No. 127223

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. MICHAEL B. PINKETT, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 4-19-0172 There on Appeal from the Circuit Court of the Eighth Judicial Circuit, Pike County, Illinois, No. 17 CF 84 The Honorable Jerry J. Hooker, Judge Presiding.

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

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ARGUMENT

I. The Circuit Court Acted Within Its Discretion by Declining to Declare a Mistrial Based on the Prosecution's Comment in Opening Statement About Defendant's Silence During Arrest.

The circuit court acted within its discretion by declining to declare a mistrial based on the prosecutor's comment in opening statement that when arrested, defendant did not ask why he was being detained. *See* Peo. Br. 13-28.[1] A mistrial should be granted only "where an error of such gravity has occurred that the defendant has been denied fundamental fairness such that continuation of the proceedings would defeat the ends of justice." *People v. Nelson*, 235 Ill. 2d 386, 435 (2009). In other words, a mistrial is unwarranted unless the error is so overwhelmingly prejudicial that there is no point in continuing with the trial because the resulting verdict cannot possibly be unaffected by that prejudice. Here, the single reference in the prosecutor's opening argument to defendant's silence during arrest did not rise to this level because it was not improper; evidence of defendant's silence during arrest was properly admitted under the Fifth Amendment, the Illinois

[1] The common law record is cited as "C__"; the report of proceedings as "R__"; the 302-page supplement to the report of proceedings issued on May 17, 2017, as "Sup. R__"; the 461-page supplement to the report of proceedings issued on August 21, 2019, as "Sup. 2d R__"; the 46-page supplement to the exhibits issued on May 31, 2019, as "Sup. 2d E__"; the 5-page supplement to the exhibits issued on July 17, 2020, as "Sup. 6th E__"; the People's opening brief as "Peo. Br.__"; and defendant's appellee's brief as "Def. Br.__." The four DVD exhibits are cited as "Peo. Exh. 1," "Peo. Exh. 2," "Peo. Exh. 3," and Peo. Exh. 41," with time stamps referring to the progress bar of the video player rather than any time-stamp on the videos themselves.

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Constitution, and Illinois evidentiary law. Moreover, even if error, the error was harmless, for the prosecutor's single comment on defendant's silence during arrest was not so prejudicial that the jury could not fairly consider the evidence at trial and return a verdict based on the evidence rather than the prosecutor's comment during opening statement.

A. The prosecutor's comment was not improper because the evidence of defendant's silence during arrest was not barred by the Fifth Amendment.

The trial court properly denied defendant's motion for a mistrial. Defendant argues that the prosecutor's brief reference in opening statement to defendant's momentary silence during arrest violated the Fifth Amendment because it impermissibly commented on his "decision to exercise his right to remain silent after arrest." Def. Br. 3. In support, he cites *Griffin v. California*, 380 U.S. 609 (1965), for the proposition that the Fifth Amendment prohibits "'comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." Def. Br. 14 (quoting *Griffin*, 380 U.S. at 615). But *Griffin* did not purport to hold that *any* comment on a defendant's silence necessarily violates the Fifth Amendment. Rather, *Griffin* concerned a case where the jury was instructed that it could infer the truth of the prosecution's evidence from the defendant's decision not deny the truth of that evidence by testifying at trial. 380 U.S. at 610. To be sure, such reliance on defendant's decision not to testify to confirm the reliability of the People's case would have been impermissible.

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Id. at 613. But *Griffin* had nothing to say about a defendant's post-arrest silence.

