No. 127805

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- TRUMANE TOMPKINS, Petitioner-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-19-0693. There on appeal from the Circuit Court of Cook County, Illinois, No. 18 CR 6765. Honorable Timothy Joseph Joyce, Judge Presiding.

BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

JAMES E. CHADD
State Appellate Defender

DOUGLAS R. HOFF
Deputy Defender

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

COUNSEL FOR PETITIONER-APPELLANT

ORAL ARGUMENT REQUESTED

E-FILED
5/20/2022 10:43 AM
CYNTHIA A. GRANT
SUPREME COURT CLERK

TABLE OF CONTENTS AND POINTS AND AUTHORITIES

NATURE OF THE CASE

After a jury found Trumane Tompkins guilty of unlawful use of a weapon by a felon, the trial court imposed a sentence of seven and a half years' imprisonment.

This is a direct appeal from the judgment of the court below. Trumane is not challenging the charging instrument.

ISSUES PRESENTED FOR REVIEW

1. Trumane Tompkins was found guilty of possessing a handgun but, in violation of the Law Enforcement Officer-Worn Body Camera Act (Body Camera Act), the arresting officer failed to activate his body camera during the foot chase when he allegedly witnessed Trumane tossing a weapon. Consistent with §10-30 of the Body Camera Act, defense counsel tendered a non-IPI instruction that would have directed the jury that it may consider the officer's violation of this statute in evaluating the evidence. Where the trial judge agreed that this instruction was well-written and closely tracked this statute, did he commit reversible error by refusing the instruction based on a credibility determination of the officer's explanation for violating the statute?

2. Did the trial court also commit reversible error when it allowed the prosecution to play an irrelevant and highly prejudicial DVD clip featuring a large bag of marijuana that belonged to Trumane's codefendant and had no bearing on the prosecution's case against Trumane for the charged weapons offense?

STATUTES AND RULES INVOLVED

The Law Enforcement Officer-Worn Body Camera Act. 50 ILCS 706/10-1, *et seq*.

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

***

§ 10-20. Requirements.

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

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

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

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

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

***

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

reasonable justification.

Chicago Police Department Special Order 03-14, Body Worn Cameras.

I. PURPOSE
This directive:
A. establishes the Body Worn Camera (BWC) policy and procedures.
B. satisfies:
1. the requirements of the Illinois Officer-Worn Body Camera Act (50 ILCS 706/10).
II. POLICY
The Department is committed to protecting the safety and welfare of the public as well as its members. Recordings from the BWC can provide members with an invaluable instrument to enhance criminal prosecution. Additionally, they can protect members from false accusations through the objective documentation of interactions between Department members and the public. Members issued a BWC will use it pursuant to this directive.
***
IV. GENERAL INFORMATION
A. Members will:
1. be trained prior to utilizing the BWC.
2. each be assigned a specific BWC that will be utilized by that member only.
3. follow the provisions of this directive when assigned a BWC.

B. Assignment of the BWC is intended for members assigned to field duties.
1. All field sergeants and field officers, including personnel assigned to casual dress, are mandated to utilize a BWC when assigned a camera.
***
E. Department members assigned a BWC:
1. will activate the system to event mode to record the entire incident for all:
a. routine calls for service;
b. investigatory stops;
c. traffic stops;
d. traffic control;
e. foot and vehicle pursuits;
f. emergency driving situations;
g. emergency vehicle responses to in-progress or just-occurred dispatches where fleeing suspects or vehicles may be captured on video leaving the crime scene;
h. high-risk situations, including search warrants;
i. situations that may enhance the probability of evidence-based prosecution;
j. situations that the member, through training and experience, believes to serve a proper police purpose, for example, recording the processing of an uncooperative arrestee;
k. any encounter with the public that becomes adversarial after the initial contact; and
l. any other instance when enforcing the law.
NOTE: Department members responding as assist units will active the BWC for all of the above-listed incidents.

STATEMENT OF FACTS

In 2018, police arrested Trumane Tompkins after a car in which he was a passenger fled from police during a traffic stop, and an officer alleged that he observed Trumane toss a gun during a foot chase. (C. 82-84). Trumane was charged with multiple weapons offenses. (C. 12-22). His codefendant, Brittany Mallett, was charged with aggravated fleeing a peace officer. (C. 23-24). Although the car chase was captured by a dash cam video, Officer Martinez, who claimed to see Trumane toss the gun, did not activate his body camera as mandated by Illinois state statute and Chicago Police Department regulations.

At a pre-trial hearing, Trumane filed a motion seeking to bar the admission of a DVD clip of Officer Opacion finding a large bag of marijuana that was tossed to him by another officer before joining other officers near the gun Martinez claimed Trumane had tossed. (R. 65). The prosecutor claimed the segment featuring the drugs could not be excised without affecting other relevant sections relating to recovery of the gun, but he explained that an officer would testify that the marijuana belonged to Trumane's codefendant. (R. 73-75, 78-79). The defense responded that the prosecution had a shorter clip available, taken from Officer Blocker's body cam when she was directed to the gun, and which did not depict the marijuana. (R. 79-80). The court denied the defense motion, asserting it did not want to "dictate" what evidence the prosecution could use. (R. 80).

At Trumane's jury trial, Officer Piotr Opacion testified that on April 23, 2018, at 11:00 p.m., he and his partner were attempting to curb a black Hyundai Sonata with an inoperable license plate light. (R. 203-06). The Sonata briefly pulled to the side of the road, but then the driver took off at a very high rate of speed. (R. 206). The officers followed the fleeing vehicle until it jumped over a curb and crashed into the side of a house. (R. 207-10). A dash camera inside Opacion's squad car recorded the car chase and was played in open court. (R. 212-13;

State's Ex. No. 1).

Brittany Mallet, Lamar Cole and Trumane exited the car and ran in different directions. (R. 210-12). Opacion pursued Cole and Mallet on foot, while Officer Martinez, who also arrived on the scene with his partner, Officer Blocker, chased after Trumane on foot. (R. 212, 216). Officer Constantino Martinez, who also testified for the prosecution, explained that during the foot chase, Trumane held onto his waistband as if he was attempting to retrieve something. (R. 253-54). Martinez testified that he told the other officers about this fact, but conceded it was not reflected in any of the police reports. (R. 278).

Martinez claimed that during the chase, he also observed Trumane toss a red and black colored object into the front yard of a home at 7111 Champlain. (R. 255-57). He claimed he was 10 to 15 feet from Trumane and said there were no other civilians in the area, which he described as well lit. (R. 254, 256). Trumane stopped running, raised his hands in the air, and Martinez placed him under arrest without incident. (R. 255-56).

Martinez described the neighborhood as violent and high in crime and said that it was common for people to stash guns throughout the area. (R. 269). Martinez also admitted that young men often wear jeans that are too big and have to hold up their waistbands with their hands. (R. 276).

Martinez directed his partner, Officer Katie Blocker, to an area between a gangway of a porch and a wrought iron fence, where Martinez claimed he saw Trumane toss a gun. Blocker testified she located a red gun with an extended magazine. (R. 261). A DVD clip recorded by Blocker's body camera, State's Ex. 7, was played in court. (R. 293-95).[1]

The prosecutor also played Opacion's body camera footage, which depicted him retrieving

---

[1]From the trial testimony, State's Ex. 7, appears to be a short clip labeled "2326 to 45" and contained in the DVD "Thompkins 18 CR6765 Clipped BWC," and folder "Thompkins Jury clipped Video." (R. 293-95).

a large bag of marijuana in the street while exclaiming: "holy shit, "after which he sees a red and black gun. (R. 220-21; State's Ex. No. 2). Opacion testified that the narcotics was "from a different individual" who exited the vehicle. (R. 221-22).

Both Opacion and Martinez acknowledged that Chicago Police Department regulations require officers to manually activate their body-worn and dash-cam cameras when initiating traffic stops, foot pursuits, arrests and investigatory stops. (R. 229-31, 245, 263, 270-73). A two-push activation feature on the camera causes it to rewind one minute prior to the stop and begin recording events. (R. 230). Although Martinez had worn a body camera for the majority of his career, he claimed he forgot to activate his body camera because of the spontaneous nature of the incident and because he was concerned for his partner's safety. (R. 263-65).

Thereafter, the parties stipulated that Trumane has previously been convicted of a qualifying felony in Illinois, and the prosecution rested. (R. 298-300).

The defense requested a non-IPI instruction based on the Law Enforcement Officer-Worn Body Camera Act (Body Camera Act), but the prosecution objected. (R. 311-13; Sup. Sec. C. 36). The proposed instruction would have advised the jury as follows:

> You have heard testimony that Officer Martinez was wearing a body-worn camera but did not turn it on prior to or during his encounter with the defendant. If you find that the officer intentionally did not capture a recording of this encounter, then you should consider that fact when determining what weight to give to Officer Martinez's testimony. (Sup. Sec. C. 36).

The court agreed with the defense that the instruction tracked the statutory language and was well-drafted. But finding that Martinez had offered a reasonable justification for not activating his body camera, the court sustained the prosecution's objection and refused to tender the instruction. (R. 313-15). The jury found Trumane guilty of unlawful use of a weapon by a felon. (R. 351-52; Sup. Sec. C. 4).

At the post-trial hearing, the defense argued that the court erred in allowing the marijuana

evidence, and in refusing the non-IPI instruction. (R. 359-60). The court denied the motion. (R. 361-62). The judge imposed an extended-term sentence of seven and a half years' imprisonment. (R. 369-70).

On appeal, Trumane argued that the court erred in refusing the instruction and in allowing the jury to view the recovery of the bag of marijuana. A majority of the appellate court rejected the first claim after finding that the non-IPI was an inaccurate statement of the law. *People v. Tompkins*, 2021 IL App (1st) 190693, ¶29. The dissenting justice disagreed, agreeing with the trial judge's determination that the instruction was well-written and tracked the statutory language of the Body Camera Act. *Id.* ¶49 (Walker, J., dissent). Further, the dissent found that the trial judge abused his discretion in determining that Martinez had offered a reasonable explanation for failing to activate his camera since this represented a factual question, which should have been reserved for the jury as trier of fact. *Id.* ¶46. Both the dissent and the majority agreed that the trial court erred in admitting the video of marijuana evidence, but the majority found that the errors were harmless. *Id.* ¶¶40, 51. No rehearing was requested.

On October 25, 2021, Trumane sought leave to appeal in this Court, challenging the lower courts' rulings on both the denial of the proffered instruction and the admission of the drug evidence. This Court allowed Trumane's petition for leave to appeal on January 26, 2022. That same day, Trumane filed his notice of election, indicating that he would be filing a brief before this Court. This brief now follows.

ARGUMENT

I. The court erred in denying the defense non-IPI instruction which, consistent with the language and purpose of the Body Camera Act, advised the jury to consider whether Officer Martinez intentionally failed to activate his camera, and if so, to determine what weight to give that fact in evaluating his testimony. Because a finding of guilt depended on the jury's assessment of Martinez's credibility, the error was reversible.

Trumane Tomkins was charged with the unlawful use of a weapon by a felon (UUW felon) after the police recovered a firearm in an area where guns were frequently stashed. Although Officer Martinez claimed that he saw Trumane toss a weapon in the course of a foot chase, Martinez failed to operate his body camera as required by the Law Enforcement Officer-Worn Body Camera Act (Body Camera Act). The Body Camera Act also requires that when an officer fails to comply with the law, the fact finder is to be instructed to consider whether the officer's failure was intentional, and to consider that fact in evaluating the officer's testimony. The court's refusal to give the jury the defense's proffered instruction, which accurately conveyed this law, denied Trumane of a fair trial where the prosecution's case hinged on Martinez's credibility.

