No. 126830

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- JEREMY MUDD, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-19-0252. There on appeal from the Circuit Court of Cook County, Illinois , No. 17 CR 12579. Honorable Charles P. Burns, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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E-FILED
5/19/2021 10:28 AM
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NATURE OF THE CASE

After a jury trial, Jeremy Mudd was convicted of unlawful use of a weapon by a felon and sentenced to five years and six months in prison. This is a direct appeal from the judgment of the court below. No issue is raised challenging the charging instrument.

ISSUE PRESENTED FOR REVIEW

Whether the appellate court erred in holding that is a matter of "general knowledge, common experience, or common sense" that a defendant has access to and can obtain forensic testing of the State's evidence, whether the prosecutor committed misconduct during rebuttal closing argument by misstating the evidence and shifting the burden to the defense, and whether these errors require a new trial.

STATEMENT OF FACTS

The State charged Jeremy Mudd with, *inter alia*, unlawful use of a weapon by a felon for allegedly possessing a firearm on August 12, 2017. (C. 56) After a jury trial where the State called only two witnesses to testify, Mudd was found guilty. (Sec C. 4; R. 111-14) The trial court sentenced Mudd to five years and six months in prison. (C. 152; Sup R. 327-29) On appeal, Mudd argued he should receive a new trial because the State committed misconduct during rebuttal closing argument by misstating the evidence and shifting the burden to Mudd. *People v. Mudd*, 2020 IL App (1st) 190252-U, ¶2. The appellate court affirmed, finding it a matter of common knowledge of the jurors that Mudd had "access to evidence to be used against him 'to have a test made by his chosen expert'. . ." *Id*. at ¶23. The court further held that the prosecutor had not shifted the burden to Mudd to present evidence that his fingerprints were not found on the gun. *Id*. at ¶¶24-25.

Trial proceedings

Opening statements

In Mudd's opening statement, trial counsel told the jurors, "There are numerous things that are documentation, things like forensic analysis and testing, DNA, gunshot residue, fingerprints, photographs, audiovisual recordings. You won't hear any of that. You won't hear that the officers submitted a gun for fingerprints or that Mr. Mudd's fingerprint was on that firearm. You won't hear that they submitted for gunshot residue testing, or that any gunshot residue was on Mr. Mudd. You won't hear that any DNA was swabbed on that firearm or any DNA was recovered." (Sup R. 200)

Officer Gerardo Garcia

Around 10:20 p.m. on August 12, 2017, Officer Garcia was in a squad car with his partner when they, and another squad car, went to Harding Park near 4900 South Calumet

in Chicago to respond to a large group in the park. (Sup R. 203-06) The 40 to 50 people in the park were drinking and loudly playing music. (Sup R. 206) Garcia entered the park with Officer Rice, an officer from the other car, and they walked toward 49th Street while the other officers walked toward 50th Street. (Sup R. 207, 229-30)

In the park, Garcia claimed he saw Mudd in a red shirt and black shorts with a bulge in his right waistband and grabbing at that area. (Sup R. 207-08, 231) Garcia alleged Mudd walked west out of the park, via a small door in the park's fence, toward an adjoining alley underneath the EL tracks. (Sup R. 208-09) Garcia asserted there was good lighting in the area from street lights (that faced toward the center of the street) and lights underneath the EL tracks. (Sup R. 208, 230-32)

Garcia told Mudd to stop. (Sup R. 209-10) Mudd looked back and said, "Who, me?" and continued walking away. (Sup R. 210) Incident reports did not include this alleged statement by Mudd. (Sup R. 235-36); (DE #4-5) While allegedly still holding his right side, Mudd walked northbound in the alley. (Sup R. 213, 215) Garcia and Officer Rice kept pace with Mudd as he walked away. (Sup R. 211) Garcia was about 15 feet away from Mudd while Rice was a few feet in front of Garcia. (Sup R. 212)

In the alley, Garcia said Mudd went toward the driver's side of a van that was facing east. (Sup R. 214-15, 232) Garcia was about five to eight feet away. (Sup R. 215) The van was the only vehicle in the alley. (Sup R. 232) No one was inside the van, and Garcia did not see anyone else approach the van beside Mudd. (Sup R. 225) Garcia claimed he saw Mudd momentarily kneel down by the driver's side rear tire. (Sup R. 214-15) Incident reports did not say Mudd kneeled down. (Sup R. 235-36); (DE #4-5)

Rice detained Mudd. (Sup R. 216) Garcia testified he went to the driver's side rear tire and found a gun on top of the tire. (Sup R. 216-17) Garcia recovered no other items on

either the top or side of the tire. (Sup R. 216-17) With his bare hands, Garcia grabbed the gun and put it in his pocket. (Sup R. 217) Garcia knew police department guidelines instructed officers to recover guns with gloves in order to preserve fingerprints. (Sup R. 236) Garcia did not use gloves because, "There was a lot of people on scene, and they were yelling, they were a little bit upset. They seemed upset." (Sup R. 243, 245)

After the officers walked Mudd to a squad car, Garcia unchambered the gun and removed the magazine. (Sup R. 217-18, 237) He inventoried the gun and bullets. (Sup R. 219-20, 238-39); (PE #2A-D) The inventory sheet for the gun and bullets stated that the items were "recovered/seized from" Garcia. (Sup R. 227-28); (DE #3) Other inventory sheets were created for Mudd's personal property. (Sup R. 242); (DE #1-2) The firearm evidence was submitted via "police mail" to the state crime lab. (Sup R. 239-40) The court sustained several objections to trial counsel's cross-examination of Garcia as to whether he learned the gun or Mudd's fingerprints were submitted to the crime lab for analysis. (Sup R. 238-41) Although Mudd's fingerprints were collected, no DNA or gunshot residue swabs were taken from him. (Sup R. 241)

Officer Jeremy Rice

Officer Rice was working with Garcia and other officers when they arrived at Harding Park around 10:00 p.m. on August 12, 2017, because "[t]here was a party going on, loud disturbances, people drinking within the park." (R. 21, 48-49) In uniform, Rice approached the 40 to 50 people in the park. (R. 22) Rice's incident reports did not mention anything regarding loud music or drinking in the park. (R. 35-37); (DE #4-5) Inside the park from about 15 to 20 feet away, Rice claimed he saw Mudd wearing a red shirt and black shorts and "a bulge poking from the right side of his body, also holding his waistband. . . an object appeared to be sticking out of his shirt." (R. 23-24)

Rice approached Mudd to make a *Terry* stop. (R. 24) Mudd walked west out of the park, and Rice and Garcia followed him. (R. 25) Rice claimed he could see Mudd well due to streetlights and the squad cars' headlights. In a photo of the north end of the park, Rice circled two locations of lights. (R. 40-42); (PE #3) As for the lighting in the adjacent alley, Rice stated, "I'm assuming those are the lights that's coming from the street lamps in the alley. . . I couldn't tell you. . . I know that it was light outside. I didn't use a flashlight to observe him. From my knowledge the light is coming from the street lights above." (R. 41-42) In another photo of the north end of the park, Rice conceded there were no lights underneath the EL tracks in the alley. (R. 42); (DE #6)

Rice "told [Mudd] to stop, let me talk to you." (R. 25) Mudd allegedly turned around, said "Who, me?" and walked northbound in the alley. (R. 26) Rice's reports did not include the alleged "Who, me?" statement but did include that Mudd walked away and ignored verbal commands. (R. 37-38, 49); (DE #4-5) From five to ten feet away, Rice claimed he saw Mudd "walk[] around a blue minivan Caravan. He g[ot] down on one knee and place[d] an object on the rear wheel of the driver's side of the vehicle." (R. 26-27) Although Rice could not see what the "object" was, Mudd allegedly pulled it from his waistband and placed it on the tire. (R. 27) Rice's report did not include anything about Mudd pulling an item out of his waistband. (R. 39); (DE #4-5) Other than the officers and Mudd, there was no else in the alley or the van. (R. 28)

Rice detained Mudd and instructed Garcia to get the item on the tire. (R. 28, 40-41) Rice saw Garcia go to the tire and get a black handgun. (R. 28) Rice's incident report asserted Mudd kneeled down and placed a weapon on the rear wheel of the van's driver's side and that is where the gun was recovered from. (R. 49) During Rice's grand jury testimony, he provided a different version of how the gun was recovered:

Q: "At that point did you see him kneel down and place an object by a van?