Defendant's overly broad reading of *Griffin* reflects the "[p]opular misconception[ ]" that the Fifth Amendment "establish[es] an unqualified 'right to remain silent.'" *Salinas v. Texas*, 570 U.S. 178, 189 (2013) (plurality opinion); *see United States v. Hubbell*, 530 U.S. 27, 34 (2000) ("The term 'privilege against self-incrimination' is not an entirely accurate description of a person's constitutional protection against being 'compelled in any criminal case to be a witness against himself.'" (quoting U.S. Const., amend. V)). The Fifth Amendment does not bar use of a person's incriminating silence against him at trial any more than it bars use of a person's incriminating statements; it prohibits the use of either only if the government compelled the silence or the statements. *Colorado v. Connelly*, 479 U.S. 157, 170 (1986) ("The sole concern of the Fifth Amendment . . . is governmental coercion."). Here, because the government did not compel defendant to remain silent when a stranger grabbed him as he was leaving the Walmart bathroom, the Fifth Amendment did not bar evidence of his incriminating lack of response in that moment.

Because the Fifth Amendment focuses solely on speech or silence where it is compelled by the government, this Court should decline to follow *United States v. Whitehead*, 200 F.3d 634 (9th Cir. 2000), *United States v. Moore*, 104 F.3d 377 (D.C. Cir. 1997), and *United States v. Hernandez*, 948

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F.2d 316 (7th Cir. 1991). Defendant relies on those cases, which comprise one side of a split among the federal circuit courts of appeal, to argue that silence during arrest is categorically privileged under the Fifth Amendment, Def. Br. 19-21, but none of those cases addressed, much less persuasively explained, why such silence is compelled such that it falls within the privilege. *See Whitehead*, 200 F.3d at 638-39; *Moore*, 104 F.3d at 385-87; *Hernandez*, 948 F.2d at 322-24. Indeed, the concurrence in *Moore*, recognizing that "[a] defendant must establish the required element of compulsion to activate Fifth Amendment considerations," 104 F.3d at 393 (Silberman, J., concurring), concluded that "[i]t is simply impossible to understand why the Constitution should be read as permitting a prosecutor to produce evidence that a defendant . . . *sua sponte* [made incriminating statements] but not that he remained silent under circumstances where an innocent man would surely have said or done something reflecting shocked surprise," *id.* at 394 (Silberman, J., concurring). Accordingly, this Court should join those circuits that have adopted the better-reasoned view that a person's silence during arrest is admissible under the Fifth Amendment unless that silence was compelled. *See*, *e.g.*, *United States v. Wilchcombe*, 838 F. 3d 1179, 1190 (11th Cir. 2016); *United States v. Frazier*, 408 F.3d 1102, 1111 (8th Cir. 2005); *United States v. Love*, 767 F. 2d 1052, 1063 (4th Cir. 1985).

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Because arrest alone is not "governmental action which implicitly induces a defendant to remain silent," *Fletcher v. Weir*, 455 U.S. 603, 606 (1982) (internal quotations omitted), the Fifth Amendment did not bar evidence of defendant's failure to express surprise at the moment of arrest. Defendant is incorrect that his silence at the moment of arrest was compelled because when Deputy Frazier arrested him, Frazier told him not to make a scene and to keep his mouth shut. Def. Br. 22. As an initial matter, that instruction could account only for defendant's silence after the instruction was given — that is, while Frazier led him from the bathroom to the front of the store. *See* Sup. 2d R265. Defendant's lack of reaction at the moment of arrest — that is, when a stranger wearing a t-shirt and shorts grabbed him as he left the bathroom — was not the product of any governmental compulsion; defendant was free to cry out, call for help, or ask what was happening when he felt someone grab him from behind.

Moreover, Frazier's instruction not to make a scene did not compel defendant to remain silent because defendant in fact did *not* remain silent after the instruction was given. As they walked to the front of the store, defendant asked how he could know that Frazier was actually a police officer (Frazier admitted that he had no identification on him), Sup. 2d R265; told Frazier to take the sheath for the knife that Frazier had seized from him, Sup. 2d R265-66; and admitted to Sheriff Petty at the front of the store that the motorcycle outside was his, Sup. 2d R290-91. Then, on the way to jail,

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defendant told Frazier that he had gone into the Walmart to buy zip ties, Sup. 2d R266, and had not been running from police, Sup. 2d R282. In effect, defendant asks this Court to construe his statements as an exercise of his right to remain silent. But the fact that defendant asked various questions and made various statements while suspiciously failing to ask why he was being arrested cannot be reasonably construed as an exercise of his Fifth Amendment right not to answer police questions.