Although George Floyd's shocking 2020 death at the hands of the police garnered national and worldwide attention and focused public outrage, the sad truth is that such racial inequities have long plagued the criminal justice system. The 2014 death of Laquan McDonald, and other young Black men at the hands of police required Illinois to face this truth earlier and was the impetus behind the 2016 enactment of the Body Camera Act. 50 LCS 706/10-1 *et seq*., *eff*. Jan. 1, 2016; see Dublinski, Liane C., *Comprehensive Police Officer Body Camera Guidelines in Illinois*, 47 LOY. U CHI L.J. 1449,1454-55 (2016) (Body Camera Act was the product of a bipartisan effort by Illinois lawmakers to address public concerns about police body cameras and the institutional problems within law enforcement that led to a tragic nationwide epidemic of police shootings of young Black men) (citing Illinois senate debates).

At the time of this offense, April 23, 2018, this statute regulated the use of body cameras when employed by law enforcement agencies, like the Chicago Police Department, which separately mandated the use of body cameras pursuant to a special order. (R. 270-73); Chicago Police Department Special Order No. SC 03-14 (Special Order 03-14), (*eff.* May 10, 2016), available at http://directives.chicagopolice.org/directives/ (last retrieved March 19, 2022). Both the Body Camera Act and Special Order 03-14 were passed with hopes of improving transparency and fostering public trust in the police. 50 ILCS 706/10-5 (West 2018) (implemented to"help collect evidence while improving transparency and accountability, and strengthening public trust"); Special Order 03-14 II (implemented to "to protect[] the safety and welfare of the public as well as its members... from false accusations through the objective documentation of interactions between Department members and the public."). This Court too has recently recognized the need for increased transparency and healing, acknowledging that "people of color...are continually confronted with racial injustices that the courts have the ability to nullify and set right."[2] But as Trumane's case illustrates, these lofty goals mean little if a jury is not given the proper tools to evaluate the trustworthiness of the officer's testimony in light of his failure to comply with this statutory mandate.

A jury found Trumane Tompkins guilty of unlawful use of a weapon by a felon but only one of the prosecution's witnesses, Officer Martinez, claimed to observe Trumane toss the weapon that he was convicted of possessing. Importantly, however, Martinez failed to activate his camera during the foot chase where he allegedly made the observation. This violated the Body Camera Act and Special Order 03-14, both of which required the officer to activate

---

[2]Illinois Supreme Court Statement on Racial Justice, June 22, 2020. https://ilcourtsaudioblob.core.windows.net/antilles-resources/resources/62e3902f-8750-4d17-9768-0781daaf869/062220.pdf (last visited March 31, 2022).

his body camera. Special Order No. 03-14 (V)(E)(1) (2018) (Special Order 03-14) (requiring officers to activate their body- worn cameras during *inter alia*, all foot and vehicle pursuits); 50 ILCS 706/10-15, 10-20(a)(3) (West 2018) (for all law enforcement agencies employing body cameras, requiring body cameras to "be turned on at all times when the officer is in uniform and is responding to calls for service or engaged in any law enforcement-related encounter or activity, that occurs while the officer is on duty").[3]

Although challenging Martinez's credibility in light of this violation was central to Trumane's defense and his closing argument, the trial court refused a tendered non-IPI even though it accurately stated the applicable law. (R. 313-15). Instead, the court found the instruction was not necessary or applicable because the officer had offered a reasonable explanation for failing to activate his body camera. (R. 315). The officer's intent, and whether his explanation was reasonable, however, was a factual question that should have been reserved for the jury, the sole fact finder in the case.

A divided panel of the First District Appellate Court upheld the judge's decision, though on a different basis. *People v. Tompkins*, 2021 IL App (1st) 190693-U, at ¶¶ 32-35. The majority found the instruction to be an inaccurate statement of the law because it did not include language regarding the reasonableness of the officer's explanation. *Id.*, at ¶32. In so holding, the majority implicitly agreed that the officer's intent and the reasonableness of his actions was a jury question. The majority further determined that even if there was error in denying the instruction that any error was harmless. *Id.* at ¶35. As discussed more fully below, both case law and the plain language of the Body Camera Act establish that the question of whether the officer intentionally

---

[3]On February 22, 2021, as part of the passage of the Safety, Accountability, Fairness and Equity-Today (SAFE-T) Act, a wide-sweeping criminal justice reform bill, the Body Camera Act was amended to mandate the use of officer-worn body cameras statewide. 50 ILCS 706/10-15 (West 2021) ("law enforcement agencies must employ officer-worn cameras in accordance with the provisions of this Act.")

failed to turn on his camera is a factual question for the jury, that the proffered instruction in this case, which instructed the jury to determine if the officer's action was intentional, was an accurate statement of law that encompassed the question of the reasonableness of the officer's explanation, and that the failure to give the instruction prejudiced Trumane. Accordingly, this Court should vacate the lower courts' rulings to the contrary, reverse Trumane's conviction and remand for a new trial.

While generally the giving of a non-IPI instruction is reviewed for an abuse of discretion, the trial court's ruling here was frustrated by an error in law and in statutory interpretation, both of which are reviewed *de novo*. *People v. Hudson*, 222 Ill. 2d 392, 399-400 (2006) (instructional error generally reviewed for an abuse of discretion); see also *People v. Williams*, 188 Ill. 2d 365, 369 (1999), citing *People v. Brockman*, 143 Ill. 2d 351, 363 (1991) ("However, a trial court must exercise its discretion within the bounds of the law. Where a trial court's exercise of discretion has been frustrated by an erroneous rule of law, appellate review is required to permit the exercise of discretion consistent with the law"). *People v. Johnson*, 2013 IL 114639, ¶9, citing *Ries v. City of Chicago*, 242 Ill. 2d 205, 216 (2011) (questions of statutory construction are reviewed *de novo*). Moreover, the question of whether a jury instruction is legally correct is reviewed *de novo. People v. Hartfield,* 2022 IL 126729, ¶45 (applying *de novo* review in determining whether jury instruction was legally correct).

In this case, *de novo* review is appropriate because this Court must determine whether the trial court misinterpreted the Body Camera Act in denying the proffered instruction and whether the tendered non-IPI was in fact a correct statement of the law. Yet if this Court finds that the issue of giving the instruction was within the trial court's discretion, the court abused its discretion where the officer's explanation for his failure was not reasonable. Under either standard, Trumane is entitled to a reversal of his conviction and remand for a new trial.

Trumane has a state and federal constitutional right to a trial by a fair and impartial jury. U.S. CONST., amends. V, XIV; ILL. CONST. 1970, art. I, §2; *People v. Williams*, 181 Ill. 2d 297, 318 (1998). Implicit in this right is the requirement that Trumane's jury be properly instructed on the law. *People v. Ogunsola*, 87 Ill. 2d 216, 222 (1981). To that end, the trial court was required to provide Trumane's jury with instructions that convey the legal rules applicable to the evidence presented at trial. *People v. Mohr*, 228 Ill. 2d 53, 65 (2008); *People v. Novak,* 163 Ill. 2d 93, 115-16 (1994); *Ogunsola*, 87 Ill. 2d at 222. However, as Trumane's case illustrates, a jury is unable to fulfill its constitutional function without proper instructions. U.S. CONST., amends. VI, XIV; ILL CONST. 1970, art. I, §§8, 13; *People v. Jenkins*, 69 Ill. 2d 61, 66 (1977)

Illinois Supreme Court Rule 451(a) requires that a trial court instruct the jury pursuant to the Illinois Pattern Jury Instruction (IPI) unless the court finds that the IPI does not accurately state the law or there is no IPI on a particular subject. *Hudson*, 222 Ill. 2d at 399-400 (citing ILL. S. CT. R. 451(a)). If there is no relevant IPI, the court may tender a non-pattern instruction (non-IPI) to the jury so long as it is simple, brief, impartial, and free from argument. *People v. Ramey*, 151 Ill. 2d 498, 536 (1992). While the giving of a non-IPI is generally discretionary, as shown below, the Body Camera Act mandates that the fact finder *shall be instructed* to consider if an officer intentionally violated that Act when considering the weight to give the officer's testimony. 50 ILCS 706/10-30 (emphasis added).

Even though the language of the Body Camera Act expressly requires that the jury shall be instructed to consider the officer's failure to record the encounter, there is currently no IPI that covers the mandatory provision of §10-30 of the Body Camera Act. In particular, this provision requires that "if a court or other finder of fact finds by a preponderance of the evidence that a recording was intentionally not captured....then the court or other finder of

fact shall consider or be instructed to consider that violation in weighing the evidence, unless the State provides a reasonable justification." 705 ILCS 706/10-30. Consistent with this provision and his defense, Trumane submitted the following non-IPI:

> You have heard testimony that Officer Martinez was wearing a body-worn camera but did not turn it on prior to or during his encounter with the defendant. If you find that the officer intentionally did not capture a recording of this encounter, then you should consider that fact when determining what weight to give to Officer Martinez's testimony. (Sup. Sec. C. 36).

The trial judge agreed with the defense that this instruction set forth in simple, brief and impartial terms the appropriate way to evaluate Martinez's testimony in light of his violation of the Body Camera Act. (R. 313-14). However, the trial judge refused counsel's request because he found that Officer Martinez had offered a reasonable explanation for failing to activate his body camera. (R. 313-15). The trial court's ruling fails to withstand scrutiny.

The reasonableness of the officer's failure is a jury question

First, the statute makes clear that the initial question of whether the officer intentionally failed to turn on his body camera is a question for the fact finder. To hold otherwise violates the plain language of the statute. *People v. Hardman*, 2017 IL 121453, ¶19, *quoting Hall v. Henn*, 208 Ill. 2d 325, 330 (2003) (cardinal rule of statutory construction is to give effect to the legislature's intent, and the best indication of legislative intent " 'is the statutory language, given its plain and ordinary meaning.' ").

The Body Camera Act instructs that if the "court *or other finder of fact*...finds that a recording was intentionally not captured...in violation of [the Body Camera] Act, then the court *or other finder of fact* shall consider *or be instructed* to consider that violation in weighing that evidence." 705 ILCS 706/10-30 (emphasis added). The use of the disjunctive "or" in both clauses signifies that the phrase "be instructed" modifies the separate phrase "other finder of fact," such that the statute should be read as follows: the court shall consider or the other

finder of fact shall be instructed to consider. *Elementary School Dist. 159 v. Schiller*, 221 Ill. 2d 130, 145 (2006) (use of the disjunctive "or" in its ordinary sense connotes two alternatives by connecting various parts of a sentence which are separated from one another); *People v. Frieberg*, 147 Ill. 2d 326, 349 (1992) (same). To read the statute any other way, as the trial judge did, is to render the language "or other finder of fact" superfluous. See *People v. Jackson*, 2011 IL 110615, ¶12 ("Each word, clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous.")(citations omitted); see also *People v. Gutman,* 2011 IL110338, ¶38 ("We construe statutes so as not to render any term superfluous"). The statute is clear that the fact finder is to be instructed to consider both the officer's intention and to consider that fact in weighing the officer's testimony. As discussed further below, the language requiring the fact finder to be instructed to consider the officer's intention encompasses the question of the reasonableness of his actions.

