hernandez's recorded statements were inadmissible hearsay, without exception. With no video footage, forensic evidence, or another witness that could corroborate Hernandez's claim, the State cannot meet its burden of proving that this fully-preserved error was harmless. This Court should affirm the appellate court's decision and order a new trial.

Alternatively, should this Court reverse the appellate court, Collins requests that this Court remand this case to the appellate court for resolution of the remaining issues raised by Collins including prosecutorial misconduct, ineffective assistance of trial counsel for failing to request an adverse inference jury instruction based on the officer's untimely activation of the body camera, and cumulative error. *In re Marriage of Crecos*, 2021 IL 126192, ¶ 48 (remanding for the appellate court to address unresolved issues).

CONCLUSION

For the foregoing reasons, Jodon Collins, defendant-appellee, respectfully requests that this Court affirm the appellate court or, alternatively, remand this case to the appellate court for consideration of the remaining issues raised on direct appeal.

Respectfully submitted,

DOUGLAS R. HOFF
Deputy Defender

SAMUEL B. STEINBERG
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLEE

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 or words contained in 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, is 44 pages.

/s/Samuel B. Steinberg
SAMUEL B. STEINBERG
Assistant Appellate Defender

APPENDIX

2020 IL App (1st) 181746
No. 1-18-1746
Opinion filed December 21, 2020

First Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 18 CR 825
	)	
JODON COLLINS,	)	
	)	Honorable
Defendant-Appellant.	)	Joan Charles P. Burns,
	)	Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court, with opinion.
Presiding Justice Walker and Justice Coghlan concurred in the judgment and opinion.

OPINION

¶ 1 A jury found Jodon Collins guilty of unlawful possession of a weapon by a felon and of being an armed habitual criminal. Officers arrested Collins after a foot chase partially caught on body camera video. The trial court admitted the video over repeated objections by Collins's counsel that the audio included inadmissible hearsay statements from Chicago police officer Martin Hernandez. We agree with Collins. Officer Hernandez's statements captured on the video served no nonhearsay purpose and were inadmissible. The State's evidence almost exclusively

consisted of Hernandez's testimony, further leading us to conclude the error was not harmless beyond a reasonable doubt. We reverse and remand for a new trial.

¶ 2 Background

¶ 3 Chicago police officers Martin Hernandez and Joel Lopez were on patrol shortly after 1 a.m. on December 16, 2017. As they turned onto Walnut Street they saw a group of three people standing near 3300 West Walnut. The group looked in the officers' direction and started walking away from them. As the officers got closer to 3300 West Walnut Street, Hernandez got out of the car to "conduct an investigation."

¶ 4 Hernandez saw one member of the group, who he identified as Jodon Collins, "turn around, look at us and immediately start running west and then northbound." Before Collins ran, Hernandez did not observe anything illegal. Specifically, he did not see anyone in the group engage in any hand-to-had transactions, did not see Collins holding a gun, and did not see a bulge in Collins's pants. Collins ran through a vacant lot, "holding his left side," with Hernandez five-to-eight feet behind. From that distance, Hernandez saw Collins "drop a black handgun" on the ground.

¶ 5 Hernandez, after hesitating on seeing the gun, kept chase. To get to Fulton Street, Collins had to jump two fences. Hernandez also cleared the fences, but lost ground in the process. From about 40 feet away, Hernandez saw Collins jump a final fence into the yard of a house on Fulton Street. Once Collins hopped the fence, Hernandez lost sight of him. Hernandez went into the back yard and found Collins "crouched down" against the wall of the house. Hernandez arrested Collins and handed him off to other officers before going back to the vacant lot where he recovered a black handgun in the spot where he saw Collins drop it.

¶ 6 Hernandez wore a body camera. To activate his body camera, he had to twice push a button on the front of it. Once the camera activated, there was "a 15-second period that it goes back and records." Over an objection from Collins's counsel, the court allowed the State to play video footage from the camera with the audio. The video does not start until Hernandez was "towards the third fence area" because, as Hernandez explained it, when the chase began, his "focus was on the person that's fleeing." Hernandez agreed that a Chicago Police Department special order required him to start the camera at the beginning of any incident and "leave it recording till the scene is safe."

¶ 7 During the video, Hernandez made the following statements on his radio, after putting Collins in custody:

> "Get to that lot, dude. Hurry up. He dropped it there."
>
> "Go back to the lot where he ran through, dude. It's right in the middle of the lot. It's black."
>
> "It's a pistol, squad. He dropped a pistol right there in the middle of the lot over there where it started."

Before trial, Collins's counsel had moved *in limine* to bar the video, arguing that the statements it contained were hearsay and improper prior consistent statements. The trial court denied the motion, overruled counsel's objection to the video at the time it was played, and overruled counsel's objection to the video when the court formally admitted it into evidence.

¶ 8 Chicago police evidence technician Robert Franks analyzed the gun for fingerprints but found none. The State admitted certified copies of two previous convictions for possession of a controlled substance with intent to deliver.

¶ 9 Collins did not testify, but his counsel called Sergeant Joel Lopez, who laid the foundation for the admission of his body camera video. He explained that his video starts after Hernandez had already gotten out of the car. The video shows Lopez driving for a while and then eventually getting out of his car and searching unsuccessfully for the gun. Collins's counsel played the video for the jury, without any objection by the State.

¶ 10 During closing argument, the State discussed Hernandez's body camera video, rhetorically asking the jury how Hernandez could have directed his fellow officers back to the lot where they found the gun if he had not seen Collins drop it there. The State then played the entire video for the jury. Collins's counsel played Lopez's body camera video for the jury, arguing that Hernandez's instructions to go back to the lot (audible in both officers' body camera videos) were confusing because it took Lopez so long to get to the right area.

¶ 11 The jury found Collins guilty of unlawful use of a weapon by a felon and being an armed habitual criminal. Collins filed a motion for a new trial, repeating the argument that the audio from Hernandez's body camera video was improperly admitted. The State responded that Collins's counsel had used the officers' videos for her own benefit, to which Collins's counsel replied that she had only used the videos because "the court ruled that the audio portions *** would be admissible." The trial court reiterated its view that the videos were "obviously admissible" and denied the motion for a new trial.

¶ 12 The trial court merged the unlawful use of a weapon by a felon into the armed habitual criminal count and sentenced Collins to 7½ years in the Illinois Department of Corrections.

¶ 13 Analysis

¶ 14 Collins argues the trial court erred in admitting the audio from Hernandez's body camera because it exposed the jury to "inadmissible hearsay." Collins takes issue with several statements Hernandez made throughout the audio, telling other officers that Collins dropped a "black pistol" as he ran from Hernandez. The State responds that Collins has waived the issue by using the body camera video to his advantage in closing arguments and by introducing Lopez's body camera video. On the merits, the State argues that Hernandez's statements were not hearsay because they were only offered to explain the officers' course of conduct, not for the truth of the matter asserted. See Ill. R. Evid. 802 (eff. Jan. 1, 2011).

¶ 15 Waiver Argument

¶ 16 We start by considering, and rejecting, the State's waiver argument. The State contends Collins either invited or acquiesced in the admission of Hernandez's body camera video because he later "used the 'error' " by incorporating the video into his arguments about the unreliability of Hernandez's testimony. The doctrine of invited error prevents a defendant from raising a claim on appeal where he or she "procures, invites, or acquiesces in the admission" of otherwise improperly admitted evidence. *People v. Bush*, 214 Ill. 2d 318, 332 (2005). The doctrine is grounded in "notions of fair play" (*People v. Villarreal*, 198 Ill. 2d 209, 227 (2001)), and we apply it where a defendant " 'sit[s] by' " and deprives the State of the opportunity to cure any alleged error (see *Bush*, 214 Ill. 2d at 332-33 (quoting *People v. Trefonas*, 9 Ill. 2d 92, 98 (1956))).

¶ 17 Both cases the State relies on, *Bush* and *Villarreal*, involved a defendant whose counsel behaved far differently than Collins's counsel. In *Bush*, the defendant's counsel stipulated to admission of evidence that the substance he was accused of possessing was cocaine. *Id.* at 333.

In *Villarreal*, the defendant on appeal attempted to attack verdict forms that his own counsel submitted at trial. *Villarreal*, 198 Ill. 2d at 227. On the other hand, Collins's counsel (i) filed a motion *in limine* objecting to the admission of Hernandez's body camera video, (ii) objected at the time the video was offered as a trial exhibit, (iii) objected again when the trial court formally admitted the State's exhibits at the close of evidence, and (iv) preserved her objection in a motion for a new trial by expressly arguing that she only admitted Lopez's video in response to the admission of Hernandez's video.

¶ 18 The record demonstrates that Collins's counsel never acquiesced to the admission of Hernandez's body camera video. Instead, she used Lopez's video and her argument only to make the best of the jury viewing Hernandez's video over her objection. Collins's challenge to the admissibility of Hernandez's body camera video has not been waived.

¶ 19 Hearsay Issue

¶ 20 On the merits, Collins claims the video from Hernandez's body camera—the audio in particular—should not have been admitted because it exposed the jury to hearsay not falling within any exception. In the trial court, the State argued both that the statements in the body camera video were not hearsay and, in the alternative, were admissible as excited utterances. The State abandons the latter argument on appeal and asserts only that the statements in the video were not hearsay. We review the denial of Collins's motion *in limine* and the admission of the contested video evidence for an abuse of discretion. *People v. Dunmore*, 389 Ill. App. 3d 1095, 1105-06 (2009).

¶ 21 The parties focus almost entirely on the disputed hearsay character of Hernandez's body camera video. Neither party, however, starts at the beginning—the Law Enforcement Officer-

Worn Body Camera Act (Act) (50 ILCS 706/10-1 *et seq.* (West 2016)). The Act provides that "recordings may be used as evidence in any administrative, judicial, legislative, or disciplinary proceeding." *Id.* § 10-30. The Act allows the recordings to be admitted without any expressed limitation. The Illinois Rules of Evidence, in turn, prohibit the introduction of hearsay testimony "except as provided *** by statute as provided in Rule 101." Ill. R. Evid. 802 (eff. Jan. 1, 2011). So, at least theoretically, the Act's grant of the limitless use of body camera recordings would mean that there is no need for the contents of those recordings to comply with the rule against admitting hearsay.

¶ 22 But a statutory evidentiary rule governs "unless in conflict with a rule or a decision of the Illinois Supreme Court." Ill. R. Evid. 101 (eff. Jan. 6, 2015). This means that "where an irreconcilable conflict exists between a legislative enactment and a rule of this court on a matter within the court's authority, the rule will prevail." *People v. Peterson*, 2017 IL 120331, ¶ 31. Neither party has suggested that the Act provides admission of body camera recordings without limitation, and so we will assume—without deciding—that the Act allows the trial court to admit body camera recordings subject to the rules of evidence, including the hearsay rule.

¶ 23 Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ill. R. Evid. 801(c) (eff. Oct. 15, 2015). Neither party disputes that the recording contains "statements" Hernandez made. Neither party disputes that Hernandez made the relevant statements "other than *** while testifying at the trial." See *id.* The only dispute involves admitting the statements to prove the truth of the matter they assert—that Collins "dropped a pistol right there in the middle of the lot

where we started"—or whether the statements were admitted for some other purpose, namely to chronicle the course of the police investigation.

¶ 24 Collins relies heavily on *People v. Jura*, 352 Ill. App. 3d 1080 (2004), to argue that Hernandez's statements were offered to prove the truth of the matter asserted, not to show the course of the investigation. We find *Jura* persuasive.

¶ 25 The court in *Jura* analyzed the testimony of three officers. All of them testified that they received a radio call of " 'a person with a gun' " at " '2845 West 38th Street in the alley.' " *Id.* at 1082-84. The radio call also described the suspect as a " 'male White' " and included information about height and a face tattoo. *Id.* The court's analysis began by acknowledging that officers may testify to statements made out of court where the statements are used to show the officers' investigative steps and not for the truth of the matter asserted. *Id.* at 1085. The court cautioned, however, that the statements must be " 'necessary and important' " to a full explanation of the State's case. *Id.* The court rejected the State's argument of a nonhearsay purpose because "[t]here was no issue regarding the reason why the officers proceeded to the alley behind 38th Street." *Id.* at 1086. Here, similarly, there is no issue about why officer Hernandez returned to the lot Collins ran through. Hernandez's nonhearsay testimony sufficed to explain that the officers went back to search for the gun Hernandez claimed to have seen Collins drop.

¶ 26 We conclude, as the court did in *Jura*, that the hearsay statements in Hernandez's body camera video were not "necessary and important" to explain the State's case. The State implies that the jury may have been confused because Hernandez arrested Collins and then went back "several blocks removed from where the incident eventually came to an end" to recover the gun.

See *People v. Cameron*, 189 Ill. App. 3d 998, 1004 (1989) (" 'arresting or investigating officer should not be put in the false position of seeming just to have happened upon the scene' "). Here, there was no risk of the jury believing that Hernandez just "happened upon the scene" where the gun was found because Hernandez was both the arresting officer and the pursuing officer who saw Collins toss the gun.

¶ 27 After finding no nonhearsay purpose, the court in *Jura* allowed that the State's argument would have been reasonable had it not been for multiple witnesses testifying to the hearsay statements and the State emphasizing the statements in opening and closing arguments. *Jura*, 352 Ill. App. 3d at 1088-89. Here, we do not have multiple witnesses repeating the hearsay, but do have Hernandez repeating the relevant hearsay statements in some form at least three times throughout the video. And, as in *Jura*, the State not only relied on the hearsay statements during its closing argument, it replayed the video in full. Like the court in *Jura*, we cannot accept that Hernandez's statements in the body camera video were admitted for anything but the truth of the matter it asserted—namely, that the black gun was in the lot through which Collins ran and that Collins was the one who dropped it there.

¶ 28 As this court has cautioned, "[t]he 'police procedure' shibboleth has not proved persuasive" in many cases. *People v. Warlick*, 302 Ill. App. 3d 595, 600 (1998) (collecting cases). Where it is enough for an officer to explain that an event happened (observation, radio message, witness description) and he or she responded to it, the substance of an out-of-court statement memorializing that event is inadmissible. *Id.*

¶ 29 We also find that the admission of Hernandez's statements through the body camera video was even more prejudicial than the testimony in *Jura* or many of the cases described in

Warlick, where the officers merely testified about the radio dispatch they heard. *Jura*, 352 Ill. App. 3d at 1082-84; *Warlick*, 302 Ill. App. 3d at 600 (citing, *e.g.*, *People v. Hazen*, 104 Ill. App. 2d 398, 402-03 (1969) (error to admit account of radio message)). Rather than testimony about the video, we are dealing with the video itself. As a justice of this court explained, and we agree, "a video is a most powerful piece of evidence, *** an observation requiring no citation." *Hudson v. City of Chicago*, 378 Ill. App. 3d 373, 434 (2007) (O'Malley, J., dissenting).

¶ 30 We have reviewed the video and find that it is of the type to easily overpersuade. The video depicts a chase at night, with frenetic movements caused by the camera's attachment to Hernandez's body. Hernandez calls over the radio in an urgent tone of voice, while he is breathing deeply from the chase. The video shows at least two police SUVs had responded to the scene with searchlights. Four officers, at minimum, take Collins into custody. Because there was no nonhearsay purpose to admitting the video with Hernandez's out-of-court statements, the nature of the video was more prejudicial than probative.

¶ 31 Having found error, we must determine whether it was harmless. The State, whose burden it is to establish harmless error beyond a reasonable doubt, cites no authority discussing harmless error. Instead, the State cites *People v. McNeal*, 2019 IL App (1st) 180015, ¶ 83, for the proposition that Collins's flight was evidence of consciousness of guilt. Whatever the merits of that proposition, the State reads *McNeal* out of context. There, our discussion of flight as evidence of guilt occurred during an examination of whether the evidence was closely balanced for the purposes of the plain error rule. *Id.* When a defendant raises plain error based on forfeited arguments, it is his or her burden to show the evidence as closely balanced; here, it is the State's burden to show admitting hearsay as harmless beyond a reasonable doubt. *People v. Magallanes*,

409 Ill. App. 3d 720, 746 (2011) (explaining different standards). We do not know what the court in *McNeal* would have held had the relevant issues been preserved and been subject to harmless error review, especially because we also have held that "[w]hile flight provides some evidence of consciousness of guilt, it is far from overwhelming" (*People v. Melchor*, 376 Ill. App. 3d 444, 457 (2007)).

¶ 32 The only other case the State cites, *People v. Gray*, 2017 IL 120958, was not a harmless error case and stands for the unremarkable proposition that testimony of a single eyewitness can suffice to prove guilt beyond a reasonable doubt. *Id.* ¶ 36. But on harmless error review, the question is not what the jury could have done, but what "the jury *would have* done." (Emphasis in original.) *People v. Parmly*, 117 Ill. 2d 386, 396 (1987). We must determine whether the erroneous admission of hearsay evidence was "the weight that tipped the scales against the defendant." (Internal quotation marks omitted.) *Id.* Even if the evidence is "minimally sufficient," evidentiary error constitutes reversible error if "we cannot say that retrial without this evidence would produce the same result." *People v. Manning*, 182 Ill. 2d 193, 215 (1998) (citing *Parmly*, 117 Ill. 2d at 396).