Finally, defendant argues that a person's silence during arrest might reflect the popular misconception that the right to remain silent applies whenever a person is arrested, rather than when a person is subjected to custodial interrogation. Def. Br. 17. This is true enough, and it is one reason why silence during arrest generally will not be sufficiently probative of guilt to be admitted under Illinois evidentiary law. *See* Peo. Br. 25-26. But this contention provides no basis under the Fifth Amendment to exclude evidence of uncompelled silence. The question under the Fifth Amendment is not whether silence during arrest is sufficiently probative of guilt to be admitted, but whether it was compelled. Here, it was not. Accordingly, the trial court did not err in declining to grant a mistrial.

B. The prosecutor's comment was not improper because the evidence of defendant's silence during arrest was admissible under Illinois law.

Nor was admission of the evidence of defendant's silence during arrest barred by either the Illinois Constitution or Illinois evidentiary law. *See* Def.

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Br. 4-8, 13-14. The Illinois Constitution provides no broader protection of silence than the Fifth Amendment, and Illinois evidentiary law does not categorically exclude evidence of silence.

As this Court has made clear, the Fifth Amendment and article I, section 10 of the Illinois Constitution of 1970 "differ in semantics rather than in substance," *People ex rel. Hanrahan v. Power*, 54 Ill. 2d 154, 160 (1973), for "[t]here is nothing in the proceedings of the constitutional convention to indicate an intention to provide, in article I, section 10, protections against self-incrimination broader than those of the Constitution of the United States," *People v. Rolfingsmeyer*, 101 Ill. 2d 137, 142 (1984).

Defendant fails to provide "the substantial grounds necessary for this court to depart from the federal interpretation of the self-incrimination clause." *Relsolelo v. Fisk*, 198 Ill. 2d 142, 150 (2001) ("virtually identical" self-incrimination clauses are to be interpreted in lockstep absent substantial grounds to depart from federal interpretation). Defendant relies on *People v. Nitti*, 312 Ill. 73 (1924), to argue that Illinois has a long-standing tradition of privileging *all* silence, regardless of whether it is compelled, Def. Br. 14, but that reliance is misplaced. *Nitti* concerned a case where the defendants' murder convictions "rest[ed] solely upon the assumption that [they] confessed the killing by failing to deny their guilt when . . . implicated . . . by the story . . . told in their presence." 312 Ill. at 90. *Nitti* explained that such silence cannot be "treated as though it were a confession" sufficient to support

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conviction, but rather is merely an "admission," which "tend[s], in connection with proof of other facts, to prove [one's] guilt." *Id.* at 92-93. For this reason, *Nitti* held that it was error not to instruct the jury that evidence of silence should be considered as circumstantial evidence of guilt rather than a confession. *Id.* at 97-98. To be sure, *Nitti* noted that "[b]oth the Federal and State constitutions guarantee to every person accused of a crime the privilege of silence," *id.* at 93, but ultimately the Court held that evidence of a defendant's silence *could* be properly placed before the jury, *id.* ("[T]he circumstance of silence is to be weighed by the jury as having a tendency, greater or less, according to its nature, to establish the fact stated by tacit admission."). In sum, *Nitti* provides no basis to construe the Illinois Constitution as barring evidence of silence that is admissible under the Fifth Amendment.

Because there is no constitutional impediment to its admission, whether evidence of silence during arrest is admissible turns on the application of the Illinois Rules of Evidence. Generally, evidence of a defendant's silence during arrest will be inadmissible under Rule 403 because the circumstances of arrest are usually such that a defendant's silence is only minimally probative of guilt but poses a substantial risk of improper prejudice. *See* Peo. Br. 25-26.