A: Yes. . ." (R. 45). . .

Q: "At the time he placed that weapon into the ground, was he the only person by the van?

A: Yes.. . ." (R. 45). . .

Q: "Did you immediately recover that object?

A: Yes." (R. 46)

After Rice's testimony, the parties stipulated that Mudd "was convicted of a felony offense under Case No. 04 CR 27341-02." (R. 51) Thereafter, both parties rested. (R. 54-56, 67)

Closing argument and verdict

In closing argument, trial counsel asserted:

> Now, let's talk about what you don't have. What you don't have are fingerprints. As far as we know, that gun was never even submitted for testing for fingerprints.
>
> You don't have DNA. Why? Because as far as we know, that gun was never even submitted for DNA.
>
> You don't have gunshot residue. Why? Because they never swabbed Mr. Mudd for gunshot residue. (R. 80-81)

In rebuttal argument, the prosecutor claimed:

> And it is our burden of proof, Ladies and Gentlemen. It is the State's burden of proof to prove the elements beyond a reasonable doubt. It's a burden we take on every single day. [objection overruled]. . . And we welcome that burden, Ladies and Gentlemen. We welcome that burden. But both sides have access to the evidence. Both sides if they wanted testing to be done can request testing to be done. Both sides. (R. 84)

The jury found Mudd guilty of unlawful use of a weapon by a felon. (Sec C. 4; R. 111-14)

Post-trial proceedings and sentencing

Post-trial, Mudd's trial counsel withdrew, and the court appointed new counsel, who filed a motion for new trial. (Sec C. 153-57; R. 127; Sup R. 295-97, 316-17) The motion alleged,

inter alia, that the trial court erred in overruling the defense objections in opening and closing statements and the prosecutor shifted the burden of proof to the defense during argument. (Sec C. 154, 157) The court denied the motion. (Sup R. 322) The court thereafter sentenced Mudd to five years and six months in prison with credit for 515 days. (C. 152; Sup R. 327-29)

Direct appeal

On direct appeal, Mudd argued for a new trial based upon the State committing misconduct, during rebuttal closing argument, by misstating the evidence and shifting the burden of proof to Mudd. *Mudd*, 2020 IL App (1st) 190252-U at ¶2. Specifically, Mudd asserted the prosecutor's misstatement of the evidence/burden shifting occurred when he told the jurors that Mudd could have requested forensic testing of the recovered gun if he wanted to. *Mudd*, at ¶12. "Neither the prosecution [n]or the defense presented evidence of any forensic testing on the handgun involved in this case [n]or asked a witness whether such testing was available to both the prosecution and the defense. The absence of testing was raised during [Mudd's] questioning of the police officers and in the parties' closing arguments." *Id*.

After finding Mudd had not preserved the error below (*Id*. at ¶¶13-17), the appellate court held the prosecutor had not committed misconduct because "[w]e believe the fact that a defendant has access to evidence to be used against him 'to have a test made by his chosen expert' is a matter of 'general knowledge, common experience, or common sense'" such that no evidence needed to be introduced on the subject for the prosecutor to make his rebuttal closing argument premised on that fact. *Id*. at ¶23, citing *People v. Lewis Jackson*, 391 Ill.App.3d 11, 42-43 (1st Dist. 2009). The appellate court then rejected Mudd's argument that the prosecutor had shifted the burden of proof by informing the jurors that Mudd could have tested the firearm. *Id*. at ¶¶24-25. The appellate court thus affirmed Mudd's conviction and sentence. *Id*. at ¶26. This Court granted leave to appeal on March 24, 2021.

ARGUMENT

The prosecutor in rebuttal closing argument erred when he shifted the burden of proof to Jeremy Mudd and misstated the evidence about the availability fingerprint testing. The appellate court erred when it held that it is a matter of "general knowledge, common experience, or common sense" for jurors that a defendant has access to and can obtain forensic testing of the State's evidence. Where the State introduced no evidence about this and it is not a matter of common knowledge for jurors, Jeremy Mudd's conviction should be reversed and the case remanded for a new trial.

Officers Rice and Garcia claimed to have seen Jeremy Mudd place a firearm on a van's tire after he walked out of a nearby park. (R. 26-28; Sup R. 214-17) Yet, when Rice testified at the grand jury, he claimed to have seen Mudd place the firearm on the ground. (R. 45-46) During that same grand jury testimony, Rice stated he was the one who recovered the firearm from the ground (R. 45-46); at trial, the officers' story changed to Garcia being the one who recovered the weapon from on top of the van's tire. (R. 28; Sup R. 216-17)

Recognizing these discrepancies as to the recovery of the firearm, trial counsel cross-examined Garcia as to whether the firearm was submitted to the crime lab and/or analyzed for fingerprints. (Sup R. 238-41) The State objected numerous times, and the trial court sustained six of these objections. (Sup R. 238-41) On redirect, the State chose not to question Garcia about the testing of the firearm, or lack thereof, and whether Mudd had the ability to obtain forensic testing of the firearm. (Sup R. 242-43)

Thus during Mudd's jury trial, no evidence was introduced about the testing of the firearm for fingerprints nor any evidence presented about the availability of such testing to either party. In closing argument, counsel sagely noted this lack of evidence and asserted, "As far as we know, that gun was never even submitted for testing for fingerprints." (R. 80); *infra*, p. 15. In rebuttal closing argument, the prosecutor simultaneously committed two types of error. (R. 84); *infra*, p. 15. The prosecutor's assertion that Mudd could have tested the firearm was classic burden shifting and also misstated the evidence, as the State had failed to present

any evidence that Mudd could have requested that the firearm be tested. *See*, *e.g. People v. Beasley*, 384 Ill.App.3d 1039, 1048 (4th Dist. 2008) (State shifted burden where in rebuttal argument where prosecutor faulted defense for not testing items for fingerprints); *compare People v. Lewis Jackson*, 399 Ill.App.3d 314, 318-19 (1st Dist. 2010) (prosecutor did not shift burden or misstate evidence as **the State had presented evidence** that "established that its DNA expert witness was available to both Jackson and the State"). Had the State in Mudd's case wanted to make the argument it did without committing error, it needed to have elicited evidence as to the availability of testing for both sides. Because the errors occurred in a closely-balanced case and affected Mudd's right to a fair trial, this Court should reverse his conviction and remand for a new trial.

A. The prosecutor committed misconduct in rebuttal closing argument when he shifted the burden to the defense and misstated the trial evidence.

Whether an improper statement made by a prosecutor during closing arguments warrants a new trial is a legal question reviewed *de novo*. *People v. Wheeler*, 226 Ill.2d 92, 121 (2007); *but see People v. Blue*, 189 Ill.2d 99, 128 (2000) (applying abuse of discretion standard); *see also People v. Jackson*, 2020 IL 124112, ¶83 ("The standard of review applied to a prosecutor's closing argument is similar to the standard used in deciding whether a prosecutor committed plain error."); *People v. Rudd*, 2020 IL App (1st) 182037, ¶83 (using *de novo* standard post-*Jackson*); *People v. Ealy*, 2015 IL App (2d) 131106, ¶76 (recognizing confusion in standard of review caused by *Wheeler* and *Blue*). Under either standard, this Court should reach the same result: the prosecutor here committed reversible error in rebuttal closing argument, and the appellate court erred in upholding Mudd's conviction and sentence.

The right to due process, as guaranteed by the United States and Illinois Constitutions (U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2), safeguards an accused from conviction except upon proof beyond a reasonable doubt of every fact necessary to prove each element

that constitutes the crime charged. *See Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979); *People v. Brown*, 2013 IL 114196, ¶48; *People v. Cunningham*, 212 Ill.2d 274, 278 (2004). An essential element of proof to sustain a conviction cannot be inferred but must be established. *People v. Mosby*, 25 Ill.2d 400, 403 (1962). It is axiomatic that the State carries the burden of proving each element of a charged offense beyond a reasonable doubt. *Brown*, 2013 IL 114196 at ¶52. Such burden rests on the State throughout the entire trial and never shifts to the defendant. *People v. Howery*, 178 Ill.2d 1, 32 (1997).

