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No. 1-22-0322

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff–Appellee, v. JUSSIE SMOLLETT, Defendant–Appellant.	Appeal from the Circuit Court of Cook County, Illinois Circuit Court No. 20 CR 03050-01 The Honorable James B. Linn, Judge Presiding.

BRIEF OF THE STATE-APPELLEE

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ORAL ARGUMENT REQESTED

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NATURE OF THE CASE

Defendant Jussie Smollett appeals his conviction on five felony disorderly conduct counts. On February 11, 2020, a special grand jury returned an indictment against Smollett, charging him with six counts of felony disorderly conduct, namely making false police reports in violation of 720 ILCS 5/26-1(a)(4). Following his indictment, Smollett sought emergency relief in the form of a supervisory order in the Illinois Supreme Court—seeking to void the indictment and halt his prosecution, arguing, among other things, that Dan K. Webb had been improperly appointed as Special Prosecutor. *See Jussie Smollett v. The Honorable Michael B. Toomin*, No. 125790. In a one-sentence order, the high court denied Smollett's request.

In pretrial proceedings before Judge James B. Linn, Smollett brought four motions to dismiss the indictment on various grounds, all of which were thoroughly briefed, argued, and ultimately denied. During the two-week trial, the Office of the Special Prosecutor ("OSP") presented the jury with an overwhelming amount of evidence that established Smollett orchestrated a fake hate crime and falsely reported it to the Chicago Police Department ("CPD") as a real hate crime. To counter this evidence, Smollett took the witness stand in his own defense, and presented evidence from other witnesses who testified on his behalf. The jury carefully deliberated over the course of two days and found Smollett guilty on five of six counts.

Following extensive post-trial and pre-sentencing briefing and oral arguments, Smollett was sentenced on March 10, 2022, to a term of 30 months' probation, the first 150 days of which were to be served in the Cook County Jail. Smollett was also ordered to pay a fine and pay restitution to the City of Chicago. As set forth below, the overwhelming evidence at trial supports the conviction and sentence. The issues raised in Smollett's

appeal are factually and legally misguided attacks that do not merit disturbing the jury's verdict or Judge Linn's determinations.

STATEMENT OF THE ISSUES

Smollett's appeal presents a multitude of purported issues arising from the following: (1) the validity of his prosecution, (2) pretrial matters, (3) his two-week trial, and (4) his sentencing. Because Smollett's Statement of Issues is unsatisfactory, the OSP reorganizes and reframes them below for ease of this Court's review. Ill. Sup. Ct. R. 341(j).

I. SMOLLETT'S ATTACKS ON THE VALIDITY OF HIS PROSECUTION

A. Whether this Court has jurisdiction to review the order appointing the Special Prosecutor in a different matter, Case No. 19 MR 00014, that was not directly appealed from by Smollett and is not before this Court in the instant appeal.

B. Whether the prosecution of Smollett in this case violated his due process rights where Smollett bargained for and received a *nolle prosequi* in Case No. 19 CR 03104-01 (the "Prior Charges") in exchange for performing community service and voluntarily forfeiting his bond.

C. Whether the prosecution of Smollett in this case violated his Fifth Amendment rights against double jeopardy from multiple punishments where Smollett performed community service and voluntarily forfeited his bond in exchange for a *nolle prosequi* in the Prior Charges.

II. SMOLLETT'S ALLEGED PRE-TRIAL ISSUES

A. Whether the trial court abused its discretion in issuing a limited remedy requiring that another member of Smollett's defense team, other than lead counsel Nenye Uche, cross-examine Abimbola and Olabinjo Osundairo (the "Osundairo Brothers") despite the existence of an attorney-client relationship—and therefore, a conflict of interest—between Mr. Uche and the Osundairo Brothers, the OSP's key witnesses.

B. Whether the trial court abused its discretion in denying Smollett's request to compel the production of the OSP's work product.

III. SMOLLETT'S ALLEGED TRIAL ISSUES

A. Whether the trial court correctly applied Illinois Supreme Court Rule 431 in denying Smollett's request to directly question potential jurors where the trial court allowed the parties to submit supplemental questions of potential jurors that were asked by the trial court.

B. Whether the trial court clearly erred in denying Smollett's *Batson* challenges during jury selection.

C. Whether the trial court clearly erred in its utilization of the courtroom for voir dire and throughout the trial where the courtroom was never closed and operated under capacity restrictions due to the COVID-19 pandemic.

D. Whether the trial court abused its discretion in denying Smollett's request to provide an accomplice witness jury instruction.

E. Whether the trial court abused its discretion in limiting and commenting on certain cross-examination by the defense.

F. Whether the trial court abused its discretion in sending a video exhibit of Smollett's interview on *Good Morning America* back to the jury room during deliberations after it was received into evidence and published to the jury without any objection.

G. Whether the trial court abused its discretion in both denying Smollett's motion to disqualify a member of the OSP and overruling Smollett's objection to certain arguments made during the OSP's rebuttal, as well as whether certain questions were impermissibly asked of witnesses.

IV. SMOLLETT'S ATTACKS ON HIS SENTENCE

A. Whether the trial court abused its discretion in its sentencing judgment by imposing that the first 150 days of Smollett's term of probation be served in the Cook County Jail, and by ordering Smollett to pay restitution to the City of Chicago for overtime expenditures solely related to Smollett's falsely reporting a hate crime.

STATEMENT OF FACTS

The OSP sets forth the following Statement of Facts because Smollett's Statement of Facts is unsatisfactory. Ill. Sup. Ct. R. 341(j).

I. The Prior Charges and Appointment of a Special Prosecutor

The disorderly conduct charges in this case arise from Smollett's reporting of an alleged hate crime attack against him in the early morning hours of January 29, 2019. (CI 30–46). After a rigorous investigation of the incident by the CPD during a polar vortex, Smollett was indicted on 16 counts of felony disorderly conduct in the Prior Charges (Case

No. 19 CR 03104-01), and that case was assigned to the Honorable Judge Steven Watkins. (CI 30–46; CI 71). Smollett was arraigned on those charges on March 14, 2019. (CI 71).

On March 26, 2019—12 days after Smollett's arraignment—the Cook County State's Attorney's Office ("CCSAO") advanced the status hearing date before Judge Watkins and made a motion for *nolle prosequi*. (SUP C 7–10). During the hearing, Assistant State's Attorney Risa Lanier stated: "After reviewing the facts and circumstances of this case, including Smollett's volunteer service in the community and agreement to forfeit his bond to the City of Chicago, the State's motion in regards to the indictment is to nolle pros." (SUP C 8–9).

Following the CCSAO's decision to *nolle prosequi* the Prior Charges, retired appellate justice Sheila O'Brien filed a *pro se* Petition to Appoint a Special Prosecutor in the matter of *People of the State of Illinois v. Jussie Smollett* (the "Petition"). (C 40–67; C 68–76). The Petition was docketed as a new case, Case No. 19 MR 00014, and was initially assigned to the Honorable Judge Leroy K. Martin, Jr (C 40) before being transferred to the Honorable Judge Michael B. Toomin on May 10, 2019. (C 108–09). Without moving to intervene and stating "[he] is not a party to this case" (C 77–84), Smollett "specially appeared" (via counsel) to oppose the Petition on April 18, 2019, and he continued to have counsel present at all appearances. (C 981–87).

After briefing and argument on the issue, Judge Michael Toomin entered an order granting the appointment of a special prosecutor on June 21, 2019 (the "Appointment Order"). (C 446–66). In reaching this decision, Judge Toomin concluded that due to State's Attorney Kim Foxx's recusal in conjunction with an improper delegation of her

authority to First Assistant State's Attorney Joe Magats, the Prior Charges against Smollett were void. *Id.*

On July 19, 2019, Smollett filed four motions, including a Motion for Reconsideration of the Appointment Order, a Motion for Substitution of Judge for Cause, and a Motion to Intervene Instanter. (SUP C 883–1035; SUP C 1046–54; SUP C 1036–45). Judge Toomin denied Smollett's motion to intervene, finding that the motion "was far from timely." (R 144; R146). Judge Toomin also found that Smollett lacked a direct interest in the Appointment Order because he only ordered an independent investigation, not the re-prosecution of Smollett. (R 145–46). Moreover, Judge Toomin reiterated on the record the Appointment Order "was not an interim order." (R 144).

On August 23, 2019, Judge Toomin appointed Dan K. Webb as Special Prosecutor to conduct an "independent investigation" and if "reasonable grounds exist to further prosecute Smollett, in the interest of justice" to "take such action as may be appropriate." (C 365; C 368–70). At no point did Smollett directly appeal any of the orders from Case No. 19 MR 00014.

II. Pretrial Matters

Following investigation by the Special Prosecutor in conjunction with a special grand jury, the special grand jury indicted Smollett on six counts of felony disorderly conduct on February 11, 2020, namely making false police reports in violation of 720 ILCS 5/26-1(a)(4). (C 652–58). This case was assigned to the Honorable Judge James B. Linn. (C 10).

On February 24, 2020—the day of Smollett's arraignment—Smollett filed emergency motions before the Illinois Supreme Court, including an Emergency Motion for Supervisory Order Pursuant to Illinois Supreme Court Rule 383 and an Emergency Motion

to Stay this case. (C 949–971). In that motion, Smollett asked the Illinois Supreme Court to void both the Appointment Order and the order appointing Dan K. Webb as Special Prosecutor. (C 950). On March 6, 2020, the Illinois Supreme Court denied Smollett's emergency motions. (SUP C 671).

Also on February 24, 2020, Smollett filed a Motion to Dismiss Indictment for Violation of Defendant's Rights Against Double Jeopardy. (C 683–700). After extensive briefing and oral argument, the trial court denied the motion to dismiss on June 12, 2020, finding that double jeopardy did not attach in connection with the Prior Charges. (SUP R 2224–79).

Subsequently, on July 17, 2020, Smollett filed a second motion to dismiss the indictment, challenging the appointment of the Special Prosecutor. (C 856–81). Following briefing and more oral argument, the trial court denied the second motion to dismiss on September 10, 2020, finding that it did not have jurisdiction or authority to review the Appointment Order, and even if it did, Judge Toomin's analysis was correct. (R 215–38).

On February 24, 2021, new attorneys for Smollett filed appearances in this action, including lead counsel, Nenye Uche. (SUP2 C 4). Shortly thereafter, on March 8, 2021, the Osundairo Brothers formally moved to intervene and disqualify Mr. Uche due to a conflict of interest between Mr. Uche and the Osundairo Brothers. (C 1294–1305). Because Mr. Uche factually disputed the Osundairo Brothers' sworn account (R 384–85; 405–07), and the trial court found that a *prima facie* showing of a conflict of interest (R 496–97), the trial court held an evidentiary hearing on July 14, 2021. (R 537–785). On July 29, 2021, the trial court entered an order finding that the evidence showed "clearly and convincingly" that Mr. Uche had discussions with the Osundairo Brothers on topics

related to this action prior to representing Smollett, and therefore, "the threshold criteria for an attorney-client relationship had been met." (C 1323–24). In analyzing the appropriate remedy, the trial court ruled that Mr. Uche "may appear as Counsel for Smollett," provided that "[s]ome other member(s) of the highly qualified defense attorneys shall cross examine the Osundairo family witnesses" at trial. (C 1327).

On October 14, 2021, Smollett filed another motion to dismiss claiming that the OSP's prosecution of Smollett was in violation of an "agreement" with the CCSAO to dismiss his prior case. (CI 324–36). The trial court denied that motion on October 15, 2021. (C 1343; R900).