But the evidence of defendant's silence at the moment of arrest in *this* case provides the rare circumstance in which the evidence is sufficiently

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probative and poses a sufficiently low risk of improper prejudice to be admitted. The evidence that defendant did not say *anything* when grabbed from behind by a plain-clothed stranger as he left the Walmart bathroom moments after he had led multiple police cars in a high-speed chase and moments before he volunteered a denial that he had been running from police at all is unusually probative of guilt. And the evidence poses an unusually low risk of improper prejudice because it is not readily explained as compliance with police or an exercise of defendant's right to remain silent; after all, when the stranger grabbed defendant from behind, defendant did not know that the stranger was a police officer, and so his failure to cry out cannot be readily construed as merely submitting to police. Indeed, defendant expressed skepticism that Frazier was an officer even after Frazier said he was a sheriff's deputy; defendant asked to see some kind of official identification, which Frazier was unable to produce. Sup. 2d R265, 281-82. Because the evidence that defendant made no remark when grabbed while leaving the bathroom was properly admitted under Illinois law, the prosecutor did not err in commenting on that evidence during opening statement, and the trial court acted within its discretion by declining to grant a mistrial on the basis of that comment.

Defendant's argument that evidence of silence is not subject to the usual rules of evidence, but is instead categorically inadmissible, rests on a misreading of this Court's decisions in *Rothe* and *Lewerenz*. Def. Br. 6-8.

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Rothe and *Lewerenz* held that evidence that a defendant "refused to make a statement" is inadmissible because such refusal is "within [his] rights" and therefore "ha[s] no tendency to prove or disprove the charge against [him]." *People v. Rothe*, 358 Ill. 52, 57 (1934); *see People v. Lewerenz*, 24 Ill. 2d 295, 299 (1962) (holding that evidence that defendant "refused to make a statement on advice of counsel" was inadmissible for the same reason (citing *Rothe*, 358 Ill. at 57)). But evidence that defendant said nothing during arrest is not evidence that he "refused" to make a statement because, absent questioning of some kind, there was no request for a statement for him to refuse. *See Webster's Third New International Dictionary* 1910 (2002) (defining "refuse" as "to show or express a positive unwillingness to do or comply with (as something asked, demanded, expected)," as in "*refused* to answer the question"). *Rothe* and *Lewerenz* simply recognized, as the United States Supreme Court would later, that the probative value of a defendant's refusal to make a statement — that is, his exercise of the right to remain silent in the face of police demands — is insufficient to overcome the risk of improper prejudice and so such evidence is inadmissible. *See Rothe*, 358 Ill. at 57 (excluding evidence of defendants' refusal to make statement as "prejudicial" and "neither material nor relevant to the issue being tried"); *Lewerenz*, 24 Ill. 2d at 299 (same); *see also United States v. Hale*, 422 U.S. 171, 179-80 (1975) (holding on evidentiary rather than constitutional grounds that circumstances of arrest rendered defendant's silence during arrest

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insufficiently probative for admission); *Fletcher*, 455 U.S. at 604-05 (explaining that *Hale* excluded evidence of silence on non-constitutional grounds).

In effect, *Rothe* and *Lewerenz* applied Rule 403 and concluded that evidence of a defendant's *refusal* to make a statement is insufficiently probative of guilt to be admitted given the significant risk of unfair prejudice or misleading the jury. *See* Ill. S. Ct. R. 403 ("evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion or the issues, or misleading the jury"). Accordingly, applying Rule 403 to review the admissibility of evidence of silence does not depart from a "long-established framework for addressing post-arrest silence." Def. Br. 5-6.