¶ 33 We do not quarrel with the idea that Hernandez's testimony was "minimally sufficient" to sustain Collins's conviction. We cannot conclude, however, that admitting the hearsay statements in the body camera video was harmless beyond a reasonable doubt. Collins's theory at trial centered on the officers' "tunnel vision" about his guilt and their not finding the gun until after Collins's arrest. In short, Collins attacked the officers' (especially Hernandez's) credibility. During the State's closing argument, not only did the prosecutor play and walk the jury through

the entire video, but he told the jury that Hernandez was credible *because* the video corroborated his story:

> "And what do you see when he goes back to that location? Do you see an officer who is confused about where he is? Do you see an officer looking around with his flashlight, oh, maybe it's over here, maybe it's over here, I'm not sure? No. He walks directly to where he saw that gun at. You see it on this video. *** It makes you ask a question in this situation. If Officer Hernandez didn't see the defendant drop that gun in that lot then how is he able to describe it so accurately to his partners? *** If he didn't see the defendant drop it at that location how is he able to tell his fellow officers exactly where it was dropped?"

The State's theory of the case focused on Hernandez's statements in the body camera video as essential corroboration to his testimony that he saw Collins drop the gun in the lot during the chase.

¶ 34 The State enforces its heavy reliance on the video in its brief before us, emphasizing that "Officer Hernandez's in-court testimony was bolstered by video footage which showed his return to *** the specific area where moments before, he had personally observed defendant discard a weapon." The State unintentionally raises the harm in admitting Hernandez's statements captured on video—they "bolstered" Hernandez's in-court testimony, making it more likely the jury would find him credible.

¶ 35 The State considers the evidence overwhelming, relying solely on Hernandez's testimony about seeing Collins toss the gun. As we already explained, Hernandez's testimony may have been "minimally sufficient" to support a conviction, but that is all it is. An evidence technician

recovered the gun and found "no latent prints on the firearm, firearm magazine, nor the rounds of ammunition." Nothing else corroborated Hernandez's testimony. We acknowledge, as the State points out, that Collins introduced Sergeant Lopez's body camera video during his case-in-chief. But as we read the record, counsel used Lopez's body camera video to rebut the State's introduction of Hernandez's body camera video. The record suggests Collins would not have introduced Lopez's body camera video had the statements in Hernandez's video been properly excluded. Indeed, during the hearing on Collins's motion for a new trial, counsel explicitly argued that she would not have introduced Lopez's body camera video had Hernandez's been excluded.

¶ 36 At the end of the day, the State relies on the uncorroborated testimony of a single witness to argue harmless error in admitting the hearsay statements in Hernandez's body camera video. We find these facts insufficient to meet the State's burden to show harmlessness beyond a reasonable doubt. By admitting the hearsay statements in Hernandez's body camera video, the trial court committed reversible error.

¶ 37 Remaining Arguments

¶ 38 Collins makes two more arguments. He says the prosecutor made improper statements during closing and rebuttal arguments by holding against Collins his invocating of two constitutional rights. The prosecutor, contends Collins, implied that Collins was "running away" from responsibility by exercising his right to a trial and commented on Collins's post-arrest silence. Collins also argues trial counsel was ineffective for failing to seek a jury instruction allowing jurors to draw a negative inference from Hernandez's failure to immediately turn on his body camera.

¶ 39 We have found error in admitting the hearsay statements in Hernandez's body camera video and need address his remaining arguments only if we find them likely to recur on remand. See *People v. Fuller*, 205 Ill. 2d 308, 346 (2002) (addressing "only those additional contentions *** likely to be a factor on remand").

¶ 40 Without deciding the propriety of the specific arguments Collins challenges, we reiterate the impropriety of disparaging a defendant's exercise of his or her constitutional rights during closing argument. See *People v. Herrero*, 324 Ill. App. 3d 876, 887 (2001) (describing prosecutor's comment on defendant's exercise of his right to trial as "outrageous"); *People v. Herrett*, 137 Ill. 2d 195, 212-13 (1990) (describing prosecutor's comment on post-arrest silence as "exceed[ing] the bounds of fair comment").

¶ 41 We also decline to address Collins's ineffectiveness claim directed at counsel's alleged failure to request a negative-inference instruction based on Hernandez's delay in turning on his body camera. Because we have found the hearsay statements in the body camera video inadmissible, it is unclear whether and to what extent the State will use the video on remand, and whether counsel's strategic decisions will depend entirely on the use (or not) of the video.

¶ 42 Finally, as we said, Hernandez's testimony without the hearsay statements in the video was at least "minimally sufficient" to support a conviction if believed by the factfinder, so there is no double jeopardy impediment to Collins's retrial. See *People v. Taylor*, 76 Ill. 2d 289, 309-10 (1979).

¶ 43 Reversed and remanded.

No. 1-18-1746

Cite as:	*People v. Collins*, 2020 IL App (1st) 181746
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 18-CR-825; the Hon. Charles P. Burns, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Patricia Mysza, and Samuel B. Steinberg, of State Appellate Defender's Office, of Chicago, for appellant.
Attorneys for Appellee:	Kimberly M. Foxx, State's Attorney, of Chicago (Alan J. Spellberg, Annette Collins, Joseph Alexander, and Mikah Soliunas, Assistant State's Attorneys, of counsel), for the People.

2020 IL App (1st) 181746
No. 1-18-1746
Opinion filed December 21, 2020
Modified on denial of rehearing July 26, 2021

First Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

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	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
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v.	)	No. 18 CR 825
	)	
JODON COLLINS,	)	
	)	Honorable
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	)	Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court, with opinion.
Presiding Justice Walker concurred in the judgment and opinion.
Justice Coghlan dissented on denial of rehearing, with opinion.

OPINION

¶ 1 A jury found Jodon Collins guilty of unlawful possession of a weapon by a felon and of being an armed habitual criminal. Officers arrested Collins after a foot chase partially caught on body camera video. The trial court admitted the video over repeated objections by Collins's counsel that the audio included inadmissible hearsay statements from Chicago police officer Martin Hernandez. We agree with Collins. Officer Hernandez's statements captured on the video served no nonhearsay purpose and were inadmissible. The State's evidence almost exclusively

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¶ 2 Background

¶ 3 Chicago police officers Martin Hernandez and Joel Lopez were on patrol shortly after 1 a.m. on December 16, 2017. As they turned onto Walnut Street, they saw a group of three people standing near 3300 West Walnut Street. The group looked in the officers' direction and started walking away from them. As the officers got closer to 3300 West Walnut Street, Hernandez got out of the car to "conduct an investigation."

¶ 4 Hernandez saw one member of the group, who he identified as Jodon Collins, "turn around, look at us and immediately start running west and then northbound." Before Collins ran, Hernandez did not observe anything illegal. Specifically, he did not see anyone in the group engage in a hand-to-hand transaction, did not see Collins holding a gun, and did not see a bulge in Collins's pants. Collins ran through a vacant lot, "holding his left side," with Hernandez five-to-eight feet behind. From that distance, Hernandez saw Collins "drop a black handgun" on the ground.

¶ 5 Hernandez, after hesitating on seeing the gun, kept chase. To get to Fulton Street, Collins had to jump two fences. Hernandez also cleared the fences, but it slowed him down. From about 40 feet away, Hernandez saw Collins jump another fence into the yard of a house on Fulton Street. Once Collins hopped that fence, Hernandez lost sight of him. Hernandez went into the back yard and found Collins "crouched down" against the wall of the house. Hernandez arrested Collins and handed him off to other officers before going back to the vacant lot, where he recovered a black handgun in the spot where he saw Collins drop it.

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¶ 9 Collins did not testify. His counsel called Sergeant Joel Lopez, who laid the foundation for the admission of his body camera video. He explained that his video starts after Hernandez had already gotten out of the car. The video shows Lopez driving for a while, eventually getting out of his car and searching unsuccessfully for the gun. Collins's counsel played the video for the jury, without objection by the State.

¶ 10 During closing argument, the State discussed Hernandez's body camera video, rhetorically asking the jury how Hernandez could have directed his fellow officers back to the lot where they found the gun if he had not seen Collins drop it there. The State then played the entire video for the jury. Collins's counsel played Lopez's body camera video for the jury, arguing that Hernandez's instructions to go back to the lot (audible in both officers' body camera videos) were confusing because it took Lopez so long to get to the right area.

¶ 11 The jury found Collins guilty of unlawful use of a weapon by a felon and being an armed habitual criminal. Collins filed a motion for a new trial, repeating the argument that the audio from Hernandez's body camera video to have been improperly admitted. The State responded that Collins's counsel had used the officers' videos for her own benefit, to which Collins's counsel replied that she had used the videos because "the court ruled that the audio portions *** would be admissible." The trial court reiterated its view that the videos were "obviously admissible" and denied the motion for a new trial.

¶ 12 The trial court merged the unlawful use of a weapon by a felon count into the armed habitual criminal count and sentenced Collins to 7½ years in the Illinois Department of Corrections.

¶ 13 Analysis

¶ 14 Collins argues the trial court erred in admitting the audio from Hernandez's body camera because it exposed the jury to "inadmissible hearsay." Collins takes issue with several statements Hernandez made throughout the audio, telling other officers that Collins dropped a "black pistol" as he ran from Hernandez. The State responds that Collins has waived the issue by using the body camera video to his advantage in closing arguments and by introducing Lopez's body camera video. On the merits, the State argues that Hernandez's statements were not hearsay because they were only offered to explain the officers' course of conduct, not for the truth of the matter asserted. See Ill. R. Evid. 802 (eff. Jan. 1, 2011).

¶ 15 Waiver Argument

¶ 16 We start by considering, and rejecting, the State's waiver argument. The State contends Collins either invited or acquiesced to the admission of Hernandez's body camera video because he later "used the 'error' " by incorporating the video into his arguments about the unreliability of Hernandez's testimony. The doctrine of invited error prevents a defendant from raising a claim on appeal where he or she "procures, invites, or acquiesces in the admission" of otherwise improperly admitted evidence. *People v. Bush*, 214 Ill. 2d 318, 332 (2005). The doctrine rests on "notions of fair play" (*People v. Villarreal*, 198 Ill. 2d 209, 227 (2001)), and we apply it where a defendant " 'sit[s] by' " and deprives the State of the opportunity to cure any alleged error (see *Bush*, 214 Ill. 2d at 332-33 (quoting *People v. Trefonas*, 9 Ill. 2d 92, 98 (1956))).

¶ 17 Both cases the State relies on, *Bush* and *Villarreal*, involve a defendant whose counsel behaved far differently than Collins's counsel. In *Bush*, the defendant's counsel stipulated to admission of evidence that he possessed cocaine. *Id.* at 333. In *Villarreal*, the defendant on appeal attempted to attack verdict forms that his own counsel submitted at trial. *Villarreal*, 198 Ill. 2d at

227. Here, Collins's counsel (i) filed a motion *in limine* objecting to the admission of Hernandez's body camera video, (ii) objected at the time the video was offered as a trial exhibit, (iii) objected again when the trial court formally admitted the State's exhibits at the close of evidence, and (iv) preserved her objection in a motion for a new trial by expressly arguing that Lopez's video was offered only in response to the admission of Hernandez's video.

¶ 18 The record demonstrates that Collins's counsel never acquiesced to the admission of Hernandez's body camera video. Instead, she used Lopez's video and her argument to make the best of the jury viewing Hernandez's video over her objection. We reject the State's waiver argument.

¶ 19 Hearsay Issue

¶ 20 On the merits, Collins claims the video from Hernandez's body camera—the audio in particular—should not have been admitted because it exposed the jury to inadmissible hearsay. In the trial court, the State argued both that the statements in the body camera video were not hearsay and, in the alternative, were admissible as excited utterances. The State abandons the latter argument on appeal and asserts only that the statements in the video were not hearsay. We review the denial of Collins's motion *in limine* and the admission of the contested video evidence for an abuse of discretion. *People v. Dunmore*, 389 Ill. App. 3d 1095, 1105-06 (2009).

¶ 21 The parties focus almost entirely on the disputed hearsay character of Hernandez's body camera video. In their initial briefs, neither party discussed the applicability of the Law Enforcement Officer Body-Worn Camera Act (Act) (50 ILCS 706/10-1 *et seq.* (West 2016)), but we hypothesized about its scope in our original opinion. In a timely filed petition for rehearing, the State argues the Act renders the entire video "admissible irrespective of its compliance with

hearsay rules." We requested a response from Collins, who argues the Act contains no express exception to the hearsay rule. After reviewing the Act, we agree with Collins's reading of the Act.

¶ 22 We review questions of statutory construction *de novo*. *People v. Bensen*, 2017 IL ¶ App (2d) 150085, ¶ 20, We ascertain and give effect to legislative intent by giving the statutory language its plain and ordinary meaning. *Id.* ¶ 21. Where the language is plain and unambiguous, we need proceed no further. *Id.* The Act provides that body-worn camera "recordings may be used as evidence in any administrative, judicial, or disciplinary proceeding." 50 ILCS 706/10-30 (West 2016). We see two features of the statutory text showing that the General Assembly did not intend limitless admission of body-worn camera video.

¶ 23 First, the statute does not mandate the admission of body-worn camera recordings; it provides that they "may" be used. We generally regard the legislature's use of the word "may" as permissive or directory. *People v. Robinson*, 217 Ill. 2d 43, 53 (2005). Where the subject of the verb "may" is the trial court, we read the statute to indicate "the court has discretion in [the] matter." Compare *People ex rel. Cizek v. Azzarello*, 81 Ill. App. 3d 1102, 1107 (1980) (word "may" directed at trial court indicates discretion), with *In re R.C.*, 338 Ill. App. 3d 103, 111 (2003) (word "may" directed at party indicates party has discretion to request but trial court does not have discretion to deny it if made).

¶ 24 That the statute uses the passive voice makes it a bit difficult to discern who the legislature meant as the subject of the verb phrase "may be used." While we typically think of the parties as the ones who "use" the evidence to prove their version of events, it is axiomatic that the trial court has the ultimate provenance over whether either party is permitted to "use" a particular item of evidence. *E.g.*, *People v. Becker*, 239 Ill. 2d 215, 234 (2010) ("admission of evidence is within the

sound discretion of a trial court"). We find the Act to apply the phrase "may be used" to both the parties and the trial court. The parties may, but do not have to, put forward evidence of a body-worn camera recording; the trial court then may, but does not have to, allow the evidence to be admitted. Ultimately, we find the word "may" permits trial courts to exclude body-worn camera recordings where appropriate.

¶ 25 The State correctly argues that the General Assembly used the word "evidence" without any express limitation. But the General Assembly could not have put express limitations on the word "evidence"; otherwise, it would have run into potential conflicts with a host of other rules. We know this because the Act specifically sets out the types of proceedings body-worn camera recordings may be used in—"administrative, judicial, or disciplinary proceedings"—and the rules of evidence vary across these different types of proceedings. For example, in administrative proceedings, the rules of evidence for civil cases, with express exceptions, apply. 5 ILCS 100/10-40(a) (West 2016) ("The rules of evidence and privilege as applied in civil cases in the circuit courts of this State shall be followed. Evidence not admissible under those rules of evidence may be admitted, however, *** if it is of a type commonly relied upon by reasonably prudent [people] in the conduct of their affairs."). In police disciplinary proceedings, however, the rules of evidence are typically "not as rigidly applied." (Internal quotation marks omitted.) *Kelley v. Sheriff's Merit Comm'n*, 372 Ill. App. 3d 931, 933 (2007). According to the Chicago Police Board Rules of Procedure: "The Hearing Officer shall not be bound by the formal or technical rules of evidence; however, hearsay evidence shall not be admissible during the hearing, unless an Illinois statute or rule of evidence provides otherwise." Chicago Police Board Rules of Procedure, art. III(D) (eff. Feb. 18, 2021),

https://www.chicago.gov/content/dam/city/depts/cpb/PoliceDiscipline/RulesofProcedure20210218.pdf (last visited July 5, 2021) [https://perma.cc/6DNL-QBA9]. Finally, judicial proceedings are governed by the Illinois Rules of Evidence. Ill. R. Evid. 101 (eff. Jan. 6, 2015).

¶ 26 Where does all this lead? In short, it makes sense that the General Assembly would not put any limits on the word "evidence" in the text of Act. The reason: the proceedings to which the Act applies all use different parts of the Illinois Rules of Evidence or do not use the Illinois Rules of Evidence at all. The word "evidence" broadly allows the presiding officer in each type of proceeding—judicial, administrative, or disciplinary—to employ the word "evidence" as it is used in that specific context without creating a conflict with the Act's language. In criminal judicial proceedings, then, "evidence" must be subject to the Illinois Rules of Evidence applicable to criminal cases.