III. The Jury Trial and Conviction

The trial court held a two-week jury trial starting on November 29, 2021, in which the jury heard an overwhelming amount of evidence demonstrating Smollett's guilt, including:

(1) the testimony of five CPD detectives and officers who received Smollett's false police reports and extensively investigated the fake hate crime that Smollett reported;

(2) the testimony of the Osundairo Brothers, who set forth in detail Smollett's efforts to recruit them to carry out the fake hate crime, such as asking them for "help on the low," conducting a "dry run" of the fake attack, paying the Osundairo Brothers $3,500 by check, and instructing them to purchase specific items to be used during the fake attack;

(3) over 40 exhibits corroborating the Osundairo Brothers' testimony, including (i) phone records, text messages, and social media messages reflecting the communications between Smollett and the Osundairo Brothers; (ii) video surveillance footage and GPS evidence showing Smollett's and the Osundairo Brothers' movements; (iii) receipts of the items purchased for the fake attack; and (iv) the $3,500 check written by Smollett payable to Abimbola Osundairo;

(4) the testimony of six witnesses who testified on behalf of Smollett's defense; and

(5) Smollett's own testimony and version of the events that attempted to rebut aspects of the Osundairo Brothers' testimony but was ultimately rejected by the jury.

(R 917–3259). On December 9, 2021, the jury returned a verdict of guilty on five of the six counts of felony disorderly conduct. (R 3314–16; C 1420).

IV. Smollett's Sentence

Smollett filed a Motion for Judgment Notwithstanding the Verdict or Motion for a New Trial on February 25, 2022. (C 1578–1660). The City of Chicago submitted a victim impact statement on March 3, 2022. (C 1685–1687). Smollett also submitted numerous letters of support as mitigation, many of which were read at sentencing. (CI 93–104; R 3468–3490). The trial court heard extensive oral argument on Smollett's post-trial motions and denied them. (R 3357–3434).

At his March 10, 2022 sentencing hearing, Smollett presented live testimony of numerous witnesses in mitigation. (R 3439–68). After considering the facts and circumstances of the offense, and the factors in aggravation and mitigation, the trial court sentenced Smollett to 30 months' probation, the first 150 days to be served in the Cook County Jail. (R 3557). Smollett was also ordered to pay a $25,000 fine and pay restitution to the City of Chicago in the amount of $120,106. *Id.*

ARGUMENT

Smollett's "kitchen sink" appeal cobbles together purported issues from all aspects of his case. None constitutes error or an abuse of discretion that warrants reversing the conviction or sentence—much less remanding with instructions to dismiss the indictment altogether, as Smollett urges. Smollett's attacks on the validity of his prosecution are legally and factually unsupported. Respectfully, this Court has no jurisdiction to review the Appointment Order, which was issued in a different case and is not part of this appeal.

And Smollett bargained for and received a *nolle prosequi* in the Prior Charges which disposes of his due process and double jeopardy arguments. Smollett's alleged pretrial issues are equally without merit, as the trial court did not abuse its discretion in: (i) entering a limited remedy to protect the integrity of the trial where lead counsel for Smollett was not disqualified despite having an attorney-client relationship with the OSP's two key witnesses, and (ii) finding the OSP's work product was protected from disclosure.

Moreover, a review of the record from the two-week trial confirms that the trial court carefully considered and reached legally correct decisions on each of the alleged issues raised by Smollett relating to jury selection, jury instructions, evidentiary matters and witness examination. And finally, the trial court in its broad discretion rendered a sentence, which includes a period of incarceration as a condition of probation and an order of restitution to the City of Chicago, both of which are appropriate and legally supported based on the facts and circumstances of this case. Accordingly, this Court should affirm Smollett's conviction and sentence.

I. ATTACKS ON THE VALIDITY OF HIS CASE

A. This Court lacks jurisdiction to review the order appointing the Special Prosecutor in a different matter, Case No. 19 MR 00014, that is not properly before this Court on appeal, and Judge Toomin did not abuse his discretion in entering the Appointment Order in any event.

Smollett seeks review of multiple orders from Case No. 19 MR 00014 that were not entered by the trial court and are not properly before this Court on appeal. In addition to seeking *de novo* review of the Appointment Order (Br. 36–38), Smollett seeks *de novo* review of the order appointing Dan K. Webb as Special Prosecutor (Br. 38–40), and *de novo* review of the denial of a motion for substitution of Judge Toomin, which somehow rendered Smollett's indictment, trial and sentence before the trial court "null and void."

(Br. 40–42). Yet Smollett's brief fails to explain how this Court has appellate jurisdiction to review orders issued in another case by a different court. Because neither the Appointment Order nor any other order in Case No. 19 MR 00014 was entered in this case, and Smollett never filed a direct appeal from those orders, this Court's review is limited to orders in this case, and it cannot review orders from Case No. 19 MR 00014. Even if this Court is inclined to review the Appointment Order, Judge Toomin did not abuse his discretion in appointing a special prosecutor.

1. Judge Toomin's orders are not reviewable because Smollett's notice of appeal is not from Case No. 19 MR 00014, and he never filed a notice of appeal from those orders.

The Court must independently determine whether it has jurisdiction over each issue on appeal. *See People v. Holmes*, 2016 IL App (1st) 132357, ¶ 45. "A notice of appeal is a procedural device filed with the trial court that, when timely filed, vests jurisdiction in the appellate court in order to permit review of the judgment such that it may be affirmed, reversed, or modified." *Gen. Motors Corp. v. Pappas*, 242 Ill. 2d 163, 173 (2011). "Unless there is a properly filed notice of appeal, a reviewing court has no jurisdiction over the appeal and is obliged to dismiss it." *People v. Smith*, 228 Ill. 2d 95, 104 (2008). A "notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts thereof specified in the notice of appeal." *Id.*

Smollett cites *In re Harris*, 335 Ill. App. 3d 517 (1st Dist. 2002), to claim that "legal issues regarding the propriety of the appointment of a special prosecutor are reviewed de novo." (Br. 36). But *Harris* was a direct appeal from the denial of a petition to appointment a special prosecutor, and thus, *de novo* review was proper. *See* 335 Ill. App. 3d at 518–20. In this case, the notice of appeal filed by Smollett is ***only*** from Case No. 20 CR 03050-01. (C 1710–11). As such, this Court's appellate jurisdiction is limited to reviewing orders

and rulings from Case No. 20 CR 03050-01, and it cannot review orders and rulings issued by a different trial court in another case—specifically, Case No. 19 MR 00014. *See Lee v. Pavkovic*, 119 Ill. App. 3d 439, 444 (1st Dist. 1983) (declining to review order that was "not part of the judgment appealed from, but instead was entered in another case," because "[an] appeal is a continuation of the circuit court proceeding, [so] the notice of appeal cannot vest jurisdiction in this court over an order entered in a different proceeding"); *People v. Hill*, 2021 IL App (1st) 131973-B, ¶ 32 (finding that the court did "not have jurisdiction to consider the State's challenge" to order dismissing indictment where the State did not file a notice of appeal from the order, and instead raised its arguments "in supplemental briefs filed under Hill's prior appeal").

Smollett ***never*** filed a direct appeal from the Appointment Order, the order appointing Dan K. Webb as Special Prosecutor on August 23, 2019, or any other order issued in Case No. 19 MR 000014, and Smollett made these strategic choices despite being reminded that the Appointment Order was not an "interim order." (R 144). Although Judge Toomin denied Smollett's motion to intervene after the Appointment Order (R 146), when the OSP filed charges against Smollett on February 11, 2020, Smollett had a direct interest in the existence of the OSP and could have moved to intervene again in Case No 19 MR 00014 to challenge the Appointment Order. Instead, Smollett sought extraordinary relief from the Illinois Supreme Court in Case No 19 MR 00014, which that court denied. (SUP C 671). Even after the Illinois Supreme Court refused to grant Smollett emergency relief, Smollett asked the trial court in this case to review the Appointment Order rather than move to intervene and take a direct appeal from Case No. 19 MR 00014. But the trial court correctly concluded that it did not "see any possible way that [it] would have authority at

this level to revisit Judge Toomin's ruling," and was "certain that [it does not] have authority to review that order." (R 230; R 237).

Smollett made strategic choices in each of the forums he litigated in, including not filing a direct appeal from Case No. 19 MR 00014. But Smollett's failure to properly preserve review of orders from Case No. 19 MR 00014 does not mean he can now seek backdoor *de novo* review of the Appointment Order or any other order issued by Judge Toomin in this appeal. This Court must find that it lacks jurisdiction to review those orders.

2. Judge Toomin did not abuse his discretion in appointing a special prosecutor in this case.

Even if this Court concludes that it has appellate jurisdiction to review orders from Case No. 19 MR 00014 (which it respectfully does not), Judge Toomin did not abuse his discretion in entering the Appointment Order. "The decision to appoint a special prosecutor is within the discretion of the trial court." *In re Harris*, 335 Ill. App. 3d at 520. Accordingly, when ruling on the Petition and determining whether to appoint a special prosecutor, Judge Toomin was vested with broad discretion. *Id.* Judge Toomin appropriately exercised his discretion in appointing a special prosecutor, and his ruling is grounded in law and properly reasoned.

Judge Toomin first took note of State's Attorney Foxx's public statements that she recused herself "to address potential questions of impropriety based upon familiarity with potential witnesses," as well as the CCSAO's internal statements that Foxx "is recused from the investigation involving Jussie Smollett." (C 451–52). In light of those statements using the word "recuse"—a term with legal import—Judge Toomin found that a "reasonable assumption exists" that Foxx's decision to recuse herself was based on 55 ILCS 5/3-9008(a-15), which states that a state's attorney "***may file*** a petition to recuse

himself or herself from a cause or proceeding for any other reason he or she deems appropriate and the court shall appoint a special prosecutor as provided in this Section." (C 459) (emphasis added). Notably, per the plain language of the statute and contrary to Smollett's contention (Br. 36–38), the filing of such a petition is permissive and not required. *In re Est. of Ahmed*, 322 Ill. App. 3d 741, 746 (1st Dist. 2001) ("As a rule of statutory construction, the word 'may' is permissive, as opposed to mandatory."). Since Foxx failed to file a petition for recusal, Judge Toomin noted that she "depriv[ed] the court of notice that appointment of a special prosecutor was mandated." (C 459). Instead, Foxx (improperly) turned the prosecution of Smollett over to "Acting State's Attorney" Joseph Magats. (C 459–61).

Judge Toomin found that, despite the absence of a formal petition, there was no other way to construe the actions of Foxx than an "unconditional legal recusal." *Id.* Moreover, Judge Toomin found that Foxx deviated from section 3-9008(a-15) when, instead of allowing the court to appoint a special prosecutor, she created the role of "Acting State's Attorney" which she "was possessed of no authority, constitutionally or statutorily, to create that office." (C 461–62).[1]

Judge Toomin noted that Illinois courts have routinely disapproved of similar arrangements where state's attorneys make invalid recusals under the law and appoint an individual to serve in their place. *See People v. Jennings*, 343 Ill. App. 3d 717, 724 (5th Dist. 2003) ("This type of appointment cannot be condoned. State's Attorneys are clearly not meant to have such unbridled authority in the appointment of special prosecutors.").

[1] *See* 55 ILCS 5/3-9005(a) (listing the 13 enumerated powers of each state's attorney, which does not include the power to create subordinate offices or appoint prosecutors following recusal).

Consequently, courts have found prosecutions pursuant to these invalid arrangements to be void. *See* (C 463–65) (collecting cases).[2] Thus, Judge Toomin correctly ruled that all the proceedings under the Acting State's Attorney were void, as there "was no State's Attorney" when Smollett was charged, arraigned, and when the proceedings were *nolle prosequi*. (C 465).

Accordingly, the Appointment Order was well reasoned and not an abuse of discretion.