The framework that defendant asks this Court to adopt — a categorical rule excluding evidence that a defendant was silent at any point during and after arrest — arises not from this Court's holdings in *Rothe* and *Lewerenz*, but from a line of appellate court cases that misread those holdings. *See* Def. Br. 7. *Rothe* and *Lewerenz* held that evidence of a defendant's "refus[al] to make a statement" is insufficiently probative for admission, but in *People v. McMullin*, the appellate court read that limited holding as announcing a far broader rule: that "evidence of a defendant's post-arrest silence is inadmissible because such evidence is neither material nor relevant, having no tendency to prove or disprove the charge against defendant." 138 Ill. App. 3d 872, 876 (2d Dist. 1985) (citing *Rothe*, 358 Ill. at

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57; *Lewerenz*, 24 Ill. 2d at 299). Other appellate decisions then either adopted *McMullin*'s reframing of *Rothe* and *Lewerenz*, *see*, *e.g.*, *People v. Clark*, 335 Ill. App. 3d 758, 762-63 (3d Dist. 1991) (quoting *McMullin*, 138 Ill. App. 3d at 876), or followed other appellate court decisions that did, *see*, *e.g.*, *People v. Boston*, 2018 IL App (1st) 140369, ¶ 84 (citing *Clark*, 335 Ill. App. 3d at 762-63); *People v. Quinonez*, 2011 IL App (1st) 092333, ¶¶ 26-27 (citing *Clark*, 335 Ill. App. 3d at 762-63); *People v. Sanchez*, 392 Ill. App. 3d 1084, 1096 (3d Dist. 2009) (citing *Clark*, 335 Ill. App. 3d at 763). But *McMullin*'s broader rule that silence during and after arrest is categorically irrelevant to guilt is contrary to both this Court's and the Supreme Court's precedent. *See People v. Aughinbaugh*, 36 Ill. 2d 320, 322-23 (1967); *see also Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993).[2]

And this Court is not bound by the appellate court's overly broad interpretation of *Rothe* and *Lewerenz*. *See Vitro v. Mehelcic*, 209 Ill. 2d 76, 82 (2004) (function of stare decisis is to allow "both the people and the bar of this state to rely upon *this court's* decisions with assurance that they will not be lightly overruled" (cleaned up and emphasis added)); *see also Rosewood Care Ctr., Inc. v. Caterpillar, Inc.*, 226 Ill. 2d 559, 572 (2007) (rejecting appellate court's interpretation of two of this Court's prior decisions and observing that

[2] Defendant's suggestion that this Court's precedent recognizing post-arrest silence as potentially relevant is "discredited" by *Miranda*, Def. Br. 10, is foreclosed by the Supreme Court's recognition, after *Miranda*, that a defendant's silence "after arrest if no *Miranda* warnings are given" is "probative" of guilt. *Brecht*, 507 U.S. at 628.

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"'Lesson Number One in the study of law is that general language in an opinion must not be ripped from its context to make a rule far broader than the factual circumstances which called forth the language'" (quoting *Fed. Deposit Ins. Corp. v. O'Neil*, 809 F.2d 350, 354 (7th Cir. 1987))). In sum, the rules of evidence govern the admissibility of evidence of silence during arrest, and the evidence that defendant was silent during his arrest in this case was admissible under those rules.

II. Defendant Was Not Prejudiced by Any Error in Admitting the Evidence of His Silence During Arrest or in the Prosecution's Comment on that Evidence During Opening Statement or Closing Argument.

In addition to arguing that the trial court erred by denying the motion for a mistrial based on the prosecutor's comment in opening statement on the evidence of defendant's silence during arrest, defendant argues that he is entitled to a new trial under a variety of theories based on two unpreserved claims of error: that the trial court improperly admitted the evidence at trial and the prosecution improperly commented on the evidence during closing argument. *See* Def. Br. 31-42. But all of those theories fail because the evidence was properly admitted, and therefore the prosecutor was permitted to comment on it during opening statement and closing argument. *See supra* § I; Peo. Br. 14-28.