¶ 27 We also can look outside the Act to see other instances in which the General Assembly has expressly provided for exceptions to the Rules of Evidence when it means to do so. For instance, the legislature has expressly delineated hearsay exceptions in prosecutions for sexual acts against children under the age of 13 and those with intellectual, cognitive, or developmental disabilities (725 ILCS 5/115-10 (West 2016) (listed evidence "shall be admitted as an exception to the hearsay rule")) and in actions for orders of protection on behalf of high-risk adults with disabilities in certain circumstances (750 ILCS 60/213.1 (West 2016) (same)). Here, the Act contains no exceptions to any rule of evidence as demonstrated by the General Assembly's silence. *E.g.*, *Estate of Howell v. Howell*, 2015 IL App (1st) 133247, ¶ 30 (looking to evidence "that when the General Assembly wishes to dictate a certain result, it knows how to do so and it has done so expressly").

¶ 28 The State's position leads to absurd results it makes no attempt to explain. What about relevance, a threshold requirement that must be met by every item of evidence? *People v. Dabbs*, 239 Ill. 2d 277, 289 (2010). Irrelevant evidence is not admissible. Ill. R. Evid. 402 (eff. Jan. 1, 2011). Under the State's expansive reading, it could seek to admit body-worn camera footage entirely unrelated to a particular judicial proceeding. With that, counsel might improperly impeach witnesses by way of opinion or reputation evidence, so long as any out-of-court statements constituting that evidence were captured by on an officer's body-worn camera. See Ill. R. Evid. 608 (eff. Jan. 1, 2011). Officers' audible speculation could find its way into the trial record, uninhibited by the personal knowledge requirement. See Ill. R. Evid. 602 (eff. Jan. 1, 2011). Perhaps most worrisome, trial judges would find themselves powerless to exclude evidence even when the danger of unfair prejudice, confusion of the issues, or misleading the jury substantially outweighs its probative value. See Ill. R. Evid. 403 (eff. Jan. 1, 2011). We must construe the Act to avoid these absurd results. See *People v. Burchell*, 2018 IL App (5th) 170079, ¶ 8.

¶ 29 The dissent argues that our analysis runs counter to the purpose of the Act, which is to "promote trust and mutual respect." We fail to see how a trial court promotes "trust and mutual respect" by allowing irrelevant or unduly prejudicial evidence when it happens to be recorded on a police body-worn camera. Like the State, the dissent makes no attempt to explain why the rule against hearsay happens to be the only rule of evidence the Act ignores. Of course, the State may think rules of relevancy or undue prejudice fall by the wayside as well. As we have explained, however, that result would be absurd and, as even the dissent reminds us, contrary to the Act's truth seeking and trust building purposes.

¶ 30 Having concluded the Act does not allow the admission of body-worn camera video without evidentiary limitation, we adhere to our original analysis of the statements in Hernandez's video as hearsay. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ill. R. Evid. 801(c) (eff. Oct. 15, 2015). Neither party disputes that the recording contains "statements" Hernandez made. Neither party disputes that Hernandez made the relevant statements "other than *** while testifying at the trial." See *id.* The only dispute involves admitting the statements to prove the truth of the matter they assert—that Collins "dropped a pistol right there in the middle of the lot where we started"—or whether the statements were admitted for some other purpose, namely, to chronicle the course of the police investigation.

¶ 31 Collins relies heavily on *People v. Jura*, 352 Ill. App. 3d 1080 (2004), to argue that Hernandez's statements were offered to prove the truth of the matter asserted, not to show the course of the investigation. We find *Jura* persuasive.

¶ 32 The court in *Jura* analyzed the testimony of three officers. All of them testified that they received a radio call of " 'a person with a gun' " at " '2845 West 38th Street in the alley.' " *Id.* at 1082-84. The radio call also described the suspect as a " 'male White' " and included information about height and a face tattoo. *Id.* The court's analysis began by acknowledging that officers may testify to statements made out of court where the statements are used to show the officers' investigative steps and not for the truth of the matter asserted. *Id.* at 1085. The court cautioned, however, that the statements must be " 'necessary and important' " to a full explanation of the State's case. *Id.* The court rejected the State's argument of a nonhearsay purpose because "[t]here was no issue regarding the reason why the officers proceeded to the alley behind 38th Street." *Id.*

at 1086. Here, similarly, there is no issue about why officer Hernandez returned to the lot Collins ran through. Hernandez's nonhearsay testimony sufficed to explain that the officers went back to search for the gun Hernandez claimed to have seen Collins drop.

¶ 33 We conclude, as the court did in *Jura*, that the hearsay statements in Hernandez's body camera video were not "necessary and important" to explain the State's case. The State implies that the jury may have been confused because Hernandez arrested Collins and then went back "several blocks removed from where the incident eventually came to an end" to recover the gun. See *People v. Cameron*, 189 Ill. App. 3d 998, 1004 (1989) (" 'arresting or investigating officer should not be put in the false position of seeming just to have happened upon the scene' "). Here, no risk existed that the jury would believe Hernandez just "happened upon the scene" where the gun was found because Hernandez was both the arresting officer and the pursuing officer who saw Collins toss the gun.

¶ 34 After finding no nonhearsay purpose, the court in *Jura* allowed that the State's argument would have been reasonable had it not been for multiple witnesses testifying to the hearsay statements and the State emphasizing the statements in opening and closing arguments. *Jura*, 352 Ill. App. 3d at 1088-89. Here, we do not have multiple witnesses repeating the hearsay, but do have Hernandez repeating the relevant hearsay statements in some form at least three times throughout the video. And, as in *Jura*, the State not only relied on the hearsay statements during its closing argument, it replayed the video in full. Like the court in *Jura*, we cannot accept that Hernandez's statements in the body camera video were admitted for anything but the truth of the matter it asserted—namely, that the black gun was in the lot through which Collins ran and that Collins dropped it there.

¶ 35 As this court has cautioned, "[t]he 'police procedure' shibboleth has not proved persuasive" in many cases. *People v. Warlick*, 302 Ill. App. 3d 595, 600 (1998) (collecting cases). Where it is enough for an officer to explain that an event happened (observation, radio message, witness description) and he or she responded to it, the substance of an out-of-court statement memorializing that event is inadmissible. *Id.*

¶ 36 We also find that the admission of Hernandez's statements through the body camera video to be even more prejudicial than the testimony in *Jura* or many of the cases described in *Warlick*, where the officers merely testified about the radio dispatch they heard. *Jura*, 352 Ill. App. 3d at 1082-84; *Warlick*, 302 Ill. App. 3d at 600 (citing, *e.g.*, *People v. Hazen*, 104 Ill. App. 2d 398, 402-03 (1969) (error to admit account of radio message)). Rather than testimony about the video, we are dealing with the video itself. As a justice of this court explained, and we agree, "a video is a most powerful piece of evidence, *** an observation requiring no citation." *Hudson v. City of Chicago*, 378 Ill. App. 3d 373, 434 (2007) (O'Malley, J., dissenting).

¶ 37 We have reviewed the video and find that it is of the type to easily overpersuade. The video depicts a chase at night, with frenetic movements caused by the camera's attachment to Hernandez's body. Hernandez calls over the radio in an urgent tone of voice, while he is breathing deeply from the chase. The video shows at least two police SUVs had responded to the scene with searchlights. Four officers, at minimum, take Collins into custody. Because there was no nonhearsay purpose to admitting the video with Hernandez's out-of-court statements, the nature of the video turns more prejudicial than probative.

¶ 38 The State raised a second argument in its petition for rehearing based on *People v. Theis*, 2011 IL App (2d) 091080, and *People v. Griffin*, 375 Ill. App. 3d 564 (2007), contending that the

audio portions of Hernandez's body camera video were admissible because they were mechanical recordings. The State did not cite these cases in its initial briefing, and the cases were decided well before briefing. More troubling still, the State's new cases raise a new theory for the admissibility of Hernandez's camera audio. We admonish the State that a petition for rehearing does not present an opportunity to raise old cases or new theories. Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020) ("Points not argued *** shall not be raised *** on petition for rehearing."). But because we asked for a response from Collins and the matter is fully briefed, we will address the State's new theory.

¶ 39 Both *Theis* and *Griffin* include a broad assertion, on which the State now relies. The State contends that "[a] taped conversation is not hearsay; rather, it is a 'mechanical eavesdropper with an identity of its own, separate and apart from the voices recorded.' " *Theis*, 2011 IL App (2d) 091080, ¶ 32 (quoting *Griffin*, 375 Ill. App. 3d at 571). In *Theis*, the court rejected a criminal defendant's argument that a detective's recorded statements constituted hearsay. *Id.* ¶ 32. Because the defendant's answers would have been "nonsensical" without the detective's statements, the court concluded they were nonhearsay statements admissible to show their effect on the listener. *Id.* ¶ 33. In *Griffin*, the court also dealt with statements of a party to a conversation with the defendant. *Griffin*, 375 Ill. App. 3d at 570-71.

¶ 40 The broad pronouncements in both *Theis* and *Griffin* are *dicta* because the relevant statements in each were admissible under an exception to the hearsay rules. *Theis*, 2011 IL App (2d) 091080, ¶ 33; see also *Exelon Corp. v. Department of Revenue*, 234 Ill. 2d 266, 277 (2009) (defining *dicta*).

¶ 41 Aside from countering that the statements in *Theis* and *Griffin* about mechanical eavesdropping are not *dicta*, the dissent makes no attempt to reconcile *Theis* and *Griffin* with the

earlier cases on which they purport to rely. *Theis* relied on *Griffin*, which in turn relied on *People v. Harvey*, 95 Ill. App. 3d 992, 1004-05 (1981) ("The recording *** is not treated as hearsay but as a mechanical eavesdropper ***."). *Harvey* pulled the "mechanical eavesdropper" rule from *Belfield v. Coop*, 8 Ill. 2d 293 (1956), but examining *Belfield*, we see its rule had nothing to do with hearsay.

¶ 42 In *Belfield*, the question presented dealt with witness competency. There, a conversation between two witnesses was critical to the case. *Belfield*, 8 Ill. 2d at 299-300. One of the parties to the conversation, however, lacked competency to testify under evidentiary rules governing the cause of action. *Id.* at 300. The incompetent witness could provide the same information to the court, however, because the admissibility of the mechanical recording of the conversation between the two witnesses was the same as if an otherwise competent witness had overheard the conversation and testified to it. *Id.* at 303. Once again and critically, the conversation would have been admitted as an exception to the hearsay rule because at least one conversation participant was a party. See *id.* at 297. The statements in *Theis* and *Griffin* on which the State relies are overly broad and do not accurately reflect the principle they purport to convey.

¶ 43 Having found error, we must determine whether it was harmless. The State, whose burden it is to establish harmless error beyond a reasonable doubt, cites no authority discussing harmless error. Instead, the State cites *People v. McNeal*, 2019 IL App (1st) 180015, ¶ 83, for the proposition that Collins's flight shows consciousness of guilt. Whatever the merits of that proposition, the State reads *McNeal* out of context. There, our discussion of flight as evidence of guilt occurred during an examination of whether the evidence was closely balanced for the purposes of the plain error rule. *Id.* When a defendant raises plain error based on forfeited arguments, it is his or her

burden to show the evidence as closely balanced; here, it is the State's burden to show admitting hearsay as harmless beyond a reasonable doubt. *People v. Magallanes*, 409 Ill. App. 3d 720, 746 (2011) (explaining different standards). We do not know what the court in *McNeal* would have held had the relevant issues been preserved and been subject to harmless error review, especially because we also have held that "[w]hile flight provides some evidence of consciousness of guilt, it is far from overwhelming" (*People v. Melchor*, 376 Ill. App. 3d 444, 457 (2007)).

¶ 44 The only other case the State cites, *People v. Gray*, 2017 IL 120958, was not a harmless error case and stands for the unremarkable proposition that testimony of a single eyewitness can suffice to prove guilt beyond a reasonable doubt. *Id.* ¶ 36. But on harmless error review, the question is not what the jury could have done, but what "the jury *would have* done." (Emphasis in original.) *People v. Parmly*, 117 Ill. 2d 386, 396 (1987). We must determine whether the erroneous admission of hearsay evidence serves as "the weight that tipped the scales against the defendant." (Internal quotation marks omitted.) *Id.* Even if the evidence is "minimally sufficient," evidentiary error constitutes reversible error if "we cannot say that retrial without this evidence would produce the same result." *People v. Manning*, 182 Ill. 2d 193, 215 (1998) (citing *Parmly*, 117 Ill. 2d at 396).

¶ 45 We do not quarrel with the idea that Hernandez's testimony was "minimally sufficient" to sustain Collins's conviction. We cannot conclude, however, that admitting the hearsay statements in the body camera video constitutes harmless beyond a reasonable doubt. Collins's theory at trial centered on the officers' "tunnel vision" about his guilt and their not finding the gun until after Collins's arrest. In short, Collins attacked the officers' (especially Hernandez's) credibility. During

the State's closing argument, not only did the prosecutor play and walk the jury through the entire video, but he told the jury the video corroborated Hernandez's credibility:

> "And what do you see when he goes back to that location? Do you see an officer who is confused about where he is? Do you see an officer looking around with his flashlight, oh, maybe it's over here, maybe it's over here, I'm not sure? No. He walks directly to where he saw that gun at. You see it on this video. *** It makes you ask a question in this situation. If Officer Hernandez didn't see the defendant drop that gun in that lot then how is he able to describe it so accurately to his partners? *** If he didn't see the defendant drop it at that location how is he able to tell his fellow officers exactly where it was dropped?"

The State's theory of the case focused on Hernandez's statements in the body camera video as essential corroboration to his testimony that he saw Collins drop the gun in the lot during the chase.

¶ 46 The State enforces its heavy reliance on the video in its brief, emphasizing that "Officer Hernandez's in-court testimony was bolstered by video footage which showed his return to *** the specific area where moments before, he had personally observed defendant discard a weapon." The State unintentionally raises the harm in admitting Hernandez's statements captured on video—they "bolstered" Hernandez's in-court testimony, making it more likely the jury would find him credible.

¶ 47 The State considers the evidence overwhelming, relying solely on Hernandez's testimony about seeing Collins toss the gun. As we already explained, Hernandez's testimony may have been "minimally sufficient" to support a conviction, but that is all it is. An evidence technician recovered the gun and found "no latent prints on the firearm, firearm magazine, nor the rounds of

ammunition." Nothing else corroborated Hernandez's testimony. We acknowledge, as the State points out, that Collins introduced Sergeant Lopez's body camera video during his case-in-chief. But as we read the record, counsel used Lopez's body camera video to rebut the State's introduction of Hernandez's body camera video. The record suggests that Collins would not have introduced Lopez's body camera video had the statements in Hernandez's video been properly excluded. Indeed, during the hearing on Collins's motion for a new trial, counsel explicitly argued that she would not have introduced Lopez's body camera video had Hernandez's been excluded.

¶ 48 At the end of the day, the State relies on the uncorroborated testimony of a single witness to argue harmless error in admitting the hearsay statements in Hernandez's body camera video. We find these facts insufficient to meet the State's burden to show harmlessness beyond a reasonable doubt. By admitting the hearsay statements in Hernandez's body camera video, the trial court committed reversible error.

¶ 49 Remaining Arguments

¶ 50 Collins makes two more arguments. He says the prosecutor made improper statements during closing and rebuttal arguments by holding against Collins his invocating of two constitutional rights: (i) the prosecutor implied that Collins was "running away" from responsibility by exercising his right to a trial and (ii) the prosecutor commented on Collins's post-arrest silence. Collins also argues that trial counsel was ineffective for failing to seek a jury instruction allowing jurors to draw a negative inference from Hernandez's failure to immediately turn on his body camera.

¶ 51 We have found error in admitting the hearsay statements in Hernandez's body camera video and need address his remaining arguments only if we find them likely to recur on remand.

See *People v. Fuller*, 205 Ill. 2d 308, 346 (2002) (addressing "only those additional contentions *** likely to be a factor on remand").

¶ 52 Without deciding the propriety of the specific arguments Collins challenges, we reiterate the impropriety of disparaging a defendant's exercise of his or her constitutional rights during closing argument. See *People v. Herrero*, 324 Ill. App. 3d 876, 887 (2001) (describing prosecutor's comment on defendant's exercise of his right to trial as "outrageous"); *People v. Herrett*, 137 Ill. 2d 195, 212-13 (1990) (describing prosecutor's comment on post-arrest silence as "exceed[ing] the bounds of fair comment").

¶ 53 We also decline to address Collins's ineffectiveness claim directed at counsel's alleged failure to request a negative inference instruction based on Hernandez's delay in turning on his body camera. Because we have found the hearsay statements in the body camera video inadmissible, it is unclear whether, and to what extent, the State will use the video on remand and whether counsel's strategic decisions will depend entirely on the use (or not) of the video.

¶ 54 Finally, as we said, Hernandez's testimony without the hearsay statements in the video appears at least "minimally sufficient" to support a conviction if believed by the factfinder, so there is no double jeopardy impediment to Collins's retrial. See *People v. Taylor*, 76 Ill. 2d 289, 309-10 (1979).

¶ 55 Reversed and remanded.

¶ 56 JUSTICE COGHLAN, dissenting:

¶ 57 I respectfully dissent from the majority's modified opinion upon denial of rehearing because, as the trial judge correctly held, body camera evidence is not hearsay. Rather, such evidence is admissible in "judicial *** proceeding[s]" under the unambiguous language of the Act.