B. The prosecution of Smollett did not violate his due process rights because Smollett bargained for and received a *nolle prosequi* in the Prior Charges, which does not bar a subsequent prosecution.

Throughout this action, Smollett has offered numerous, different—and oftentimes, conflicting—framings of the purported "agreement" that was struck with the CCSAO on March 26, 2019. For example, in the trial court, Smollett called the disposition reached on March 26, 2019, an "informal agreement" (C 801), "analogous to a negotiated plea agreement" (*id.*), a "negotiated agreement" (C 802), "effectively" pretrial diversion (C 783), a "contractual immunity agreement" (CI 330), and an "immunity-type agreement." (CI 326). In this appeal, Smollett has tossed aside these previous descriptions and landed on "non-prosecution agreement." (Br. 18–27). But the record supports only one conclusion—Smollett bargained for and received a *nolle prosequi*, which legally cannot bar the prosecution of Smollett in this case.

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[2] *See People v. Munson*, 319 Ill. 596, 604–05 (1925) (quashing indictment where elected state's attorney was not licensed to practice law); *People v. Ward*, 326 Ill. App. 3d 897, 902 (5th Dist. 2002) (vacating conviction and stating that "[i]f a case is not prosecuted by an attorney properly acting as an assistant State's Attorney, the prosecution is void and the cause should be remanded so that it can be brought by a proper prosecutor."); *People v. Dunson*, 316 Ill. App. 3d 760, 770 (2d Dist. 2000) (finding that participation of assistant state's attorney not licensed to practice law in Illinois rendered trial "null and void *ab initio* and that the resulting final judgment is also void.").

On March 26, 2019, the CCSAO in the Prior Charges advanced the status hearing date and made a motion for *nolle prosequi*. (SUP C 7–10). Indeed, during the hearing, Assistant State's Attorney Risa Lanier explicitly stated that "the State's motion in regards to the indictment is to nolle pros." (SUP C 8–9). Noticeably absent from the record is any discussion of the disposition being a formal "non-prosecution agreement," an "immunity agreement," a deferred prosecution agreement, or some form of pretrial diversion. And Smollett cites no evidence in the record to support the notion that he bargained for a formal "non-prosecution agreement," and instead asks this Court to make an improper factual finding that the disposition was a "non-prosecution agreement." The record clearly reflects that Smollett only bargained for and received a *nolle prosequi*—full stop.[3]

Illinois law is crystal clear that a *nolle prosequi* "will not bar another prosecution for the same offense." *People v. Milka*, 211 Ill. 2d 150, 172 (2004) (internal quotation marks and citations omitted). And because the CCSAO's *nolle prosequi* was entered before any jeopardy attached in the initial case, "the State may reprosecute the defendant." *See People v. Hughes*, 2012 IL 112817, ¶ 23; *People v. Norris*, 214 Ill. 2d 92, 104 (2005) ("[W]hen a *nolle prosequi* is entered before jeopardy attaches, the State is entitled to refile the charges against the defendant.").

Moreover, it is black-letter law and beyond dispute that a *nolle prosequi* that is entered before jeopardy attaches "is ***not*** a final disposition of the case." *Norris*, 214 Ill. 2d at 104 (emphasis added) (quoting *People v. Watson*, 394 Ill. 177, 179 (1946)); *see also People v. Daniels*, 187 Ill. 2d 301, 312 (1999) (stating that a *nolle prosequi* before jeopardy

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[3] Indeed, on March 26, 2019, Smollett's attorneys told the media: "***There was no deal***. The State dismissed the charges." *See* "Jussie Smollett's Attorney Says 'There Was No Deal' to Get Charges Dropped," Yahoo, March 26, 2019, *available at*: https://www.yahoo.com/lifestyle/jussie-smollett-attorney-says-no-161817405.html (emphasis added).

attaches "does not operate as an acquittal"). Thus, contrary to his assertion that the disposition on March 26, 2019, meant "the case was *permanently* over" (Br. 24), Smollett did not bargain for or receive finality. Rather, he bargained for and received a *nolle prosequi*, which under Illinois law (absent jeopardy attaching), left the door open for Smollett to be re-prosecuted. *Milka*, 211 Ill. 2d at 172.

The cases that Smollett relies on are readily distinguishable and affirm that the disposition he received on the Prior Charges did not bar the new charges. First, in *People v. Stapinski*, the defendant entered into a "cooperation agreement" whereby if he cooperated in the arrest of another individual, he would ***not be charged*** with possession of a controlled substance. 2015 IL 118278, ¶ 16. When the defendant was subsequently charged despite entering into this cooperation agreement, the Illinois Supreme Court held that the defendant's substantive due process rights were violated due to the State's breach of the cooperation agreement. *Id.*, ¶¶ 43–52. Here, Smollett obviously did not enter into a "cooperation agreement" with the CCSAO. Moreover, unlike the defendant in *Stapinski*, Smollett had already been charged with felony disorderly conduct, and he bargained for and received a *nolle prosequi*—not a bar against the filing of charges like the defendant in *Stapinski*.

In *People v. Starks*, the defendant agreed to cooperate and submit to a polygraph examination prior to trial in exchange for a complete dismissal of his case. 106 Ill. 2d 441, 444–45 (1985). Despite passing the polygraph, the State never dismissed the charges and the defendant's case proceeded to trial where he was convicted. *Id.* The Illinois Supreme Court found that if there was a pretrial agreement to dismiss the charges in exchange for the defendant's cooperation with a polygraph, then the State must fulfill its end of the

bargain and dismiss. *Id.* at 452. Here, Smollett did not enter into any sort of cooperation agreement (and no record evidence indicates otherwise), and he instead bargained for a *nolle prosequi*, which was entered—unlike in *Starks*, where the State refused to dismiss the charges. And critically, Smollett's *nolle prosequi* did not bar re-prosecution for the same offense. *See Norris*, 214 Ill. 2d at 104.

On the other hand, *People v. Smith* supports the position that the OSP was not barred from prosecuting Smollett. In that case, the defendant again bargained for a "cooperation-immunity" agreement in which the defendant cooperated in exchange for a dismissal of the charges. 233 Ill. App. 3d 342, 344 (2d Dist. 1992). After cooperating, the State dismissed the charges but later re-filed them. *Id.* at 344–45. The trial court dismissed the new indictment because the State had sought an "outright dismissal" of the charges which functioned as a dismissal "with prejudice and operated as an acquittal" but was "not a *nolle prosequi*." *Id.* at 346–48. The appellate court agreed that the dismissal was with prejudice and noted that "***[i]f a nolle prosequi had been intended, it is likely that the charges would have been nol-prossed***." *Id.* at 348 (emphasis added). Thus, critical to that court's analysis was the defendant's receipt of an "outright dismissal"—***not*** a *nolle prosequi*, as Smollett bargained for and received from the CCSAO. *Id.*

Even setting aside the fact that Smollett bargained for a *nolle prosequi*, which does not bar this prosecution, when Judge Toomin entered an order appointing a special prosecutor relating to Smollett's case, he concluded that the actions by the CCSAO in the Prior Charges were void. (C 465). Among other things, Judge Toomin noted that there was no duly appointed State's Attorney at the time Smollett was charged, indicted, arraigned, or when the proceedings were *nolle prosequi*. *Id.* Therefore, even assuming

that the disposition on March 26, 2019, meant finality—which it did not—the indictment brought by the special grand jury in this case was brought on a clean slate.

Accordingly, the prosecution of Smollett in this case did not violate his due process rights.

C. The prosecution of Smollett did not violate his Fifth Amendment right against double jeopardy from multiple punishments where Smollett performed community service and voluntarily forfeited his bond in exchange for a *nolle prosequi* in the Prior Charges.

In claiming that his Fifth Amendment right against double jeopardy was violated, Smollett switches gears from alleging he entered into a "non-prosecution agreement" with the CCSAO—which implies no criminal punishment—to arguing that criminal punishment was imposed in the Prior Charges. (Br. 28–29). To make this contradictory leap, Smollett claims that the disposition of the Prior Charges was "tantamount to an alternative prosecution or pretrial diversion agreement or program," and argues that jeopardy attached on March 26, 2019. *Id.* at 29. But this argument is a non-starter since it is undisputed the prior case was dismissed via a *nolle prosequi* a mere 12 days after arraignment, and therefore, under black letter law, jeopardy did not attach. And there is no record evidence that the disposition on March 26, 2019 was "alternative prosecution" or "pretrial diversion," or even resembles these sorts of dispositions. Because jeopardy never attached in the Prior Charges, Smollett's Fifth Amendment rights against double jeopardy were never violated.

1. Jeopardy did not attach because Smollett bargained for and received a *nolle prosequi*.

A trial court's ruling on a motion to dismiss a charge on double jeopardy grounds presents a question of law that is reviewed *de novo*. *People v. Jimenez*, 2020 IL App (1st) 182164, ¶ 10. "The double jeopardy clause protects against three distinct abuses: (1) a

second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense." *People v. Gaines*, 2020 IL 125165, ¶ 22 (quoting *People v. Placek*, 184 Ill. 2d 370, 376–77 (1998)).

As the Illinois Supreme Court has explained, "[t]he starting point in ***any*** double jeopardy analysis, of course, is determining whether or not jeopardy had attached." *People v. Bellmyer*, 199 Ill. 2d 529, 538 (2002) (quoting *People ex rel. Mosley v. Carey*, 74 Ill. 2d 527, 534 (1979)) (emphasis added). Indeed, the U.S. Supreme Court has "consistently adhered to the view that jeopardy does not attach, and ***the constitutional prohibition can have no application***, until a defendant is put to trial before the trier of facts, whether the trier be a jury or a judge." *Serfass v. United States*, 420 U.S. 377, 388 (1975) (emphasis added). Therefore, the "protections against double jeopardy are triggered ***only*** after the accused has been subjected to the hazards of trial and possible conviction." *Bellmyer*, 199 Ill. 2d at 537 (emphasis added).

There are three ways in which jeopardy may attach: "(1) at a jury trial when the jury is empaneled and sworn; (2) at a bench trial when the first witness is sworn and the court begins to hear evidence; and (3) at a guilty plea hearing when the guilty plea is accepted by the trial court." *People v. Cabrera*, 402 Ill. App. 3d 440, 447 (1st Dist. 2010) (internal quotation marks omitted). Importantly, the prerequisite of jeopardy attaching is applicable even in a "multiple punishment" double jeopardy challenge. *See People v. Delatorre*, 279 Ill. App. 3d 1014, 1019 (2d Dist. 1996) (noting that the proposition "that there can be no double jeopardy without a former jeopardy … is as appropriate to multiple punishments for the same offense when sought in separate proceedings as it is to successive

prosecutions for the same offense."); *People v. Portuguez*, 282 Ill. App. 3d 98, 101 (3rd Dist. 1996) (adopting analysis and following holding from *Delatorre*).

Jeopardy never attached in the Prior Charges because Smollett's case was dismissed via a *nolle prosequi* a mere 12 days after arraignment—before discovery had commenced, let alone a jury being empaneled or a witness being sworn. It is bedrock Illinois law that "*nolle prosequi* is not a final disposition of the case, and will not bar another prosecution for the same offense." *Milka*, 211 Ill. 2d at 172 (internal quotation marks and citations omitted). Since the CCSAO's *nolle prosequi* was entered before any jeopardy attached in the initial case, the *nolle prosequi* did not bar prosecution for the same offense. *See Hughes*, 2012 IL 112817, ¶ 23 ("[I]f a *nolle prosequi* is entered before jeopardy attaches, the State may reprosecute the defendant"). Thus, because jeopardy never attached, Smollett's double jeopardy claim must be rejected.

2. Smollett received no legal "punishment" in the prior proceeding and the out-of-state cases cited by Smollett have no application.