Defendant's theories also fail because the overwhelming evidence of his guilt shows that he was not prejudiced by the admission of, or comment upon, the evidence of his silence at the moment of arrest. Defendant's preserved

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constitutional challenge to the prosecutor's comment in opening statement fails because there is no reasonable doubt that the comment (or the evidence that it commented upon) contributed to his conviction. *Chapman v. California*, 386 U.S. 18, 24 (1967). And because defendant was not prejudiced even under that standard, he cannot prevail on any of his claims of ineffective assistance of counsel or unpreserved claims of prosecutorial misconduct premised on the admission of, and comment upon, the evidence because those claims all require showings of even greater prejudice. *See United States v. Andreas*, 216 F.3d 645, 674 (7th Cir. 2000) ("harmless beyond a reasonable doubt" standard is "the highest standard of review," and so when mistakenly applied to claims governed by lower standards "serve[s] only to *over*protect the defendants' rights" (emphasis in original)).

Defendant's claims that trial counsel was ineffective for not raising an evidentiary objection to the prosecutor's comment in opening statement about defendant's silence during arrest, not objecting to the admission of the evidence, and not objecting to the closing argument concerning the evidence all fail because there is no reasonable probability that defendant would have been acquitted but for the alleged errors. *See People v. Dupree*, 2018 IL 122307, ¶ 44 (claims of ineffective assistance of counsel require showing that, but for counsel's deficient performance, there would have been a reasonable probability of a different outcome). And defendant's unpreserved claims that the prosecution engaged in misconduct by presenting Frazier's testimony

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about defendant's silence during arrest and commenting on that silence during closing argument fail to satisfy the plain-error standard because defendant cannot show that the evidence was so closely balanced that any error, no matter how slight, could have caused the jury to find him guilty where it otherwise would have acquitted him. *See People v. Sebby*, 2017 IL 119445, ¶ 51.

The evidence overwhelmingly proved that defendant violated 625 ILCS 5/11-204.1(a)(1) by exceeding the speed limit by at least 21 mph while knowingly failing to obey Deputy Wassell's (and later, Officer Hobbs's) visual or audible signals to stop.[3] The evidence showed that Wassell chased defendant at high speed with his vehicle's emergency lights flashing and

[3] Defendant argues that he could not have knowingly failed to obey Wassell's and Hobbs's signals to stop unless those signals were made using both lights and sirens simultaneously, Def. Br. 25, but section 11-204.1(a) requires only that the person fail to stop "after being given a visual *or* audible signal by a peace officer in the manner prescribed by subsection (a) of Section 11-204." 625 ILCS 5/11-204.1(a) (emphasis added). And section 11-204(a) similarly requires only that the person have "been given a visual *or* audible signal" to stop. 625 ILCS 5/11-204(a) (emphasis added). The only reference to any relationship between lights and sirens appears in a provision governing the *character* of the lights that an officer must use if attempting to effect a stop from a vehicle — they must be "oscillating, rotating or flashing red or blue lights which when used in conjunction with an audible horn or siren would indicate that the vehicle to be an official police vehicle." 625 ILCS 5/11-204(a) (emphasis added). Accordingly, by the unambiguous, plain language of the governing statutes, there is no requirement that the officer's signal to stop be made using both visual and audible signals simultaneously. A person is obligated to stop when a police car pulls behind him and signals for him to pull over by activating its emergency lights, regardless of whether it also activates its siren, and vice versa.