Therefore, the defendant is under no obligation to produce any evidence, and the burden of proof never shifts to the defendant but remains the responsibility of the State throughout the trial. *People v. Weinstein*, 35 Ill.2d 467, 470 (1966); *People v. Kelley*, 2015 IL App (1st) 132782, ¶62. "Because the State bears the burden of proof, it similarly bears the consequences of any omission of proof." *People v. Murray*, 2019 IL 123289, ¶30. The State's attempt to shift the burden of proof to defendant, excusing it from being required to prove the elements of the charged offense, violates defendant's right to due process. *See Jackson*, 443 U.S. at 315-16.

"The purpose of closing arguments is to give the parties a final opportunity to review with the jury the admitted evidence, discuss what it means, apply the applicable law to that evidence, and argue why the evidence and law compel a favorable verdict." *People v. Nicholas*, 218 Ill.2d 104, 121 (2005) (quotations and citation omitted). A prosecutor has wide latitude to make arguments in furtherance of these purposes. *Wheeler*, 226 Ill.2d at 123. But if a prosecutor strays from these purposes, he can commit misconduct that deprives a defendant of his constitutional right to a fair trial. *Id*. at 121-23 (citing U.S. Const., amend. XIV; Ill. Const. 1970, art. I, §2). If the misconduct was a material factor in a defendant's conviction, reviewing courts reverse the defendant's conviction and remand for a new trial. *Wheeler*, 226 Ill.2d at

123. The misconduct is material if, had the improper remarks not been made, the jury could have reached a contrary verdict, or, if this Court cannot determine whether the misconduct contributed to the conviction. *Id.*

To set the stage as to why the prosecutor in Jeremy Mudd's case improperly shifted the burden of proof and misstated the evidence, it is necessary to recognize what was at issue in this case. The State charged Mudd with unlawful use of a weapon by a felon, and the parties stipulated to Mudd's prior conviction. (R. 51) Thus, the only trial issue was whether the State could establish beyond a reasonable doubt that Mudd knowingly possessed a firearm on August 12, 2017. (C. 56; Sec C. 15-16); 720 ILCS 5/24-1.1(a) (West 2017).

But during its case, the State had difficulty tying the firearm to Mudd. While multiple items were found on Mudd when he was detained by Officer Rice, no firearm was found. (Sup R. 226-29) Reports showed the firearm was "recovered/seized" from Officer Garcia. (Sec C. 31; Sup R. 228-29; DE #1-3) And while Garcia claimed he recovered a firearm from on top of a van's tire near where Mudd had allegedly knelt down (Sup R. 216-17), Rice's grand jury testimony averred that he saw Mudd place a firearm on the ground and that Rice was the one who retrieved the firearm from the ground. (R. 45-46)

Garcia's alleged recovery of the firearm was also questionable. Garcia admitted using his bare hands to grab the firearm and put it in his pocket. (Sup R. 217) Garcia did this despite police department regulations dictating that such a recovery should be made with gloves to preserve fingerprints. (Sup R. 217, 236) Finally, the officers described a chaotic scene of 40 to 50 people drinking and loudly playing music at 10:20 p.m. with minimal lighting in the area. (R. 21, 40-42, 48-49; Sup R. 208, 230-32; PE #3, DE #6)

Coupled with that problematic evidence was also the lack of any evidence detailing whether Mudd's fingerprints were found on the firearm. In cross-examining Garcia, trial counsel

tried to elicit the lack of any fingerprints. (Sup R. 240-41) However, the trial court sustained six objections by the State:

[Counsel]:	And then you take it all the way to the station while it's in your pocket and hen you inventory it?
[Garcia]:	I made it safe at the car when we were away from the group.
[Counsel]:	And after you make it safe, you took it to the station and then put it in an inventory bag?
[Garcia]:	Yes.
[Counsel]:	Have you used a gun box before where you mark submit for fingerprints or one of those fancy paper bags, submit for fingerprints?
[State]:	Objection.
THE COURT:	Rephrase the question. Sustained. (Sup R. 238-39). . .
[Counsel]:	After did [*sic*] you inventoried it at the station, did you submit it to the forensics division?
[Garcia]:	Yes.
[Counsel]:	And what happened to it when it got to the forensics division?
[State]:	Objection.
THE COURT:	Sustained, assumes a fact not in evidence.
[Counsel]:	Was that submitted via police mail?
[Garcia]:	Yes.
[Counsel]:	And police mail is when you send the gun to the Crime Lab, right?
[Garcia]:	Yes.
[Counsel]:	And that's in the mail?
[Garcia]:	Yes.

[Counsel]: That's not following procedure and protocol?

[State]: Objection.

THE COURT: Overruled.

[Garcia]: That's how they have us do it.

[Counsel]: You've heard of ERPS, right?

[Garcia]: Yes.

[Counsel]: Where they come with a specialized guarded van?

[Garcia]: Yes.

[Counsel]: And they put all the evidence in all the different bags, plastic bags and boxes, and take it to the Illinois State Police Crime Lab?

[Garcia]: Yes.

[State]: Judge, I'm going to object.

THE COURT: I'm going to sustain the objection.

[Counsel]: One moment, your Honor. . . To the best of your knowledge, you never learned that this gun was submitted for fingerprints?

[State]: Objection.

THE COURT: Again, if this calls for a hearsay response, it's going to be sustained. Rephrase the question.

[Counsel]: Did you learn whether this firearm was tested for fingerprints?

[State]: Objection.

THE COURT: Sustained. Calls for a hearsay. (Sup R. 239-40). . .

[Counsel]: Were those fingerprints ever sent to the Crime Lab?

[State]: Objection.

THE COURT: Again, unless there's personal knowledge here, it would call for a hearsay response. Sustained. (Sup R. 241)

After counsel finished questioning Garcia, the State chose not to ask Garcia any questions about the testing of the firearm for fingerprints and/or the availability of such testing to Mudd and the State. (Sup R. 242-43) In closing argument, trial counsel wisely called the jury's attention to the lack of forensic evidence in the case:

> Now, let's talk about what you don't have. What you don't have are fingerprints. As far as we know, that gun was never even submitted for testing for fingerprints.
>
> You don't have DNA. Why? Because as far as we know, that gun was never even submitted for DNA.
>
> You don't have gunshot residue. Why? Because they never swabbed Mr. Mudd for gunshot residue. (R. 80-81)

In rebuttal argument, the prosecutor committed reversible error when he told the jury:

> And it is our burden of proof, Ladies and Gentlemen. It is the State's burden of proof to prove the elements beyond a reasonable doubt. It's a burden we take on every single day. [objection overruled]. . . And we welcome that burden, Ladies and Gentlemen. We welcome that burden. But both sides have access to the evidence. Both sides if they wanted testing to be done can request testing to be done. Both sides. (R. 84)

Arguments that misstate the evidence or that are not based on the evidence are improper. *People v. Williams*, 333 Ill.App.3d 204, 214 (1st Dist. 2002) (error where State made unsupported claim that defendant knew he was the father of victim's child and was about to lose a child support battle); *People v. Dorian Jackson*, 2012 IL App (1st) 102035, ¶¶19-20 (error where State falsely claimed defendant admitted to the offense). Such a practice has repeatedly been found to be error and often reversible error. *See People v. Beier*, 29 Ill.2d 511, 517 (1963) (reversal warranted where prosecutor argued that fingerprints had been wiped clean off of a weapon when there was no such evidence that the weapon bore fingerprints, let alone that the prints had been wiped away); *People v. Whitlow*, 89 Ill.2d 322, 340 (1982) (improper for prosecutor to argue that certain money was "going in defendant's pocket" when that statement was "totally unsupported by any evidence"); *Williams*, 333 Ill.App.3d at 214 (reversal warranted

where prosecutor argued facts imputing a motive to defendant when there was no evidence that defendant knew of the facts underlying the motive at the time of the offense); *People v. Nightengale*, 168 Ill.App.3d 968, 975 (1st Dist. 1988) (improper for prosecutor to argue that defendant's fingerprints were found at the scene when there was no such evidence). And a prosecutor need only make a single misstatement to warrant reversal. *See*, *e.g.*, *Dorian Jackson,* 2012 IL App (1st) 102035 at ¶18.