This reading of the Body Camera Act is wholly consistent with case law that recognizes that the trier of fact is solely responsible for evaluating the reasonableness of a person's actions. In this case, Trumane opted for a jury trial. As the dissent aptly recognized, "in a jury trial, the jury, as finder of fact, must determine 'whether the State provides a reasonable justification' because reasonableness is a question of fact, rather than a question of law." *Tompkins*, 2021 IL App (1st) 190693-U, at ¶46. See also *People v. Nitz*, 143 Ill. 2d 82, 95 (1991) ("[D]eterminations of the credibility of witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence are the responsibility of the trier of fact"); *People v. Enerson*, 202 Ill. App. 3d 748, 749 (3d Dist. 1990) ("whether the victim was in reasonable apprehension of a battery is a question of fact"); *People v. Wood*, 24 Ill. App. 3d 15, 20 (4th Dist. 1974) (whether an individual reasonably believes that force is necessary to prevent imminent death or great bodily harm raises a question of fact for the fact finder).

Thus, the trial judge usurped the province of the jury by interpreting reasonableness as a legal pre-requisite for the giving of the instruction rather than a factual question that should have been reserved for the jury. See *People v. Washington,* 2012 IL 110283, ¶¶56, 60 (court usurped role of the jury where judge allowed self-defense instruction but rejected one on second-degree murder, because reasonableness of defendant's actions is a question of fact that is reserved to the jury in a jury trial).

Further, similar instructions that require the fact finder's resolution of a preliminary factual question are routinely given. For example, IPI 3.06-3.07 directs the jury to determine whether the defendant made a statement and, if so, how much weight to afford it, considering all of the circumstances under which it was made. *People v. Johnson*, 385 Ill. App. 3d 585, 599 (1st Dist. 2008); *People v. Turman*, 2011 IL App (1st) 091019, ¶34. And IPI 3.11 similarly directs the jury to consider if a witness made a prior inconsistent statement and, if so, what weight it should be given, considering the circumstances under which it was given. *People v. Mitchell*, 27 Ill. App. 3d 117, 121 (1st Dist. 1975). Like these instructions, the requested non-IPI here directed the jury to determine whether Martinez intentionally failed to activate his camera and if so to consider that fact when weighing his testimony.

Yet if this Court determines that it was appropriate for the trial court to make an initial determination of the officer's reasonableness, the court abused its discretion in finding that the officer provided a reasonable explanation for his violation. The officer explained that he failed to turn on his body camera due to the spontaneous nature of the event and his concern for his fellow officers. However, these factors are inherent in almost every police encounter that involves a foot or vehicle pursuit. In fact, Officer Martinez responded to the call of Officer Opacion who initiated the encounter, and whose experience would have been even more spontaneous. Yet, that officer, like Martinez's partner, had the presence of mind to turn on

their cameras. If Martinez's explanation is to be accepted as reasonable, police would almost always be able to offer an excuse for failing to activate his camera.

The proffered instruction was an accurate statement of law

The majority affirmed the trial court's ruling but did so on a completely contrary basis. The appellate court concluded the instruction was inaccurate because it omitted the statutory language "unless the State provides a reasonable justification," thereby implicitly indicating that the question of the reasonableness of the officer's explanation belonged to the jury. *Tompkins*, 2021 IL App (1st) 190693-U, at ¶30. While the majority was correct in finding the reasonableness of the violation is to be a jury question, it erred in finding the tendered instruction did not accurately convey the law. Indeed, by requiring the jury to first determine whether the officer's failure to turn on his body camera and record the foot chase was intentional, the instruction necessarily gives effect to the statute's language: "unless the State had provided a reasonable justification" for the officer's failure.

Section 10-20(a)(3) of the Body Camera Act, at issue here, mandates that an officer activate his body camera at "all times...when the officer is responding to calls of service or engaged in any law enforcement-related encounter or activity" absent exigent circumstances and even then the camera "must be turned on as soon as practicable." 50 ILCS 706/10-20(a)(3) (West 2018). Similarly, Special Order 03-14, mandates that the Chicago police activate their body camera during all arrests and foot chases, allowing for no exceptions. Given this mandatory directive, it is evident that the legislature contemplated that there is no reasonable justification for intentionally violating subsection (a)(3) of this statute. See ILLINOIS PATTERN JURY INSTRUCTION-CRIMINAL 5.01A ("A person acts intentionally to accomplish a result or engage in conduct when his conscious objective or purpose is to accomplish that result or engage in that conduct"). This of course is fully consistent with the newly-created offense of law

enforcement misconduct, which now makes it a Class 3 felony for an officer to knowingly and intentionally fail to comply with sections 10-20(a) (3), (5), (6) and (7) of the Body Camera Act. 720 ILCS 5/33-9(a) (3), (b) (West 2021) (defining offense of law enforcement misconduct, a Class 3 felony), *eff.* July 1, 2021; *People v. Rinehart*, 2012 IL 111719 ¶26 (under the statutory maxim of *in pari materia*, two statutes concerning the same subject must be considered in harmony with one another). If there could be a reasonable explanation for intentionally failing to activate the camera, there would not be criminal consequences. Indeed, while equipment malfunction might provide a reasonable explanation, a finding that an officer acted willfully precludes a reasonable explanation.

Moreover, where one of the Body Camera Act's stated purposes is to protect members of the police from false accusations and to assist in prosecutions with additional visual evidence, an officer's intentional failure jeopardizes this important legislative purpose and the evils it sought to remedy such that it cannot ever be deemed reasonable. See *Investigation of the Chicago Police Department*, United States Dep't of Justice Civil Rights Div. & U.S. Attorney's Office, Northern Dist of Illinois, Jan. 13, 2017, page 78-79 (faulting Chicago Police Department's failure to "explicitly provide that an officer who deliberately fails to use his or her assigned body-cam properly will face discipline" for continued police abuses); available at https://www.justice.gov/opa/file/925846/download; (Last visited April 5, 2022).[4] Because the instruction directs the jury to determine if the officer intentionally violated the Body Camera Act by failing to activate his camera, the statutory language "unless the State had provided

[4]This Court may take judicial notice of the Justice Department's report as it a public document that is readily verifiable and of indisputable accuracy. *People v. Henderson*, 171 Ill. 2d 124, 134 (1996); *People v. Mata*, 217 Ill. 2d 535, 539-40 (2005) (reviewing courts may take judicial notice of public documents); see also *People v. Horton*, 2019 IL App (1st) 142019-B, ¶¶70 (taking judicial notice of a joint report of the policing tactics employed by the Chicago Police Department by the U.S. Department of Justice Civil Rights Div. & U.S. Attorney's Office Northern Dist. of Illinois).

a reasonable justification" is not rendered superfluous. *Jackson*, 2011 IL 110615, ¶12.

In short, the instruction proffered below sufficiently and accurately informed the jury of the requirements of §10-30 where the requirement that the jury find the officer's violation was intentional encompasses the reasonableness of his explanation. See *e.g., Hudson*, 222 Ill. 2d at 407 (tendered non-IPI accurate because it sufficiently conveyed legal concept of proximate causation notwithstanding that it used the phrase "sets in motion a chain of events" rather than the more precise language "direct and foreseeable consequence"). Thus, the appellate court was incorrect in its finding that the instruction was an inaccurate statement of law.

The instructional error was not harmless beyond a reasonable doubt

In addition, the refusal to tender the proffered instruction prejudiced Trumane. *Tompkins*, 2021 IL App (1st) 190693-U, ¶ 32. Because the trial court's error impinged on Trumane's constitutional rights, the harmless beyond a reasonable doubt standard applies and requires a determination of whether the result of trial would have been different had the jury been properly instructed. *People v. Childs*, 159 Ill. 2d 217, 228 (1994); *People v. Washington*, 2012 IL 110283, ¶60. Under this standard, a court considers whether: the error contributed to Trumane's conviction, there was overwhelming evidence of guilt, and whether the requested instruction was merely duplicative or cumulative. *People v. King*, 2020 IL 123926, ¶40. Defense counsel requested the non-IPI at issue, and included the court's refusal to tender the instruction in Trumane's post-trial motion, fully preserving the instant claim. (Sup. Sec. C. 36; R. 311, 360; C. 152-53); *People v. Moon*, 2022 IL 12959, ¶17 citing *People v. Sebby*, 2017 IL 119445 ¶48. The prosecution therefore has the burden to prove to this Court that these constitutional errors were (individually and cumulatively) harmless beyond a reasonable doubt. *People v. Johnson*, 238 Ill. 2d 478, 488 (2010); *People v. Patterson*, 217 Ill. 2d 407, 428 (2005) (citing U.S. Supreme Court cases); see *Chapman v. California*, 386 U.S. 18, 24 (1967). The prosecution cannot meet this "extremely

high standard[.]" See *People v. Magallanes*, 409 Ill. App. 3d 720, 747 (1st Dist. 2011).

Had the jury been properly instructed, it is likely that it would have found that Officer Martinez acted intentionally in failing to activate his camera. Officer Martinez admitted he failed to activate his camera even though he knew that he was required to record his foot pursuit of Trumane, and had worn a body camera for the bulk of his career. (R. 245, 270-73). Importantly, Martinez needed just two quick pushes to activate his body camera, which would have immediately captured the entirety of the foot chase. (R. 229-30).). Martinez claimed that he "wasn't thinking about" manually activating his camera because of the spontaneous nature of events and because he was concerned for his partner's safety and the erratic driving. (R. 263-65). However, such factors are inherent in most police encounters.

Moreover, Martinez was responding to the other officer's calls for assistance with a fleeing vehicle. (R. 247-48). Given that Martinez had time to anticipate the ensuing police encounter he would soon be confronting and in light of his familiarity with his body camera, he should not have been so taken off guard by the foot chase that he was unable to record the chase. Indeed, Officer Blocker, Martinez's partner, and Officer Opacion, the officer who initiated the traffic stop, both activated their body-worn cameras despite the "spontaneous" nature of events. (R. 231, 295). Their ability to quickly activate their cameras is hardly surprising as much of a police officer's job is unexpected. In point of fact, Special Order 03-14 specifically contemplates this truism by mandating officers to activate their body-worn cameras during spontaneous occurrences like the foot chase at issue here. And the Body Camera Act specifically recognizes that even "if exigent circumstances [] prevent the camera from being turned on, the camera *must be turned on as soon as practicable*." 50 ILCS 706/10-20(3)(A) (emphasis supplied).

Moreover, Trumane was prejudiced because the denial of the instruction impeded the

jury from considering an important factor in evaluating Martinez's testimony. As noted above, his claims about the chase were never visually corroborated. Apart from this failure, Martinez was additionally impeached by the officers' reports, none of which indicated that Trumane held onto his waistband as if he was holding something. (R. 278). The jury should have considered his intentional failure in assessing his credibility. Certainly, there was more than "some"evidence to justify counsel's requested instruction. *Washington*, 2012 IL 110283, ¶43.

Without directly acknowledging the prosecution's heavy burden of persuasion, the majority found no prejudice. First, the majority cited the fact that the "jury was properly instructed [pursuant to IPI 1.02] regarding assessing witness credibility." *Tompkins*, 2021 IL App (1st) 190693-U, ¶35. However, a general instruction advising the jury that it "may take into account [a witness's] ability and opportunity to observe, [his age,] his memory, his manner while testifying, any interest, bias, or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case,"does not advise the jury to consider whether the officer's violation of the Body Camera Act was intentional. ILL. PATTERN JURY INSTR.-CRIM. 1.02. Under similar circumstances this Court has rejected this very argument. *People v. Crane*, 145 Ill. 2d 520, 527-28 (1991) (general instruction regarding mental states did not render harmless the trial court's refusal to give specific defense of mistake of fact instruction, to which defendant was entitled); see also *People v. Wheeler*, 401 Ill. App. 3d 304, 314 (3d. Dist. 2010) (trial court's general instruction to consider "any interest, bias or prejudice" of witness did not cure court's refusal to tender accomplice-witness instruction which "went far beyond the instruction relating to the credibility of witnesses in general"). Indeed, the specific ill that the Body Camera Act was designed to remedy — the intentional failure to activate an officer's body camera — is not redressed by general instructions such as IPI 1.02, which are given in virtually every criminal case. *Tompkins*, 2021 IL App (1st) 190693-U, ¶49 (Walker, J., dissent).