Setting aside the fact that jeopardy did not attach, which is dispositive, the disposition of the Prior Charges cannot constitute legal "punishment." First, Smollett voluntarily forfeited his bond, and no court ordered him to forfeit his bond. (SUP C 8). And second, because Smollett voluntarily forfeited his bond, it cannot constitute a "fine" or any other similar sentencing disposition because Judge Watkins did not impose any sentence in connection with a guilty plea or conviction. *See* 730 ILCS 5/5-1-19 ("'Sentence' is the disposition imposed by the court on a convicted defendant."); 730 ILCS 5/5-4.5-15(a) (listing the sentencing "dispositions," including a fine). Indeed, it is undisputed that Smollett did not admit guilt and was not found guilty of disorderly conduct in the Prior Charges because they were *nolle prosequi*.

Ignoring black-letter law, Smollett argues—without any legal support—that jeopardy attached, and he was punished when the Prior Charges were *nolle prosequi* and he voluntarily forfeited his bond. (Br. 29). In support of this novel argument, Smollett invites this Court to make a finding that the disposition he received on March 26, 2019, was "tantamount to an alternative prosecution or pretrial diversion agreement or program" (Br. 29), and that it was "in essence an alternative prosecution." (Br. 33). But this invitation should be rejected since it is undisputed that Smollett did not enter into any sort of alternative prosecution or pretrial diversion, and indeed, the disposition of the Prior Charges does not even resemble these programs.

Illinois law provides for the "Offender Initiative Program" (730 ILCS 5/5-6-3.3), which Cook County implements through the "Felony Deferred Prosecution Program" (Branch 9). But there can be no dispute that Smollett did not enter into this program or that the disposition on the Prior Charges even resembles this program since (1) the Prior Charges were never transferred to Branch 9, (2) Smollett did not enter into a written agreement with the CCSAO setting forth requirements he must meet, and (3) a court did not "enter an order specifying that the proceedings be suspended while [Smollett] is participating in a Program of not less than 12 months." 730 ILCS 5/5-6-3.3(b). Instead, the Prior Charges were *nolle prosequi* a mere 12 days after arraignment.

Smollett cites inapplicable out-of-state cases that generally stand for the proposition that jeopardy can attach following the successful completion of a diversion program. (Br. 30–33) (discussing *State v. Urvan*, 4 Ohio App. 3d 151 (1982), *Com. v. McSorley*, 335 Pa. Super. 522 (1984) and *State v. Maisey*, 215 W. Va. 582 (2004)). But these cases have no application here because, as Smollett notes, all of them involved ***actual*** entrance and

completion of a court-ordered or invited diversion program. *See Urvan*, 4 Ohio App. 3d at 154; *State v. Maisey*, 215 W. Va. at 586; *McSorley*, 335 Pa. Super. at 525.[4]

Smollett made this exact same argument before the trial court (SUP R 2227–44, SUP R 2254–59), and the trial court rejected it, stating that "I cannot find here that this can be treated as deferred prosecution because it certainly wasn't." (SUP R 2277). This Court should conclude the same and find that there was no legal punishment in the Prior Charges.

3. Smollett's unfounded public policy arguments should be rejected.

Finally, with no legal authority to support his main argument, Smollett asks this Court to reverse his conviction on double jeopardy grounds for "public policy" reasons. (Br. 33–35). As an initial matter, Smollett repeatedly states that the double jeopardy analysis should not be "decided by any mechanical test" or "applied in a rigid, mechanical nature." (Br. 33–34) (citing *Illinois v. Somerville*, 410 U.S. 458, 467 (1973)). But, as the U.S. Supreme Court recently clarified in an appeal from Illinois, the "rigid, mechanical" rule that *Somerville* referred to was "not whether jeopardy had attached, but whether the manner in which it terminated (by mistrial) barred the defendant's retrial." *Martinez v. Illinois*, 572 U.S. 833, 840 (2014) (per curiam). Thus, this Court should reject failed pleas to depart from bedrock law that require jeopardy to attach *before* the jeopardy analysis can even begin. Indeed, while Smollett feigns concern of this case setting "precedent," established Illinois precedent controls this issue because jeopardy did not attach when the Prior Charges were *nolle prosequi*.

[4] Smollett's citation to a case from 1880 is misplaced since the Court in *Chouteau* was not dealing with a *nolle prosequi*, but rather a penalty paid for "full satisfaction, compromise, and settlement of said indictments and prosecutions." *See United States v. Chouteau,* 102 U.S. 603, 610–11 (1880).

Moreover, Judge Toomin concluded that the CCSAO's actions in the Prior Charges were void (C 465), and thus, there cannot be a double jeopardy violation because the charges in this case were brought on a clean slate. Any public policy concerns raised by Smollett in this appeal are the exact same public policy arguments that were raised and rejected by the Illinois Supreme Court when it independently reviewed the Appointment Order in March 2020 and denied relief. *See Jussie Smollett v. The Honorable Michael B. Toomin*, No. 125790; (C 949-971; SUP C 671). Accordingly, Smollett's rights against double jeopardy were not violated.

II. SMOLLETT'S ALLEGED PRETRIAL ISSUES

A. The trial court properly exercised its discretion when it issued a limited remedy restricting cross-examination by Smollett's lead counsel despite the existence of an attorney-client relationship between lead counsel and the OSP's key witnesses.

After a lengthy evidentiary hearing, the trial court found that Smollett's lead counsel, Nenye Uche, had formed an attorney-client relationship with the Osundairo Brothers—the OSP's central witnesses—***prior*** to representing Smollett. Rather than disqualify Mr. Uche, which the trial court had discretion to do given the conflict created by Mr. Uche, the trial court issued a limited remedy delegating the cross-examination of the Osundairo Brothers to another member of Smollett's team of counsel. Smollett argues that this limited remedy allowing Mr. Uche to remain as lead counsel for Smollett was error. But a review of the record confirms the trial court carefully navigated this issue, did not abuse its discretion, and issued a limited remedy that protected the integrity of the trial while recognizing Smollett's right to the counsel of his choice.

1. The trial court's decision to hold an evidentiary hearing was not an abuse of discretion.

Though Smollett suggests that the trial court's "decision to hold an evidentiary hearing was based on an erroneous legal holding" and thus subject to *de novo* review (Br. 43), Smollett cites no case where a disqualification motion was reviewed *de novo*. Under Illinois law, a trial court is vested with significant discretion in ruling on a disqualification motion, and "a reviewing court must not set aside a trial court's decision to disqualify a defendant's chosen counsel unless there has been a clear abuse of discretion." *People v. Ortega*, 209 Ill. 2d 354, 359 (2004). A "clear abuse of discretion" only occurs when the trial court's "decision is fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it." *Id.*

In arguing that there was not a sufficient basis to hold an evidentiary hearing, Smollett distorts and omits the key factual timeline that led to an evidentiary hearing. Within weeks of Mr. Uche's filing his appearance as new lead counsel for Smollett on February 24, 2021, the Osundairo Brothers filed a motion to intervene and disqualify Mr. Uche, and submitted affidavits in support thereof, including an affidavit from their mother, Adeola Osundairo. (C 1294 (motion)); (CI 309–14 (affidavits)). Those sworn affidavits stated that Ms. Osundairo spoke with Mr. Uche multiple times following the Osundairo Brothers' arrest on February 14, 2019, and that Olabinjo Osundairo had further discussions ***about this case*** with Mr. Uche and his brother, Abimbola, who was present for the conversation. (CI 303–14).

In response to the motion, Mr. Uche repeatedly and categorically denied even speaking with the Osundairo Brothers. *See* (R 384–85) ("***I did not talk to the brothers on the phone***. I never met the brothers in my life. ***I do not know what they sound like*** … I

have ***never spoken*** to these boys ….") (emphasis added); *see also* (R 388; 399; 406–07). Although Mr. Uche made these unequivocal denials in court, Mr. Uche had previously asked Smollett to sign a conflict waiver on February 21, 2021, disclosing to Smollett that he had been contacted to "represent the brothers in the same matter"—all clearly indicating that Mr. Uche knew a conflict could arise if he took on the representation of Smollett. (CI 194). Before deciding how to handle the disqualification motion, the trial court—at Mr. Uche's specific request—conducted an *ex parte* meeting with counsel for the Osundairo Brothers, Gloria Rodriguez, to probe the Osundairo Brothers' motion and affidavits. (R 401; 417). After the *ex parte* meeting, the trial court concluded that a "prima facie showing had been made" that there was a conflict of interest, and "an evidentiary hearing was required" to resolve the factual dispute and conflict. (R 496–97). Thus, the record shows that the trial court correctly held an evidentiary hearing given Mr. Uche's denials of the Osundairo Brothers' account and the trial court's conclusion that a *prima facie* conflict existed.

2. The trial court correctly applied a limited remedy despite finding an attorney-client relationship between Mr. Uche and the Osundairo Brothers.

After a lengthy evidentiary hearing, the trial court correctly applied Illinois Supreme Court precedent, and in its discretion, fashioned a limited remedy that did ***not*** result in disqualification, but instead balanced Smollett's interests in counsel of his choice against the OSP's interest in maintaining the integrity of the trial.

While Smollett enjoys a Sixth Amendment right to the counsel of his own choice, his right to choose his own counsel is not "absolute." *People v. Holmes*, 141 Ill. 2d 204, 217 (1990). In *Holmes* and *Ortega*, the Illinois Supreme Court set forth a now well-established framework for ruling on a motion to disqualify counsel. First, the trial court

must determine whether "defense counsel has a specific professional obligation that actually does conflict or has a serious potential to conflict with defendant's interests." *Ortega*, 209 Ill. 2d at 361. And second, if there is "at least a serious potential for conflict," the court must then "consider the interests threatened by the conflict or potential conflict." *Id.* One of the interests is "the State's right to a fair trial in which defense counsel acts ethically and does not use confidential information to attack a State's witness." *Id.* at 361–62 (citing *Holmes*, 141 Ill. 2d at 226–27). The trial court correctly applied this framework in its order following the evidentiary hearing.

During the lengthy evidentiary hearing, the trial court heard live testimony from both the Osundairo Brothers and Ms. Osundairo (but not Mr. Uche, who declined to testify) (R 546–739), and based on the Osundairo testimony, found that "[t]he totality of the evidence shows ***clearly and convincingly*** that at different points, Uche talked to both brothers and their mother." (C 1323) (emphasis added). The trial court also specifically identified the topics that the Osundairo Brothers discussed with Mr. Uche: (a) potential immunity for the Osundairo Brothers; (b) the $3500 check Smollett paid to the Osundairo Brothers; (c) the search warrant executed on the Osundairo Brothers' residence; (d) items seized during execution of the search warrant; (e) laws about hate crimes; and (f) the handling of the intense media demands. (C 1323–24). Thus, the trial court found "that the threshold criteria for an attorney-client relationship had been met." (C 1324).[5]

[5] *See Nuccio v. Chicago Commodities, Inc.*, 257 Ill. App. 3d 437, 440 (1st Dist. 1993) ("An attorney/client relationship can be created at the initial interview between the prospective client and the attorney, and it is possible that confidential information passed during the interview sufficient to disqualify the attorney from representing the opposing party in related litigation."). Smollett's unsupported contention that the Osundairo Brothers had not "signed any agreements or paid any fees to hire [Mr. Uche] as their attorney" is also misplaced and irrelevant. "[A]n attorney-client relationship need not be explicit or expressed and is not dependent on the amount of time the client spends with the attorney, the payment of fees or execution of a contract, the consent of the attorney,

After finding Mr. Uche had formed an attorney-client relationship with the Osundairo Brothers based on numerous discussions about the ***facts of this case***, and therefore, that this created an actual or potential conflict, the trial court considered the interests threatened by the conflict—namely, Smollett's right to counsel of his choice, and the trial court's "firm obligation to protect the integrity of the trial and the legitimate concerns of the Osundairo family witnesses." (C 1326–27). After weighing these interests, the trial court noted that disqualification was an appropriate remedy but fashioned a far more limited remedy that allowed Mr. Uche to remain as lead counsel while requiring another member of Smollett's counsel to cross-examine the Osundairo Brothers at trial. (C 1327).