Further, it is improper for the State to shift the burden of proof onto the accused. *People v. Johnson*, 208 Ill.2d 53, 115 (2004); *People v. McGee,* 2015 IL App (1st) 130367, ¶69. The accused in a criminal case is presumed innocent, and the burden is on the State to present sufficient evidence to prove his guilt beyond a reasonable doubt. *People v. Lopez*, 152 Ill.App.3d 667, 677 (1st Dist. 1987). "Courts have found error where the prosecution implied that the defendant had an obligation to come up with evidence to create a reasonable doubt of his guilt." *Beasley*, 384 Ill.App.3d at 1048; *see also People v. Euell*, 2012 IL App (2d) 101130, ¶20 (State shifted the burden of proof by stating during closing argument that there was no evidence "from the defense standpoint" that a witness had attempted to frame the defendant, and by commenting on the questions that defendant should have asked the witness); *People v. Giangrande*, 101 Ill.App.3d 397, 402 (1st Dist. 1981) (prosecutor shifted burden by arguing "Now where's the evidence that the defendant didn't do it?"). This is true even where "the jury is otherwise properly instructed on the burden of proof." *Lopez*, 152 Ill.App.3d at 677. Burden-shifting misconduct also constitutes an impermissible "comment on the defendant's failure to take the stand in his own defense." *People v. Smith*, 402 Ill.App.3d 538, 542 (1st Dist. 2010).

Notably in instances where there is a question as to whether the defendant could have tested the materials (similar to those made by the prosecutor in Mudd's case), reviewing courts have typically upheld convictions, in the face of a burden-shifting challenge, only where the

trial evidence demonstrated that the untested evidence could have been tested "by any party involved with the case." *Kelley*, 2015 IL App (1st) 132782 at ¶67; *see also Lewis Jackson*, 399 Ill.App.3d at 319; *Beasley*, 384 Ill.App.3d at 1048. *Beasley*, *Lewis Jackson*, and *Kelley* illustrate why the prosecutor in Mudd's case committed reversible misconduct.

In *Beasley*, no evidence was presented by the State as to the forensic-testing of the recovered narcotics and related items. 384 Ill.App.3d at 1042-43. During closing argument, the defense noted that the State never bothered to have several items checked for fingerprints, such as the box of baking soda found in the basement safe, or the list of names found in the bedroom safe. *Id*. Over defense objection, the prosecutor in rebuttal argument was allowed to tell the jury that if "it's unconscionable on the part of [the State,] it's just as unconscionable on the part of the defense. So, if you want something tested, you can get it tested. You can't sit back and say, 'Well, nobody tested it; therefore, the evidence fails.'" *Id*. at 1043. Holding that a defendant can never "open the door" to shift the burden of proof, the appellate court found the prosecutor's comments to be reversible error further augmented by the trial court overruling the defense objection to them. *Id*. at 1048.

In *Lewis Jackson*, the defendant argued that the State improperly shifted the burden of proof to him by emphasizing his failure to present results of DNA testing of various items found at the crime scene, including clothes, bedding, and hair. 399 Ill.App.3d at 318-19. The alleged emphasis occurred during redirect examination of the prosecution's expert DNA witness and during rebuttal argument. *Id*. However, the State's questioning and argument happened only after defense cross-examination and closing argument highlighted the State's failure to seek testing of the same items. *Id*. The appellate court rejected Jackson's argument because "**the prosecution established that its DNA expert witness was available** to both Jackson and the State and that the untested items had not been the subject of an examination request

by either party." *Id* (emphasis added). The court further reasoned that [t]he prosecution's questions and argument on this subject were proper responses to the defense's suggestion of doubt regarding the lack of testing and d[id] not warrant reversal of Jackson's conviction." *Id*.

In *Kelley*, investigators obtained swabs of apparent bloodstains from the scene but those swabs were never tested. 2015 IL App (1st) 132782 at ¶60. During cross-examination of the State's expert witnesses, trial counsel asked about the case management process that determined what pieces of evidence would be tested. *Id*. On redirect examination, the State elicited testimony regarding who could request evidence to be tested and the witness responded: "We take requests from the submitting agency or any of the attorneys that are involved with the case;" another witness stated: "Anyone involved in the case can request the testing. The submitting agency can request it, or the State's Attorney's Office, or the Defense Attorney's Office." The trial court overruled defense objections to each question. *Id*. And the appellate court rejected Kelley's burden shifting claim precisely because the State elicited said evidence and it came in response to defense questioning on the subject. *Id*; *see also People v. Luna*, 2013 IL App (1st) 072253, ¶129 (finding no prosecutorial misconduct due to burden shifting because the State had elicited evidence from its fingerprint expert).

In contrast, the State first thwarted Mudd's attempt to elicit evidence from Officer Garcia (*supra*, pp. 13-14) as the prosecutor objected on numerous occasions as to whether the firearm here was tested for fingerprints. The State then failed to elicit any evidence from Garcia or Officer Rice about whether Mudd could have requested that the firearm be tested. Where the State made these tactical decisions during its witnesses' testimony, it must be held to those choices and cannot be allowed to present argument premised on evidence the State could have but did not present to the trier of fact.

Adding to harm to the instant case, Mudd had no opportunity to respond to the misstatement because it was made during the State's rebuttal closing argument. *See Dorian Jackson*, 2012 IL App (1st) 102035 at ¶20. Further and contrary to the appellate court holding (*Mudd*, at ¶24), trial counsel did not invite the error. Trial counsel's comments on the trial evidence were proper and in no way allowed the prosecutor to make the improper burden shifting comments he did here. *See United States v. Young*, 470 U.S. 1, 12-13 (1985) ("The invited response doctrine allows a party who is provided by **his opponent's improper argument** to right the scale by fighting fire with fire.") (emphasis added). Simply put, the prosecutor here committed error by shifting the burden and misstating the evidence during rebuttal argument.

B. The appellate court erred in holding that it was a matter of general knowledge, common experience, and common sense that a defendant can obtain forensic testing of the State's evidence.

Circumventing the State's tactical decision to object to trial counsel's questioning of Garcia as well as the State's choice not to present any evidence that Mudd could have obtained forensic testing of the firearm (*Mudd*, at ¶12), the appellate court erroneously held that "the fact that a defendant has access to evidence to be used against him 'to have a test made by his chosen expert' is a matter of 'general knowledge, common experience, or common sense.'" *People v. Mudd*, 2020 IL App (1st) 190252-U, ¶23, citing *Lewis Jackson*, 399 Ill.App.3d at 42-43. However, as the appellate court admitted, whether a defendant has access to the State's evidence and the ability to obtain forensic testing of that evidence is a complicated legal concept. *Mudd*. 2020 IL App (1st) 190252-U at ¶20, citing *People v. Peeples*, 155 Ill.2d 422, 477 (1993).

Peeples cited at length this Court's Rule 412(e) and relevant committee notes. *Peeples*, 155 Ill.2d at 477. And the appellate court cited no authority (and appellate counsel has found none, *infra*, pp. 21-22) that Illinois Supreme Court Rules are matters of such "general knowledge, common experience, or common sense" that lay jurors need not be presented evidence on the

subjects the Rules govern. Instead, the appellate court relied upon heavily distinguishable authority and misrepresented the holding of one of those cases. *Mudd,* at ¶21. The appellate court asserted, "Matters **within the common knowledge of jurors** includes knowledge of the law and legal procedures." *Id.* (emphasis added), citing *People v. Rave*, 392 Ill. 435, 444 (1946); *People v. Taylor*, 410 Ill. 469, 474 (1951); and *People v. Bernette*, 30 Ill.2d 359, 370 (1964).

But *Rave*, 392 Ill. at 444, was an appeal from the denial of a writ of error *coram nobis*, and **this Court did not hold** that writs of *habeas corpus* or *coram nobis* **are matters of common knowledge for jurors**. In *Rave*, the petitioner pleaded guilty in 1922 to burglary in exchange for a term of probation. *Id*. at 436-37. In 1934, petitioner was found guilty of armed robbery and sentenced to natural life in prison based upon the Habitual Criminal Act. *Id*. at 437. 10 years later, Rave filed the petition alleging that the judgment and sentence of life imprisonment were erroneous and a nullity, inasmuch as Rave had not been lawfully convicted of the crime of burglary as charged in the 1922 indictment; that if the trial court in the 1934 robbery case had known that Rave had not been convicted of the crime of burglary he would not have been sentenced under the Habitual Criminal Act to a term of life imprisonment. *Id*.