50 ILCS 706/10-30 (West 2016). The evidence is also admissible as a properly authenticated "taped conversation or recording." (Internal quotation marks omitted.) *People v. Hughes*, 2013 IL App (1st) 110237, ¶ 65.

¶ 58 "The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature." *People v. McLure*, 218 Ill. 2d 375, 381 (2006). The "best evidence of legislative intent is the language of the statute." *Id.* at 382. When possible, the court should interpret a statute according to its plain and ordinary meaning. *People v. Donoho*, 204 Ill. 2d 159, 171 (2003). We do not look beyond the plain language of a statute to ascertain legislative intent unless the statute is ambiguous, meaning that it can "reasonably be interpreted in two different ways." *People v. Holloway*, 177 Ill. 2d 1, 8 (1997). "We will not depart from the plain statutory language by reading into it exceptions, limitations, or conditions that conflict with the expressed intent of the legislature." *Gaffney v. Board of Trustees of Orland Fire Protection District*, 2012 IL 110012, ¶ 56.

¶ 59 The majority looks beyond the plain, unambiguous language of the Act and creates a limitation that conflicts with the intent of the legislature. On its face, the Act unambiguously allows officer body camera recordings, including both audio and visual footage, to be admitted in a judicial proceeding without any express limitation. The Act provides that "recordings" from officer-worn body cameras "may be used as evidence in any administrative, judicial, legislative, or disciplinary proceeding." 50 ILCS 706/10-30 (West 2016). The Act contemplates the admission of both audio and visual recordings, as it defines "officer-worn body camera" as "an electronic camera system for creating *** and processing *audiovisual* recordings that may be worn about the person of a law enforcement officer." (Emphasis added.) 50 ILCS 706/10-10 (West 2016).

Additionally, a "recording" is defined as the process of capturing data stored on a "recording medium," which includes the "playback of recorded *audio and video*." (Emphasis added.) *Id.*

¶ 60 Moreover, the majority's interpretation of the Act conflicts with its explicit purpose. The Act clearly provides that its purpose is to promote "trust and mutual respect between law enforcement agencies and the communities they protect" by "provid[ing] state-of-the-art evidence collection" as well as "impartial evidence and documentation to settle disputes and allegations of officer misconduct." 50 ILCS 706/10-5 (West 2016). Additionally, it seeks to "help collect evidence while improving transparency and accountability, and strengthening public trust." *Id.* It would therefore vitiate the clear purpose of the Act if we parsed through this "impartial evidence and documentation" and excluded any statements made therein if they meet the definition of hearsay (especially where the Act does not provide for such a limitation under its plain language). To do so would impermissibly rewrite the statute by reading into it a limitation that "conflicts with the expressed intent of the legislature" of "improving transparency and accountability." See *Gaffney*, 2012 IL 110012, ¶ 56.

¶ 61 It is well established that "[t]he legislature has the power to prescribe new rules of evidence and alter existing ones." See, *e.g.*, 725 ILCS 5/115-10 (West 2016) (creating a hearsay exception in a prosecution for a physical or sexual act perpetrated against a child under the age of 13 and those with intellectual, cognitive, or developmental disabilities); 750 ILCS 60/213.1 (West 2016) (establishing a hearsay exception in an action for an order of protection for a high-risk adult with disabilities under certain circumstances). "A statutory rule of evidence is effective unless in conflict with a rule or a decision of the Illinois Supreme Court." Ill. R. Evid. 101 (eff. Jan. 1, 2011)."[W]here an irreconcilable conflict exists between a legislative enactment and a rule of this

court on a matter within the court's authority, the rule will prevail." *People v. Peterson*, 2017 IL 120331, ¶ 31.

¶ 62 Our original opinion assumed that the Act allows for the admission of body camera recordings, subject to the hearsay rule; in effect, it implied that there is a conflict with an Illinois Supreme Court rule or decision where there is none. Our supreme court has not held that statements made in officer-worn body camera recordings are inadmissible hearsay or subject to a hearsay analysis under the Act. *Contra Peterson*, 2017 IL 120331, ¶¶ 31-34 (finding that a statute providing for a hearsay exception for intentional murder of a witness was in direct conflict with Illinois Supreme Court Rule 804(b)(5) (eff. Jan. 1, 2011) and therefore "the statute must give way to the rule"). Nor is there a Supreme Court rule that irreconcilably conflicts with the Act. See, *e.g.*, *People v. Solis*, 221 Ill. App. 3d 750, 751-53 (1991) (holding that a statute that deemed written results of blood alcohol tests admissible as evidence under the business record exception did not conflict with Illinois Supreme Court rule prohibiting the admission of such records); *In re Estate of Crawford*, 2019 IL App (1st) 182703, ¶ 36 (statutory rule of evidence under the Dead Man's Act (735 ILCS 5/8-201 (West 2016)) prohibiting admission of claimant's affidavit and handwritten log of alleged loans governed and was not subject to hearsay exceptions). Absent an Illinois Supreme Court rule or decision in direct conflict with the Act, we must, under the well-established rules of statutory construction, apply its unambiguous language. Under the clear terms of the Act, audiovisual recordings from police body cameras are admissible "as evidence in any administrative, judicial, legislative or disciplinary proceeding." 50 ILCS 706/10-30 (West 2016).

¶ 63 Even assuming *arguendo* that audio recordings are not admissible under the Act, the trial court correctly observed that this evidence is also admissible as "just a regular video of a crime

scene that was occurring at that point in time." As the author of the majority opinion in this case recognized in *Hughes*, 2013 IL App (1st) 110237, ¶ 65, "[w]hen introduced by the State, a video and transcript are not considered hearsay (Ill. R. Evid. 802(d) (eff. Jan. 1, 2011)), and likened to in-court testimony."[1] The majority distinguishes *People v. Theis*, 2011 IL App (2d) 091080, and *People v. Griffin*, 375 Ill. App. 3d 564 (2007), because "the relevant statements in each were admissible under an exception to the hearsay rule." *Supra* ¶ 40. However, in both cases, this court directly relied on the rule that "a taped conversation or recording, which is otherwise competent, material and relevant is admissible so long as it is authenticated and shown to be reliable through proper foundation" in holding that the relevant statements were not hearsay. See *Griffin*, 375 Ill. App. 3d at 570-71; see also *Theis*, 2011 IL App (2d) 091080, ¶ 32. Similarly, here, the body camera evidence was properly admitted because it is not hearsay.

¶ 64 For the foregoing reasons, the properly admitted evidence introduced at trial supports the defendant's convictions beyond a reasonable doubt. I would affirm the defendant's convictions for unlawful possession of a weapon by a felon and armed habitual criminal.

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[1]Quoting, with approval, *People v. Theis*, 2011 IL App (2d) 091080, ¶ 32, the *Hughes* majority also recognized that, " 'It is well established that a taped conversation or recording, which is otherwise competent, material and relevant, is admissible so long as it is authenticated and shown to be reliable through proper foundation. [Citation.] A taped conversation is not hearsay; rather, it is a "mechanical eavesdropper with an identity of its own, separate and apart from the voices recorded." ' [Citation.]." Hughes, 2013 IL App (1st) 110237, ¶ 65.

No. 1-18-1746

Cite as:	*People v. Collins*, 2020 IL App (1st) 181746
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 18-CR-825; the Hon. Charles P. Burns, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Patricia Mysza, and Samuel B. Steinberg, of State Appellate Defender's Office, of Chicago, for appellant.
Attorneys for Appellee:	Kimberly M. Foxx, State's Attorney, of Chicago (Alan J. Spellberg, Annette Collins, Joseph Alexander, and Mikah Soliunas, Assistant State's Attorneys, of counsel), for the People.

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 50. Local Government
Police, Fire, and Emergency Services
Act 706. Law Enforcement Officer-Worn Body Camera Act (Refs & Annos)

50 ILCS 706/10-1

706/10-1. Short title

Effective: August 20, 2021
Currentness

§ 10-1. Short title. This Article may be cited as the Law Enforcement Officer-Worn Body Camera Act. References in this Article to "this Act" mean this Article.

Credits

P.A. 99-352, § 10-1, eff. Jan. 1, 2016. Amended by P.A. 102-558, § 290, eff. Aug. 20, 2021.

50 I.L.C.S. 706/10-1, IL ST CH 50 § 706/10-1
Current through P.A. 102-804 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

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50 ILCS 706/10-5

706/10-5. Purpose

Effective: January 1, 2016
Currentness

§ 10-5. Purpose. The General Assembly recognizes that trust and mutual respect between law enforcement agencies and the communities they protect and serve are essential to effective policing and the integrity of our criminal justice system. The General Assembly recognizes that officer-worn body cameras have developed as a technology that has been used and experimented with by police departments. Officer-worn body cameras will provide state-of-the-art evidence collection and additional opportunities for training and instruction. Further, officer-worn body cameras may provide impartial evidence and documentation to settle disputes and allegations of officer misconduct. Ultimately, the uses of officer-worn body cameras will help collect evidence while improving transparency and accountability, and strengthening public trust. The General Assembly creates these standardized protocols and procedures for the use of officer-worn body cameras to ensure that this technology is used in furtherance of these goals while protecting individual privacy and providing consistency in its use across this State.

Credits
P.A. 99-352, § 10-5, eff. Jan. 1, 2016.

50 I.L.C.S. 706/10-5, IL ST CH 50 § 706/10-5
Current through P.A. 102-804 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

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50 ILCS 706/10-10

706/10-10. Definitions

Effective: July 28, 2016
Currentness

§ 10-10. Definitions. As used in this Act:

"Badge" means an officer's department issued identification number associated with his or her position as a police officer with that department.

"Board" means the Illinois Law Enforcement Training Standards Board created by the Illinois Police Training Act.

"Business offense" means a petty offense for which the fine is in excess of $1,000.

"Community caretaking function" means a task undertaken by a law enforcement officer in which the officer is performing an articulable act unrelated to the investigation of a crime. "Community caretaking function" includes, but is not limited to, participating in town halls or other community outreach, helping a child find his or her parents, providing death notifications, and performing in-home or hospital well-being checks on the sick, elderly, or persons presumed missing.

"Fund" means the Law Enforcement Camera Grant Fund.

"In uniform" means a law enforcement officer who is wearing any officially authorized uniform designated by a law enforcement agency, or a law enforcement officer who is visibly wearing articles of clothing, a badge, tactical gear, gun belt, a patch, or other insignia that he or she is a law enforcement officer acting in the course of his or her duties.

"Law enforcement officer" or "officer" means any person employed by a State, county, municipality, special district, college, unit of government, or any other entity authorized by law to employ peace officers or exercise police authority and who is primarily responsible for the prevention or detection of crime and the enforcement of the laws of this State.

"Law enforcement agency" means all State agencies with law enforcement officers, county sheriff's offices, municipal, special district, college, or unit of local government police departments.

"Law enforcement-related encounters or activities" include, but are not limited to, traffic stops, pedestrian stops, arrests, searches, interrogations, investigations, pursuits, crowd control, traffic control, non-community caretaking interactions with an individual while on patrol, or any other instance in which the officer is enforcing the laws of the municipality, county, or State. "Law enforcement-related encounter or activities" does not include when the officer is completing paperwork alone or only in the presence of another law enforcement officer.

"Minor traffic offense" means a petty offense, business offense, or Class C misdemeanor under the Illinois Vehicle Code or a similar provision of a municipal or local ordinance.

"Officer-worn body camera" means an electronic camera system for creating, generating, sending, receiving, storing, displaying, and processing audiovisual recordings that may be worn about the person of a law enforcement officer.

"Peace officer" has the meaning provided in Section 2-13 of the Criminal Code of 2012.

"Petty offense" means any offense for which a sentence of imprisonment is not an authorized disposition.

"Recording" means the process of capturing data or information stored on a recording medium as required under this Act.

"Recording medium" means any recording medium authorized by the Board for the retention and playback of recorded audio and video including, but not limited to, VHS, DVD, hard drive, cloud storage, solid state, digital, flash memory technology, or any other electronic medium.

Credits

P.A. 99-352, § 10-10, eff. Jan. 1, 2016. Amended by P.A. 99-642, § 195, eff. July 28, 2016.

50 I.L.C.S. 706/10-10, IL ST CH 50 § 706/10-10

Current through P.A. 102-804 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

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50 ILCS 706/10-15

706/10-15. Applicability

Effective: July 1, 2021
Currentness

§ 10-15. Applicability.

(a) All law enforcement agencies must employ the use of officer-worn body cameras in accordance with the provisions of this Act, whether or not the agency receives or has received monies from the Law Enforcement Camera Grant Fund.

(b) All law enforcement agencies must implement the use of body cameras for all law enforcement officers, according to the following schedule:

(1) for municipalities and counties with populations of 500,000 or more, body cameras shall be implemented by January 1, 2022;

(2) for municipalities and counties with populations of 100,000 or more but under 500,000, body cameras shall be implemented by January 1, 2023;

(3) for municipalities and counties with populations of 50,000 or more but under 100,000, body cameras shall be implemented by January 1, 2024;

(4) for municipalities and counties under 50,000, body cameras shall be implemented by January 1, 2025; and

(5) for all State agencies with law enforcement officers and other remaining law enforcement agencies, body cameras shall be implemented by January 1, 2025.

(c) A law enforcement agency's compliance with the requirements under this Section shall receive preference by the Illinois Law Enforcement Training Standards Board in awarding grant funding under the Law Enforcement Camera Grant Act.

(d) This Section does not apply to court security officers, State's Attorney investigators, and Attorney General investigators.

Credits

P.A. 99-352, § 10-15, eff. Jan. 1, 2016. Amended by P.A. 101-652, § 10-145, eff. July 1, 2021; P.A. 102-28, § 25, eff. June 25, 2021.

50 I.L.C.S. 706/10-15, IL ST CH 50 § 706/10-15

Current through P.A. 102-804 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

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50 ILCS 706/10-20

706/10-20. Requirements

Effective: January 7, 2022
Currentness

§ 10-20. Requirements.

(a) The Board shall develop basic guidelines for the use of officer-worn body cameras by law enforcement agencies. The guidelines developed by the Board shall be the basis for the written policy which must be adopted by each law enforcement agency which employs the use of officer-worn body cameras. The written policy adopted by the law enforcement agency must include, at a minimum, all of the following:

(1) Cameras must be equipped with pre-event recording, capable of recording at least the 30 seconds prior to camera activation, unless the officer-worn body camera was purchased and acquired by the law enforcement agency prior to July 1, 2015.

(2) Cameras must be capable of recording for a period of 10 hours or more, unless the officer-worn body camera was purchased and acquired by the law enforcement agency prior to July 1, 2015.

(3) Cameras must be turned on at all times when the officer is in uniform and is responding to calls for service or engaged in any law enforcement-related encounter or activity that occurs while the officer is on duty.

(A) If exigent circumstances exist which prevent the camera from being turned on, the camera must be turned on as soon as practicable.

(B) Officer-worn body cameras may be turned off when the officer is inside of a patrol car which is equipped with a functioning in-car camera; however, the officer must turn on the camera upon exiting the patrol vehicle for law enforcement-related encounters.

(C) Officer-worn body cameras may be turned off when the officer is inside a correctional facility or courthouse which is equipped with a functioning camera system.

(4) Cameras must be turned off when:

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(A) the victim of a crime requests that the camera be turned off, and unless impractical or impossible, that request is made on the recording;

(B) a witness of a crime or a community member who wishes to report a crime requests that the camera be turned off, and unless impractical or impossible that request is made on the recording;

(C) the officer is interacting with a confidential informant used by the law enforcement agency; or

(D) an officer of the Department of Revenue enters a Department of Revenue facility or conducts an interview during which return information will be discussed or visible.

However, an officer may continue to record or resume recording a victim or a witness, if exigent circumstances exist, or if the officer has reasonable articulable suspicion that a victim or witness, or confidential informant has committed or is in the process of committing a crime. Under these circumstances, and unless impractical or impossible, the officer must indicate on the recording the reason for continuing to record despite the request of the victim or witness.

(4.5) Cameras may be turned off when the officer is engaged in community caretaking functions. However, the camera must be turned on when the officer has reason to believe that the person on whose behalf the officer is performing a community caretaking function has committed or is in the process of committing a crime. If exigent circumstances exist which prevent the camera from being turned on, the camera must be turned on as soon as practicable.

(5) The officer must provide notice of recording to any person if the person has a reasonable expectation of privacy and proof of notice must be evident in the recording. If exigent circumstances exist which prevent the officer from providing notice, notice must be provided as soon as practicable.

(6)(A) For the purposes of redaction, labeling, or duplicating recordings, access to camera recordings shall be restricted to only those personnel responsible for those purposes. The recording officer or his or her supervisor may not redact, label, duplicate or otherwise alter the recording officer's camera recordings. Except as otherwise provided in this Section, the recording officer and his or her supervisor may access and review recordings prior to completing incident reports or other documentation, provided that the supervisor discloses that fact in the report or documentation.

(i) A law enforcement officer shall not have access to or review his or her body-worn camera recordings or the body-worn camera recordings of another officer prior to completing incident reports or other documentation when the officer:

(a) has been involved in or is a witness to an officer-involved shooting, use of deadly force incident, or use of force incidents resulting in great bodily harm;

(b) is ordered to write a report in response to or during the investigation of a misconduct complaint against the officer.