This narrowly tailored and limited remedy was well-within the trial court's discretion under *Holmes and Ortega*—two Illinois Supreme Court decisions that affirmed complete disqualification of defense counsel under analogous circumstances. *See Ortega*, 209 Ill. 2d at 369–70 (affirming disqualification of defense counsel and finding "it would be seriously unfair to the State if defendants were to use confidential information received from [the defense attorney's former client] to cross-examine [the defense attorney's former client], or to otherwise mount their defense"); *Holmes*, 141 Ill. 2d at 225–27 (affirming the trial court's decision to disqualify defense counsel where defense counsel received privileged information from the State's key witness five years before the trial); *see also People v. House*, 377 Ill. App. 3d 9, 10, 17 (1st Dist. 2007) (affirming disqualification of defense counsel because "a potential conflict presented by the fact that he had also represented both of the State's eyewitnesses" and "would have acquired more information

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or the actual employment of the attorney." *Herbes v. Graham*, 180 Ill. App. 3d 692, 699 (2d Dist. 1989).

about [the witnesses] by virtue of his relationship with them than he would have ordinarily had about a State witness").

Indeed, the limited nature of the trial court's order is apparent since it did not prohibit Mr. Uche from: (i) preparing witness outlines and questions for co-counsel to ask the Osundairo Brothers; (ii) proposing questions to co-counsel during the examinations of the Osundairo Brothers; and (iii) attacking the Osundairo Brothers' credibility during opening and closing statements which Mr. Uche, in fact, did. Simply put, the trial court's limited remedy, which did not result in disqualification, was legally sound and well-within the trial court's discretion.

B. The trial court correctly concluded Smollett was not entitled to the OSP's work product and did not abuse its discretion.

Smollett contends that he was entitled to receive what the trial court correctly concluded was the OSP's work product. But, Illinois Supreme Court Rule 412(j)(i) explicitly protects work product from disclosure, and the trial court correctly concluded that any notes or memoranda containing the OSP's opinions, theories and conclusions were work product protected from disclosure under Rule 412. That decision was not an abuse of discretion and, more importantly, resulted in no prejudice to Smollett.

The standard of review for an alleged discovery violation "is whether the trial court abused its discretion." *People v. Taylor*, 409 Ill. App. 3d 881, 908 (1st Dist. 2011). Further, failure to comply with the discovery rules does not require reversal absent a showing of prejudice. *Id.*

Following Smollett's arraignment in this case, the OSP made multiple productions and completed all discovery required under Rule 412 prior to June 2020. (SUP R 2279–80). Those productions included, *inter alia*: (i) the entire CPD case file containing witness

statements, reports, logs, security camera and taxi footage, audio and video recordings, including the reports and recordings of the Osundairo Brothers' interviews by the CPD, and (ii) all grand jury statements and testimony, including the grand jury testimony of the Osundairo Brothers. (R 246). Consistent with Rule 412(j)(i), the OSP did not produce any notes or memoranda containing the OSP's opinions, theories and conclusions from a meeting with the Osundairo Brothers.

After fully vetting the issue with counsel during a hearing, the trial court correctly found that Smollett was not entitled to the OSP's work product: "It comes down to are you entitled to their notes and notes are about impressions and thoughts and other things that they want to check out. Those are their notes. Those are lawyer notes. That's something totally different. That's something we call work product and you cannot have their work product." (R 250). That conclusion was required under Rule 412(j)(i), and therefore, not an abuse of discretion.

Even assuming the trial court did abuse its discretion (which it did not), Smollett has failed to demonstrate prejudice that is not harmless. *Taylor*, 409 Ill. App. 3d at 908. The OSP produced discovery reflecting the Osundairo Brothers' statements, including video and transcripts of their post-arrest interviews with CPD detectives, and their grand jury testimony. Indeed, Smollett was able to, and did, use those statements to cross-examine the Osundairo Brothers at length at trial, along with a substantial amount of other evidence concerning the Osundairo Brothers and their credibility, including physical evidence, video evidence, text messages, call records, social media accounts, and GPS data. *See* (R 1999–2102, 2125–31, 2226–33, 2335). Thus, Smollett was not hamstrung or

limited in his ability to confront the Osundairo Brothers with their prior statements and other evidence affecting their credibility.

In *People v. Young*, the Illinois Supreme Court found that the defendant was not prejudiced by the lack of disclosure and *in camera* inspection of the State's witness interview notes because that witness's testimony "was not the only evidence tending to establish" the defendant's guilt. *People v. Young*, 128 Ill. 2d 1, 44–45 (1989). The court also rejected the argument that the lack of an *in camera* inspection of the interview notes "deprived the defendant an opportunity to effectively cross-examine" the witness. *Id.* at 45 ("[W]e do not believe that the denial of the opportunity to use the interview notes in cross-examining [the witness] affected the reliability of the fact-finding process at trial."). Like *Young*, Smollett was not prejudiced because he had the Osundairo Brothers' statements (including audio and video) to the CPD from their custodial interviews as well as their grand jury testimony, which were used extensively to cross-examine them. And unlike in *People v. Szabo*, 94 Ill. 2d 327 (1983), which Smollett relies on, Smollett's guilt was established through an overwhelming amount of physical evidence, video evidence, cell phone evidence, and testimony from several CPD officers and detectives, all of which corroborated the Osundairo Brothers' testimony that Smollett orchestrated a fake hate crime and reported it as a real crime.

Although the OSP was not required to turn over its work product under Rule 412, this Court "cannot say that there is a reasonable doubt that [Smollett] would not have been convicted if the circuit court had conducted an *in camera* inspection of the [OSP's] notes of pretrial interviews with" the Osundairo brothers. *Young*, 128 Ill. 2d at 45. Thus, like *Young*, this Court must conclude that the trial court did not abuse its discretion in finding

that the OSP's work product was protected from disclosure, and thus any error in this regard was harmless. *Id.*

III. SMOLLETT'S ALLEGED TRIAL ISSUES

A. The trial court properly conducted *voir dire* and adhered to Rule 431.

Illinois Supreme Court Rule 431(a) states that during *voir dire*, "[t]he court ***may*** permit the parties to submit additional questions to it for further inquiry if it thinks they are appropriate and shall permit the parties to supplement the examination by such direct inquiry ***as the court deems proper*** for a reasonable period of time depending upon the length of examination by the court, the complexity of the case, and the nature of the charges." Ill. S. Ct. R. 431(a) (emphasis added). Despite this permissive language, Smollett contends that the trial court violated Rule 431 because it did not permit counsel to directly question the prospective jurors. (Br. 51–55). That is wrong, under the rule, the case law, and the trial court record.

Rule 431(a) mandates "that the trial court ***consider***: (1) the length of examination by the court; (2) the complexity of the case; and (3) the nature of the charges; ***and then determine***, based on those factors, whatever direct questioning by the attorneys would be appropriate." *People v. Garstecki*, 234 Ill. 2d 430, 444 (2009) (emphasis added). In other words, the trial court has discretion to permit direct attorney questioning in any given case so long as the court considers those factors. *Id.* at 444–45 ("There is simply no support in the text of the rule for defendant's contention that the attorney must be allowed to directly question the entire venire in every case."). Here, the trial court was well aware of Rule 431 and applied the factors set forth in *Garstecki* to conclude that direct questioning of the venire by the attorneys was not appropriate in this case.

Prior to trial, the trial court explained that it would extensively examine the venire with its own questions but welcomed the parties to submit supplemental questions prior to *voir dire*, and said that during *voir dire*, it would have a sidebar with the parties to elicit additional questions. (R 863–67). This inquiry satisfied the first factor regarding the "length of examination by the court." *Garstecki*, 234 Ill. 2d at 444 (holding compliance with Rule 431(a) where "court inquired as to what questions the defendant's attorney wanted to ask, and then explained that these were areas that the court was already going to cover in its own questioning").

Indeed, prior to trial, Smollett submitted at least ***fifty-seven*** supplemental *voir dire* questions (CI 725–29), and the trial court "considered Counsel's suggestions for voir dire questions" and "incorporate[d] the suggestions during the voir dire process." (CI 171). Although virtually all of these supplemental questions were asked by the trial court, Smollett cherry-picks a select few—three of the fifty-seven—that the trial court did not ask. (Br. 53). First, there's no requirement, and Smollett cites none, that a party is entitled to have every single question asked it wants asked. But more importantly, the trial court did ask the venire questions that were substantively the same. *Compare* (CI 726) (Smollett's question: "Did you form an opinion about this case upon reading about it or seeing it in the media?") *with* (R 971–72) (trial court's question: "You will be able to put aside everything that you heard from the media about this case?").

The trial court also expressly considered the second and third factors—the complexity of the case and the nature of the charges, respectively. It correctly noted that direct attorney questioning was not warranted because this was a "disorderly conduct case" and a "Class 4 felony," even though "the stakes are still high." (R 876). In other words,

the trial court acknowledged that this case did not involve complex legal or factual issues, and that even if the case was highly publicized, it did not deem direct questioning necessary or appropriate in this specific case. That was a proper exercise of the court's discretion under Rule 431(a).

Because the record shows that the trial court unquestionably complied with Rule 431(a), there was no error in not permitting defense counsel to directly examine prospective jurors. Even if there was some error in that exercise of discretion (there was not), there was no prejudice because Smollett fully participated in the questioning of prospective jurors by submitting fifty-seven proposed *voir dire* questions, most of which were asked, and by requesting that the court ask follow-up questions during *voir dire*.[6]

B. The trial court correctly denied Smollett's *Batson* challenges during jury selection and did not clearly err.

During *voir dire*, Smollett brought four oral motions under *Batson v. Kentucky*, 476 U.S. 79 (1986) regarding the OSP's use of its peremptory challenges, and in each, the trial court correctly found that Smollett had not established a *prima facie* showing of discrimination. Smollett completely ignores the trial court's findings on the lack of discrimination (Br. at 66–67) and has not established that those determinations are against the manifest weight of the evidence to demonstrate clear error.

In *Batson*, the United States Supreme Court established a three-step approach for evaluating whether the prosecution exercised its peremptory challenges in a racially discriminatory manner. *Id.* at 96–98; *People v. Williams*, 173 Ill. 2d 48, 70 (1996). At the

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[6] Smollett claims he suffered prejudice when he was not allowed to question one juror who had family members in law enforcement. (Br. 54–55). This argument is wholly without merit. The trial court did question this juror at length about her background and these familial relationships (R 1118–22), and as the trial court noted, she was "very candid" and "emphatic" that she could be a fair juror. (R 1798).

first step, the defendant must establish a *prima facie* case of purposeful discrimination in the selection of the jury. *Batson*, 476 U.S. at 96. To do so, the defendant must show that the relevant circumstances "raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." *Id.* Importantly, "the mere fact of a peremptory challenge of a black venireperson who is the same race as defendant or the mere number of black venirepersons peremptorily challenged, without more, will not establish a *prima facie* case of discrimination." *People v. Davis*, 231 Ill. 2d 349, 361 (2008). If, and only if, the defendant makes a *prima facie* showing, then at step two the burden shifts to the State to come forward with a race-neutral reason for challenging the venireperson. *Batson*, 476 U.S. at 97. Finally, at step three of the *Batson* framework, the trial court "must consider those explanations and determine whether the defendant has met his burden of establishing purposeful discrimination." *Williams*, 173 Ill. 2d at 71.