After rejecting Rave's argument on appeal that his probation sentence did not qualify as a predicate in the instant matter (*Id*. at 440-43), this Court turned to an alternative reason for why Rave's petition was correctly dismissed: the petition was untimely. *Id*. at 443-44. And in discussing the statute of limitations and why Rave was not under duress or disability (which would excuse the untimely filing), this Court concluded that because individuals who file petitions for writ of *habeas corpus* or *coram nobis* are inherently imprisoned, that mere fact could not be used to establish duress or disability. *Id*. at 444. This Court thus did not hold that these legal concepts were matters of common knowledge for jurors as the appellate court in Mudd's case claimed.

The appellate court's reliance upon *Taylor* and *Bernette* fare no better. *Mudd*, 2020 IL App (1st) 190252-U at ¶21. In *Taylor*, this Court analyzed whether the defendant's possession of a screwdriver and pair of pliers qualified as burglary tools. 410 Ill. at 473-74. And while this Court noted it is common knowledge that a screwdriver and pair of pliers can be used to commit burglary (beyond their innocent purposes), this Court also stated that "**the police officers in this case testified** without contradiction" that said items were commonly used to commit burglary. *Id*. at 474 (emphasis added). Thus, this Court's "common knowledge" statement was mere *dicta* given the trial evidence and officers' testimony.

And finally in *Bernette*, this Court concluded that the mere fact that the jury was not told on its verdict forms that the defendant would be punished if the jury returned a mere guilty verdict (versus guilty with a sentence of death) was insufficient to reject the jury's death sentence verdict. 30 Ill.2d at 470. Such a basic tenet of our justice system (that a defendant convicted of murder, but not sentenced to death, would still be punished) is light years away from the complex discovery rules in Supreme Court Rule 412, its committee notes, and case law governing the rights of a defendant to access the State's evidence pre-trial for forensic-testing purposes. Ill.S.Ct. R. 412(e) (West 2021); *Peeples*, 155 Ill.2d at 477.

When this Court has concluded a fact is of common knowledge, it has made such a finding where a juror's normal, day-to-day life experience would establish the fact without trial evidence. A few examples suffice to illustrate this:

- *People v. Beauchamp*, 241 Ill.2d 1, 10 (2011): common knowledge that "[hyradulic] arms are necessarily affixed to the interior of the vehicle";
- *People v. Cunningham*, 212 Ill.2d 274, 281 (2004): taking notice that " mid-December nights in Chicago are usually cold, and that people usually do not go outside in the cold dressed only in a T-shirt";

- *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill.2d 302, 315-16 (2001): common knowledge that "golfers do not always hit their shots straight";
- *Fanning v. LeMay*, 38 Ill.2d 209, 211 (1967): common knowledge that "shoes are more likely to slip when wet than when dry."

And the concept of common knowledge for a juror is sometimes fraught with improper assumptions. *See, e.g.*, *People v. Sandoval*, 135 Ill.2d 159, 168 (1990) (citing a treatise, this Court noted, "It is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman."). But what cannot be disputed about this Court's prior decisions, as to matters of common knowledge, is that they do not involve the intricacies of criminal trials and the complex discovery rules governing those trials. *See, e.g., People v. Lerma*, 2016 IL 118496, ¶24 (research regarding eyewitness identifications outside of jurors' common knowledge thus warranting expert testimony on subject).

The appellate court's holding of common knowledge, as to the availability of forensic-testing of evidence by the defense, also flies in the face of multiple jury instructions and established authority. *Mudd*, at ¶23; *see* Illinois Pattern Jury Instruction-Criminal No. 1.01 ("[3] It is your duty to determine the facts and to determine them only from the evidence in this case. You are to apply the law to the facts and in this way decide the case. . . [9] The evidence which you should consider consists only of the testimony of the witnesses [and (the exhibits) (and) (stipulations) (and) (judicially noticed facts)] which the court has received. [You may, but are not required to, accept as conclusive any fact judicially noticed.]. . . [10] You should consider all the evidence in the light of your own observations and experience in life.").

In *Beasley*, 384 Ill.App.3d at 1048, the Fourth District Appellate Court rejected a State's argument, similar to the appellate court's rationale here, and held that "while defendant may

have invited the State to explain why it chose not to submit certain items for fingerprint, a defendant in a criminal case can never 'open the door' to shift the burden of proof." If the appellate court's holding in *Mudd* were correct, there would have been no need for the reviewing courts in *Kelley*, 2015 IL App (1st) 132782 at ¶67, *Lewis Jackson*, 399 Ill.App.3d at 319, or *Patterson*, 217 Ill.2d 407, 445-46 (2005), to recognize in their holdings **that evidence had been presented about the availability of testing for the defense** (as well as for the State).

What the prosecutor did in Jeremy Mudd's case was to try to have his cake and eat it too: he prevented the defense from asking pertinent questions about the forensic testing (or lack thereof) of the weapon here (Sup R. 238-41), chose not present any evidence about the availability of testing to the defense, and then argued in rebuttal that Mudd could have done just that. (R. 84) This Court should not excuse the prosecutor's decisions on the basis that his argument was a matter of common knowledge for the jurors. Absent such a finding, it is inarguable that the State presented no evidence on the subject and thus committed misconduct by making a rebuttal argument not based upon the evidence and shifting the burden of proof to Mudd.

C. Whether under harmless error, plain error, or trial counsel's ineffectiveness, this Court should reverse Jeremy Mudd's conviction and remand for a new trial.

Trial counsel objected to the State's attempt to shift the burden of proof (R. 84) and preserved, in the motion for new trial, the trial court's erroneous overruling of the objection. (Sec C. 154, 157; R. 84); *People v. Herron*, 215 Ill.2d 167, 175 (2005); *see also People v. Mohr*, 228 Ill.2d 53, 64-65 (2008) ("rejecting State's forfeiture argument because the defendant did not need to make an objection "on identical grounds" to preserve it for appeal; the fact that defendant objected to the claimed error at trial and in his post-trial motion was sufficient"). The appellate court however concluded Mudd forfeited the prosecutorial misconduct claim by not objecting a second time to the State's improper burden shifting argument when the

prosecutor stated, "both side have access to the evidence" and "[b]oth sides if they wanted testing to be done can request testing to be done. Both sides." *Mudd*, at ¶¶16-17. As it is likely that had trial counsel objected for a second time to the State's burden shifting argument that it would have fallen on deaf ears (*see People v. Thompson*, 238 Ill.2d 598, 612 (2010) (explaining *Sprinkle* exception for error preservation), and because the trial court was given an opportunity to review said error via the post-trial motion, this Court should find that Mudd preserved the error for review.

Should this Court hold that the misconduct was preserved, it is the State's burden on appeal to demonstrate the error in this case was harmless beyond a reasonable doubt. *People v. Thurow*, 203 Ill.2d 352, 363 (2003). The State cannot meet this high burden. The State's evidence as to whether Mudd knowingly possessed the firearm introduced into evidence was subject to multiple discrepancies in the officers' version of events. *Supra*, pp. 12-13. Coupled with those discrepancies, the specific comment here went to the key issue in the case: whether the firearm could be tied to Mudd. By shifting the burden to Mudd and misstating the trial evidence, the prejudice from the prosecutor's comments was palpable.

To be clear, Mudd's argument is not that the State failed to prove its case beyond a reasonable doubt, so case law regarding the reasonable doubt standard has no application in this appeal. The salient point is that some considerable amount of doubt existed, warranting reversal in light of the State's misconduct during rebuttal argument. *See Smith*, 402 Ill.App.3d at 544-45 (reversing in light of improper comments, even though "the prosecution produced sufficient evidence to support the convictions"). Since the evidence in this case was not overwhelming, this Court cannot conclude that the misconduct was harmless beyond a reasonable doubt. *Lerma*, 2016 IL 118496 at ¶¶5, 33; *People v. Stechly*, 225 Ill.2d 246, 310-11 (2007).