As the dissent aptly recognized:

> [t]he Law Enforcement Officer-Worn Body Camera Act is not some pointless exercise in virtue signaling. The Act is intended to address the pervasive problem of overly aggressive police tactics, especially when confronting people of color. Police, in general, are given the benefit of the doubt in allegations of abuse, so actual victims have little voice and no real opportunity to prove the course of events. Recognizing this problem, our legislature designed the Act to 'provide impartial evidence and documentation to settle disputes and allegations of officer misconduct.' 50 ILCS 706/10-5. *Tompkins*, 2021 IL App (1st) 190693-U, ¶47 (Walker, J., dissent).

The dissent's position finds support in a January 13, 2017, investigation of the Chicago Police Department by the Justice Department, which found that in many circumstances, officers' accounts were later discredited by video evidence. *Investigation of the Chicago Police Department*, United States Dep't of Justice Civil Rights Div. & U.S. Attorney's Office, Northern Dist of Illinois, Jan. 13, 2017, page 6. Not only did the proffered instruction reflect the law provided in the statute, it also furthers the purpose of the Body Camera Act, which was intended to increase transparency and foster trust in the police. The instruction merely fulfills the Act's purpose by instructing the jury to consider if the officer intentionally flouted this means of improving public trust and signals that it is appropriate to evaluate the officer's trustworthiness at trial in light of a willful violation of the statute.

The majority further held that any error was cured by defense counsel's advising the jury of the officer's violation during his closing argument. *Tompkins*, 2021 IL App (1st) 190693-U, ¶31. This, however, ignores the court's instruction that arguments do not constitute evidence and the fact that the prosecutor below was able to nullify counsel's arguments during the prosecution's rebuttal arguments to the jury. (Sup. Sec. C. 8; R. 339). Moreover, there is an appreciable and measured difference between an instruction tendered by a neutral judge than an impassioned argument from a defense counsel who is a partial advocate with a vested interest in the case's outcome. Martinez's failure to activate his body worn camera was central to discrediting Martinez's testimony that he saw Trumane toss a gun. Thus, it was a focal point

of defense counsel's closing argument, which began:

> The State has failed to prove beyond a reasonable doubt that Mr. Tompkins ever possessed that gun on April 23rd of 2018 because nobody ever saw Mr. Tompkins with that gun and the only individual, the only police officer who saw Mr. Tompkins, allegedly with what he suspected to be that gun, did not turn on his body worn camera as is required of him professionally. It's required of him professionally and he didn't do that and because of that the State has failed to meet its burden. (R. 323).

She also argued:

> [Martinez] didn't turn on his body-worn camera, so we don't really know what happened. We don't really know what he saw and if he had pressed that button when he allegedly saw Mr. Tompkins throw this red item…if he pressed that button, you would have seen [sic] what he saw, whether it shows something or it doesn't, but he didn't do what he was supposed to. He didn't follow the rules. He didn't follow the rules that day and so you don't know what he saw. (R. 325).

Before concluding her remarks, defense counsel returned to the issue again, and spoke specifically to the Body Camera Act, arguing:

> Now, I want to just briefly touch on body-worn camera issue. It is not an after thought. It is required by Chicago Police Department officers to wear that body-worn camera and the officers that you saw and you heard testimony from, they followed that requirement. They followed that rule, but Officer Martinez did not. He did not do his job that night. He had been wearing that body-worn camera for three years and you heard Officer Opacion testified that in order to turn that body-worn camera on, you double-click it and you saw that [Martinez] was engaged in that chase for several minutes or at least a minute on the road and then he gets out of his vehicle and he's saying he thinks that Mr. Tompkins had something in his waistband, but he doesn't turn his body-worn camera on. Did not follow the rules and why is that important? Because if he had, you would have the information that you need before you to make your decision, but he didn't. He didn't do what he was supposed to that night and because of that, the State cannot meet their burden. (R. 327-28)

Yet, counsel did not specifically advise the jury that §10-30 mandates that it consider an intentional violation of this statute when assessing the officer's credibility as the instruction would have explained. Without the requested non-IPI explaining the significance of police non-compliance, the jury did not have the proper tools to apportion significance to Martinez's actions or to evaluate how his failure to comply with the statute should play into its deliberations and assessment of credibility.

Instead, the prosecutor was able to effectively minimize Martinez's failure and undermine Trumane's defense, arguing to the jury during rebuttal — the last argument the jury would hear before being given its final instructions — that the "body camera issue…It's a great distraction." (R. 329). Even though Martinez's failure to activate his camera and his resulting credibility were a legitimate consideration for the jury, the prosecutor compounded the error during rebuttal, suggesting that counsel's argument was merely an attempt to distract the jury from Trumane's prior conviction and his flight from Martinez.

> Talk about the camera issue so we don't focus on this gun that the gun that [Trumane], who was a convicted felon, had on him when he fled from the police and then tossed []thinking he could get away with it. Talk about the camera. Talk about Officer Martinez. Vilify him and then maybe that will distract everybody from the reason that we're here. (R. 329).

The prosecutor mitigated Martinez's violation of the Body Camera Act and in fact suggested that pointing out Martinez's conduct was an improper attempt by the defense to vilify Martinez. Not only was it Martinez who failed to comply with the law, but contrary to the prosecutor's argument, the spate of recent police shootings provides an innocent explanation for why, Trumane, a Black man, might flee from police. (C. 154); *Horton*, 2019 IL App (1st) 142019-B, ¶¶69-71 (explaining the "troubling reality" that young minority men may flee from police out of "fear and distrust of police" and to avoid the recurring indignity of racial profiling, as opposed to attempting to conceal criminal activity); see also *Miles v. United States*, 181 A.3d 633, 641-45 (D.C. 2018)(explaining that there are "myriad reasons" why an innocent person might avoid the police, including fear of brutality or harassment, or a "distaste for police officers based upon past experience").

However, ignoring this Court's decisions in *People v. Naylor*, 229 Ill. 2d 584 (2008) and *People v. Sebby*, 2017 IL 119445, the majority found that the prosecution had presented overwhelming evidence of Trumane's guilt, based solely on the testimony of Martinez and

Trumane's flight from the police. *Tompkins*, 2021 IL App (1st) 190693-U, ¶34. Both cases recognized that evidence is closely balanced if "the outcome of [a] case turn[s] on how the finder of fact resolved a 'contest of credibility.' " *Sebby*, 2017 IL 119445, ¶63 (quoting *Naylor*, 229 Ill. 2d at 606-07). Although those cases involved un-preserved errors, this Court has adopted a similar evaluation when considering fully preserved errors. See *People v. Thurow*, 203 Ill. 2d 352, 363 (2003) (plain error and harmless error normally require the same analysis for evaluating prejudice). For example, in *Washington*, 2012 IL 110283, this Court held that the trial court's refusal to tender a second-degree murder jury instruction was not harmless where the case hinged on a credibility determination. *Id.* at ¶60; *Tompkins*, 2021 IL App (1st) 190693-U, ¶52 (Walker, J., dissent), citing *People v. Hayes*, 183 Ill. App 752, 757-58 (1st Dist. 1989) (conviction based largely on the credibility of complainant's testimony not overwhelming); and *People v. Fultz*, 2012 IL App (2d) 101101 ¶74 (instructional error not harmless where evidence, resting on a credibility contest between defendant and another witness, not overwhelming).

Where only Martinez claimed Trumane possessed a gun and no physical evidence connected him to the weapon, Trumane's conviction hinged on the veracity of Officer's Martinez's testimony in light of his failure to activate his camera. Had the events transpired as Martinez testified to, the common sense action would have been to activate his body camera in order to provide corroboration for his version of events. Significantly, the complained-of error went precisely to the jury's ability to assess Martinez's credibility. Importantly, Martinez claimed only that he saw Trumane tossing a red and black object. (R. 255). He also acknowledged an innocent explanation for Trumane's actions during the chase as he admitted that young men often wear pants that are too big and have to hold up their pants. (R. 276). And, Martinez admitted that it was not unusual for individuals to stash their guns around the neighborhood.

(R. 269). Also, two other individuals were inside of the sedan that Opacion attempted to curb, both of whom also fled on foot and who could have easily dropped the gun in question. (R. 210-11). Finally, as discussed above, there is an wholly innocent explanation for Trumane's flight from the officer.

Against this backdrop, the majority erred in finding overwhelming evidence of guilt. *Tompkins*, 2021 IL App (1st) 190693-U, ¶52 (Walker, J., dissent) (evidence not overwhelming), citing *Hayes*, 183 Ill. App. 3d at 757-58. Certainly, under such circumstances, the State cannot prove that this error did not contribute to Trumane's conviction. This is particularly true, where, as the dissent additionally found and discussed more fully in Argument II, the admission of the irrelevant drug evidence worked in tandem with the instructional error here to create a pattern of unfair prejudice that deprived Trumane of his constitutional right to a fair trial. *Tompkins*, 2021 IL App (1st) 190693-U,¶53, citing *People v. Blue*, 189 Ill. 2d 99, 139 (2000); see also *e.g. People v. Sandridge*, 2020 IL App (1st) 173158 ¶26 (reversing and remanding despite overwhelming evidence of guilt after finding that officer violated Illinois law in intentionally destroying his notes, stating that "[t]o hold otherwise would be to signal that flouting established Illinois law during a criminal trial is without consequences so long as the State believes the evidence is overwhelming. This, we cannot do").

It is more clear than ever that the jury should have been instructed to consider Martinez's violation of the Body Camera Act when weighing the evidence and that the trial court's erroneous refusal to do so was anything but harmless beyond a reasonable doubt. In order to nullify and set right the recognized racial inequities that have long plagued the criminal justice system, and which the Body Camera Act specifically sought to remedy, this Court should hold that the judge erred in refusing the non-IPI instruction at issue here. For all of the reasons advanced herein, Trumane Tompkins respectfully asks that this Court reverse the majority's decision

and remand his cause for a new trial.

II. This Court should also reverse Trumane Tompkins's conviction where the trial judge erred in allowing the prosecution to introduce irrelevant and prejudicial body cam video of the recovery of drugs that belonged to Trumane's codefendant.

The trial judge also committed a second error which, whether evaluated individually or in tandem with the instructional error in Argument I, deprived Trumane of a fair trial. Not only did the trial court refuse an instruction which would have advised the jury to consider whether Officer Martinez intentionally violated the Body Camera Act and the impact of any failure on Martinez's credibility, it unfairly bolstered the prosecution's case by allowing it to introduce the irrelevant but highly inflammatory body camera (body cam) video of Officer Opacion, evidence that impermissibly insinuated guilt by association. Specifically, the clip at issue featured Opacion retrieving a large bag of marijuana tossed to him while exclaiming, "holy shit." Though the prosecution conceded the drugs belonged to Trumane's codefendant and was unrelated to the weapon charges against him, the trial judge allowed the jury to view the clip based on the prosecutor's patently false representation that the scene depicting the drugs could not be redacted from the clip without affecting another section depicting the weapon. However, not only could Officer Opacion's body cam video have been limited or excised to preclude depiction of the marijuana, his video was not necessary at all as there was a separate body cam video from Officer Blocker that depicted the gun and which was shown to the jury. On appeal, the majority and dissent agreed that the trial court erred in allowing the prosecution to play the clip as the marijuana evidence had no bearing whatsoever on the charged weapons offenses. *People v. Tompkins*, 2021 IL App (1st) 190693-U, ¶¶38, 40, 51. However, they parted ways on whether the error was harmless. Because the dissent's assessment of the evidence is the only one that can be reconciled with this Court's prior holdings, this Court should reverse the majority's decision and remand for a new trial. *Id.* ¶¶41, 52.