"Generally, a trial court's ultimate conclusion on a *Batson* claim will not be overturned unless it is clearly erroneous. *Davis*, 231 Ill. 2d at 361 . "A trial judge's determination of whether a *prima facie* case has been shown will not be overturned unless it is against the manifest weight of the evidence." *Williams*, 173 Ill. 2d at 71.

In each of Smollett's four *Batson* motions, the trial court correctly found that Smollett had not made a *prima facie* showing of discrimination based on race or sexual orientation. (R 1136; 1140; 1143). As for the first and second challenges, the first venireperson had been arrested for disorderly conduct, and the second venireperson was "a victim of a hate crime." (R 1136). So, with those "specific answers that they are directly on the nature of this case," the trial court concluded was no *prima facie* case made of racial

discrimination. *Id.* Although no *prima facie* showing was made, the trial court invited the OSP to provide race-neutral reasons to make a complete record. The OSP explained that aside from the disorderly conduct conviction, the first venireperson watched the show *Empire* (of which Smollett was a star), and that she received news from "TMZ" (a celebrity gossip outlet) and other non-traditional media outlets. (R 1137). And the OSP noted that the second venireperson was the victim of a hate crime in which he had been beaten and suffered facial injuries. *Id.* The trial court stood by its ruling that no *prima facie* case of racial discrimination had been made. (R 1138).

In the third *Batson* challenge, the trial court again found no *prima facie* evidence of racial discrimination but invited the OSP to provide a race-neutral reason. (R 1140). The OSP explained that this third venireperson "watche[d] *Empire*" and received "all of her news from social media …." (R 1140). And as to Smollett's fourth *Batson* challenge, the trial court did not find "a *prima facie* showing of sexual orientation discrimination" (R 1143), but again invited the OSP to provide any neutral reasons for the record, to which the OSP explained that he watched *Empire* and he also received "a significant amount of his news through social media and Instagram." (R 1144).

All four of the trial court's findings that Smollett failed to make a *prima facie* case of racial discrimination are sound, and Smollett has not established that the determinations were "against the manifest weight of the evidence." *Williams*, 173 Ill. 2d at 71. Therefore, the trial court did not commit clear error in overruling Smollett's *Batson* challenges.

C. The trial court's utilization of the courtroom for *voir dire* during the COVID-19 pandemic was not clearly erroneous.

The trial court successfully conducted this high-profile trial in the midst of the COVID-19 pandemic and with capacity restrictions imposed on the Cook County courts to

limit the spread of the virus. Indeed, Smollett acknowledges that he agreed to and does not challenge the trial court's COVID-19 protocols, including the capacity restrictions.[7] (Br. 70–71). Nonetheless, Smollett contends that his public trial right was somehow violated even though the courtroom was never closed. Yet, Smollett forfeited any such challenge because he failed to object at the trial; and even if Smollett had properly preserved this alleged error, the courtroom was never closed and the trial court's utilization of the courtroom for *voir dire* was not a clear and obvious error that calls into question the fairness and integrity the trial.

1. Smollett forfeited the alleged public trial error by failing to make a contemporaneous objection.

As an initial matter, Smollett failed to preserve his objection to the trial court's utilization of the courtroom. "To preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion." *People v. Thompson*, 238 Ill. 2d 598, 611 (2010) (finding forfeiture of a structural error). "A contemporaneous objection is particularly crucial when challenging any courtroom closure" so as to prevent "a defendant from potentially remaining silent about a possible error and waiting to raise the issue, seeking automatic reversal only if the case does not conclude in his favor." *People v. Radford*, 2020 IL 123975, ¶ 37.

Here, Smollett made no contemporaneous objection to the trial court's capacity restrictions and utilization of the courtroom during *voir dire*. In fact, as acknowledged in his brief (Br. 70–71), Smollett agreed to and cooperated with the trial court in observing

[7] Ironically, Smollett objected to having cameras in the courtroom during trial for extended media coverage, which would have ensured unfettered public access to the trial despite the COVID-19 capacity restrictions, yet Smollett now complains that his public trial rights were violated. (R 3415).

the constraints on courtroom capacity imposed due to the COVID-19 pandemic. (C 1669) (noting that Smollett requested 42 out of 57 seats in the courtroom, which he was asked to modify); *see also Radford*, 2020 IL 123975, ¶ 38 (noting that the "trial court's partial closure in this case did not occur in a vacuum without defendant's knowledge … [and] required defendant's cooperation."). Smollett's failure to lodge a contemporaneous objection during *voir dire* should end the review on this topic.

2. The trial court did not clearly err in observing COVID-19 protocols and enforcing capacity restrictions in the courtroom.

Although the error was forfeited, "[a] reviewing court also may consider unpreserved error when a ***clear or obvious error*** occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Id.* at ¶ 23. Yet, there was no clear or obvious error that affected the fairness and integrity of Smollett's trial because the courtroom was never "closed" for *voir dire*. At the time, Cook County courts imposed capacity restrictions in courtrooms for "social distancing" (which Smollett agreed to), and the trial court's courtroom was limited to 57 people, inclusive of the judge, courtroom staff, sheriffs, lawyers, and jurors. (R 2497). During *voir dire*, the trial court utilized the gallery for prospective jurors, but seats were otherwise limited due to the capacity restriction. (R 920–21). Nonetheless, the trial court kept the courtroom doors open so that the media and other members of the public could view and listen to the *voir dire* process. (R 921) ("I'm going to keep the doors open on both sides for you to listen and observe as best you can"). In addition, the trial court also allowed two members of the media to stay in the courtroom

to observe and be the eyes and ears for the public—a fact that Smollett knew about, but completely ignores. (R 3415–16).[8]

Even if the Court were to conclude that the courtroom was partially closed during *voir dire* (which it was not), the trial court's utilization of the courtroom in the face of the COVID-19 pandemic and capacity restrictions did not deprive Smollett of the protections afforded by the right to public trial. As in *Radford*, where the Illinois Supreme Court affirmed a partial closure of the courtroom for *voir dire*, the trial court's use of the entire courtroom for the venire does "not call into question the confidence in the public integrity and impartiality of the court system." *Radford*, 2020 IL 123975, ¶ 41. Members of the venire who did not become jurors, along with the OSP, defense counsel, courtroom staff, Cook County Sheriffs, and two members of the media who remained in the courtroom and were able to view the jury selection process from within the room itself, at a minimum, "served as the eyes and ears of the public." *Id.* And, like in *Rashford*, "the courtroom was open for the remainder of the trial." *Id.*, ¶ 40.[9]

In short, Smollett has forfeited any consideration of the alleged violation of his public trial right, but even if he had objected contemporaneously, the trial court did not close the courtroom during *voir dire*, and the utilization of the courtroom under the

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[8] *See* Twitter, Megan Crepeau, Chicago Tribune Reporter, November 29, 2021 at 9:51 a.m. ("Judge Linn has allowed two pool reporters into the courtroom during selection. One of them is me.") *available at:* https://twitter.com/crepeau/status/1465347721670369290.

[9] Smollett also raises an objection to the purported exclusion of a spectator, Ms. Ambrell Gambrell, from the courtroom for two days, in which the trial court disputed that Ms. Gambrell was excluded at all. (C 1663-1666). Setting the factual dispute aside, Ms. Gambrell's purported exclusion for a few days of testimony does not call into question the confidence in the public integrity and impartiality of the court system. *Radford*, 2020 IL 123975, ¶ 41.

constraints of the COVID-19 pandemic was not a clear and obvious error that calls into question he fairness and integrity of Smollett's trial.

D. The trial court correctly denied Smollett's request to provide an accomplice witness jury instruction and did not abuse its discretion.

Smollett's claim that the trial court abused its discretion in declining to give an accomplice instruction regarding the testimony of the Osundairo Brothers (Br. 55–57) is without merit. This argument ignores that the Osundairo Brothers were not accomplices to the charged crimes (filing false police reports), and therefore, an accomplice instruction would have been inappropriate.

A trial court's decision whether to give the jury an accomplice instruction is subject to an abuse of discretion standard. *People v. Ticey*, 2021 IL App (1st) 181002, ¶ 62. Illinois Pattern Jury Instruction (IPI) 3.17 provides that "[w]hen a witness says he was involved in ***the commission of a crime with the defendant***, the testimony of that witness is subject to suspicion and should be considered by you with caution." IPI, Criminal 3.17 (emphasis added). The plain language of the instruction reflects that it is only appropriate to include where a witness was "involved in the commission of a crime with the defendant." *Id.* The commentary to IPI 3.17, and the cases relied upon by Smollett, further support this conclusion. The commentary provides that the instruction should be given: "(1) if the witness, rather than the defendant, could have been the person responsible for the crime, or (2) if the witness admits being present at the scene of the crime and could have been indicted either as a principal or under a theory of accountability, but denies involvement." *Id.*; *see also People v. Lewis*, 240 Ill. App. 3d 463, 466–67 (1st Dist. 1992) (finding accomplice witness instruction appropriate if "the witness could have been indicted ***for the***

offense in question either as a principal or under a theory of accountability") (emphasis added).

Neither condition applies. There is no evidence in the record that the Osundairo Brothers "could have been … responsible" for making false reports to police, much less that they agreed to reporting a fake hate crime to authorities, especially when they were the purported attackers. (R 3004–05). There is likewise no evidence that the Osundairo Brothers were present when Smollett made the false reports, and therefore, they could not have been "indicted for the offense in question." *Id.*; (R 3009).

Smollett contends that it is enough that "[b]oth Osundairo brothers admitted to being involved in planning the attack on Mr. Smollett" (Br. 57), and that "an accomplice can be one who is in some way concerned in or associated with another in the commission of a crime." *Id.* at 56 (quoting *People v. Fane*, 2021 IL 126715, ¶ 38). However, the Osundairo Brothers' association with Smollett was limited to only planning and carrying out a fake attack, which is not a crime under Illinois law. Indeed, the Osundairo Brothers testified that Smollett ***never*** told them that he was going to file a police report of the fake hate crime, and both testified that if Smollett had told them he was going to file a police report, they never would have agreed to participate in it. (R 2165; 2179–80). Finally, Smollett argues the accomplice instruction was necessary because the Osundairo Brothers "may have faced criminal liability but for their statements." (Br. 57). But again, this ignores that the Osundairo Brothers were not at risk of liability as accomplices in the commission of the crime charged—disorderly conduct.

Because the Osundairo Brothers were not involved in the commission of a crime with Smollett, and therefore, cannot fairly be considered accomplices, it was not an abuse of discretion to deny giving an accomplice jury instruction.

E. The trial court did not abuse its discretion in commenting on and limiting certain cross-examination by the defense.

In the over 2,400 pages of transcripts from the two-week trial, Smollett cherry-picks a select few out-of-context quotes and smears the trial court for "dismissive commentary." (Br. at 64). A review of the entire trial record reflects that the handful of quotes Smollett complains of were simply an exercise of the trial court's broad discretion to manage cross-examination. Moreover, Smollett was not limited in cross-examining multiple OSP witnesses on matters collateral to the disorderly conduct offense.

As this Court knows, "[t]he trial court has ***broad discretion to limit or exclude*** cross-examination that would be irrelevant or unhelpful or that would risk confusing the issues for the jury." *People v. Jenkins*, 2021 IL App (1st) 200458, ¶ 82 (emphasis added). Thus, this issue is appropriately reviewed under an abuse of discretion standard—not *de novo* as Smollett wrongly asserts. (Br. 62). Moreover, as Smollett acknowledges, "a verdict will only be disturbed upon showing that the comments constituted a material factor in the conviction or there is prejudice to the defendant from the comments." *People v. Edwards*, 2021 IL App (1st) 200192, ¶ 57-59.