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siren blaring for 13 miles. Sup. R255-66; Sup. 2d R171-72. Wassell's siren was audible from nearly a mile away, and he trailed defendant by as little as 100 feet. *See* Sup. R263, 266; Peo. Exh. 3 at 0:00:52-0:00:56. When they reached Pittsfield, Hobbs joined the chase with *her* lights flashing and siren blaring, as well. Sup. 2d R170-72, 186, 194. Defendant then accelerated to more than 90 mph (45 mph faster than the posted speed limit) and pulled away from his pursuers and out of sight. Sup. R268-69; Sup. 2d R150-51. During that moment of opportunity, he sped into the Walmart parking lot at nearly 40 mph and drove around the building to the loading dock area, where he could not be seen from the road. Sup. 2d R196-98. He remained there until the pursuing police cars had passed, then reemerged, parked by the side of the building, and went inside the store. Sup. 2d R197-99, 243-44. When he was discovered in the Walmart bathroom, he appeared nervous. Sup. 2d R 263-64. After he was apprehended, he volunteered that he had not been running from police. Sup. 2d R282.[4] The duration of the chase, which involved multiple police cars and reached speeds of 90 mph, together with defendant's evasion of those pursuing police cars by hiding behind the Walmart until they passed and his subsequent unsolicited denial that he had been running from police after he was arrested in the Walmart bathroom,

[4] Defendant speculates that he might have denied that he ran from police in response to Frazier telling him that he had been arrested for fleeing from police. Def. Br. 28. But when Wassell interviewed defendant at the station, defendant claimed not to know why Frazier had arrested him. *See* Peo. Exh. 41 at 0:15:41-0:15:54.

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overwhelmingly proved that defendant knowingly failed to obey police signals to stop and did so while exceeding the speed limit by at least 21 mph.

Given this overwhelming evidence, Frazier's testimony about defendant's silence when Frazier apprehended him in the bathroom could have had no effect on the jury's verdict. As an initial matter, the evidence that defendant said nothing when arrested was extremely limited. The prosecutor asked Frazier whether defendant, "at that point, when [Frazier] had detained him, ask[ed] why he was being detained," and Frazier answered "No." Sup. 2d R267. That was the entirety of the evidence of defendant's silence presented at trial. Frazier then continued, testifying to his observations of defendant's behavior and demeanor. Frazier explained that when he grabbed defendant and disarmed him, defendant "didn't act like [Frazier] was doing anything out of line whatsoever," "not like somebody going to your side and grabbing — in plain clothes grabbing a knife off your waistband or anything," which "to [Frazier] [wa]s odd." *Id.* None of this additional testimony commented on defendant's silence. *See People v. Davis*, 151 Ill. App. 3d 435, 441 (2d Dist. 1986) (defendant's "emotional tone, his facial expression, and his demeanor" not privileged under Fifth Amendment).

Moreover, the inference supported by Frazier's limited testimony about defendant's silence at the moment of arrest — that defendant was conscious of his guilt of having just led police in a lengthy high-speed chase — was supported still more strongly by defendant's statement (while being

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transported to the station) that he had not been fleeing from police. *See* Sup. 2d R282. Because defendant's unsolicited denial that he fled from police demonstrated his consciousness of guilt, Frazier's testimony that defendant did not say anything when grabbed while exiting the bathroom was merely cumulative.

Defendant's arguments that the evidence against him was "anything but overwhelming," Def. Br. 24, are belied by the record. For example, defendant argues that the way he entered the Walmart parking lot did not suggest he was fleeing from police because there was no evidence that he entered at high speed other than Frank Smith's "uncorroborated, subjective impression." Def. Br. 28. But Smith did not testify to a "subjective impression" that defendant was driving too fast or unusually fast; he testified that defendant entered the parking lot at 40 or 45 mph. Sup. 2d R198. Nor was Smith's testimony about defendant's speed uncorroborated. The surveillance footage of the Walmart parking lot shows a series of cars taking about 15 seconds to travel up a one-way parking lane from the striped loading area at the front of the store to the entrance of the lot. *See*, *e.g.*, Peo. Exh. 1, Clip 1 at 06:03:25-06:03:50 (dark pickup truck), 06:03:33-06:03:58 (white SUV), 06:03:49-06:04:12 (second white SUV), 06:03:51-06:04:20 (second dark pickup truck), 06:07:00-06:07:30 (white sedan). But when defendant entered the parking lot and drove the wrong way down that same one-way parking lane, he traveled that same distance in only about 10