This Court reviews the admission of evidence for an abuse of discretion. *People v. Becker,* 239 Ill. 2d 215, 234 (2010); *People v. Lopez*, 2014 IL App (1st) 102938-B, ¶22. In addition, the instant claim is fully preserved, counsel having filed a pre-trial motion *in limine* seeking to bar the evidence and renewing the error in Trumane's post-trial motion. (C. 145, ¶3, C. 153, ¶7; R. 76-77, 359); *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Therefore, the prosecution carries the substantial burden of proving the error is harmless beyond a reasonable doubt. *People v. Thurow*, 203 Ill. 2d 352, 363 (2003) (where defendant makes a timely objection, the prosecution bears the burden of persuasion with respect to prejudice). Again, the State has failed to satisfy this heavy burden.

Trumane Tompkins has a constitutional right to a fair and impartial trial. U.S. Const., amends. V, VI, XIV; Ill. Const. 1970, art. I, §2; *People v. Blue*, 189 Ill. 2d 99, 138 (2000). As part of that right, the prosecution was required to rely solely on competent evidence. *People v. Hope*, 116 Ill. 2d 265, 275 (1986). Evidence is relevant (and thus admissible) when it has a tendency to make the existence of any fact that is of consequence to the proceeding more probable or less probable than it would be without the evidence. ILL. R. EVID. 401, 402; *People v. Wheeler*, 226 Ill. 2d 92, 132 (2007). A trial court may reject offered evidence on grounds of irrelevancy if it has little probative value due to its remoteness, uncertainty, or possibly unfair prejudicial nature. *People v. Harvey*, 211 Ill. 2d 368, 392 (2004). Further, a trial judge may exclude otherwise relevant evidence if it determines that the probative value is substantially outweighed by the danger of unfair prejudice. ILL. R. EVID. 403; *Gill v. Foster*, 157 Ill. 2d 304, 313 (1993). Because Trumane's "guilt [was not] established by legal and competent evidence, uninfluenced by bias or prejudice raised by irrelevant evidence," this Court should reverse his conviction and remand for a new trial. *People v. Bernette*, 30 Ill. 2d 359, 371 (1964).

The appellate court correctly found that the trial judge erred in admitting the officer's

body cam video showing his recovery of drugs that belonged to the co-defendant. Prior to trial, the defense asked the judge to prevent the prosecution from introducing a DVD clip featuring a bag of marijuana that was thrown to Officer Opacion from another officer while he chased after Trumane's codefendants. (R. 76-77). The prosecutor did not claim that the marijuana belonged to Trumane or allege that it was in anyway relevant to the charged weapons offenses. Nevertheless, the prosecutor maintained that playing the entire video clip was necessary, claiming that "excluding that video in its entirety would be cutting off a very relevant portion and it's so close in time in proximity it would be hard to cut that part out." (R. 78). This claim is patently false. Contrary to the prosecutor's representations, the first minute of State's Ex. 2 could have been excised to exclude the marijuana while leaving intact the relevant portion depicting the gun. The clip in question, which was introduced as State's Exhibit 2,[5] is 2.02 minutes in length and was taken by Officer Opacion's body camera. Early in the clip, at the 45 second mark, Officer Opacion observes a bag of marijuana while exclaiming "holy shit." (St. Ex. 2, at .45 seconds; R. 220-21). However, it is not until much later, at some point after the first minute, that Opacion spots a red and black gun Trumane allegedly possessed. (St. Ex. 2, 1.11-2.02). It is also notable that, as defense counsel highlighted, the prosecution had yet another shorter clip from Officer Blocker's camera that featured the gun only at its disposal.[6] (R. 79). The prosecution provided no explanation as to why it was necessary to show two video clips depicting the recovery of the gun.

---

[5]State's Exhibit 2 is entitled "2318 9 to 11," and is contained in a DVD labeled "Thompkins 18CR67675 Clipped BWC" within a folder called "Thompkins Jury Clipped Video." For clarification, the DVDs spell Tompkins' last name incorrectly.

[6]This clip is labeled "2326 to 45" and is also contained in the DVD "Thompkins 18 CR6765 Clipped BWC," and folder "Thompkins Jury clipped Video." From the testimony, this clip appears to be recorded from Officer Blocker's body-worn camera and introduced at trial as State's Ex. 7. (R. 293-95).

Despite this, the trial court denied Trumane's motion, saying it would not dictate which clip the prosecution could show the jury. (R. 79-80). The bag of marijuana was wholly unconnected to the charged weapons offense and the clip in question could have been be excised or limited to exclude the drug evidence. Yet rather than exercising his discretion and weighing the relevance and the prejudicial nature of the evidence the judge suggested he would not "dictate" which evidence the prosecution could show, and abdicated his duty as the gatekeeper of the evidence and exposed the jury to unnecessary and highly prejudicial evidence. *People v. Feldman*, 314 Ill. App. 3d 787, 798 (5th Dist. 2000) ("[t]he trial judge is the gatekeeper of what a jury hears in the way of evidence"); *Decker v, Libell*, 193 Ill. 2d 250, 254 (2000); *People v. Tenney*, 205 Ill. 2d 411, 435-36 (2002) (both recognizing same). In such a close case, the trial judge's failure constitutes reversible error.

The prosecution's basis for asking to allow the video, that it needed to show the gun and did not want to excise the tape, is a pretextual one, where it already had Blocker's body cam video of the gun or where it could have started playing Oppacion's video after the recovery of the marijuana. It did not articulate a legitimate admissible basis for allowing the depiction of the marijuana and Officer Opacion's expletive, nor could it have. The video of the marijuana could not have been admitted as other crimes evidence, because it was not connected to Trumane. *People v. Pikes*, 2013 IL 115171, ¶20 (rejecting the use of other-crimes analysis when evaluating the improper admission of crimes/bad acts committed by a codefendant). Nor was the body cam video admissible on traditional relevancy principles.

In this regard, the case of *People v. Lopez,* 2014 IL App (1st) 102938-B is instructive. A jury found Lopez and several codefendants guilty of murder for killing a factory employee in the parking lot of a tortilla factory where the decedent worked. *Id.* at ¶1. Over a defense objection, the court permitted the prosecution to present evidence of a separate beating committed

by the codefendants outside the tortilla factory three weeks prior to the murder, after the prosecutor argued that the beating was relevant to the charged murder offense. *Id.*, at ¶¶3, 5-6.

On appeal, the court applied traditional relevancy principles and found that, contrary to the prosecutor's representation below, there was no evidence that the murder was tied to the beating three weeks earlier. *Lopez*, 2014 IL App (1st) 102938-B, ¶24. In point of fact, the court found that the prosecution had not presented a "whit of evidence establishing [the defendant] participated or even had knowledge of" the earlier beating. *Id.* at ¶29. After additionally finding that the beating had no bearing on whether the *Lopez* defendant was one of the perpetrators responsible for the factory employee's death, the appellate court found that the judge had erred in denying the pretrial motion to exclude. *Id.* at ¶30. The court further found that the error was prejudicial where evidence of the beating increased the likelihood that the jury found Lopez guilty because it believed he, like his fellow gang members and codefendants, was a bad person deserving of punishment. *Id.* Accordingly, the court remanded for a new trial. *Id.*

Arguably, the introduction of the marijuana in Trumane's case was even more egregious than the beating at issue in *Lopez* as the prosecutor here never claimed a remote connection between the codefendant's marijuana possession and the weapons charge before Trumane's jury. Its only basis for admitting the evidence was the false assertion that the tape could not be excised. As in *Lopez*, the admission of the highly inflammatory evidence prejudiced Trumane.

The nature of the improperly admitted evidence was prejudicial as there tends to be a perceived connection between drugs and guns. See *United States v. Johnson*, 592 F.3d 164, 169 (D.C. Cir. 2010); *United States v. Lopez*, 649 F.3d 1222, 1242 (11th Cir.2011) ("[T]his Court has long recognized that, as Forrest Gump might say, drugs and guns go together like peas and carrots."); see also *People v. Robinson*, 167 Ill. 2d 397, 408 (1995) (one of the indicators

of an intent to deliver drugs is the presence of a weapon). And although the prosecution acknowledged that Trumane had no connection to the marijuana, the jury may have well speculated that Trumane had some involvement with it as it was recovered during the encounter with police and his codefendants. This is particularly likely where the jury also heard Officer Opacion's hearsay response "holy shit" upon seeing how much drugs were in the bag, leading it to infer that the occupants of the car were engaged in illicit drug activity. Where juries tend to associate guns and drugs together, it is likely that the jury relied on the presence of such a large quantity of marijuana in this case to find it likely that Trumane must have possessed the gun even though there was no visual corroboration for Martinez's account. As in *Lopez*, the irrelevant evidence may have convinced the jury that Trumane was a bad guy who deserved punishment by virtue of his associations. Opacion's testimony that the drugs were not "from" Trumane was very perfunctory, and did not preclude the jury from inferring that Trumane might have had some involvement with the pot. (R. 220-21).

Additionally, as argued extensively in Argument I, and incorporated herein by reference, the prosecution's case against Trumane rested largely on the questionable testimony of Officer Martinez — the only individual to claim to see Tompkins in possession of a weapon — who failed to activate his body-worn camera as required by Chicago Police Department regulations and the Body Camera Act. (R. 225, 263-65). Where Martinez was additionally impeached by police reports of the incident, the prosecution failed to prove that the admission of the irrelevant and prejudicial marijuana evidence was harmless. (R. 278). Allowing the jury to see video of the marijuana, evidence from which it might infer that Trumane likely also possessed the gun, unfairly bolstered Martinez's testimony.

Further, as explained at length *supra* in Argument I, Trumane's flight from police is not necessarily indicative of consciousness of guilt. As an initial matter, Trumane was not

the driver of the Hyundai that Opacion attempted to curb and the prosecution presented no evidence that Trumane had any control over the driver's refusal to curb her vehicle when the officer initiated the traffic stop. In addition, given the recent police shootings of young Black men for seemingly minor infractions, it is no wonder that one might flee on foot, as Trumane did from Officer Martinez. *People v. Horton*, 2019 IL App (1st) 142019-B, ¶¶69-71 (explaining the "troubling reality" that young minority men may flee from police out of "fear and distrust of police" and to avoid the recurring indignity of racial profiling, as opposed to attempting to conceal criminal activity).

Moreover, giving the jury a reason to infer from the presence of drugs that Trumane must have possessed the gun was especially prejudicial where the jury was not given the proper instruction by which to evaluate Martinez's credibility after he failed to turn on his body cam. It is notable that the prosecution was allowed to use irrelevant body cam footage from another officer while the defense was precluded from instructing the jury in considering the lack of body cam footage from the officer who actually followed Trumane.

Ultimately, the majority's assessment of the prejudicial impact of the irrelevant drug evidence was hampered by the same incorrect harmless-error analysis which caused it to dismiss the instructional error. Pursuant to this Court's prior decisions, where the prosecution's evidence rested largely on Martinez's uncorroborated account, the evidence was anything but overwhelming. *People v. Sebby*, 2017 IL 119445, ¶63, *People v. Naylor*, 229 Ill. 2d 584 606-07 (2008); *People v. Moore*, 2020 IL 124538, ¶52; *People v. Washington*, 2012 IL 110283 ¶ 60 (all holding that evidence is not overwhelming where prosecution's case hinged on a credibility contest). Therefore, this Court should find that the instant error was not harmless.