(ii) If the officer subject to subparagraph (i) prepares a report, any report shall be prepared without viewing body-worn camera recordings, and subject to supervisor's approval, officers may file amendatory reports after viewing body-worn

camera recordings. Supplemental reports under this provision shall also contain documentation regarding access to the video footage.

(B) The recording officer's assigned field training officer may access and review recordings for training purposes. Any detective or investigator directly involved in the investigation of a matter may access and review recordings which pertain to that investigation but may not have access to delete or alter such recordings.

(7) Recordings made on officer-worn cameras must be retained by the law enforcement agency or by the camera vendor used by the agency, on a recording medium for a period of 90 days.

(A) Under no circumstances shall any recording, except for a non-law enforcement related activity or encounter, made with an officer-worn body camera be altered, erased, or destroyed prior to the expiration of the 90-day storage period. In the event any recording made with an officer-worn body camera is altered, erased, or destroyed prior to the expiration of the 90-day storage period, the law enforcement agency shall maintain, for a period of one year, a written record including (i) the name of the individual who made such alteration, erasure, or destruction, and (ii) the reason for any such alteration, erasure, or destruction.

(B) Following the 90-day storage period, any and all recordings made with an officer-worn body camera must be destroyed, unless any encounter captured on the recording has been flagged. An encounter is deemed to be flagged when:

(i) a formal or informal complaint has been filed;

(ii) the officer discharged his or her firearm or used force during the encounter;

(iii) death or great bodily harm occurred to any person in the recording;

(iv) the encounter resulted in a detention or an arrest, excluding traffic stops which resulted in only a minor traffic offense or business offense;

(v) the officer is the subject of an internal investigation or otherwise being investigated for possible misconduct;

(vi) the supervisor of the officer, prosecutor, defendant, or court determines that the encounter has evidentiary value in a criminal prosecution; or

(vii) the recording officer requests that the video be flagged for official purposes related to his or her official duties.

(C) Under no circumstances shall any recording made with an officer-worn body camera relating to a flagged encounter be altered or destroyed prior to 2 years after the recording was flagged. If the flagged recording was used in a criminal, civil, or administrative proceeding, the recording shall not be destroyed except upon a final disposition and order from the court.

(D) Nothing in this Act prohibits law enforcement agencies from labeling officer-worn body camera video within the recording medium; provided that the labeling does not alter the actual recording of the incident captured on the officer-worn body camera. The labels, titles, and tags shall not be construed as altering the officer-worn body camera video in any way.

(8) Following the 90-day storage period, recordings may be retained if a supervisor at the law enforcement agency designates the recording for training purposes. If the recording is designated for training purposes, the recordings may be viewed by officers, in the presence of a supervisor or training instructor, for the purposes of instruction, training, or ensuring compliance with agency policies.

(9) Recordings shall not be used to discipline law enforcement officers unless:

(A) a formal or informal complaint of misconduct has been made;

(B) a use of force incident has occurred;

(C) the encounter on the recording could result in a formal investigation under the Uniform Peace Officers' Disciplinary Act; or

(D) as corroboration of other evidence of misconduct.

Nothing in this paragraph (9) shall be construed to limit or prohibit a law enforcement officer from being subject to an action that does not amount to discipline.

(10) The law enforcement agency shall ensure proper care and maintenance of officer-worn body cameras. Upon becoming aware, officers must as soon as practical document and notify the appropriate supervisor of any technical difficulties, failures, or problems with the officer-worn body camera or associated equipment. Upon receiving notice, the appropriate supervisor shall make every reasonable effort to correct and repair any of the officer-worn body camera equipment.

(11) No officer may hinder or prohibit any person, not a law enforcement officer, from recording a law enforcement officer in the performance of his or her duties in a public place or when the officer has no reasonable expectation of privacy. The law enforcement agency's written policy shall indicate the potential criminal penalties, as well as any departmental discipline, which may result from unlawful confiscation or destruction of the recording medium of a person who is not a law enforcement officer. However, an officer may take reasonable action to maintain safety and control, secure crime scenes and accident sites, protect the integrity and confidentiality of investigations, and protect the public safety and order.

(b) Recordings made with the use of an officer-worn body camera are not subject to disclosure under the Freedom of Information Act, except that:

(1) if the subject of the encounter has a reasonable expectation of privacy, at the time of the recording, any recording which is flagged, due to the filing of a complaint, discharge of a firearm, use of force, arrest or detention, or resulting death or bodily harm, shall be disclosed in accordance with the Freedom of Information Act if:

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(A) the subject of the encounter captured on the recording is a victim or witness; and

(B) the law enforcement agency obtains written permission of the subject or the subject's legal representative;

(2) except as provided in paragraph (1) of this subsection (b), any recording which is flagged due to the filing of a complaint, discharge of a firearm, use of force, arrest or detention, or resulting death or bodily harm shall be disclosed in accordance with the Freedom of Information Act; and

(3) upon request, the law enforcement agency shall disclose, in accordance with the Freedom of Information Act, the recording to the subject of the encounter captured on the recording or to the subject's attorney, or the officer or his or her legal representative.

For the purposes of paragraph (1) of this subsection (b), the subject of the encounter does not have a reasonable expectation of privacy if the subject was arrested as a result of the encounter. For purposes of subparagraph (A) of paragraph (1) of this subsection (b), "witness" does not include a person who is a victim or who was arrested as a result of the encounter.

Only recordings or portions of recordings responsive to the request shall be available for inspection or reproduction. Any recording disclosed under the Freedom of Information Act shall be redacted to remove identification of any person that appears on the recording and is not the officer, a subject of the encounter, or directly involved in the encounter. Nothing in this subsection (b) shall require the disclosure of any recording or portion of any recording which would be exempt from disclosure under the Freedom of Information Act.

(c) Nothing in this Section shall limit access to a camera recording for the purposes of complying with Supreme Court rules or the rules of evidence.

Credits

P.A. 99-352, § 10-20, eff. Jan. 1, 2016. Amended by P.A. 99-642, § 195, eff. July 28, 2016; P.A. 101-652, § 10-145, eff. July 1, 2021; P.A. 102-28, § 25, eff. June 25, 2021; P.A. 102-687, § 60, eff. Dec. 17, 2021; P.A. 102-694, § 16, eff. Jan. 7, 2022.

Notes of Decisions (1)

50 I.L.C.S. 706/10-20, IL ST CH 50 § 706/10-20

Current through P.A. 102-804 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

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50 ILCS 706/10-25

706/10-25. Reporting

Effective: July 1, 2021
Currentness

§ 10-25. Reporting.

(a) Each law enforcement agency must provide an annual report on the use of officer-worn body cameras to the Board, on or before May 1 of the year. The report shall include:

(1) a brief overview of the makeup of the agency, including the number of officers utilizing officer-worn body cameras;

(2) the number of officer-worn body cameras utilized by the law enforcement agency;

(3) any technical issues with the equipment and how those issues were remedied;

(4) a brief description of the review process used by supervisors within the law enforcement agency;

(5) for each recording used in prosecutions of conservation, criminal, or traffic offenses or municipal ordinance violations:

(A) the time, date, location, and precinct of the incident;

(B) the offense charged and the date charges were filed; and

(6) any other information relevant to the administration of the program.

(b) On or before July 30 of each year, the Board must analyze the law enforcement agency reports and provide an annual report to the General Assembly and the Governor.

Credits
P.A. 99-352, § 10-25, eff. Jan. 1, 2016. Amended by P.A. 101-652, § 10-145, eff. July 1, 2021.

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706/10-25. Reporting, IL ST CH 50 § 706/10-25

50 I.L.C.S. 706/10-25, IL ST CH 50 § 706/10-25

Current through P.A. 102-804 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

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50 ILCS 706/10-30

706/10-30. Evidence

Effective: January 1, 2016
Currentness

§ 10-30. Evidence. The recordings may be used as evidence in any administrative, judicial, legislative, or disciplinary proceeding. If a court or other finder of fact finds by a preponderance of the evidence that a recording was intentionally not captured, destroyed, altered, or intermittently captured in violation of this Act, then the court or other finder of fact shall consider or be instructed to consider that violation in weighing the evidence, unless the State provides a reasonable justification.

Credits
P.A. 99-352, § 10-30, eff. Jan. 1, 2016.

Notes of Decisions (2)

50 I.L.C.S. 706/10-30, IL ST CH 50 § 706/10-30
Current through P.A. 102-804 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

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50 ILCS 706/10-35

706/10-35. Authorized eavesdropping

Effective: January 1, 2016
Currentness

§ 10-35. Authorized eavesdropping. Nothing in this Act shall be construed to limit or prohibit law enforcement officers from recording in accordance with Article 14 of the Criminal Code of 2012 or Article 108A or Article 108B of the Code of Criminal Procedure of 1963.

Credits
P.A. 99-352, § 10-35, eff. Jan. 1, 2016.

50 I.L.C.S. 706/10-35, IL ST CH 50 § 706/10-35
Current through P.A. 102-804 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

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Rule 101.
SCOPE

These rules govern proceedings in the courts of Illinois to the extent and with the exceptions stated in Rule 1101. A statutory rule of evidence is effective unless in conflict with a rule or a decision of the Illinois Supreme Court.

Adopted September 27, 2010, eff. January 1, 2011; comment amended Jan. 6, 2015, eff. immediately.

Comment

Rule 101 provides that a statutory rule of evidence is effective unless in conflict with an Illinois Supreme Court rule or decision. There is no current statutory rule of evidence that is in conflict with a rule contained in the Illinois Rules of Evidence.

Rule 105.
LIMITED ADMISSIBILITY

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper purpose or scope and instruct the jury accordingly.

Adopted September 27, 2010, eff. January 1, 2011.

Rule 401.
DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means 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.

Adopted September 27, 2010, eff. January 1, 2011.

Rule 402.
RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by law. Evidence which is not relevant is not admissible.

Adopted September 27, 2010, eff. January 1, 2011.

Rule 403.
EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Adopted September 27, 2010, eff. January 1, 2011.

Rule 801.
DEFINITIONS

The following definitions apply under this article:

(a) **Statement**. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) **Declarant**. A "declarant" is a person who makes a statement.

(c) **Hearsay**. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) **Statements Which Are Not Hearsay**. A statement is not hearsay if

(1) **Prior Statement by Witness**. In a criminal case, the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is

(A) inconsistent with the declarant's testimony at the trial or hearing, and—

(1) was made under oath at a trial, hearing, or other proceeding, or in a deposition, or

(2) narrates, describes, or explains an event or condition of which the declarant had personal knowledge, and

(a) the statement is proved to have been written or signed by the declarant, or

(b) the declarant acknowledged under oath the making of the statement either in the declarant's testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought or at a trial, hearing, or other proceeding, or in a deposition, or

(c) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording; or

(B) one of identification of a person made after perceiving the person.

(2) **Statement by Party-Opponent**. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy, or (F) a statement by a person, or a person on behalf of an entity, in privity with the party or jointly interested with the party.

Adopted September 27, 2010, eff. January 1, 2011; amended Oct. 15, 2015, eff. immediately.

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RULE 802.
HEARSAY RULE

Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Supreme Court, or by statute as provided in Rule 101.

Adopted September 27, 2010, eff. January 1, 2011.

RULE 803.
HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Reserved. [Present Sense Impressions]

(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including:

(A) a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will; or

(B) a statement of declarant's then existing state of mind, emotion, sensation, or physical condition to prove the state of mind, emotion, sensation, or physical condition of another declarant at that time or at any other time when such state of the other declarant is an issue in the action.

(4) Statements for Purposes of Medical Diagnosis or Treatment. (A) Statements made for purposes of medical treatment, or medical diagnosis in contemplation of treatment, and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment but, subject to Rule 703, not including statements made to a health care provider consulted solely for the purpose of preparing for litigation or obtaining testimony for trial, or (B) in a prosecution for violation of sections 11-1.20, 11-1.30, 11-1.40, 11-1.50, or 11-1.60 of the Criminal Code of 1961 (720 ILCS 5/11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60), or for a violation of the Article 12 statutes in the Criminal Code of 1961 that previously defined the same offenses, statements made by the victim to medical personnel for purposes of medical diagnoses or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly.

(6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), unless the opposing party shows that the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

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(7) Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the opposing party shows that the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, police accident reports and in criminal cases medical records and matters observed by police officers and other law enforcement personnel, or (C) in a civil case or against the State in a criminal case, factual findings from a legally authorized investigation, but not findings containing expressions of opinions or the drawing of conclusions, unless the opposing party shows that the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of Vital Statistics. Facts contained in records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of Public Record or Entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of Religious Organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, Baptismal, and Similar Certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family Records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of Documents Affecting an Interest in Property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in Documents Affecting an Interest in Property. A statement contained

in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in Ancient Documents. Statements in a document that was prepared before January 1, 1998, and whose authenticity is established.

(17) Market Reports, Commercial Publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Reserved. [Learned Treatises]

(19) Reputation Concerning Personal or Family History. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation Concerning Boundaries or General History. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to Character. Reputation of a person's character among associates or in the community.

(22) Judgment of Previous Conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to Personal, Family or General History, or Boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) Receipt or Paid Bill. A receipt or paid bill as prima facie evidence of the fact of payment and as prima facie evidence that the charge was reasonable.

Adopted September 27, 2010, eff. January 1, 2011; amended April 26, 2012, eff. immediately; amended Sept. 28, 2018, eff. immediately; amended Mar. 24, 2022, eff. immediately.

Rule 901.
REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of Witness With Knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert Opinion on Handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by Trier or Expert Witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive Characteristics and the Like. Appearance, contents, substance, internal patterns, or other distinctive characteristics of an item, including those that apply to the source of an electronic communication, taken in conjunction with the circumstances.

(5) Voice Identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone Conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public Records or Reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient Documents or Data Compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or System. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods Provided by Statute or Rule. Any method of authentication or identification provided by statute or by other rules prescribed by the Supreme Court.

Adopted September 27, 2010, eff. January 1, 2011; amended Sept. 17, 2019, eff. immediately.

Rule 1101.
APPLICABILITY OF RULES

(a) Except as otherwise provided in paragraphs (b) and (c), these rules govern proceedings in the courts of Illinois.

(b) Rules Inapplicable. These rules (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary Questions of Fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104.

(2) Grand Jury. Proceedings before grand juries.

(3) Miscellaneous Proceedings. Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing; postconviction hearings; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise, and contempt proceedings in which the court may act summarily.

(c) Small Claims Actions. These rules apply to small claims actions, subject to the application of Supreme Court Rule 286(b).

Adopted September 27, 2010, eff. January 1, 2011; amended Apr. 8, 2013, eff. immediately; amended Jan. 6, 2015, eff. immediately; amended Sept. 17, 2019, eff. immediately.

2021 IL App (2d) 190797-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

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

Appellate Court of Illinois, Second District.

The PEOPLE of the State of Illinois, Plaintiff-Appellee,

v.

Alejandro ANDRADE, Defendant-Appellant.

No. 2-19-0797

Order filed August 16, 2021

Appeal from the Circuit Court of Kane County. No. 17-CF-1678, Honorable Kathryn D. Karayannis, Judge, Presiding.

ORDER

JUSTICE JORGENSEN delivered the judgment of the court.

*1 ¶ 1 *Held*: At defendant's trial where he claimed self-defense for stabbing his brother in a domestic fight, the trial court properly excluded audio of bodycam footage from the officers as they spoke with defendant and his brother after the dispute. The evidence of their respective demeanors was not, as defendant claimed, relevant circumstantial evidence as to who was the aggressor in the quarrel.

¶ 2 Following a jury trial, defendant, Alejandro Andrade, was convicted of two counts of domestic battery (720 ILCS 5/12-3.2(a)(1), (a)(2) (West 2016)) and one count of aggravated battery (720 ILCS 5/12-3.05(f)(1) (West 2016)) and sentenced to 24 months' probation. He appeals, contending that the trial court erred by barring him from playing for the jury portions of the audio from two officers' bodycam recordings. We affirm.

¶ 3 I. BACKGROUND

¶ 4 At trial, Wilfrido Lorenzo testified that he is defendant's brother. On September 4, 2017, there was a family cookout at the home the brothers shared. Defendant was out of work at the time. Lorenzo had tried to get defendant hired by his employer but had recently learned that defendant would not be hired.

¶ 5 Sometime during the day of the cookout, Lorenzo and defendant went to the liquor store. During the ride, Lorenzo told defendant that his employer was not going to hire him. Defendant became angry and began driving erratically. He was still upset when they returned home, but the two were separated during most of the party because Lorenzo was cooking.

¶ 6 After everyone else had left, defendant and Lorenzo were cleaning up. When they had finished, they were in the garage. Lorenzo set out a chair for defendant, offered him a beer, and asked if he was still mad at him. They initially had a civil conversation, but defendant began to get louder and started cursing. Lorenzo closed the overhead door so as not to disturb the neighbors. Defendant appeared highly intoxicated.