While Mudd does not concede that the appellate court's forfeiture finding was correct, reversal is also warranted under either prong of the plain error doctrine and/or trial counsel's ineffectiveness for not objecting again after the prosecutor made the erroneous comment. *People v. Herron*, 215 Ill.2d 167, 186-87 (2005); Ill.S.Ct. R. 615(a) (West 2021). First, the evidence was closely balanced. To determine whether the evidence at trial was close, a reviewing court evaluates the totality of the evidence and conducts a qualitative, commonsense assessment of it within the context of the case. *People v. Sebby*. 2017 IL 119445, ¶53. This inquiry "involves an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses' credibility." *Id*. When error occurs in a close case, a reviewing court errs on the side of fairness, so as not to convict an innocent person. *People v. Naylor*, 229 Ill.2d 584, 605-06 (2008) (quoting *People v. Piatkowski*, 225 Ill.2d 551, 566 (2007); *Herron*, 215 Ill.2d at 193) (internal quotations omitted).

Absent any physical or forensic evidence demonstrating Mudd knowingly possessed the firearm, the case here turned on the two officers' credibility about seeing what they claimed to have seen. As explained earlier (*supra* pp. 12-13), the State's evidence as to whether Mudd knowingly possessed the firearm introduced into evidence was subject to multiple discrepancies in the officers' version of events. Coupled with those discrepancies, the prosecutorial misconduct here went to the key issue in the case: whether the firearm could be tied to Mudd. By shifting the burden to Mudd and misstating the trial evidence, the prejudice from the prosecutor's comments was palpable. While sufficient for a conviction, the evidence here was closely-balanced warranting reversal under the first prong of plain error.

Review is also warranted under the second prong of the plain error doctrine because the prosecutor's misstatement denied Mudd a jury verdict based on the facts introduced at trial and the applicable law a fundamental right necessary to maintain the integrity of the

judicial process. *See Blue*, 189 Ill.2d at 126; *Johnson*, 208 Ill.2d at 64 (finding prosecutorial misconduct serious enough that it undermined the fairness of defendant's trial).

Finally, trial counsel performed deficiently when he did not renew the objection to the shifting of the burden and misstating the evidence during rebuttal closing argument. (R. 84); *see People v. Eddmonds*, 101 Ill.2d 44, 63, 66 (1984) (explaining that errors that are not properly preserved may be considered regarding an ineffective-assistance-of-counsel claim). A criminal defendant has the right to the effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, §8. A defendant is deprived of that right when: (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness; and (2) counsel's errors deprived the defendant of a fair trial with a reliable result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Prejudice exists when counsel's errors "undermine confidence in the outcome of proceedings or deprive defendant of a fair trial." *People v. Ingram*, 382 Ill.App.3d 997, 1005 (1st Dist. 2008).

Here, no conceivable trial strategy justified failing to object to the State's improper comment. *People v. Rogers*, 172 Ill.App.3d 471, 477 (2d Dist. 1988) (unreasonable for counsel not to object when prosecutor "improperly placed before the jury evidence not produced during trial"); *People v. Moore*, 356 Ill.App.3d 117, 120 (1st Dist. 2005) (counsel ineffective for failing to object to prosecutor's improper remarks in closing argument). Reasonably effective counsel would have objected to the prosecutor's shifting of the burden and misstating the evidence (and ensured both legal claims were included in the motion for new trial). Moreover, counsel's error undermined confidence in the outcome of the proceeding, where, as explained before, the State's misstatements went directly to the heart of Mudd's defense. Had counsel objected to these comments, it is reasonably probable that the outcome in this case could have been different. Mudd was therefore deprived of the effective assistance of counsel. Whether via

harmless error, plain error, or ineffective assistance of counsel, this Court should reverse Mudd's conviction and remand the case for a new trial.

CONCLUSION

For the foregoing reasons, Jeremy Mudd, Defendant-Appellant, respectfully requests that this Court reverse his conviction and remand the case for a new trial.

Respectfully submitted,

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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 27 pages.

/s/Christofer R. Bendik
CHRISTOFER R. BENDIK
Assistant Appellate Defender

APPENDIX TO THE BRIEF

Jeremy Mudd No. 126830

E-FILED
5/19/2021 10:28 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

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2020 IL App (1st) 190252-U

THIRD DIVISION
December 9, 2020

No. 1-19-0252

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 17 CR 12579
	)	
JEREMY MUDD,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices McBride and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County is affirmed; the prosecutor did not misstate the evidence or shift the burden of proof to defendant when they argued defendant could have requested forensic testing of firearm recovered from the possession of a convicted felon.

¶ 2 Following a jury trial in the circuit court of Cook County defendant, Jeremy Mudd, was convicted of unlawful use of a weapon by a felon (UUWF) and was sentenced to five years and six months' imprisonment. Defendant appeals his conviction on the ground the State committed misconduct during rebuttal closing argument by misstating the evidence and shifting the burden of proof to the defense. Defendant argues the trial court's error in permitting this misconduct was not harmless beyond a reasonable doubt and that his conviction should be reversed because the State's misconduct resulted in unfair prejudice.

¶ 3 For the following reasons, we affirm defendant's conviction.

¶ 4 BACKGROUND

¶ 5 Defendant does not challenge the sufficiency of the evidence to sustain his conviction. Therefore, we will recount it only summarily to provide the appropriate context for our disposition.

¶ 6 In August 2017 police responded to a large group in a park. When police arrived they observed 40 to 50 people in the park drinking and playing loud music. Officer Garcia testified at defendant's trial he observed a man later identified as defendant grabbing at the area of a bulge in his waistband. Officer Garcia's partner, Officer Rice, testified he saw a bulge on defendant's right side, an object sticking out of defendant's shirt, and that defendant was holding his waistband. Garcia saw defendant exit the park and he followed defendant. Defendant ignored the officers' request to stop and continued walking away still holding his right side. Garcia testified he observed defendant kneel near the rear driver's side wheel of a van parked in an alley. Rice testified he saw defendant kneel, remove an object from his waistband, and place an object on the rear driver's side wheel of the vehicle but he could not see what the object was. Garcia and his partner stopped defendant at the van and Garcia recovered a handgun from the top of the rear driver's side tire.

¶ 7 In closing argument defendant's attorney argued, in pertinent part, as follows:

> "Now, let's talk about what you don't have. What you don't have are fingerprints. As far as we know, that gun was never even submitted for testing for fingerprints.
>
> You don't have DNA. Why? Because as far as we know, that gun was never even submitted for DNA.

You don't have gunshot residue. Why? Because they never swabbed [defendant] for gunshot residue.

You don't have body cameras. Why? They say they weren't wearing body cameras. Seven months ago. In Chicago? Police officers weren't wearing body cameras?

They say there's no in-squad video. Really? In Chicago, seven months ago, no in-car video? Why? Because they think they can just say, trust me. Believe me. Take my word for it.

Well, you know, Ladies and Gentlemen, usually we don't say, take my word for it. We say, don't take my word for it. Look at this and judge for yourself.

The problem with the case before you there is no this. You have nothing else. And is that really how we want to conduct the criminal justice system in this city? Because if it is, we don't need trials. We don't need prosecutors, or judges, or defense lawyers, or juries. The police can just say, we saw him do it. End of story.

That's not how we conduct justice in this city.

You all told us at the beginning of this case, the very beginning of this case [the trial judge] asked all of you would you judge a police officer's word the same as you would any other citizen, and every one of you said, yes. Yes, I will.

They have no corroboration. The curtain has been pulled back, and all you have are men.

Men who didn't tell a consistent story. Men who didn't put important information in their reports. Men who have nothing, nothing to back up what they're telling you."

¶ 8 During its rebuttal closing argument, the State argued as follows:

"And it is our burden of proof, Ladies and Gentlemen. It is the State's burden of proof to prove the elements beyond a reasonable doubt. It's a burden we take on every single day.

[Defendant's attorney]: Objection

THE COURT: To what line, overruled.

[Assistant State's Attorney]: And we welcome that burden, Ladies and Gentlemen. We welcome that burden.