Finally, as the dissent noted, the cumulative effect of the trial court's grave errors require that this Court take corrective action to preserve the integrity of the judicial process. *Tompkins*,

2021 IL App (1st) 190693-U, ¶53, citing *Blue*, 189 Ill. 2d at 138-39. Individually, the errors here — the trial judge's refusal to instruct the jury that it should determine if Officer Martinez intentionally violated the Body Camera Act when weighing his testimony and the trial judge's decision to admit irrelevant drug evidence — constituted reversible error given the weaknesses in the prosecution's evidence. Collectively, they worked hand in hand where the instructional error deprived the jury of the tools necessary to fully evaluate Martinez's credibility while Opacion's irrelevant body cam evidence improperly bolstered Martinez's testimony by playing into negative public perceptions about guns and drugs. Together the errors gave the prosecution an unfair advantage in prosecuting its case against Trumane by bolstering the strength of its case in the eyes of the jury. There can be little doubt that Trumane's defense would have been far stronger — and the prosecution's case much less persuasive — absent the errors in this case, thereby depriving Trumane of his constitutional right to a fair trial. Because the prosecution did not, and indeed cannot, prove that these errors are harmless beyond a reasonable doubt, this Court should reverse and remand for a new trial.

CONCLUSION

For the foregoing reasons, Trumane Tompkins, Petitioner-Appellant, respectfully requests that this Court vacate the appellate court's decision below, reverse Tompkins's unlawful use of a weapon by a felon conviction and remand for a new trial.

Respectfully submitted,

DOUGLAS R. HOFF
Deputy Defender

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

COUNSEL FOR PETITIONER-APPELLANT

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 34 pages.

/s/Yasaman Hannah Navai
YASAMAN HANNAH NAVAI
Assistant Appellate Defender

APPENDIX TO THE BRIEF

INDEX TO THE RECORD

Common Law Record ("C") **Page**

Secured Record ("Sec. C.")

Supplemental Common Law Record ("Sup2.C.")

Report of Proceedings ("R")

		Direct	Cross	Redir.	Recr.
Jury Trial					
Witnesses					
	Officer Piotr Opacian	202	227	237	
	Officer Constantino Martinez	245	267		
	Officer Katie Blocker	281	296		

IN THE CIRCUIT COURT OF COOK COUNTY

PEOPLE OF THE STATE OF ILLINOIS)
V.)
TRUMANE TOMPKINS)
Defendant

CASE NUMBER 18CR0676501
DATE OF BIRTH 11/08/95
DATE OF ARREST 04/23/18
IR NUMBER 1967388 SID NUMBER 013103651

ORDER OF COMMITMENT AND SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

The above named defendant having been adjudged guilty of the offense(s) enumerated below is hereby sentenced to the Illinois Department of Corrections as follows:

Count	Statutory Citation	Offense	Sentence	Class
001	720-5/24-1.1(A)	FELON POSS/USE FIREARM PRIOR	YRS. 007 MOS. 06	2

and said sentence shall run concurrent with count(s) ___ ___ ___ ___

____ _____ _____ YRS. ____ MOS. ____ ____
and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:

____ _____ _____ YRS. ____ MOS. ____ ____
and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:

____ _____ _____ YRS. ____ MOS. ____ ____
and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:

____ _____ _____ YRS. ____ MOS. ____ ____
and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:

On Count ___ defendant having been convicted of a class _ offense is sentenced as a class x offender pursuant TO 730 ILCS 5/5-5-3(C)(8).

On Count ___ defendant is sentenced to an extended term pursuant to 730 ILCS 5/5-8-2.

The Court finds that the defendant is entitled to receive credit for time actually served in custody for a total credit of 0332 days as of the date of this order. Defendant is ordered to serve 0002 years Mandatory Supervised Release.

ENTERED Judge 1956 MAR 21 2019 DOROTHY BROWN CLERK OF THE CIRCUIT COURT OF COOK COUNTY, IL DEPUTY CLERK

IT IS FURTHER ORDERED that the above sentence(s) be concurrent with _____ _____ _____ _____ _____ the sentence imposed in case number(s) _____ _____ _____ _____ _____ AND: consecutive to the sentence imposed under case number(s) _____ _____ _____ _____ _____ _____

IT IS FURTHER ORDERED THAT COUNT 2-10 MERGE INTO COUNT 1. MITT TO ISSUE_____

IT IS FURTHER ORDERED that the Clerk provide the Sheriff of Cook County with a copy of this Order and that the Sheriff take the defendant into custody and deliver him/her to the Illinois Department of Corrections and that the Department take him/her into custody and confine him/her in a manner provided by law until the above sentence is fulfilled.

DATED MARCH 21, 2019
CERTIFIED BY V WIMBERLY
DEPUTY CLERK
VERIFIED BY _____

ENTER: 03/21/19
JUDGE JOYCE TIMOTHY JOSEPH 1956

CCG N305

A-3

C 165

TO THE APPELLATE COURT OF ILLINOIS
IN THE CIRCUIT COURT OF COOK COUNTY
CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	**Case No:** **18CR0676501**
vs.	)	**Judge:** **TIMOTHY JOYCE**
	)	**Attorney:** **RICHARD KRUSS**
TRUMANE TOMPKINS	)	

NOTICE OF APPEAL

An Appeal is taken from the order of judgment described below:

APPELLANT'S NAME: **TRUMANE TOMPKINS - DOB: 11/08/1995 - IR # 1967388**
APPELLANT'S ADDRESS: IDOC
APPELLANT'S ATTORNEY: **Office of the State Appellate Defender**
ATTORNEY'S ADDRESS: **203 North LaSalle Street, 24th Floor, Chicago, IL 60601**
ATTORNEY'S EMAIL: **1stDistrict@osad.state.il.us**
OFFENSE: **UNLAWFUL USE OF A WEAPON BY A FELON**
JUDGMENT: **GUILTY**
DATE OF JUDGMENT: **02/15/2019**
SENTENCE: **2 YRS IDOC**
IF NOT A CONVICTION, NATURE OF ORDER APPEALED FROM: _____

_____
APPELLANT/APPELLANT'S ATTORNEY

VERIFIED PETITION FOR REPORT OF PROCEEDINGS COMMON LAW RECORD AND FOR APPOINTMENT OF COUNSEL ON APPEAL

Under Supreme Court Rules 605-608, appellant asks the Court to order the Official Court Reporter to transcribe an original and copy of the proceedings, file the original with the Clerk and deliver a copy to the Appellant; order the Clerk to prepare the Record on appeal, and to appoint the State Appellate Defender as counsel on appeal. Appellant, being duly sworn, says that at the time of his conviction he was and is now unable to pay for the Record or to retain counsel on appeal.

_____
APPELLANT/APPELLANT'S ATTORNEY

ORDER

IT IS ORDERED that the State Appellate Defender be appointed as counsel on appeal and the Record and Report of Proceedings be furnished to appellant without cost, within 45 days of receipt of this Order.
Dates to be Transcribed: _____
TRIAL DATE(S): 02/14/2019 – 02/15/2019
SENTENCING DATE(S): 03/21/2019

DATE:_____ ENTER:_____
JUDGE

A-4

2021 IL App (1st) 190693-U

FIRST DISTRICT,
FIRST DIVISION
September 20, 2021

No. 1-19-0693

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TRUMANE TOMPKINS, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County, Illinois. No. 18 CR 6765 Honorable Timothy Joseph Joyce, Judge Presiding.

JUSTICE COGHLAN delivered the judgment of the court.
Justice Pierce concurred in the judgment.
Justice Walker dissented.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in declining to give a non-Illinois Pattern Jury Instruction concerning a police officer's failure to turn on his body-worn camera. Error in admitting body-camera footage depicting marijuana recovered from defendant's co-arrestee was harmless.

¶ 2 Defendant Trumane Tompkins was convicted of unlawful use or possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2018)) and sentenced to seven and a half years' imprisonment. Defendant appeals, arguing that the trial court erred in declining to give the jury a non-Illinois Pattern Jury Instruction (non-IPI) pursuant to the Law Enforcement Officer-Worn

Body Camera Act (Act) (50 ILCS 706/10-1 *et seq.* (West 2018)) and admitting body-camera footage showing marijuana belonging to defendant's co-arrestee. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Motion *in limine*

¶ 5 On April 23, 2018, defendant was a passenger in a car that fled from police during a routine traffic stop. After the car crashed into the side of a house, defendant and two other individuals ran from the vehicle. During a foot chase, an assisting officer saw defendant toss a red and black object, later identified to be a firearm. Defendant was charged with unlawful use or possession of a weapon by a felon.

¶ 6 Prior to trial, defendant filed a motion *in limine* seeking to bar any evidence "regarding the recovery of marijuana that allegedly was possessed by a co-arrestee." One of the body-worn camera videos depicted a bag of marijuana seized from a co-arrestee being tossed to an officer at the scene, who responded, "Holy s***." Defense counsel argued that the clip is "highly prejudicial" because of the implication that defendant is somehow involved with the bag of marijuana. Counsel suggested showing a "shorter" body-camera video of another officer "which actually shows again the gun being found where it's laying on the ground *** and there is no marijuana involved in that video."

¶ 7 The State maintained that the marijuana is shown "within seconds" of when the officer who ultimately inventories the gun sees the gun, "[s]o excluding that video in its entirety would be cutting off a very relevant portion and it's so close in time in proximity it would be hard to cut that part out." The State offered to "easily remedy" defendant's concerns through the testimony

of the officer establishing that the marijuana was not in defendant's possession and that it belonged to a co-arrestee, who was charged with its possession.

¶ 8 The court denied defendant's motion *in limine* regarding the body-camera video, stating, "I'm not going to make the State's decisions with respect to what video is better or worse from a persuasive standpoint."

¶ 9 Jury Trial

¶ 10 Officer Piotr Opacian (Opacian) testified that on the evening of April 23, 2018, he was driving in a marked police car while on duty with his partner, Officer Amaris Furlan. Around 11:00 p.m., Opacian observed a black Hyundai Sonata with an inoperable license plate light near 79th Street and Cottage Grove Avenue in Chicago, Illinois. He activated the sirens and lights and attempted to curb the vehicle. The Hyundai Sonata slowed down and pulled over to the right, but "did not make a full, complete stop and just took off at a very high rate of speed."

¶ 11 The vehicle "disobey[ed] a red light and almost [T-boned] a car at [an] intersection." He continued pursuing the vehicle, but turned off the lights and sirens. The Hyundai Sonata ran through multiple stop signs, and he lost sight of it for "[a] few seconds." When Opacian saw the vehicle again, it had "jumped over a curb" and crashed "[i]nto the side of the house" located at 7104 South Champlain Avenue.

¶ 12 A woman exited from the driver's seat, a man from the front passenger's seat, and another man from the rear passenger side of the vehicle, later identified as defendant. They all ran in "different directions." Defendant and the woman ran southbound on Champlain and the other man "ran southbound between Champlain and *** St. Lawrence in the alley." Opacian parked the squad car and pursued the suspects on foot, going southbound on Champlain.

¶ 13 Opacian "lost sight of the individuals," but saw an assisting police vehicle following defendant. Shortly thereafter, he learned that one of the individuals had been arrested near 7111 South Champlain and that a weapon had been recovered. When he arrived at that location, one of the officers directed him to a red and black Glock 22 .40 caliber with an extended magazine "between two apartment buildings behind a fence in the front gangway area" within 10 feet of the fence, and he inventoried the gun.