¶ 7 Defendant began pushing Lorenzo across the garage. When Lorenzo's back was against the wall, defendant lunged at him again. Lorenzo pushed back and defendant fell into some bicycles. Defendant got back up, went after Lorenzo again, and the two exchanged punches for a couple of minutes. At some point, defendant fell to his knees. Lorenzo told him not to get back up and walked away.

¶ 8 Thinking the fight was over, Lorenzo left the garage and walked toward the rear of the house. Out of the corner of his eye, he saw defendant approaching. Believing that defendant was going to punch him again, Lorenzo turned around and raised his arm. He then realized that defendant had a knife. Lorenzo grabbed defendant's arm and punched him in the nose. Lorenzo thought that the knife fell out of defendant's hand. Lorenzo turned and walked up the stairs to the house. He saw defendant's reflection in the patio door. Thinking that defendant was trying to stab him again, Lorenzo turned and kicked defendant in the face, sending him into a flower bed. When Lorenzo got inside the house, he realized his shirt was wet. His girlfriend told him that he had been stabbed. After changing his shirt, Lorenzo saw that the police and an ambulance had arrived. He had not called them. Lorenzo was willing to speak to the police and went to the door to meet them. At the time, due to adrenaline, Lorenzo did not feel the stab wound and believed he was okay. He "remember[ed] telling them that [he] didn't want to go to a certain hospital [that] they were trying to send [him] to." He was upset

because there "was a lot that just went on, especially with [his] brother," but he was not angry with the police. Lorenzo told the police that he did not have the right to let them into the house because it was not his house. Lorenzo was eventually transported to a hospital, where he received stitches for his wound. At the hospital, the police asked Lorenzo if he wanted to provide a written statement. He refused and told the police that he did not want to press charges.

*2 ¶ 9 Officer Ryan Nelis testified that he responded to the scene. He encountered defendant walking down the driveway. He had injuries to his face and blood coming from his nose. Defendant had difficulty walking, and Nelis believed that he was intoxicated.

¶ 10 Nelis went to the house to speak to Lorenzo while another officer spoke with defendant. Nelis saw a stab wound on Lorenzo's left shoulder. Lorenzo was uncooperative. He did not want to press charges, go to the hospital, or allow the officer to enter the house. Lorenzo did eventually go to the hospital but continued to be uncooperative.

¶ 11 Defendant testified that he got into an argument with Lorenzo about 30 minutes before the cookout ended. Afterward, while defendant was cleaning the garage, Lorenzo entered and closed the overhead garage door. Because of their prior argument, defendant felt uncomfortable with Lorenzo in the garage. When Lorenzo grabbed two chairs and set them down across from each other, defendant decided to leave. Lorenzo then rushed at defendant, shoulder-bumped him, and prevented him from leaving the garage.

¶ 12 When defendant attempted to physically move Lorenzo out of the way, the latter pushed him so that he fell into some bicycles. As defendant tried to get up, Lorenzo punched him in the face, causing his nose to bleed. Defendant tried to crawl away as Lorenzo punched him repeatedly in the back of the head. Defendant asked Lorenzo over and over to stop hitting him, but he continued.

¶ 13 As defendant was on the ground, he came across his knife, which had been knocked to the floor. Defendant picked up the knife and, as Lorenzo swung to hit him again, he swung the knife at Lorenzo. Lorenzo ran into the house, and defendant used the phone in the garage to call 911. The jury heard a recording of the 911 call.

¶ 14 Defendant's sister, Iraida Andrade, testified that Lorenzo had spoken to her about what happened. Lorenzo told her that his argument with defendant concerned Lorenzo's baby's mother. Lorenzo said that he got on top of defendant and kicked him while he was on his hands and knees.

¶ 15 Officer Sean Callahan testified that, as he responded to the scene, he encountered defendant bleeding and stumbling down the driveway. Callahan helped defendant to sit on the curb and called for an ambulance.

¶ 16 During the defense case, a portion of Callahan's bodycam footage from the night in question was played for the jury. The video was played without audio. The trial court denied defendant's request to play portions of the audio from Nelis's and Callahan's bodycams. The court found that the statements on the audio were either hearsay that was not subject to an exception or impermissible collateral impeachment.

¶ 17 The jury was instructed on self-defense. It found defendant guilty of two counts of domestic battery and one count of aggravated battery. The court sentenced him to 24 months' probation. Defendant timely appealed.

¶ 18 II. ANALYSIS

¶ 19 Defendant contends that the trial court erred by barring the audio clips from Nelis's and Callahan's bodycams. He argues generally that "[b]ody cameras are arguably the best source of unbiased information available when police interact with people at the scene of a crime." He contends that the audio of Nelis's interaction with Lorenzo was relevant because his "tone and mannerisms," along with his reluctance to allow the police into his home and to go to the hospital, were evidence that he was the initial aggressor in the fight. See *People v. Frazier*, 2019 IL App (1st) 172250, ¶ 40 (a defendant acts in self-defense when, *inter alia*, he is not the initial aggressor). Defendant contends that the evidence was not hearsay because he was not offering it to prove the truth of the matters asserted, *e.g.*, that Lorenzo did not want to go to the hospital. Defendant emphasizes that he would not have wanted to introduce the audio to prove the truth of Lorenzo's statements, because in some portions Lorenzo blamed defendant for starting the fight. Alternatively, defendant contends that the statements were admissible as excited utterances, given that Lorenzo's agitation was likely the result of the fight.

*3 ¶ 20 Conversely, defendant contends that the audio of his calm and cooperative demeanor while speaking with

Callahan was proof that he was not the initial aggressor. He argues alternatively that the statements qualified as excited utterances.

¶ 21 The State responds as follows. Evidence of the combatants' respective demeanors after the fight was not relevant to prove who was the initial aggressor. Moreover, the evidence was hearsay and not admissible as an excited utterance. Defendant's statements on the audio were similar to his trial testimony and thus were inadmissible prior consistent statements. Finally, the evidence was cumulative, given that defendant, Lorenzo, and the officers testified to much of the same information.

¶ 22 Evidentiary rulings are generally within the trial court's sound discretion, and we will not disturb such rulings absent an abuse of that discretion. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). An abuse of discretion occurs only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the trial court's view. *Id.* Defendant contends, however, that we should review the trial court's ruling *de novo* because the " 'trial court's exercise of discretion has been frustrated by an erroneous rule of law.' " *Id.* (quoting *People v. Williams*, 188 Ill. 2d 365, 369 (1999)). We disagree. Here, as in *Caffey*, the trial court based its ruling on the specific facts of the case and not on a broadly applicable rule. Thus, we review its decision for an abuse of discretion.

¶ 23 Defendant argues that the body camera evidence, recorded immediately after the event, was highly probative. Section 10-30 of the Law Enforcement Officer-Worn Body Camera Act (50 ILCS 706/10-30 (West 2016)) provides that body camera recordings "may be used as evidence in any administrative, judicial, legislative, or disciplinary proceeding." However, nothing in this section manifests an intent to override the normal rules of evidence regarding relevancy and hearsay.

¶ 24 First, as to Lorenzo's interaction with Nelis, we agree with the State that evidence of Lorenzo's demeanor after the fight was simply not relevant to whether he was the initial aggressor. In deciding the admissibility of evidence, "[t]he court must ask whether the proferred evidence fairly tends to prove or disprove the offense charged and whether that evidence is relevant in that it tends to make the question of guilt more or less probable." *People v. Wheeler*, 226 Ill. 2d 92, 132 (2007). Moreover, the trial court has the discretion to reject even relevant evidence if it has little probative value due to its remoteness, uncertainty, or unfairly prejudicial nature. *Id.*; see also Ill. R. Evid. 403 (eff. Jan. 1, 2011).

¶ 25 It is not surprising that Lorenzo would be upset after a fight in which he had been stabbed. Indeed, in arguing that the Lorenzo's statements were excited utterances, defendant concedes that "the fight between [Lorenzo] and [defendant] was an event 'sufficiently startling' to elicit an exited [*sic*] utterance." Thus, Lorenzo's agitation after the fight does not make it more or less likely that he was the initial aggressor. It is at least equally likely that his agitation was the result of simply the fight itself. Yelling, by itself, "is no indication of violent behavior." *People v. Cruzado*, 299 Ill. App. 3d 131, 137 (1998).

*4 ¶ 26 Similarly, that Lorenzo was reluctant to go to the hospital or to allow the police into his home in the early morning hours simply has nothing to do with whether he started the fight sometime earlier. Even if he were the victim (which he claimed he was, in speaking with Nelis), Lorenzo might not have wanted any further inconvenience.

¶ 27 Further, Lorenzo's statements to Nelis did not qualify as excited utterances. For a statement to be admissible under the excited-utterance exception there must be an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, an absence of time for the declarant to fabricate a statement, and a statement relating to the circumstances of the occurrence. Ill. R. Evid. 803(2) (eff. Sept. 28, 2011); *People v. Busch*, 2020 IL App (2d) 180229, ¶ 41. An excited utterance is admissible as an exception to the hearsay rule and, as such, is offered to prove the truth of the matter asserted. See Ill. R. Evid. 801(c) (eff. Oct. 15, 2015) (hearsay is an out-of-court statement offered to prove the truth of the matter asserted); see also *People v. Tenney*, 205 Ill. 2d 411, 432-33 (2002).

¶ 28 Whether a statement is admissible as an excited utterance depends upon the totality of the circumstances. *People v. Williams*, 193 Ill. 2d 306, 352 (2000). Such an analysis encompasses several factors, including the amount of time that has passed since the incident, the mental and physical condition of the declarant, the nature of the event, and the presence or absence of self-interest. *People v. Sutton*, 233 Ill. 2d 89, 107 (2009). The key inquiry, however, is "whether the statement was made while the excitement of the event predominated." (Internal quotation marks omitted.) *Id.*

¶ 29 Many of Lorenzo's statements to Nelis did not relate to the occurrence itself but to collateral issues such as whether Lorenzo would go to the hospital, and thus they did not meet the elements of an excited utterance. Moreover, in other portions of the audio, Lorenzo blamed defendant for starting the fight. Hence, under defendant's theory of the case, Lorenzo's statements were not unreflecting accounts of the incident but, rather, had been fabricated. Because the statements were not offered for their truth, a hearsay exception does not apply.

¶ 30 In any event, we agree with the State that the evidence was essentially cumulative. Illinois Rule of Evidence 403 (eff. Jan. 1, 2011) states:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

¶ 31 Lorenzo testified that he was upset after the fight, that he did not want the police to go inside the house, and that he argued with Nelis about going to the hospital. Nelis, too, testified that Lorenzo was upset and uncooperative. [1] Thus, the recording was cumulative of other properly admitted evidence, and the trial court did not abuse its discretion by excluding it.

*5 ¶ 32 A similar analysis applies to the audio portion of Callahan's interaction with defendant. Defendant's calm demeanor after the fact simply had no relevance to whether he was the initial victim of an unprovoked assault. A fight is likely to change the combatants' demeanors regardless of who initiated it. Lorenzo and Nelis testified that defendant appeared intoxicated, and Callahan testified that defendant's face was bleeding. On the audio portion that defendant wanted to be played, he claims that he was very tired. Thus, his placidity after the fight was more likely the product of intoxication, pain, and exhaustion than of a clear conscience.

¶ 33 Moreover, defendant's calm demeanor was inconsistent with an excited utterance. Although, as defendant argues, the recording was made a relatively short time after his 911 call (which was admitted as an excited utterance), the time factor is not dispositive. The key inquiry is whether the excitement of the event still predominated. *Sutton*, 233 Ill. 2d at 107. Here, it appears that defendant was intoxicated and exhausted rather than feeling the excitement of the event. Another factor is whether the statement was in the declarant's self-interest. *Id.* And defendant's statements, in which he blamed Lorenzo for starting the fight, were largely self-serving.

¶ 34 Finally, defendant and Callahan testified about their interaction, making the audio of the conversation cumulative. We agree with the State that proffering this evidence appears to have been defendant's attempt to put his version of events before the jury a second time and, as such, was inadmissible as a prior consistent statement. Self-serving, out-of-court statements of a defendant are inadmissible hearsay. *People v. Patterson*, 154 Ill. 2d 414, 452 (1992). A prior consistent statement is admissible only to rebut an inference of recent fabrication or recent motive to testify falsely if the prior statement was made before the motive existed. *People v. Lambert*, 288 Ill. App. 3d 450, 453 (1997). Defendant does not attempt to satisfy these criteria.

¶ 35 III. CONCLUSION

¶ 36 The judgment of the circuit court of Kane County is affirmed.

¶ 37 Affirmed.

Justices Zenoff and Schostok concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2021 IL App (2d) 190797-U, 2021 WL 3619858

Footnotes

1 Lorenzo testified that he only objected to going to a specific hospital while Nelis implied that Lorenzo did not want to go the hospital at all. To the extent that the audio contradicted Lorenzo's testimony on this point,

it was inadmissible as collateral impeachment. See *People v. Collins*, 106 Ill. 2d 237, 269 (1985) (cross-examiner may not impeach a witness on a collateral matter; he or she must accept the witness's answer).

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2022 IL App (1st) 200375-U

FIRST DISTRICT,
FIRST DIVISION
May 23, 2022

No. 1-20-0375

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 18 CR 10031
	)	
STACY NORRIS,	)	Honorable
	)	Joan Margaret O'Brien,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE COGHLAN delivered the judgment of the court.
Presiding Justice Hyman and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for armed habitual criminal is reversed and the case is remanded for a new trial where the trial court abused its discretion in excluding evidence of flight consistent with defendant's innocence.

¶ 2 Following a jury trial, defendant Stacy Norris was convicted of armed habitual criminal and sentenced to 8 years' imprisonment. On appeal, defendant argues that (1) his trial counsel was ineffective for failing to file a motion to suppress evidence recovered during a vehicle search, (2) his trial counsel was ineffective for failing to include certain recorded hearsay statements in a pretrial motion *in limine*, and (3) the trial court erred when it limited the scope of the sole defense witness's testimony. For the reasons that follow, we reverse and remand for a new trial.

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¶ 3 BACKGROUND

¶ 4 The evening of June 28, 2018, defendant was driving a green Toyota Camry Solara near 91st Street and South Colfax Avenue. While on patrol at about 8:20 p.m., Chicago Police Officers David Marinez and Rafael Razo observed defendant using a cell phone while driving. When defendant failed to make a complete stop at a stop sign, Razo activated their "lights and sirens" to curb the vehicle. Defendant proceeded to pull over at the mouth of an alley on Colfax.

¶ 5 Marinez saw defendant "reaching into his side or his pockets retrieving something" but was unable to see what he retrieved or whether he opened the center console. Marinez alerted his partner that defendant was "making mo[v]ements from his side to the center console." As the officers exited their vehicle, defendant drove off down the alley.

¶ 6 The officers followed defendant through the alley for about 15 seconds. Defendant pulled into a garage at 9135 South Colfax. The officers exited their vehicle and ordered him out of his car. Defendant complied but exited holding a glass juice bottle. The officers ordered defendant to put his hands on the hood of the SUV "for safety purposes" because they believed defendant "could be armed *** due to everything that had happened." Defendant did not immediately put the glass bottle down, but eventually placed his hands on the hood of the SUV.

¶ 7 Razo began searching the defendant's vehicle. After first searching the driver's seat, he was directed to the other side of the vehicle by Marinez, where he ultimately recovered a loaded handgun from the center console.

¶ 8 This incident was recorded on video from the officers' squad car camera and Razo's body-worn camera. The audio and video from both cameras was admitted into evidence without objection and published to the jury. Although defendant's movements are not clear in the squad car footage, one of the officers can be heard saying "He's reaching for something." Marinez explained that his elevated position in passenger seat of the SUV enabled him to look downward

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through the rear windshield of the Toyota and observe defendant appear to retrieve something from his pockets and place it in the center console of his vehicle.

¶ 9 The parties stipulated to defendant's two prior qualifying felony convictions.

¶ 10 Prior to testifying on her husband's behalf, the trial court admonished Paris White about the danger of self-incrimination. The judge was concerned because White did not have a Concealed Carry License. After speaking with an Assistant Public Defender in the courtroom, White testified that she owned the Toyota defendant was driving at the time of his arrest, but she did not allow him to drive her car because his license was suspended. Defense counsel followed up by asking, "Something happen to your car prior to June 28, 2018, that you wouldn't let him drive your car then?" The State objected to this question and a sidebar conference was held outside the presence of the jury.

¶ 11 At the sidebar, defense counsel made an offer of proof that White was going to testify that the last time she let defendant drive her car, it was impounded because he did not have a driver's license. The trial court questioned the relevance of this information since defendant was shown on video driving the vehicle. Defense counsel responded that it was "relevant in regards to her reason why she doesn't allow him to drive the car." The trial court ruled that the evidence was not relevant "to any of the elements of the offense or to the defense that it's her car."

¶ 12 White subsequently testified that her father had given her the gun recovered in her car for "protection" a few days prior to the incident. She never told defendant about the gun or that it was in her vehicle, despite knowing that defendant was not allowed to be around firearms because he is a convicted felon. White admitted that she did not have a Concealed Carry License but explained that she kept the gun unloaded in the center console and the gun's magazine in the glove compartment.