But both sides have access to the evidence. Both sides if they wanted testing to be done can request testing to be done. Both sides.

* * *

As I told you when we started, Illinois has rules and laws about who can, who cannot possess weapons. This defendant is a convicted felon. He cannot—

[Defendant's attorney]: Objection. I would object.

THE COURT: Objection is overruled. That's an element of the offense.

[Assistant State's Attorney]: He cannot own, possess, he cannot hold a gun."

¶ 9 Defendant's attorney filed a posttrial motion for a new trial on the grounds the trial court erred in overruling defense objections during closing argument and the State shifted the burden

of proof to the defense during closing argument. The trial court denied defendant's motion for a new trial.

¶ 10 This appeal followed.

¶ 11 ANALYSIS

¶ 12 Defendant argues that the State's rebuttal closing argument constituted "classic burden shifting" and also misstated the evidence when it argued the defense could have requested forensic testing of the gun if it wanted to. Neither the prosecution or the defense presented evidence of any forensic testing on the handgun involved in this case or asked a witness whether such testing was available to both the prosecution and the defense. The absence of testing was raised during the defense's questioning of the police officers and in the parties' closing arguments. "The standard of review applied to a prosecutor's closing argument is similar to the standard used in deciding whether a prosecutor committed plain error. [Citations.] A reviewing court will find reversible error only if the defendant demonstrates that the remarks were improper *and* that they were so prejudicial that real justice was denied or the verdict resulted from the error. [Citation.]" (Emphasis added.) *People v. Jackson*, 2020 IL 124112, ¶ 83. We also agree with defendant that our "resolution of the prosecutorial misconduct issue should be the same under either" a *de novo* standard of review or an abuse of discretion standard of review. See *People v. Rudd*, 2020 IL App (1st) 182037, ¶ 83 ("when a prosecutor's closing argument comments are challenged, we apply an abuse of discretion standard to the trial court's determination regarding the propriety of the challenged comments but review whether any improper comments were sufficiently egregious to warrant a new trial *de novo*.").

¶ 13 Defendant argues the State misstated the evidence when it stated the defense could have tested the gun because "the State objected on numerous occasions as to whether the firearm here

was tested for fingerprints and *** chose not to question the officers about whether [defendant] could have requested that the firearm be tested." Defendant argues the State shifted the burden to him to " 'come up with evidence to create a reasonable doubt of his guilt.' [Citation.]" when the State argued as follows:

> "And it is our burden of proof, Ladies and Gentlemen. It is the State's burden of proof to prove the elements beyond a reasonable doubt. It's a burden we take on every single day. [Objection overruled]. And we welcome that burden, Ladies and Gentlemen. We welcome that burden. But both sides have access to the evidence. Both sides if they wanted testing to be done can request testing to be done. Both sides."

Defendant further argues the State's misconduct was not harmless because of "discrepancies" in the evidence as to whether he possessed the gun. Finally, defendant argues trial counsel preserved these errors for review but if we find the error was not preserved review is warranted based on either prong of the plain error analysis or trial counsel's deficient performance.

¶ 14 The State responds defendant forfeited this argument by failing to object when the prosecutor made the allegedly offending comments. Defendant asks this court to review the alleged error for plain error or as a result of trial counsel's ineffective assistance. The State responds neither alternative means of reaching defendant's argument applies because no error occurred and, therefore, defendant suffered no prejudice. The State argues no error occurred because the prosecutor's statement was not a mischaracterization of the evidence but rather "[t]he ASA's remark about the defense's access and ability to request testing was *** a reasonable inference based on common sense and the evidence at trial." Further, the State's comments "were provoked by and directly responsive to defense counsel's remarks." The State

further argues the comments that allegedly shifted the burden of proof did not in fact do so because "the prosecutor here merely pointed out that both parties had access to the evidence and could request testing; but the prosecutor never stated or implied that defendant was required to provide any evidence proving his innocence or faulted him for not doing so." (Emphases omitted.) Finally, the State argues "any error associated with the ASA's remarks was *de minimis* and harmless beyond a reasonable doubt" given the "clear, consistent, credible testimony that defendant possessed a firearm, and *** that defendant was a convicted felon at the time."

¶ 15 "A claim is forfeited unless a contemporaneous objection was made and a written posttrial motion raised the issue, and forfeiture may be overcome under a plain-error analysis. [Citation.] As noted above, the first step in plain-error analysis is determining whether an error occurred at all. [Citation.]" *People v. Short*, 2020 IL App (1st) 162168, ¶ 79. Defendant failed to make a contemporaneous objection to the prosecutor's comments defendant now claims misstated the evidence and shifted the burden of proof. Defendant argues he made an objection during closing argument and was not required to make another objection "on identical grounds;" he was only required to "object during and after trial" (see *People v. Mohr*, 228 Ill. 2d 53, 65 (2008)), which he claims he did. The "identical" objection on which defendant relies in this case, however, was to the prosecutor's statement that "It's a burden we take on every single day." We note,

> "the State always has the burden of proving, beyond a reasonable doubt, the crime's elements, and the State may not suggest that it has no burden of proof or attempt to shift the burden of proof to the defendant. [Citation.] However, if defense counsel provokes a response in closing argument, the defendant cannot

complain that the State's reply in rebuttal argument denied him a fair trial. [Citation.]" *People v. Legore*, 2013 IL App (2d) 111038, ¶ 55.

¶ 16 Regardless, the State's allegedly burden-shifting comment ("But both sides have access to the evidence. Both sides if they wanted testing to be done can request testing to be done. Both sides.") followed defendant's objection to a previous statement and defendant's trial counsel failed to object again. Therefore, defendant's arguments are forfeited. *Short*, 2020 IL App (1st) 162168, ¶ 79.

¶ 17 Having determined that defendant forfeited this claim of error, "[w]e may consider a forfeited claim under the plain-error doctrine, under which we consider a clear or obvious error if either (1) the trial evidence was closely balanced or (2) the error was so serious as to deny the defendant a fair trial and challenges the integrity of the judicial process. [Citation.] A defendant claiming plain error has the burden of showing plain error, and the first step in plain-error analysis is determining whether an error occurred at all. [Citation.]" *Id.* ¶ 66.

¶ 18 Regarding the alleged error in this case, "[p]rosecutors are afforded wide latitude in closing argument and may properly comment on the evidence presented or reasonable inferences drawn from that evidence, may respond to comments by defense counsel that invite response, and may comment on witness credibility. [Citations.] A prosecutor is not allowed to misstate the evidence, argue facts not in evidence, or attempt to shift the burden of proof to the defense." *Id.* ¶ 76. "Our review considers closing arguments in their entirety and considers remarks in context, and improper remarks do not merit reversal unless they cause substantial prejudice to the defendant. *Id.* Substantial prejudice exists when the jury could have reached a contrary verdict had the improper remarks not been made or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the conviction. *Id.* The strength of the

evidence against the defendant is often a decisive factor in this determination." *Id.* ¶ 78. With these standards in mind, we hold no error occurred in this case.

¶ 19 The first allegation of error, that the prosecutor misstated the evidence because there is no evidence in the record that, in fact, defendant could have requested testing of the firearm, fails. The State argues the statement was a "reasonable inference[] drawn from [the] evidence" (*id.* ¶ 76). Defendant replies the fact the firearm could have been tested by him was never established for the jury "and thus misstated the evidence and at the same time improperly shifted the burden to [defendant.]" We agree with the State.

¶ 20 A defendant in a criminal case has a "constitutional right to conduct his own tests on physical evidence." *People v. Beasley*, 384 Ill. App. 3d 1039, 1048 (2008), citing *People v. Peeples*, 155 Ill. 2d 422, 477 (1993). In *Peeples*, our supreme court wrote as follows:

> " 'There can be no question that the defendant has a constitutional right to conduct his own tests on physical evidence.' [Citation.]
>
> Supreme Court Rule 412 requires the State, upon written motion of defense counsel, to disclose to defense counsel, *inter alia*, any tangible object the prosecutor intends to use at trial, or which was obtained from or belongs to the defendant. (134 Ill. 2d R. 412(a)(v).) The rule further provides that the State may perform this obligation (1) in any manner agreed to by itself and defense counsel, or (2) by notifying defense counsel that those objects may be tested, and making available to defense counsel those objects 'and suitable facilities or other arrangements for the inspection and testing of those objects. 134 Ill. 2d R. 412(e). The committee comments to Supreme Court Rule 412(e) explain as follows:

> 'Access to material by a defense expert must be permitted, sufficient to allow him to reach conclusions regarding the State's examining or testing techniques and results. Where feasible, defense counsel should have the opportunity to have a test made by his chosen expert, either in the State's laboratory or in his own laboratory using a sufficient sample.' 134 Ill. 2d R. 412, Committee Comments, at 349." *Peeples*, 155 Ill. 2d at 477.