¶ 14 Opacian's squad car was equipped with a dash-cam that recorded the car chase, which was played for the jury. The jury was also shown footage from his body-worn camera. He explained that police officers are required to manually turn on their body-worn camera when they are "engaged in some sort of stop" or an arrest. The footage depicts, in part, another officer tossing him a bag of marijuana shortly before he sees the firearm. The marijuana was found "in [an] alley" and was "not *** recovered on scene in the location where the gun was recovered." Opacian clarified that "there is an indication that there was some narcotics that were also found on scene," but that was "from a different individual who exited the Hyundai Sonata." Again on cross examination, he explained that he "arrested somebody else" for the marijuana that was shown on the body camera footage.

¶ 15 Officer Constantino Martinez (Martinez) testified that on April 23, 2018, between 11:00 and 11:30 p.m., he was on duty in an unmarked police car with his partner, Officer Katie Blocker. They received a call to assist a marked unit with a vehicle that tried to flee during a traffic stop. While driving, he observed the marked police car in pursuit of a "black sedan" near 70th Street and Cottage Grove.

¶ 16 Martinez followed the marked police car "[a]t a safe distance but fairly close." He saw the fleeing vehicle "almost T-bone[] another car." He continued following the marked squad car

and saw the black sedan again "[a]fter it crashed into a house." The marked squad car continued westbound and pulled into an alley. Martinez drove southbound on Champlain because "[he] saw two subjects run from the vehicle, a *** female driver and a male rear passenger." Martinez identified the male as defendant.

¶ 17 When defendant "cross[ed] in front of" Martinez's vehicle, he exited and pursued defendant on foot. He ran after defendant southbound on Champlain and across the street onto the east sidewalk. Defendant "was running fast *** and he kept holding his waistband like he was holding something and he was trying to retrieve it from wherever he had it in his front waistband." Once he "retrieve[d] the item from the front waistband" defendant "toss[ed] a black and red object" over the gate in front of 7111 South Champlain. Martinez was about 10-15 feet behind defendant when he saw him toss the object. Defendant "stopped running and then just immediately put his hands up in the air," and Martinez placed him into custody.

¶ 18 Martinez explained that he was wearing a body-worn camera that night and that police officers are required to activate their body-worn camera in certain situations, including investigatory stops, traffic stops, and foot pursuits when "safe and feasible to do so." However, he failed to activate his camera that night "[d]ue to the spontaneous nature of the event, everything happened so quickly." He was "more worried about the safety of [his] partners and the erratic driving" and "wasn't thinking about turning [his] camera on at the time."

¶ 19 Officer Blocker testified that Martinez pursued a black male that fled from the crashed vehicle. She started running toward Opacian, but lost sight of him. She was running "parallel" to Martinez and could see him "out of the side of [her] eye." She saw that he "already physically had the subject in custody at that time," so she went over to them. Martinez told her that defendant threw something red "over there" and pointed to where he had apprehended defendant.

Officer Blocker used her flashlight to search the area and, "within seconds," located a gun between the gangway of a porch and a wrought iron fence. She called Opacian over to inventory the gun.

¶ 20 The parties stipulated that defendant was convicted of a qualifying felony offense for unlawful use or possession of a weapon by a felon under Illinois law.

¶ 21 Jury Instruction Conference and Closing Arguments

¶ 22 Defendant requested that the jury be given a non-IPI jury instruction concerning Martinez's failure to turn on his body-worn camera pursuant to the Act. See 50 ILCS 706/10-30 (West 2018). The Act provides that body-worn camera recordings may be used as evidence in any judicial proceeding. *Id.* "If a court or other finder of fact finds by a preponderance of the evidence that a recording was intentionally not captured *** in violation of this Act, then the court or other finder of fact shall consider or be instructed to consider that violation in weighing the evidence, unless the State provides a reasonable justification." *Id.*

¶ 23 Defense counsel argued that "the Court and the trier of fact, the jury, heard evidence that although Martinez was wearing a body-worn camera and was required to turn it on pursuant to Chicago Police Department rules, he did not, in fact, turn on his body-worn camera at any point during *** the chase and the arrest." Defense counsel requested that the jury be given the following non-IPI jury instruction:

> "You have heard testimony that Officer Martinez was wearing a body-worn camera but did not turn it on prior to or during his encounter with the defendant. If you find that the officer intentionally did not capture a recording of this encounter, then you should consider that fact when determining the weight to give to officer Martinez's testimony."

The trial court refused to give the instruction, noting that it was "somewhat confusing" as to "whether the court has to make such a finding by a preponderance of the evidence before the jury shall be so instructed or whether the finder of fact *** has to make such a finding." The court found that while the instruction tracked the statutory language, the State provided a "reasonable justification" for Martinez's failure to turn on his body camera, stating:

> "I've listened carefully to the testimony of Officer Martinez, who was involved in a quick investigation made under adrenalin inducing circumstances in connection with a high-speed chase through a residential part of town in a very short period of time. The fact that he was more concerned with his safety, fellow officer's safety and the safety of other persons, including those in the car *** strikes me as eminently reasonable justification in the face of his failure to turn on the body-worn camera in the face of the additional things he was doing at that time."

¶ 24 During closing arguments, defense counsel emphasized that "the only police officer who saw [defendant], allegedly, with what he suspected to be that gun, did not turn on his body-worn camera as is required." Counsel also asserted:

> "Now I want to briefly touch on the body-worn camera issue. It is not an after thought. It is required by Chicago Police Department officers to wear that body-worn camera and the officers that saw and you heard testimony from, they followed that requirement. They followed that rule, but Officer Martinez did not. He did not do his job that night. He has been wearing that body-worn camera for three years and you heard Opacian testify that in order to turn that body-worn camera on, you double click it and you saw that he was engaged in that chase for several minutes or at least a minute on the road and then he gets out of his vehicle and he's saying he thinks that [defendant] has

something in his waistband, but he doesn't turn his body-worn camera on. Did not follow the rules and why is that important? Because if he had you would have the information that you need before you to make your decision."

¶ 25 The jury found defendant guilty of unlawful use or possession of a weapon by a felon and he was sentenced to seven and a half years' imprisonment. On March 21, 2019, defendant filed a motion for a new trial, arguing that the trial court erred in denying his motion *in limine*, specifically by allowing the State to show the body-camera video depicting the marijuana and that the court erred in denying defendant's request to give the jury the non-IPI jury instruction on Martinez's failure to activate his body-worn camera. The court denied defendant's motion.

¶ 26 ANALYSIS

¶ 27 "A non-IPI instruction should be used only if the IPIs for criminal cases do not contain an accurate instruction and if the tendered non-IPI instruction is accurate, simple, brief, impartial, and free from argument." *People v. Ortiz*, 2017 IL App (1st) 142559, ¶ 50 (citing *People v. Pollock*, 202 Ill. 2d 189, 211-12 (2002)). The instruction must not be misleading or confusing. *Id.* The trial court's "refusal to issue a nonpattern jury instruction *** will not be reversed on appeal absent an abuse of discretion." *People v. Garcia*, 165 Ill. 2d 409, 432 (1995).

¶ 28 "The court must give a non-IPI instruction 'if the refusal to give a non-IPI instruction results in the jury not being instructed as to a defense theory of the case which is supported by some evidence.' " *People v. Ehlert*, 274 Ill. App. 3d 1026, 1037 (1995) (quoting *People v. Hanson*, 138 Ill. App. 3d 530, 540 (1985)). "Refusal to give a Non-IPI instruction does not constitute an abuse of discretion however, if there is an applicable IPI instruction and/or the essence of the refused instruction is covered by other given instructions." *People v. Nutall*, 312 Ill. App. 3d 620, 634 (2000) (citing *People v. Thomas*, 175 Ill. 3d 521, 528 (1988)). We review

the jury instructions tendered as a whole to determine whether they fully and fairly cover the law. *Nutall,* 312 Ill. App. 3d at 633 (citing *People v. Hines*, 257 Ill. App. 3d 238, 244 (1993)).

¶ 29 Defendant maintains that the trial court abused its discretion in refusing the non-IPI jury instruction because there was at least "some evidence" to support the instruction. Viewing the jury instructions as a whole, we find no abuse of discretion. First and foremost, the proposed non-IPI instruction was an inaccurate statement of the law and was therefore properly refused by the court. "Whether a court has abused its discretion will depend on whether the nonpattern instruction tendered is an *accurate*, simple, brief, impartial, and nonargumentative statement of the law." (Emphasis added.) *Pollock*, 202 Ill. 2d at 211-12 (citing *People v. Ramey*, 151 Ill. 2d 498, 536 (1992)).

¶ 30 Here, defendant's proposed non-IPI instruction omitted the statutory language, "unless the State provides a reasonable justification" in its entirety. See 50 ILCS 706/10-30. Because the non-IPI instruction was an inaccurate statement of the law, the trial court did not abuse its discretion in refusing the instruction. See, *e.g.*, *People v. Testin*, 260 Ill. App. 3d 224, 233 (1994) (holding that trial court properly refused a non-IPI instruction where the "tendered instruction is an incorrect and overly broad statement of the law"); *People v. Sequoia Books, Inc.*, 160 Ill. App. 3d 750, 759 (1987) (trial court did not abuse its discretion in denying defendant's non-IPI instructions where they were "inaccurate statements as to the applicable obscenity law in Illinois"); *People v. Bush*, 157 Ill. 2d 248, 255-56 (1993) (finding that the trial court abused its discretion in giving a non-IPI instruction that misstated the law).

¶ 31 In addition, the jury was given IPI Criminal No. 1.02, providing that, "In considering the testimony of any witness, you may take into account his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias, or prejudice he may have, and the

reasonableness of his testimony considered in the light of all the evidence in the case." The jury was instructed to consider the witness's credibility in light of "all the evidence in the case," which included Martinez's failure to turn on his body camera. In addition, Martinez admitted that he failed to turn on his body-worn camera and defendant concedes that the "focal point" of his closing argument addressed how this failure undermined Martinez's credibility. See *People v. Buck*, 361 Ill. App. 3d 923, 944 (2005) (the trial court did not abuse its discretion in refusing a non-IPI jury instruction concerning factors in weighing defendant's confession where "defense counsel repeatedly informed the jury that defendant's statement was not electronically recorded" and the instruction given did not prohibit the jury from considering this fact in assessing the weight to give his statement); see also *Nutall*, 312 Ill. App. 3d at 634 (finding that the trial court did not abuse its discretion in refusing to give a non-IPI on "mere presence" where the jury was given IPI instructions on the presumption of innocence, burden of proof, and elements of the crime under an accountability theory and defense counsel argued the same points as the non-IPI instruction); *People v. Trice*, 2017 IL App (4th) 150429, ¶ 45 (finding that IPI Criminal No. 1.02 "was sufficient to instruct the jury to consider any potential interest or bias when assessing [government informant's] credibility").

¶ 32 Defendant further asserts that based on the language of the Act, the "trial judge invaded the province of the jury when he refused the instruction based on his determination that the officer had offered a reasonable explanation for failing to activate his body camera."[1] We need not address that argument because any error in refusing to give the inaccurate non-IPI instruction was harmless. See *People v. Mertz*, 218 Ill. 2d 1, (2005) ("We need not determine whether

[1] The State argues that the Act "mandating the instruction is an unconstitutional violation of the separation-of-powers-doctrine." We "will not consider a constitutional question if the case can be decided on other grounds because constitutional issues are only reached as a last resort." *People v. Stroud*, 392 Ill. App. 3d 776, 790 (2009) (citing *People v. Brown*, 225 Ill. 2d 188, 200 (2007)).

Wright's 'profiler' testimony was properly before the jury because any error in its admission was harmless beyond a reasonable doubt."); *People v. Hart*, 124 Ill. 2d 490, 517 (2005) (unnecessary to address merits of argument where error, if any, is harmless).