The so-called "commentary" consists of a handful of quotes from the thousands of pages of the trial transcript, such as "move on," or that the cross-examination was going "far afield" into "very collateral matters." (Br. 63–64). But these statements by the trial court were not prejudicial, and are more properly understood as an exercise of its broad discretion to limit the scope of cross-examination into matters that are irrelevant or

unhelpful to the jury. *Jenkins*, 2021 IL App (1st) 200458, ¶ 82. A close examination of the record demonstrates that rather than being overly restrictive, the trial court, in fact, gave Smollett wide latitude to cross-examine state witnesses regarding these "collateral" topics. *See*, *e.g.*, (R 1496–99) (overruling OSP's objections and allowing cross-examination of Detective Theis about allegedly homophobic tweets); (R 1504-1520) (extensively cross-examining Detective Theis about the CPD's decision not to charge the Osundairo Brothers after finding guns and drugs at the family residence); (R 1479–82) (allowing Detective Theis to be questioned at length about non-occurrence witness Alex McDaniels); (R 2247–55, 2277–81) (giving ample leeway to question Olabinjo Osundairo about allegedly homophobic messages). Indeed, even after the Court made one of these purported "comments," reminding defense counsel that the examination was getting "a little far [a]field," it subsequently allowed the defense to continue cross-examining Mr. Osundairo on the very same topics. (R 2255; 2277–81). Thus, the record simply belies any argument that the trial court's statements resulted in any prejudice to Smollett.

The trial court also gave a curative instruction after using the word "collateral." (R 2276). ("It's just me talking to the lawyers. I don't want you to consider any of those colloquies whatsoever in coming to your decision here."). To the extent there was any concern over prejudice from the comments, the trial court's instruction cured the prejudice. *See People v. Harris*, 123 Ill. 2d 113, 138–39 (1988) (finding no prejudice in trial court comments where curative instruction was given to explain that "the court's rulings and remarks were not meant to indicate any opinion either on the facts or on what the verdict should be").

Finally, the trial court's statements were neither a material factor in the conviction, nor was it manifestly prejudicial when the statements concerned issues that had nothing to do with Smollett's reports of a fake hate crime—i.e., "homophobic comments made by a fellow detective" (Br. 63), non-occurrence witness Alex McDaniels allegedly "the victim of a homophobic attack from one of the Osundairo brothers" (*id.*), CPD's "failure to arrest and charge the Osundairo brothers with [possession of] contraband" (*id.* at 63–64), and "homophobic tweets" by Olabinjo Osundairo. *Id.* at 64.

Because none of the court's comments resulted in any prejudice, the trial court did not abuse its broad discretion over cross-examination.

F. The trial court correctly sent the video exhibit of Smollett's interview on *Good Morning America* to the jury room and did not abuse its discretion.

Smollett wrongly contends that the trial court abused its discretion in allowing the entire *Good Morning America* video (the "GMA Video") into jury deliberations. (Br. 68). But the GMA Video had been admitted into evidence and published to the jury during the OSP's case-in-chief, and the trial court appropriately allowed the GMA Video into the jury room.

"It is well-established that whether evidentiary items … should be taken to the jury room rests within the discretion of the trial judge, whose decision will not be disturbed unless there was an abuse of discretion to the prejudice of the defendant." *People v. Hollahan*, 2020 IL 125091, ¶ 11 (internal quotation marks omitted). As an initial matter, the GMA Video had been authenticated, received into evidence, and published to the jury during the OSP's case-in-chief ***without any objection from the defense***. (R 1336–38). Thus, Smollett is simply wrong when he contends the GMA Video was only admitted for impeachment, and there can be no error when the GMA Video was admitted as substantive

evidence. *People v. Lee*, 243 Ill. App. 3d 1038, 1044 (1st Dist. 1993) (affirming trial court's decision to send signed statement of witness back to jury room because it "was properly admitted as substantive evidence"). Notably, Smollett referenced the GMA Video on multiple occasions during his own direct examination. (R 2726–29).

Smollett also argues it is "erroneous for a trial court to allow a witness' entire statement to go to the jury during deliberations where only a portion of the statement was presented at trial." (Br. 68). But the 1912 civil case Smollett cites for this proposition concerned the jury receiving prior statements used for impeachment purposes only—not substantive evidence that was properly admitted at trial like the GMA Video. *See Nelson v. Nw. Elevated R. Co.*, 170 Ill. App. 119, 124 (1st Dist. 1912). Because the GMA Video was admitted as substantive evidence, it was not improper to send the entire video into the jury room. *People v. Montes*, 2013 IL App (2d) 111132, ¶ 68 (affirming trial court's decision to send entire audio recording to jury room which was admitted as substantive evidence and where only a portion was played at trial).

Simply put, it was neither an abuse of discretion nor prejudicial for the trial court to send the entire GMA Video to the jury room.

G. The trial court did not abuse its discretion in both denying Smollett's motion to disqualify a member of the OSP, and overruling Smollett's objections to alleged burden-shifting arguments and questions that allegedly referenced Smollett's post-arrest silence.

Smollett claims that certain actions involving the OSP—one of which he manufactured in the middle of trial to deliberately blemish the OSP—resulted in the denial of a fair trial. None of these arguments has any merit and the trial court did not abuse its discretion in denying or overruling each.

1. Smollett's motion to disqualify a member of the OSP was properly denied.

In the middle of the trial, Smollett and his counsel called a witness to the stand, elicited perjury that contradicted the witness's prior sworn grand jury statement, and then moved to disqualify the OSP based on alleged "prosecutorial misconduct."[10] The trial court quickly recognized this tactical gamesmanship and properly denied the motion to disqualify. That decision was hardly an abuse of discretion. *People v. Downey*, 351 Ill. App. 3d 1008, 1011 (2d Dist. 2004) ("A trial court's decision regarding a motion to disqualify will not be disturbed absent an abuse of discretion.").

Anthony Moore—a witness who saw the Osundairo Brothers leave the scene of the fake hate crime—met with the OSP on January 9, 2020, and thereafter provided a sworn grand jury statement. (R 2511–13, 2533–34). The OSP did not call Mr. Moore as a witness during its case-in-chief. Rather, Smollett called Mr. Moore to the witness stand and during his direct examination, Mr. Moore lied and contradicted his sworn grand jury statement. (R 2507; 2513). When asked by Smollett's counsel to explain his inconsistency, Mr. Moore agreed with Smollett's counsel that he felt pressured to change his original statement to CPD that one of the two persons he saw running was white.[11] (R 2514–15). Based on this testimony alone, defense counsel immediately moved to disqualify a member of the OSP.

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[10] The OSP is compelled to state for the record that it did not threaten any witnesses or engage in any sort of impropriety and flatly denies Smollett and his counsel's suggestions otherwise.

[11] It is undisputed that the two men who fake attacked Smollett are the Osundairo Brothers, who are not white. (R 2531).

The trial court recognized this was an underhanded attempt to discredit and prejudice the OSP in front of the jury, and admonished Smollett's counsel that it "was not pleased with the way that went down." (R 2822). Indeed, the manner in which Smollett's counsel conducted the examination of Mr. Moore, and especially the leading nature of it (*e.g.*, R 2513), indicates that Smollett's counsel, unbeknownst to the OSP, was aware that Mr. Moore intended to perjure himself live at trial. Assuming that Smollett's counsel learned prior to calling Mr. Moore as a witness that he intended to testify that the OSP pressured him, they should have immediately moved for potential relief.[12] *In re Est. of Klehm*, 363 Ill. App. 3d 373, 377 (1st Dist. 2006) ("In an effort to discourage tactical gamesmanship, courts have determined that motions to disqualify should be made with reasonable promptness after a party discovers the facts which [led] to the motion.") (internal quotation marks omitted).

Smollett also claims that Mr. Moore's credibility was "negatively impacted in front of the jury due to having inconsistent statements." (Br. 73). But that cannot be since Smollett called Mr. Moore to the witness stand—not the OSP—and elicited the inconsistent (and perjured) statements through their direct examination of Mr. Moore. This improper tactical gamesmanship designed to smear the OSP was not credited by the trial court, and this Court should not credit it either. Simply put, it was not an abuse of discretion to deny Smollett's unfounded motion to disqualify.

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[12] Moreover, Smollett's counsel was obligated to disclose the inconsistent statement under Illinois Supreme Court 413(d), which provides that the defense "shall furnish the State" with "[t]he names and last known addresses of persons he intends to call as witnesses, together with their ***relevant written or recorded statements, including memoranda reporting or summarizing their oral statements***." Ill. Sup. Ct. R. 413(d) (emphasis added).

2. The OSP did not improperly shift the burden during closing arguments, but rather simply responded to comments made by Smollett's counsel during his closing.

Smollett claims that a single comment in the OSP's rebuttal argument improperly shifted the burden of proof. (Br. 74). But the allegedly improper comment was made in response to arguments by Smollett's counsel during the defense closing argument, and the trial court instructed the jury that closing arguments are not evidence. Therefore, there was no clear abuse of discretion. *People v. Phagan*, 2019 IL App (1st) 153031, ¶ 54.

"Closing arguments must be viewed in their entirety and the allegedly erroneous argument must be viewed contextually." *People v. Blue*, 189 Ill. 2d 99, 128 (2000). Smollett completely ignores the context for the ***single*** comment made during rebuttal—"Mr. Uche gave you no evidence of any video that was missing" (R 3226)—but the context is critical since it was only made in response to defense counsel's contention that there was "a lot of missing data. You don't have the whole video." (R 3144). "[I]f defense counsel provokes a response in closing argument, the defendant cannot complain that the State's reply in rebuttal argument denied him a fair trial." *People v. Legore*, 2013 IL App (2d) 111038, ¶ 55. Clearly, the OSP's comment was prompted by defense counsel's suggestion there was "a lot of missing data," and therefore, there was no improper burden shifting.

Moreover, granting a new trial based on alleged improper remarks during closing argument is only required if "they engendered substantial prejudice against the defendant such that it is impossible to tell whether the verdict of guilt resulted from them." *People v. Elizondo*, 2021 IL App (1st) 161699, ¶ 84. Smollett does not even attempt to show that this single comment resulted in substantial prejudice, especially given that the court instructed the jury that "[c]losing arguments are not evidence" (R 3017), which Illinois court have found "may cure errors." *Elizondo*, 2021 IL App (1st) 161699, ¶ 86.

Accordingly, no error—much less substantial prejudice—resulted from the OSP's allegedly improper comment in rebuttal closing.

3. The OSP did not impermissibly question witnesses about Smollett's post-arrest silence.

Finally, Smollett misleadingly claims that the OSP allegedly referred to Smollett's post-arrest silence, but he only preserved his objection to one of these instances. And even so, a review of the record confirms the OSP did not question the witnesses about Smollett's post-arrest silence, and therefore, no error occurred.

Both lines of questioning concerned State Exhibit 31, which was a screenshot of the following text message from Smollett to Abimbola Osundairo:

> Brother … I love you. I stand with you. I know 1000% you and your brother did nothing wrong and never would. ***I am making a statement so everyone else knows.*** They will not get away with this. Please hit me when they let you go. I'm fully behind you.

(R 1430–31) (emphasis added). First, the OSP asked Detective Michael Theis questions about this text message and the supposed "statement" Smollett intended to put out clearing the Osundairo Brothers' name, including questions like "did you ever become aware of Mr. Smollett making a statement," and "[d]id he ever make a statement that they did nothing wrong and never would?" (R 1431–1432). The defense ***never*** objected to this line of questioning and has therefore forfeited any alleged error. *People v. Sebby*, 2017 IL 119445, ¶ 48 (noting that "[t]o preserve a purported error for consideration by a reviewing court, a defendant must object to the error at trial").