¶ 13 The jury found defendant guilty of armed habitual criminal and he was sentenced to a term of 8 years' imprisonment.

¶ 14 ANALYSIS

¶ 15 Ineffective Assistance of Counsel

¶ 16 Defendant first argues his trial counsel was ineffective for failing to file a motion to suppress the gun and ammunition found in the vehicle and for failing to move *in limine* to exclude statements captured on the videos from the squad car and body-worn cameras. The State responds that defendant cannot meet his burden under *Strickland v. Washington*, 466. U.S. 668 (1984).

¶ 17 To establish ineffective assistance of counsel under *Strickland*, a defendant must show that counsel's performance was objectively unreasonable and that the deficient performance prejudiced the defendant. *People v. Domagala*, 2013 IL 113688, ¶ 36 (quoting *Strickland*, 466 U.S. at 694). A defendant's "[f]ailure to make the requisite showing of either deficient performance or sufficient prejudice defeats the claim." *People v. Flowers*, 2015 IL App (1st) 113259, ¶ 41. To satisfy the deficiency prong, the defendant must show that his counsel's performance was so deficient that counsel "was not functioning as the 'counsel' guaranteed by the sixth amendment." *People v. Easley*, 192 Ill. 2d 307, 317 (2000). "The defendant must overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy." *Id.*

¶ 18 Where it is "easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, *** that course should be followed." *Strickland*, 466 U.S. at 697. To demonstrate prejudice, a defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Domagala*, 2013 IL 113688, ¶ 36. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

¶ 19 Defendant argues that his trial counsel was objectively unreasonable in failing to file a motion to suppress the gun and ammunition recovered in the Toyota. The decision of whether to file a motion to suppress is a matter of trial strategy and entitled to great deference. *People v. Bew*, 228 Ill. 2d 122, 128 (2008). Counsel cannot be deemed ineffective if the motion would have been futile. *People v. Givens*, 237 Ill. 2d 311, 331 (2010).

¶ 20 Under the fourth amendment of the United States Constitution, individuals have the right to be secure against unreasonable searches and seizures. U.S. Const., amend. IV. Under *Terry v. Ohio*, 392 U.S. 1, 27 (1968), the United States Supreme Court held that during an investigatory stop, an officer may conduct "a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." *Terry*, 392 U.S. at 27; see also *People v. Close*, 238 Ill. 2d 497, 505 (2010) (noting this Court follows the principles set forth in *Terry v. Ohio*). The officer need not be "absolutely certain" the individual is armed, and the issue is "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27.

¶ 21 In determining whether the officer acted reasonably, a reviewing court must give weight to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience, but not to any "inchoate and unparticularized suspicion or 'hunch.'" *Id.* A protective search under *Terry* may extend to a search of the passenger compartment of an automobile "limited to those areas in which a weapon may be placed or hidden." *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). A *Terry* search is permissible if the police officer reasonably believes, based on specific and articulable facts, taken together with reasonable inferences from those facts, that the suspect is dangerous and may gain immediate control of weapons. *Id.*; see also *People v. Colyar*, 2013 IL 111835, ¶ 38 ("Explaining its decision, the *Long* court noted that roadside encounters are

'especially hazardous,' and a police officer may reasonably believe that he is in danger from the possible presence of accessible weapons inside the vehicle.").

¶ 22 In reviewing an officer's actions, this Court applies an objective standard to decide whether the facts available to the officer at the time of the incident would lead an individual of reasonable caution to believe the action was appropriate. *Colyar*, 2013 IL 111835, ¶ 40. The court analyzes these actions based on the totality of the surrounding circumstances. *People v. Moss*, 217 Ill. 2d 511, 527 (2005). "Although we must apply an objective standard, 'the testimony of an officer as to his subjective feelings is one of the facts which we may consider in the totality of the circumstances known to the officer at the time of the [search].' " *People v. Johnson*, 2019 IL App (1st) 161104, ¶ 20 (quoting *People v. Galvin*, 127 Ill. 2d 153, 168 (1989)).

¶ 23 Defendant does not dispute that "a vehicle stop based on an officer's observation of a traffic violation is valid at its inception." *Moss*, 217 Ill. 2d at 527 (citing *People v. Gonzalez*, 204 Ill. 2d 220, 228-29 (2003)). Rather, defendant challenges the subsequent search of his car, premised on the officers' belief that he had a firearm. He argues that the only reason the officers had to believe he was armed and dangerous was Marinez's observation of defendant's alleged furtive movements in the car, which this Court has held to be insufficient to justify the search of a vehicle. See *People v. Smith*, 2015 IL App (1st) 131307, ¶ 36.

¶ 24 We find that Razo had a sufficient basis to search defendant's car based on the totality of the circumstances. "[M]ovements taken *alone* are insufficient to constitute probable cause to search since they may be innocent." (Emphasis added.) *People v. Creagh*, 214 Ill. App 3d 744, 747-48 (1991). However, furtive movements "may be considered justification for performing a warrantless search when coupled with other circumstances tending to show probable cause." *Smith*, 2015 IL App (1st) 131307, ¶ 29. Here, the evidence shows that the officers relied on more than furtive movements as a basis to search defendant's car.

¶ 25 Marinez testified that during the initial stop of defendant's vehicle, he was able to see defendant reach to the right side of his body, retrieve something, and "appear to be placing it in the center console of his vehicle." As the officers were exiting their vehicle, defendant drove off down the alley. Marinez testified that "based on [his] experience, when a car takes off on you *** it elevates your high risk" that the driver is hiding something. After defendant pulled into a garage, he was ordered to get out of his car and place his hands on the hood of the police SUV for "safety purposes." In response, defendant exited the vehicle holding a glass bottle which he did not immediately place on the ground, despite being ordered to do so. Given these circumstances, we find the officers' observations were sufficient to justify searching the vehicle.

¶ 26 Relying on *Arizona v. Gant*, 556 U.S. 332 (2009), defendant argues that, because he was out of reach of the vehicle at the time of the search, there was no safety reason to search the vehicle for the weapon. He urges review as a search incident to arrest. We find *Gant* inapposite. In *Gant*, the police searched the passenger compartment of a vehicle pursuant to the lawful, custodial arrest of the driver. *Gant*, 556 U.S. at 336. The Court held that the search was not justified under the search-incident-to-arrest doctrine where the driver was handcuffed and secured in a squad car before the search. *Id.* at 343-44. However, the Court observed that other established exceptions to the warrant requirement authorize a vehicle search "under additional circumstances when safety or evidentiary concerns demand." *Id.* at 346 (citing *Long*, 463 U.S. at 1049).

¶ 27 In *Long*, the Court extended *Terry* to include "the search of the passenger compartment of an automobile" and "those areas in which a weapon may be placed or hidden." *Long*, 463 U.S. at 1049. The safety concerns supporting this type of search are not dissipated simply because an individual is temporarily detained outside the vehicle. As the Court observed in *Long*, an officer does not act unreasonably in taking "preventive measures" to ensure that there are no weapons

within the detained individual's "immediate grasp before permitting him to reenter his automobile." *Id.* at 1051.

¶ 28 In this case, the totality of the circumstances known to the officers at the time of the search led them to reasonably believe that defendant "could be armed." Although defendant was detained outside of his vehicle during the search, he was not handcuffed or secured inside a police vehicle. We cannot say that Officer Razo acted unreasonably in taking preventative measures to ensure that defendant did not have a weapon in his immediate control by searching the front seats and center console of the vehicle.

¶ 29 Because it is not reasonably probable that a motion to suppress would have been granted, counsel was not ineffective for failing to file such a motion. It follows that defendant cannot establish a reasonable probability that, but for defense counsel's alleged unprofessional error, the result of the proceeding would have been different. Thus, his ineffective assistance of counsel claim fails. See *Strickland*, 466 U.S. at 694.

¶ 30 Defendant also contends that his trial counsel was ineffective for failing to move to exclude statements captured on the videos from the squad car and body-worn cameras. The State responds that the statements at issue were either admissible as an excited utterance or strategically unchallenged by defense counsel.

¶ 31 At issue are eight statements made by Marinez and depicted on video from the squad car camera and body-worn camera, including: (1) "He's reaching for something," (2) "Hey Razo, on the other side he reached for something," (3) "What's in your car? I saw you," (4) "I saw you dropping something," (5) "Ok, what were you putting—?" and (6) "I saw you leaning again."

¶ 32 The parties dispute what Marinez said in the final two recorded statements. Defendant hears "What were you putting in the side? I saw you reaching," and "Remember I told you as we stopped he leaned." The State hears Marinez say "What were you putting on the side? I saw you

leaning," and "Remember, I told you as we stopped he's...he's putting...he's leaning?" respectively.

¶ 33 Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ill. R. Evid. 801(c) (eff. Oct. 15, 2015); *People v. Collins*, 2020 IL App (1st) 181746, ¶ 23. Such statements are generally inadmissible unless an exception applies. Ill. R. Evid. 802 (eff. Jan. 1, 2011); Ill. R. Evid. 803 (eff. Sept. 28, 2018).

¶ 34 The State asserts that one of the statements, "He's reaching for something," was admissible under the excited utterance exception to the rule against hearsay. The State concedes that the other statements are hearsay, but argues that defendant's trial counsel made the strategic decision not to challenge their admission. We find it unnecessary to make either determination since defendant cannot demonstrate prejudice from his counsel's inaction.

¶ 35 All of the information being challenged was also established through the live testimony of Marinez and Razo. See *People v. Abram*, 2016 IL App (1st) 132785, ¶ 76 (Finding that the defendant suffered no prejudice because there was no information contained in the disputed statements that was not also established by live testimony); see also *People v. Songer*, 229 Ill. App. 3d 901, 906 (1992) ("Reversal for improperly admitted hearsay evidence is not warranted where properly admitted evidence proves the same matter."). Based on the evidence properly presented at trial, there is not a reasonable probability that the outcome would have been different absent admission of these statements. *People v. Davis*, 2017 IL 142263, ¶ 57. Therefore, defendant cannot meet his burden under *Strickland* to show that he was prejudiced by counsel's failure to file a motion to exclude these statements.

¶ 36 Right to Present a Defense

¶ 37 Finally, defendant argues that he "was denied his constitutional right to present a defense" where the trial court barred Paris White from testifying that her car had been impounded the last time defendant used it. According to defendant, this evidence explained why defendant was not allowed to drive his wife's car, was "directly relevant to an element of the charge and [his] theory of the defense," and "would have offered the jury an alternative, innocent explanation for why [he] drove away" at the first traffic stop, *i.e.*, that he left so his wife's car would not get towed again, not because he was attempting to hide a gun.

¶ 38 The State maintains that defendant has forfeited this claim by failing to adequately articulate that White's testimony was relevant "to support an inference that the reason defendant fled was because the car had been previously impounded when defendant was driving it." At trial, defendant asserted that the barred evidence was relevant because the "last time [White] let him drive the vehicle, it was impounded because he didn't have a license." In his posttrial motion, defendant again alleged, "The circuit court erred when it sustained the prosecutions [*sic*] objection to the defense question of Paris White as to if she did not allow the Defendant to drive her vehicle because her car had been towed 2 months prior to the defendant's arrest when Defendant was arrested for driving on a suspended license." Nothing more was required in order to preserve this issue for our review *People v. Minter*, 2015 IL App (1st) 120958, ¶ 43.

¶ 39 A criminal defendant is constitutionally guaranteed a meaningful opportunity to present a complete defense. *People v. Ramirez*, 2012 IL App (1st) 093504, ¶ 43. This includes the right of the defendant to present witnesses in his own defense. *People v. Lerma*, 2016 IL 118496, ¶ 23. A defendant also has the right "to show, by any competent evidence, facts which tend to prove that he did not leave the scene of the crime from a consciousness of guilt." *People v. Autman*, 393 Ill. 262, 266-67 (1946). Defendant claims that, although a judge's ruling on evidentiary matters is ordinarily reviewed for an abuse of discretion, the question of whether a defendant's right to

present a defense was violated is a purely legal issue and should be reviewed *de novo*. We disagree. Where, as here, "a party claims he was denied his constitutional right to present a complete defense due to improper evidentiary rulings, the standard of review is abuse of discretion." *People v. Burgess*, 2015 IL App (1st) 130657, ¶ 133.

¶ 40 The evidence showed that defendant stopped at the mouth of the alley when the police officers activated their lights and sirens but drove off as the officers were approaching his vehicle. Defendant drove down the alley and pulled into a garage. Officer Razo acknowledged that defendant was not speeding and only drove a short distance. The trial court's ruling prevented defendant from explaining to the jury why he fled from the police. Without this crucial testimony, defendant was unable to counter the State's theory that he fled because "he knew he couldn't have the gun. He knew it was illegal." While it is plausible that defendant's flight from the initial stop showed consciousness of guilt, it is equally plausible that defendant was simply driving home to avoid a repeat towing of his wife's car. See *People v. Davis*, 193 Ill. 2d 127, 131 (1963) ("[F]light is not always dictated by an impulse or purpose to escape the consequences of acts done and, in some instances, is equally or more consistent with some other hypothesis."). Under these circumstances, we find that the trial court abused its discretion in limiting the testimony of Paris White.

¶ 41 We next consider whether limiting White's testimony was harmless error. See *People v. Thompson*, 238 Ill. 2d 598, 611 (2010) ("Harmless-error analysis is conducted when a defendant has preserved an issue for review."). An error may be deemed harmless beyond a reasonable doubt if other evidence against the defendant is so overwhelming that there is no doubt of the defendant's guilt. *People v. Wilkerson*, 87 Ill. 2d 151, 157 (1981). In this case, the other evidence of defendant's guilt was not overwhelming.

¶ 42 To prove defendant guilty of armed habitual criminal as charged in this case, the State was required to show that he possessed the gun. See 720 ILCS 5/24-1.7(a) (West 2018). The gun was not recovered from defendant's actual possession, so to show constructive possession the State was required to demonstrate that defendant: (1) knew of the weapon's presence and (2) exercised control over the area where the weapon was found. *People v. Hunter*, 2013 IL 114100, ¶ 19. The State relied primarily on defendant's flight to establish these elements. In his opening statement, the prosecutor told the jury the evidence would show that defendant "fled from the police because he's a convicted felon who had a handgun in the vehicle he was driving." In his closing argument, the prosecutor told the jurors the evidence had shown, as follows:

> "[T]here is a good reason why this defendant, a two-time convicted felon, fled from the scene of that initial traffic stop. He knew he couldn't have the gun. He knew it was illegal. He knew he needed to make some distance between the gun and him. So he took it out of his pocket, tried to hide it in the console, took off speeding up the alley hoping to get to his garage before the officers could catch up with him and find the gun.
>
> He did that because he knew he was guilty. It's called consciousness of guilt. That's evidence that you should consider in this case."

¶ 43 Without White's testimony about the previous towing of her vehicle, defendant was unable to explain his flight, which undermined his entire defense. We find that there is a reasonable probability that White's testimony would have altered the trial's outcome. Therefore, we reverse and remand for a new trial.

¶ 44 Retrial raises double jeopardy concerns, and we are therefore required to assess the sufficiency of the evidence against defendant. *People v. Lopez*, 229 Ill. 2d 322, 367 (2008). After viewing the evidence presented at trial in the light most favorable to the State, we find that a

rational trier of fact could have found defendant guilty beyond a reasonable doubt. *Id.* Accordingly, there is no double jeopardy impediment to retrial.

¶ 45 CONCLUSION

¶ 46 For the foregoing reasons, we reverse defendant's conviction for armed habitual criminal and remand the cause to the circuit court for a new trial.

¶ 47 Reversed and remanded.

2021 IL App (4th) 190288-U

NO. 4-19-0288

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 19, 2021
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
CAPRIJAWN T. WINSTON,	)	No. 17CF1206
Defendant-Appellant.	)	
	)	Honorable
	)	Adam M. Dill,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Knecht and Justice Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's admission of hearsay statements included in police body camera footage was harmless error. Defendant forfeited review of her claim that the State failed to present evidence to support the felony enhancement of her driving while license revoked offense.

¶ 2 In September 2018, following a jury trial, defendant, Caprijawn T. Winston, was found guilty of driving while her license was revoked (DWLR) (625 ILCS 5/6-303(a) (West 2016)). The trial court sentenced her to 23 months in prison. Defendant appeals, arguing the court erred by allowing the State to introduce into evidence audio from police body camera footage of her traffic stop and by sentencing her to a Class 4 felony where the State failed to present evidence required under section 6-303(d-3) of the Illinois Vehicle Code (*id.* § 6-303(d-3)) to elevate her sentence from a Class A misdemeanor. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On August 31, 2017, the State charged defendant with DWLR (625 ILCS 5/6-303(a) (West 2016)), alleging defendant "drove a motor vehicle on a public highway in Champaign County, Illinois" while her license to drive was revoked as a result of a conviction for driving under the influence (DUI) (*id.* § 11-501) and when she had previously been convicted of DWLR (*id.* § 6-303) at least three times.