¶ 33 "An error in a jury instruction is harmless if it is demonstrated that the result of the trial would not have been different had the jury been properly instructed." *People v. Pomykala*, 203 Ill. 2d 198, 210 (2003) (citing *People v Johnson*, 146 Ill. 2d 109, 136 (1991)). We must determine if "the evidence of defendant's guilt was so clear and convincing as to render the error harmless beyond a reasonable doubt." *Pomykala*, 203 Ill. 2d at 210 (citing *People v. Dennis*, 181 Ill. 2d 87, 95 (1998)).

¶ 34 The evidence of defendant's guilt in this case, while circumstantial, was overwhelming. See *People v. Patterson*, 217 Ill. 2d 407, 435 (2005) ("this court has consistently held that a conviction may be based solely on circumstantial evidence"). Martinez testified that from only 10-15 feet away, he saw defendant grab at his waistband and toss a red and black object as he was running. Officer Blocker recovered the gun "within seconds" of searching for it, exactly where Martinez saw defendant toss the object, and defendant's flight from the police is circumstantial evidence "tending to show consciousness of guilt." *People v. Harris*, 52 Ill. 2d 558, 561 (1972); see also *People v. Ross*, 2019 IL App (1st) 162341, ¶ 32.

¶ 35 Moreover, as previously discussed, the jury was properly instructed regarding assessing the credibility of the witnesses and defendant's closing argument attacked Martinez's credibility by highlighting his failure to turn on his body-worn camera. Compare *People v. Parker*, 113 Ill. App. 3d 321, 330 (1983) (refusal to give non-IPI instruction on witnesses testifying under grant of immunity was harmless where IPI Criminal No. 1.02 was given and the jury was made aware of the fact that certain witnesses were testifying under grants of immunity") with *People v.*

Wheeler, 401 Ill. App. 3d 304, 314 (2010) (counsel's failure to request accomplice-witness instruction was deficient and not harmless where the evidence was closely balanced and accomplice-witness was a key witness). It therefore cannot be said that the result of defendant's trial would have been different had the jury been given the proposed non-IPI instruction.

¶ 36 Defendant also asserts that the trial court erred in admitting footage from Opacian's body-worn camera depicting the marijuana recovered from a co-arrestee "[b]ecause the marijuana shed absolutely no light on whether [defendant] committed the offense *** and its prejudicial impact was in no way remedied by the officer's testimony that [defendant's] codefendant was charged with its possession."

¶ 37 "Other crimes" evidence is admissible if it is relevant for any purpose other than showing the defendant's propensity to commit crime. *People v. Wilson*, 214 Ill. 2d 127, 135 (2005). However, "the concerns underlying the admission of other-crimes evidence are not present when the uncharged crime or bad act was *not committed by the defendant*." (Emphasis added.) *People v. Pikes*, 2013 IL 115171, ¶ 16. Therefore, in situations where defendant is not "alleged to have committed the prior offense," the "case should be judged under ordinary principles of relevance." *Id.* ¶ 20. Because it is undisputed that defendant did not possess the marijuana, we review its admission under ordinary principles of relevance.

¶ 38 Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan. 1, 2011). The admissibility of evidence rests within the discretion of the trial court, and it will not be disturbed absent an abuse of discretion. *Pikes*, 2013 IL 115171, ¶ 12. We find that while the trial court erred in admitting the evidence of the marijuana, this error was harmless.

¶ 39 Defendant, relying on *People v. Lopez*, 2014 IL App (1st) 102938-B, argues that the body-camera evidence depicting marijuana was irrelevant and prejudicial. In *Lopez*, the defendant was convicted of first degree murder for his participation in the beating death of a man in a factory parking lot. *Id.* ¶ 1. The trial court admitted evidence of an attack on another man by defendant's codefendants in the same parking lot three weeks earlier. *Id.* We held that the trial court erred in admitting evidence of the prior beating because there was "no evidence at trial showing that the [] murder was tied to the prior incident," or that defendant participated in it. *Id.* ¶¶ 24, 28-29 .

¶ 40 The State maintains that "[t]he recovery of the marijuana was part of a continuing course of the events and provided motive for the black Hyundai's flight." However, in cases where the "continuing narrative exception" to other crimes evidence applies, there is a direct, "integral" connection between the evidence and the charged offense. See *People v. Rutledge*, 409 Ill. App. 3d 22, (2011) (evidence that defendant was aggressive and struck a witness prior to hitting an arresting police officer was relevant because "[w]ithout this evidence, there [was] no explanation for defendant's conduct toward [the officer]" and was an "integral and natural part" of the aggravated battery of the police officer); *People v. Manuel*, 294 Ill. App. 3d 113, 124 (1997) (evidence that defendant had arranged prior drug sales with same police informant was admissible other crimes evidence because they were a "necessary preliminary to the current offense"); *People v. Daniels*, 2016 IL App (4th) 140131, ¶ 80 (codefendant's interview "established a continuing narrative that explained the relationship" between two rival groups that led to the shooting). Here, there was "no evidence showing a connection" between the charged offense and the marijuana and it was undisputed that the drugs did not belong to defendant. See *Lopez*, 2014 IL App (1st) 102938-B, ¶ 24.

¶ 41 However, "no reasonable probability exists that the verdict would have been different had the irrelevant evidence been excluded." *People v. Lynn*, 388 Ill. App. 3d 272, 282 (2009). Opacian clearly explained that the marijuana belonged to another passenger and that it was not found where the firearm was recovered or where defendant was arrested. See, *e.g.*, *Pikes*, 2013 IL 115171, ¶ 25 (rejecting defendant's argument that he was prejudiced by irrelevant evidence of a prior shooting he was unconnected to due to an inference of "guilt by association" because defendant was clearly not involved in, or present during, the prior shooting). And, as previously discussed, the evidence of defendant's guilt was overwhelming. See *People v. Evans*, 373 Ill. App. 3d 948, (2007) (finding that even if admitting "testimony regarding two unrelated revolvers recovered along with the murder weapon was error, such error is harmless in light of the overwhelming evidence of defendant's guilt").

¶ 42 CONCLUSION

¶ 43 For the foregoing reasons, the trial court did not abuse its discretion in declining to give the proposed non-IPI jury instruction and the admission of evidence showing marijuana recovered from defendant's co-arrestee was harmless error. Accordingly, defendant's conviction is affirmed.

¶ 44 Affirmed.

¶ 45 JUSTICE WALKER, dissenting:

¶ 46 I respectfully dissent because the trial court erred when it invaded the province of the jury and made the factual finding that the State offered a reasonable justification for Officer Martinez's failure to activate his body camera. The Act clearly requires the fact finder to find whether by a preponderance of the evidence that a recording was intentionally not captured, destroyed, altered, or intermittently captured in violation of the Act, then the fact finder shall

consider that violation in weighing the evidence, unless the State provides a reasonable justification. In a jury trial, the jury, as the finder of fact, must determine whether the "State provides a reasonable justification" because reasonableness is a question of fact, rather than a question of law. *Brame v. City of North Chicago*, 2011 IL App (2d) 100760, ¶ 13. The trial court mistakenly believed that the justification for the officer's failure to activate his body camera was a question of law for the court.

¶ 47 The Law Enforcement Officer-Worn Body Camera Act is not some pointless exercise in virtue signaling. The Act is intended to address the pervasive problem of overly aggressive police tactics, especially when confronting people of color. Police, in general, are given the benefit of the doubt in allegations of abuse, so actual victims have little voice and no real opportunity to prove the course of events. Recognizing this problem, our legislature designed the Act to "provide impartial evidence and documentation to settle disputes and allegations of officer misconduct." 50 ILCS 706/10-5 (West 2016). When officers follow the law and turn on their body cameras, the fact finder sees what the officer saw. Hence, if an officer intentionally failed to activate his body camera, the Act provides that a jury should consider the violation when weighing the evidence.

¶ 48 "The sole function of instructions is to convey to the minds of the jury the correct principles of law applicable to the evidence submitted to it in order that, having determined the final state of facts from the evidence, the jury may, by the application of proper legal principles, arrive at a correct conclusion according to the law and the evidence." *People v. Hudson*, 222 Ill.2d 392, 399 (2006). A non-IPI instruction should be used when the IPIs for criminal cases do not contain an accurate instruction, and the tendered non-IPI instruction is accurate, simple, brief, impartial, and free from argument. *People v. Ortiz*, 2017 IL App (1st) 142559, ¶ 50.

¶ 49 Currently, there is no pattern jury instruction that addresses the specific issue that the Act intends to remedy, and IPI 1.02 alone is insufficient. The majority finds the proposed non-IPI instruction was an inaccurate statement of law. However, the trial court found that the instruction was well-written and closely followed the language of the Act. Here, the proposed non-IPI instruction was appropriate and substantially covered the Act. The trial court's refusal to give the instruction was an abuse of discretion.

¶ 50 The trial court's error in refusing the non-IPI instruction was not "harmless error" because evidence of guilt was not overwhelming. Officer Martinez was the only person who supposedly saw Tompkins toss the gun. Additionally, Officer Martinez testified that it is common for individuals in a high crime area to stash guns throughout the neighborhood instead of on their person. Here, there is a reasonable possibility that had the non-IPI jury instruction been given, the result of the trial would have been different. Because there was no IPI, Tompkins was entitled to the non-IPI instruction on his theory of the case. Where there was evidence of an issue with officer's failure to turn on his body camera, the trial court abused its discretion when it refused to instruct the jury on that issue. *People v. Crane*, 145 Ill. 2d 520, 526, (1991).

¶ 51 Finally, the trial court erred by including clearly irrelevant evidence. The majority concedes that "there was 'no evidence showing a connection' between the charged offense and the marijuana, and it was undisputed that the drugs did not belong to [Tompkins]." However, the majority also believes that there was no reasonable probability that the outcome would have been different without the irrelevant evidence. I disagree.

¶ 52 Tompkins was also entitled to a new trial due to the cumulative effect of the trial court's errors. "The cumulative error analysis permits the reversal of a case where each error is individually deemed harmless or not plainly erroneous and where these errors together have the

cumulative effect of denying defendant's right to a fair trial." *People v. Jones*, 2019 IL App (3d) 160268, ¶ 50. The trial court's error in allowing irrelevant evidence compounded its error of refusing to provide the non-IPI instruction. Evidence of guilt was not overwhelming because the case rested upon the credibility of one witness. See *People v. Hayes*, 183 Ill. App. 3d 752, 757-58 (1989) (reversal based upon improper comments made by prosecutor mandated because the evidence was not overwhelming and rested entirely upon the victim's credibility).

¶ 53 Cumulatively, these errors created a pattern of unfair prejudice to Tompkins. See *People v. Blue*, 189 Ill.2d 99, 139 (2000). As in *Blue*, a new trial is necessary in this case to preserve and protect the integrity of our judicial system. I would reverse and remand for a new trial. Accordingly, I respectfully dissent.

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721
(217) 782-2035

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

January 26, 2022

In re: People State of Illinois, Appellee, v. Trumane Tompkins, Appellant. Appeal, Appellate Court, First District.
127805

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

Very truly yours,

Cynthia A. Grant

Clerk of the Supreme Court

A. 22

No. 127805

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- TRUMANE TOMPKINS, Petitioner-Appellant.	)	Appeal from the Appellate Court of Illinois, No. 1-19-0693. There on appeal from the Circuit Court of Cook County, Illinois, No. 18 CR 6765. Honorable Timothy Joseph Joyce, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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

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

Trumane Tompkins, 5662 Leverett Avenue, St. Louis, MO 63136

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 May 20, 2022, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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