Second, the OSP questioned Abimbola Osundairo about the "statement" Smollett said he was going to make clearing the Osundairo Brothers' names—"did Mr. Smollett ever make any statement ***to the public*** where he admitted that the hate crime was a hoax?" (R 1985) (emphasis added). This time, defense counsel did object, and the Court sustained

the objection while instructing the jury to "[d]isregard the question and answer." *Id.* Here, however, the OSP plainly asked whether Smollett ever made a statement to the "public"—not a statement implicating Smollett's "silence at the time of arrest."[13] Because this questioning was not directed at Smollett's post-arrest silence, there simply cannot be a due process violation.

IV. SENTENCING ISSUES

By faking a hate crime and reporting it as a real crime, Smollett attempted to exploit this fake incident for his own personal gain. The jury found him guilty beyond any reasonable doubt based on the overwhelming evidence establishing his guilt. After listening to the evidence over the course of the trial, including hours upon hours of Smollett's own testimony (rejected by the jury as lies), and an hours-long posttrial motion and sentencing hearing, the trial court sentenced Smollett to 30 months' probation, with the first 150 days to be served in the custody of the Cook County Jail, and also ordered Smollett to pay $120,106 in restitution to the City of Chicago. (R 3557). This was an appropriate, legally sound sentence, and well within the trial court's discretion, which should be affirmed.

1. The trial court's sentence was a reasonable exercise of discretion.

Trial courts enjoy "great discretion" in each case "to fashion an appropriate sentence within the statutory limits." *People v. Fern*, 189 Ill. 2d 48, 53 (1999). In determining an appropriate sentence, the trial court must consider such factors as the "defendant's credibility, demeanor, general moral character, mentality, social

[13] Indeed, the text message depicted in State Exhibit 31 was sent prior to Smollett's arrest. (R 1746) (text message was sent on February 14, 2019); (C 4) (Smollett turned himself in to custody on February 21, 2019).

environment, habits, and age." *Id.* "A reviewing court gives great deference to the trial court's judgment regarding sentencing because the trial judge, having observed the defendant and the proceedings, has a far better opportunity to consider these factors than the reviewing court, which must rely on the 'cold' record." *Id.*

During the sentencing hearing, the OSP presented evidence and argument in aggravation, and Smollett presented evidence and argument in mitigation, including live testimony from several witnesses (R 3440–68) and letters from celebrities and organizations such as Black Lives Matter and the NAACP. (R 3469–90). After hearing this evidence and argument, the trial court remarked on the toll of Smollett's conduct: it had done "damage to real … hate crime victims" (R 3538); it "caused a major investigation to take place which got many people involved and caused great stress throughout the city" (R 3548); and it "used up the police resources for [Smollett's] own benefit." (R. 3551–52). The trial court correctly found that Smollett was a "charlatan pretending to be a victim of a hate crime" which was "shameful" and "disgraceful." (R. 3553–55). The trial court also commented on Smollett's "performance on the witness stand" and stated that Smollett "committed hour upon hour upon hour of pure perjury." (R 3555–56). Based on the facts and circumstances of the case and all of mitigation and aggravation above, the trial court appropriately fashioned a sentence whereby as a condition of his probation, Smollett was ordered to spend the first 150 days in Cook County Jail. (R 3557). That decision was well-supported and not an abuse of discretion.

Smollett's arguments attacking this condition of his probation are meritless. Smollett first notes that the probation department categorized him as "low risk" in its presentence investigative report. (Br. 59). But, that "low risk" assessment was based on

the Ohio Risk Assessment System (CI 92), a predictive tool to assess the risk of recidivism, and the probation department did not purport to make any assessment of an appropriate sentence. Smollett's suggestion otherwise is wrong since "[s]entencing is a function peculiarly within the province of the trial court." *People v. Lefler*, 2016 IL App (3d) 140293, ¶ 30.

Smollett makes several other arguments, all of which are legally and factually irrelevant. He claims that a jail term was inappropriate because of "the health risk a custodial setting will pose to Mr. Smollett within the context of the current COVID 19 epidemic." (Br. 59). This is not an argument that has anything to do with the facts of this case since all defendants are "at risk" of exposure to COVID-19 in the custodial setting. Smollett also fails to mention, though the Court is well aware, that now having delayed serving the 150-day jail term for over a year while this appeal is pending, the COVID-19 pandemic has significantly subsided. *See* Pub. L. No. 118-3 (bill terminating national COVID-19 emergency). Similarly misguided is Smollett's argument that incarceration is inappropriate because he is "unpopular." (Br. 59). And there is no support for the notion that a jail term is "unnecessary" because the trial judge also imposed a fine. *Id.* Quite the contrary, the law expressly authorizes the imposition of both. 730 ILCS 5/5-4.5-50(b) ("A fine may be imposed in addition to a sentence of … probation, periodic imprisonment, or imprisonment."). The bottom line is that Smollett points to no facts or circumstances regarding the nature of the crimes, the evidence, or Smollett's "credibility, demeanor, general moral character, mentality, social environment, habits, and age" that the trial judge ignored or that would render the 150-day jail term excessive. *Fern*, 189 Ill. 2d at 53.

The same is true for Smollett's final argument that the trial judge's sentencing remarks "took on a personal retributive tone and was based on speculative information which can't be considered under this court's decision in *Brown*." (Br. 60). In *Brown*, the trial court considered "uncertain speculative evidence of the gun-jamming to support a phantom aggravating factor that but for defendant's gun jamming, defendant would have caused more violence." *People v. Brown*, 2015 IL App (1st) 130048, ¶ 44. Smollett does not explain the analogy to *Brown*, because there is none. The trial court's remarks were made to explain the rationale for the sentence it was about to impose. (R 3531) ("The sentence that's going to be rendered today is going to be ***strictly for Mr. Smollett***. It's going to be fashioned for him. And when a judge sentences somebody -- and I've been doing this for quite a while now. You have to look at both the crime that was committed and the person that committed it.") (emphasis added). This does not make the court's sentence excessive—it makes it considered, well-reasoned, and appropriately fashioned.

2. The restitution order is valid.

During the trial, the OSP elicited evidence that the CPD had poured considerable resources into solving Smollett's fake hate crime that had been reported to them as a real crime. Indeed, Detective Theis told the jury that there were 24 to 26 detectives on the investigation, working around the clock in a polar vortex, totaling over 3,000 hours of work, and that they reviewed 1,500 hours of video footage. (R 1267–69). Then at the sentencing hearing, the trial court heard evidence in the form of a victim impact statement from the City of Chicago, signed by the City's deputy corporate counsel and the police superintendent, attesting that "CPD also spent 1,837 overtime hours investigating Mr. Smollett's false reports, costing the City $130,106." (C 1685–87). Indeed, the trial court remarked that the CPD's investigation was "extraordinary" and that it had "never seen,

even in some murder cases, the amount of police work that went into this investigation." (R 3552). Against this backdrop, the trial court correctly ordered Smollett to pay $120,106[14] in restitution to the City of Chicago which is well-supported by Illinois law.

As an initial matter, prior to sentencing and at sentencing, Smollett ***did not challenge*** whether the trial court had authority under Illinois law to issue restitution to the City of Chicago as part of a sentence. Instead, Smollett ***conceded*** that the trial court could provide restitution, and argued that it was not unnecessary because Smollett allegedly could not afford it. (R 3523) ("Mr. Webb talked about the restitution, that your Honor has the power to give restitution. And ***we concede that point at this time***. Judge, what I remind you is if Mr. Smollett has to pay that amount or any amount your Honor deems fit, he's lost nearly everything.") (emphasis added); (SUP C 1724) ("Mr. Smollett cannot pay the requested $130,106.00 restitution amount unless he is allowed to over a period of time, while he is out of custody and trying to regain his livelihood.").

On appeal, Smollett has taken back this binding concession and seeks to invalidate the entire restitution amount, but his arguments fail under Illinois law. Section 5-5-6(b) of the criminal code broadly allows for restitution to not only the victim named in the charging documents, but also to "any other victim" who has suffered out-of-pocket losses, expenses, or injury due to the defendant's conduct. *See* 730 ILCS 5/5-5-6(b); *see also People v. Lowe*, 153 Ill. 2d 195, 202 (1992) ("The purpose of section 5–5–6(b) was to make all victims whole for any injury received at the hands of the criminal to be sentenced.").

More recent Illinois appellate courts have recognized that, although some earlier decisions have found that a police department is not a "victim" within the meaning of the

[14] The trial court deducted $10,000 from the restitution ordered for the bond amount Smollett voluntarily forfeited in the Prior Charges.

restitution statute, "there is no *per se* rule prohibiting a law enforcement agency from receiving restitution." *People v. Ford*, 2016 IL App (3d) 130650, ¶ 29; *see also People v. Danenberger*, 364 Ill. App. 3d 936, 944 (2d Dist. 2006) ("[W]e do not hold that a law enforcement agency can *never* be a victim entitled to restitution"). In *Danenberger*, the court vacated an order of restitution to the police department for investigating a crime because "defendant's offense did not proximately cause the department any out-of-pocket expenses, losses, damages, or injuries." *Id.* at 941–42. Since the police department "sought restitution only for the hours that officers and other employees spent on the job investigating the nonexistent crime," its "losses" were not compensable under the restitution statute. *Id.* at 942. Importantly, the court noted that "[t]he money that the officers were paid for the hours that they spent investigating defendant's claim was money that they would have been paid anyway. There is no evidence that anyone who investigated defendant's report was paid anything beyond his or her normal compensation for working on defendant's case." *Id.* In other words, out-of-pocket expenses ***beyond*** officers' normal compensation is compensable and appropriate for restitution.

In *Ford*, the court affirmed an order of restitution to a Peoria narcotics enforcement group for the cost of a unit van that was damaged by the defendant's reckless conduct. *Ford*, 2016 IL App (3d) 130650, ¶ 30. The court found that the restitution amount "did not reimburse the Peoria MEG unit for its normal costs of investigating crime," and instead was for out-of-pocket "cost of repairing a law enforcement vehicle that was damaged as a direct result of defendant's criminal conduct." *Id.* Here, the trial court ordered that Smollett pay restitution to the City of Chicago only for the overtime or out-of-pocket

expenses incurred in investigating the falsely reported hate crime. (C 1685–93). Under Illinois law, the restitution order is therefore legally valid.

Smollett also attacks the City of Chicago's evidence supporting its overtime expenses by noting the first three pages of expense reports are undated, the timecards lack "descriptions" (even though officers do not "bill" their time like lawyers), and that many of the officers' names were not introduced at trial. (Br. 61). These are all baseless and misguided. The trial court heard evidence at sentencing in the form of a victim impact statement from the City of Chicago, attesting that "CPD also spent 1,837 overtime hours investigating Mr. Smollett's false reports, costing the City $130,106." (C 1685–87). There is no requirement that the OSP or the City put every officer's name and role in the trial record to be compensable.

In sum, there was sufficient evidence of the City of Chicago' actual out-of-pocket, overtime expenses to support the court's restitution order in the amount of $120,106.

CONCLUSION

For all the foregoing reasons, this Court should affirm Smollett's conviction and sentence.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, and the Rule 341(c) certificate of service is 55 pages as allowed pursuant to this Court's May 10, 2023 order.

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PROOF OF FILING AND SERVICE

Under the penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that on May 10, 2023, the foregoing Brief of the State-Appellee was electronically filed with the Clerk, Illinois Appellate Court for the First Judicial District, thereby causing service to be effected electronically to:

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