¶ 5 Defendant filed multiple pretrial motions, including a motion to suppress statements made by defendant that were recorded by the body camera of Deputy Cory Christensen, the police officer who arrested her. In her motion, defendant alleged her recorded statements were obtained "without prior reading of a *Miranda* warning." The trial court subsequently conducted a hearing on defendant's motion. At the beginning of the hearing, the State agreed certain statements made by defendant at the end of the body camera footage were inadmissible under *Miranda v. Arizona*, 384 U.S. 436 (1966), but contended the rest of the footage was admissible. The State then called Deputy Christensen to testify. According to Deputy Christensen, while on patrol at approximately 4 a.m. on August 21, 2017, he observed a silver Chevrolet Impala without a "rear registration lamp." Deputy Christensen testified he then attempted to initiate a traffic stop. Deputy Christensen followed the Impala for some distance before it finally pulled over. Once the Impala stopped, Deputy Christensen pulled up behind it and exited his vehicle. Deputy Christensen testified, before he approached the Impala, he ordered the driver to shut off the vehicle. Deputy Christensen "heard a female who *** [he] observed in the driver's seat say[,] 'I cannot hear you.' " Deputy Christensen approached the Impala, which then "accelerated at a high rate of speed from the traffic stop." The State played an approximately two-minute video segment from Deputy

Christensen's body camera footage, which depicted Deputy Christensen initiating the traffic stop and the Impala driving away. In the last few seconds of the video, Deputy Christensen can be heard saying, after the Impala drove away: "She took off on me. It's gonna be a black, female driver accelerating eastbound on Leverett." After the presentation of evidence, defendant withdrew her motion to suppress statements with respect to the two-minute portion of the video which had been viewed by the court. The court ultimately granted defendant's motion, ordering that, while the two-minute portion of the video viewed by the court could be played to the jury with audio, the rest of the video could only be shown without audio.

¶ 6 Subsequently, defendant filed a motion *in limine* seeking to exclude all audio from Deputy Christensen's body camera footage, including from the two-minute segment which the trial court previously allowed. Defendant alleged that, during the video, "the officer narrate[d] the events as they occur[red]" and that "such statements are hearsay in that they are out of court statements to [*sic*] the truth of the matter asserted." Prior to defendant's trial, the trial court took up defendant's motion *in limine*. The assistant state's attorney informed the court he intended to present Deputy Christensen's body camera footage to the jury but that the only portion of the video he would play with audio would be the two-minute portion which had previously been allowed. The court then asked defense counsel whether he "ha[d] anything else to add regarding the motion *in limine*," to which defense counsel responded, "No, Your Honor. We'd stand on our motion. I would just add that, essentially, any audio played would, in fact, be hearsay." The assistant state's attorney responded, saying he "d[idn't] see how it [was] hearsay in this case." The court then watched the two-minute portion of the video again and ultimately denied defendant's motion with respect to that portion of the video but granted the motion with respect to the rest of the video.

¶ 7 Defendant's case proceeded to a jury trial. The State first called Deputy Christensen, who testified consistently with his testimony during the hearing on defendant's motion to suppress, although in more detail. For example, Deputy Christensen testified he "had no doubt" the voice he heard coming from the driver's side of the Impala saying, "I can't hear you." was female. He also testified as follows regarding his actions after the Impala drove away:

> "At that point, I turned around while I got on my radio, let Metcad, who is our dispatch, know that the vehicle had taken off eastbound, that there was a female driving it, from me seeing a silhouette of what I believed to be a female in the driver's seat as well as a female's voice coming from the driver's door."

Deputy Christensen later testified he pursued the Impala, and, approximately 20 seconds later, found it crashed in a nearby beanfield. Once Deputy Christensen found the crashed Impala, he observed a "black female," who he identified in court as defendant, "lying by the driver's door outside of the vehicle" and a "black male with his right leg entrapped or pinned in the front passenger door as he was seated in the front passenger seat." After more officers arrived, one officer "ran [defendant's] information through [the police] dispatch center" and Officer Christensen ran her information "through LEADS" and discovered defendant's driver's license was revoked. The State then published for the jury Deputy Christensen's body camera footage, only playing audio during the two-minute period authorized by the trial court.

¶ 8 On cross-examination, Deputy Christensen acknowledged he did not know whether the Impala's passenger side window was open and further acknowledged, if it were not, "someone in the passenger's [side could] say[ ] something, and [he would] hear that from the driver's side." He also acknowledged, based on the amount of damage to the Impala and the distance between

the roadway and the location in the beanfield where it stopped, it was "possible that [the] vehicle flipped, rolled over on its way into the ditch." Deputy Christensen agreed that, "when [a] vehicle rolls over, the people inside, if they don't have seatbelts on, get kind of jumbled up." Deputy Christensen also testified, during the initial traffic stop, he "saw a silhouette of what [he] believed to be a female in the driver's seat, a male in the passenger seat, and heard a female voice coming from the interior of the vehicle near the driver's side."

¶ 9 After Deputy Christensen testified, the State published a one-page driving abstract from the Illinois Secretary of State. The abstract stated defendant's license had been issued on June 26, 2004, and had expired on September 28, 2008. The abstract also stated "revocation was in effect on 08-21-2017."

¶ 10 Defendant testified on her own behalf. According to defendant, on August 21, 2017, her boyfriend, Anthony Miles, was driving her to a gas station in a relative's silver Impala. While Miles drove, defendant was in the passenger's seat. Defendant testified that, after the police officer initially pulled them over, Miles decided to drive away even though she asked him not to. After driving some distance, the car left the road, "flipped so many times" and, when it finally stopped, defendant was "[i]n the middle" of the car. Defendant then "crawled over" to the driver's side of the car to exit the vehicle while Miles tried to exit the vehicle from the passenger window because the passenger door would not open.

¶ 11 The jury ultimately found defendant guilty of DWLR. The trial court subsequently scheduled a sentencing hearing and ordered that a presentence report be prepared.

¶ 12 Prior to the sentencing hearing, defendant filed a motion for acquittal or, in the alternative, for a new trial. In her motion, defendant alleged, in relevant part, that the trial court

erred in denying her motion *in limine* to exclude the audio from Deputy Christensen's body camera footage.

¶ 13 Subsequently, defendant's presentence report was completed. The report reflected defendant had a DUI conviction in 2008, as well as three DWLR convictions, one of which was in 2010 and two of which were in 2011. The report further indicated, at the time the report was prepared, defendant's driver's license was revoked.

¶ 14 On January 8, 2019, the trial court conducted defendant's sentencing. At the beginning of the hearing, the court denied defendant's posttrial motion, finding no error occurred. During the sentencing portion of the hearing, the State presented no evidence. Defendant presented several letters in mitigation and made a statement in allocution. After argument, the court sentenced defendant to two years in prison.

¶ 15 In February 2019, defendant filed a motion to reconsider, which the trial court granted, reducing her sentence to 23 months in prison.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, defendant argues the trial court erred by allowing the State to introduce into evidence audio from Deputy Christensen's body camera footage of her traffic stop and by sentencing her to a Class 4 felony where the State failed to present evidence required under section 6-303(d-3) of the Illinois Vehicle Code to elevate her sentence from a Class A misdemeanor.

¶ 19 A. Admitting Audio From Deputy Christensen's Body Camera Footage

¶ 20 Defendant first argues the trial court erred by allowing the State to introduce into evidence audio from Deputy Christensen's body camera footage. Specifically, defendant argues

the portion of Deputy Christensen's body camera video in which he states, "[s]he took off on me" and "[i]t's gonna be a black, female driver" is inadmissible hearsay. On appeal, we review the trial court's evidentiary rulings for an abuse of discretion. See *People v. Caffey*, 205 Ill. 2d 52, 89, 792 N.E.2d 1163, 1188 (2001).

¶ 21 "Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." (Internal quotation marks omitted.) Ill. R. Evid. 801 (eff. Oct. 15, 2015). Generally, hearsay evidence is not admissible unless an exception applies. Ill. R. Evid. 802 (eff. Jan. 1, 2011); Ill. R. Evid. 803 (eff. Sept. 28, 2018). Here, the recorded statements were not made by Deputy Christensen while he was testifying. The State introduced the statements to prove that defendant was driving the Impala, *i.e.* to establish the truth of the matter asserted. In its closing argument, the State argued Deputy Christensen's recorded statements proved the driver of the Impala was a female and bolstered his other testimony identifying the driver because, as an officer, he was trained to "relay information accurately and quickly."

¶ 22 The State does not dispute that Deputy Christensen's statements are hearsay but contends the evidence was nonetheless admissible as an excited utterance, an exception to the rule against hearsay. See Ill. R. Evid. 803(2) (eff. Sept. 28, 2018). Defendant disputes the State's contention that the recorded statements qualified as excited utterances. We find it unnecessary to decide whether Deputy Christensen's recorded statements constituted excited utterances, and thus qualified as an exception to the hearsay rule, because even assuming *arguendo* the admission of the statements was error, any error was harmless.

¶ 23 "[W]hen the trial court has erroneously admitted a hearsay statement, a reversal is

mandatory unless it is clearly shown that the error was not prejudicial." *People v. Hayden*, 2018 IL App (4th) 160035, ¶ 134, 127 N.E.3d 823. "The improper admission of evidence is harmless where there is no reasonable probability that, if the evidence had been excluded, the outcome would have been different." (Internal quotation marks omitted.) *People v. Brothers*, 2015 IL App (4th) 130644, ¶ 97, 39 N.E.3d 1101 (abrogated on other grounds by *People v. Veach*, 2017 IL 120649, 89 N.E.3d 366). When deciding whether error in the admission of evidence is harmless, a reviewing court may: "(1) focus on the error to determine whether it might have contributed to the conviction; (2) examine the other properly admitted evidence to determine whether it overwhelmingly supports the conviction; or (3) determine whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence." (Internal quotation marks omitted.) *Id.* ¶ 98.

¶ 24 Here, before the State published the video containing Deputy Christensen's recorded statements, the deputy testified that, as he approached the Impala, he observed a female's silhouette in the driver's seat and heard a female's voice coming from the driver's side of the vehicle. Deputy Christensen also testified that, after the Impala sped away from him, he notified police dispatch that "the vehicle had taken off eastbound, *that there was a female driving it.*" (Emphasis added.) Notably, defendant did not object to this portion of Deputy Christensen's testimony. Later, Deputy Christensen again stated he "saw a silhouette of what [he] believed to be a female in the driver's seat, a male in the passenger seat." Thus, independent of the audio portion of Deputy Christensen's body camera footage, the jury heard testimony establishing defendant was driving the Impala. Accordingly, Deputy Christensen's recorded statements that "[s]he took off on me" and "[i]t's gonna be a black, female driver," which defendant contends were improperly

admitted, were merely cumulative and duplicative of the deputy's live testimony and there is no reasonable probability that their admission affected the outcome of defendant's trial. See *People v. Abram*, 2016 IL App (1st) 132785, ¶ 76, 50 N.E.3d 1197 (finding defendant suffered "no undue prejudice" from the admission of hearsay statements recorded by a police body camera where "no information was provided in the recording that was not also established through the live testimony of [the police officers]").

¶ 25 B. DWLR Conviction

¶ 26 Defendant also argues her Class 4 felony DWLR conviction should be reduced to a Class A misdemeanor because the State failed to present evidence that her license had been revoked for a DUI and that her three other DWLR convictions occurred while her license was revoked for a DUI-related offense. Defendant acknowledges she forfeited review of this claim by failing to raise it at the time of sentencing and in a post-sentencing motion. See *People v. Hillier*, 237 Ill. 2d 539, 544, 931 N.E.2d 1184, 1187 (2010). However, she requests that we nonetheless review the claim under the plain error doctrine.

¶ 27 "The plain-error doctrine permits a court of review to consider error that has been forfeited when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." (Internal quotation marks omitted.) *People v. Adams*, 2012 IL 111168, ¶ 21, 962 N.E.2d 410. "The first step of plain-error review is determining whether any error occurred." *People v. Thompson*, 238 Ill. 2d 598, 613, 939 N.E.2d 403, 413 (2010).

¶ 28 Section 6-303(a) of the Illinois Vehicle Code provides that "any person who drives or is in actual physical control of a motor vehicle on any highway of this State at a time when such

person's driver's license, permit[,] or privilege to do so *** is revoked or suspended *** shall be guilty of a Class A misdemeanor." 625 ILCS 5/6-303(a) (West 2018). However, section 6-303(d-3) provides that a fourth conviction for DWLR is a Class 4 felony if that DWLR offense and the defendant's three prior DWLR offenses occurred while the defendant's driver's license was suspended or revoked for a DUI offense under section 11-501 of the Vehicle Code (*id.* § 11-501). *Id.* § 6-303(d-3).

¶ 29 When the State charges a defendant with a DWLR offense that carries an enhanced sentence, as the State did here, it is not required to establish during trial, as an element of the offense, that the defendant's original revocation was predicated on a DUI conviction or that the defendant had previously been convicted of DWLR offenses. *People v. Lucas*, 231 Ill. 2d 169, 181, 897 N.E.2d 778, 785 (2008); *People v. Owens*, 2016 IL App (4th) 140090, ¶ 33, 59 N.E.3d 187. Instead, the State must only present proof of such facts at sentencing. *Lucas*, 231 Ill. 2d at 181; *Owens*, 2016 IL App (4th) 140090, ¶ 39.

¶ 30 The State is held to a different burden of proof at a sentencing hearing than it is at a trial. *People v. Lopez-Bonilla*, 2011 IL App (2d) 100688, ¶ 14, 962 N.E.2d 1100. "Indeed, our supreme court has not articulated a specific burden of proof at sentencing and instead maintains that relevance and reliability are the important factors in the consideration of evidence at sentencing." (Internal quotation marks omitted.) *Id.* Additionally, we have previously recognized the trial court may infer the elements necessary to sentence a defendant under section 6-303(d-3) of the Illinois Vehicle Code exist so long as the inference is supported by sufficient evidence. See, *e.g.*, *Owens*, 2016 IL App (4th) 140090, ¶ 43. For example, in *Owens*, the defendant claimed the State failed to establish his license was revoked for a DUI offense. *Id.* ¶ 41. We upheld the trial

court's decision to sentence the defendant under section 6-303(d-3) because the defendant's presentence investigation report listed his prior DUI convictions, the report did not show his license was reinstated at any point after his DUI conviction, and the defendant did not dispute his license was revoked at the time of the underlying DWLR offense. *Id.*

¶ 31 In the present case, as in *Owens*, the trial court could have reasonably inferred that defendant's driver's license was revoked as a result of a DUI offense. Defendant's presentence report indicated she was convicted of a DUI offense in 2008. As the State points out, defendant's driver's license was necessarily revoked after this conviction because, under section 501.01(d) of the Illinois Vehicle Code, the Secretary of State is required to revoke a driver's license after a DUI conviction. See 625 ILCS 5/11-501(g) (West 2006) ("The Secretary of State shall revoke the driving privileges of any person convicted under [the DUI statute] or a similar provision of a local ordinance.").

¶ 32 Sufficient evidence was also admitted from which the trial court could reasonably infer the 2008 revocation of defendant's driver's license remained in effect at the time of her three other DWLR offenses. Defendant's presentence report indicates that, following defendant's first conviction for DWLR in 2010, a notice was sent to the Secretary of State's Office stating defendant failed to pay certain fines imposed as a result of that conviction. As noted by the State, after the clerk sent the failure to pay notice, the Secretary of State could not reinstate defendant's license until her fines were fully paid. See 625 ILCS 5/6-306.6(a) (West 2010) ("Whenever any resident of this State fails to pay any traffic fine, penalty, or cost imposed for a violation of [the Illinois Vehicle Code] *** the clerk may notify the Secretary of State *** and the Secretary shall prohibit the renewal, reissue or reinstatement of such resident's driving privileges until such fine, penalty,

or cost has been paid in full."). Therefore, defendant's license could not have been reinstated until March 2016, when, according to the presentence report, defendant finished paying her fines from the 2010 DWLR conviction, and by which time she had twice more been convicted of a DWLR offense. Finally, we note the driving abstract the State presented at defendant's trial reflects defendant's driver's license expired on September 28, 2008, indicating her license was never reinstated after her 2008 DUI conviction.

¶ 33 In light of the foregoing evidence and the reasonable inferences to be drawn therefrom, we cannot say the trial court erred in sentencing defendant in accordance with section 6-303(d-3) of the Illinois Vehicle Code. Because the trial court did not err in imposing defendant's sentence, forfeiture of her claim is not excused under the plain error doctrine.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we affirm the trial court's judgment.

¶ 36 Affirmed.

No. 127584

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- JODON COLLINS, Defendant-Appellee.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-18-1746. There on appeal from the Circuit Court of Cook County, Illinois , No. 18 CR 825. Honorable Charles P. Burns, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@ilag.gov;

Ms. Kimberly M. Foxx, State's Attorney, Cook County State's Attorney Office, 300 Daley Center, Chicago, IL 60602, eserve.criminalappeals@cookcountyil.gov;

Mr. Jodon Collins, Register No. M26477, Shawnee Correctional Center, 6665 State Route 146 East, Vienna, IL 62995

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 August 23, 2022, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellee in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Alicia Corona
LEGAL SECRETARY
Office of the State Appellate Defender
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
Service via email is accepted at
1stdistrict.eserve@osad.state.il.us