¶ 21 This court has long recognized that jurors are not required to "check their common sense at the door" to the courthouse. Long ago, our supreme court wrote that "[w]henever the subject-matter of inquiry is of such a character that it may be presumed to lie within the common experience of all men of common education, moving in the ordinary walks of life, *** the jury are supposed in all such matters to be entirely competent to draw the necessary inferences from the facts testified of by the witnesses. [Citation.]" (Internal quotation marks omitted.) *Hellyer v. People*, 186 Ill. 550, 558 (1900), see also Illinois Pattern Jury Instructions-Criminal Intro. 1 ("We agree with those cases holding that 'Courts are *** not required to give an instruction that would provide the jury with no more guidance than that available to them by application of common sense.' *People v. McClellan*, 62 Ill. App. 3d 590, 595 (1978)."). Matters within the common knowledge of jurors includes knowledge of the law and legal procedures. See, *e.g.*, *People v. Rave*, 392 Ill. 435, 444 (1946) (common knowledge that writs of *habeas corpus* are filed for persons serving life sentences); *People v. Taylor*, 410 Ill. 469, 474 (1951) (common knowledge that screw drivers and pliers are "burglary tools" within meaning of statute); *People v. Barnette*, 30 Ill. 2d 359, 370 (1964) (common knowledge that death is not the only penalty for

murder). Defendant himself argued in reply that the trial court's instruction to the jury was that it "should consider all the evidence in the light of your own *** experience in life."

¶ 22 This court addressed a defendant's similar argument "that the State improperly commented on [the] defendant's failure to list [a] home on a MLS where no testimony was introduced regarding listing services." *People v. Jackson*, 391 Ill. App. 3d 11, 42 (2009). This court rejected the defendant's argument that the prosecutor's remarks were not supported by facts reasoning that "[t]he prosecution's argument was based upon common sense and life experience, factors which the jury was instructed to keep in mind when considering the evidence. See *People v. Beard*, 356 Ill. App. 3d 236, 241 (2005) (found no error in the prosecution's argument that a particular individual simply would not have the strength to have caused the victim's injuries and noted that the prosecution is permitted to discuss subjects of general knowledge, common experience, or common sense)." *Jackson*, 391 Ill. App. 3d at 42-43.

¶ 23 We reach a similar conclusion here. We believe the fact a defendant has access to evidence to be used against him "to have a test made by his chosen expert" is a matter of "general knowledge, common experience, or common sense." *Id.* The State's argument was not improper. *Id.* Additionally, the jury could reasonably infer the gun was available for defendant to test and that he could have requested such testing, from the testimony police recovered and inventoried the gun. See *Short*, 2020 IL App (1st) 162168, ¶ 76 (prosecutors may properly comment on the evidence or reasonable inferences drawn from that evidence). Defendant's argument the prosecution misstated the evidence fails.

¶ 24 The second allegation of error, that the State improperly shifted the burden of proof, also fails. Defense counsel based closing argument on the absence of forensic testing of the gun in this case. In response, the prosecution argued, correctly, that defendant could have requested

forensic testing of the gun if he wanted it. The defense argument provoked a response in rebuttal and, therefore, "defendant cannot complain that the State's reply in rebuttal argument denied him a fair trial." *Legore*, 2012 IL App (2d) 111038, ¶ 56.

> "Additionally, while the prosecution is generally not allowed to comment on a defendant's failure to produce evidence, such comments are acceptable if a defendant with equal access to that evidence assails the prosecution's failure to produce it. [Citation.] Thus, as the defense argued that the State could have introduced [certain] evidence, it was not error for the State to argue that defendant also did not introduce the [evidence.] *Cf. People v. Nowicki*, 385 Ill. App. 3d 53, 91 (2008) (it was proper for prosecutor to point out that the defendant could have subpoenaed police officers, in response to the defense's highlighting that the State had not called officers as witnesses); *People v. Baugh*, 358 Ill. App. 3d 718, 741-42 (2005) (prosecutor's argument that the defendant could have produced telephone records was not improper where defense counsel had argued that the State could have produced such records but had chosen not to)." *Legore*, 2013 IL App (2d) 111038, ¶ 57.

¶ 25 Finally, we find that the prosecutor did not "imply that defendant was required to present evidence; rather, the State [at most implied] that no evidence existed in this case to support defendant's theory" that his fingerprints were not on the gun because he did not place it where police recovered it or that the State failed to prove that he did place it there beyond a reasonable doubt. See *People v. Glasper*, 234 Ill. 2d 173, 212 (2009). The prosecutor commits misconduct and their comments are "improper [if they] suggest[] that defendant was required to present evidence tending to prove his innocence." *Id.* Here, as in *Glasper*, "[t]he State's comments ***

made no such suggestion, were invited by defense counsel's argument, and were reasonable in light of the facts presented in this case." *Id.* We find no error in the prosecutor's rebuttal.

¶ 26 Having found "no clear or obvious error in the complained-of remarks by the prosecutor, the doctrine of plain error provides no relief from the forfeiture." *People v. Jones*, 2020 IL App (4th) 190909, ¶ 4. Further, "[f]rom our finding of no clear or obvious error, it follows that omitting to object fell within the wide range of reasonable professional assistance." *Id.* ¶ 5. "[T]he failure of a defendant to show that error occurred at all defeats both an ineffective assistance claim and a claim of error under either prong of the plain error doctrine." *People v. Hensley*, 2014 IL App (1st) 120802, ¶ 47. Accordingly, defendant's arguments both fail and the judgment of the circuit court of Cook County is affirmed.

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 29 Affirmed.

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

PEOPLE OF THE STATE OF ILLINOIS	)	
-vs-	)	No. 17 CR 12579
	)	Judge: C. BURNS
JEREMY MUDD	)	Attorney: Dylan Barrett

NOTICE OF APPEAL

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

Appellant's Name:	JEREMY MUDD
Appellant's Address:	8228 S. Blackstone Avenue, Chicago, IL 60619
Appellant's Attorney:	State Appellate Defender 203 North LaSalle Street, 24TH Floor Chicago, Illinois 60601

Offense: UNLAWFUL USE OF A WEAPON BY A FELON
Judgment: Finding of Guilt – Count 1
Date of Judgment or Sentence: January 8, 2019 Sentenced; January 8, 2019-Motion to Reconsider Sentence Denied

Appellant (or Attorney)

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

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 of Appeal, and to appoint counsel on appeal.

Appellant, being duly sworn says that at the time of his conviction, he was and is unable to pay for the Record to retain counsel for appeal.

X Jeremy Mudd
Appellant

SUBSCRIBED and SWORN TO THIS _____ day of _____, 2017

Notary Public

ORDER

IT IS ORDERED THAT THE STATE APPELLATE DEFENDER is appointed as counsel on appeal and that the Common Law Record and Report of Proceedings be furnished to Appellant, without cost, within 45 days of receipt of this Order. Dates to be transcribed: 3/26/18, 3/27/18, 8/9/18, 8/10/18, 8/27/18, 1/8/19

ENTERED
JUDGE CHARLES BURNS-1780
JAN 08 2019
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

ENTER: _____ Judge

ORDER DATE: January 8, 2019

No. 126830

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- JEREMY MUDD, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-19-0252. There on appeal from the Circuit Court of Cook County, Illinois , No. 17 CR 12579. Honorable Charles P. Burns, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, aagKatherineDoersch@gmail.com;

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Mr. Jeremy Mudd, C/O Rachel Vick, 7940 S. St. Lawrence, 2nd Floor, Chicago, IL 60619

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 19, 2021, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant 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/Kelly Kuhtic
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