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seconds. *See id.* at 06:09:55-06:10:05. In other words, defendant entered and passed through the parking lot at speeds 50% faster than those of other vehicles.[5]

Similarly, defendant's argument that his detour behind the Walmart until the pursuing police cars had passed might be attributed to a lack of open parking spots in the front parking lot rather than a desire to evade detection, Def. Br. 28, is defeated by the surveillance footage. That footage shows that defendant sped past dozens of open spots as he drove the wrong way down the parking lane on his way to the loading dock area behind the building, *see* Peo. Exh. 1, Clip 1 at 06:09:55-06:10:05, which had no parking spots at all, *see* Sup. 2d E18, 24-25, but which did keep him from being seen from the roadway, *see* Sup. 2d R198-99; Sup. 2d E18.

Defendant's arguments also require that the factfinder disregard common experience and draw unreasonable inferences from the evidence. For example, defendant argues that it is "implausible" that he would drive 45 mph over the speed limit to evade police, yet obey the stop sign at the four-way intersection. Def. Br. 25-26. But it makes perfect sense: defendant wished to avoid arrest, but not at the cost of being in an automobile accident. Defendant's hesitation before passing the slower SUV reflects the same concern: rather than immediately passing the SUV by driving into the

[5] If most people drive at around 25 mph in a parking lot, then defendant's speed, at 50% faster than the other vehicles in the lot, would be about 37.5 mph, which is consistent with Smith's estimate of "40 or 45" mph.

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highway's oncoming lane of traffic, defendant waited until it was safe to do so. A rational factfinder would have no difficulty recognizing that defendant was fleeing police while trying to avoid an accident.

In contrast, no rational factfinder could accept defendant's innocent explanation of his actions. According to defendant, he had no idea he was being pursued by multiple police cars; he did not notice their lights because his motorcycle had no sideview mirrors, and he did not hear the sirens 100 feet behind him (which others could hear from a mile away) because he was wearing a helmet and possibly earphones of some kind. Def. Br. 26. After unwittingly leading this chase for nearly 13 miles, defendant realized that a piece was dragging underneath his motorcycle and decided to stop to purchase zip ties. *See id.* at 28. To accept this theory, one would have to believe that defendant responded to the realization that a piece was falling off of his motorcycle by accelerating to over 90 mph, apparently spurred by the urgent need for repairs. When, unbeknownst to him, he was momentarily out of sight of the pursuing police cars, he happened to come across a Walmart and raced into its parking lot at 40 to 45 mph so that he could buy the zip ties. Once there, however, he decided that the repairs were not so urgent after all and took a detour around the back of the building, where he happened to remain until the police cars that he did not know were chasing him had passed. He then remembered that he needed zip ties, parked his motorcycle, and went inside. But once inside, he did not buy zip ties; instead,

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he went into the bathroom, where he remained, appearing nervous, until Frazier found him. This theory is absurd, and neither the evidence that defendant did not cry out when Frazier grabbed him in the bathroom nor the prosecution's comments on that evidence played any role in the jury rejecting it.

* * *

In sum, the evidence that defendant did not cry out when grabbed from behind by a plain-clothed stranger while leaving the Walmart bathroom was properly admitted under the Fifth Amendment, Illinois Constitution, and Illinois evidentiary law. Accordingly, the prosecution did not err in commenting on that evidence in opening statement and closing argument. Moreover, any error in admitting that limited evidence or commenting on it (or any error by counsel in not objecting to the admission of, or comment upon, that evidence) was harmless by any standard because the evidence of defendant's guilt was overwhelming.

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CONCLUSION

For these reasons, and those stated in their opening brief, the People of the State of Illinois respectfully request that this Court reverse the judgment of the appellate court.

December 14, 2022

Respectfully submitted,

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 5,577 words.

/s/ Joshua M. Schneider
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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On December 14, 2022, the foregoing **Reply Brief of Plaintiff-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided notice to the following registered email address:

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