No. 126852

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-18-0826
Plaintiff-Appellee,	)	
	)	There on Appeal from the Circuit Court of Cook County, Illinois, No. 17 CR 10469
v.	)	
SERVETUS BROWN,	)	The Honorable Neera Lall Walsh, Judge Presiding.
Defendant-Appellant.	)	

BRIEF OF PLAINTIFF-APPELLEE
PEOPLE OF THE STATE OF ILLINOIS

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NATURE OF THE CASE

Defendant Servetus Brown appeals from the appellate court's judgment affirming his conviction, entered on a jury verdict, for being an armed habitual criminal. No question is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether defense counsel rendered objectively reasonable performance by agreeing during voir dire to discuss challenges to venire members at sidebar.

2. Whether, as the appellate court held, defendant failed to establish that he suffered any prejudice from the use of sidebars.

STATEMENT OF FACTS

On the evening of June 18, 2017, Chicago Police Officers Michael DiCera and David Cherry responded to a call of shots fired near 123rd Street and Yale Avenue. R172-74, 206-07.[1] When they arrived at the scene, a civilian directed them to a parked black sedan; defendant sat alone in the sedan's driver's seat. R174-76, 207-08. DiCera, in uniform and with his firearm displayed, approached the sedan and ordered defendant to exit the vehicle. R173, 176-78, 206, 208-09. When defendant, who appeared "disoriented," failed to comply with repeated orders, the officers physically

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[1] "C," "R," "Def. Br.," and "A," refer to the common law record, report of proceedings, defendant's brief, and defendant's appendix, respectively.

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removed him from the sedan. R178-79, 210. They had to hold defendant up because he was unable to stand on his own. R179, 211.

Cherry conducted a pat down of defendant and recovered a loaded handgun. R179-81, 211-12. The officers placed defendant in custody, conducted a search of the sedan, and recovered two plastic bags containing a black, tar-like substance, which they suspected to be narcotics. R182-84, 212-13. Following his arrest, defendant told the officers that he had "plenty more guns." R187, 215.

A grand jury indicted defendant on multiple charges. C6-27. The trial court appointed the public defender to represent defendant. R5. The case proceeded to a jury trial on two counts: armed habitual criminal and possession of a controlled substance. R34; C113, 126. Two attorneys appeared at trial on defendant's behalf, Assistant Public Defenders Crystal Brown and Rachelle Hatcher. R25, 27.

During voir dire, the trial court posed questions to the venire members. R55-162. After questioning each panel of prospective jurors, the judge met with the attorneys at sidebar, out of the hearing of the venire, to discuss any objections to the venire members. R84, 98, 114, 131, 150-51, 157, 160, 163. The court conducted eight such sidebar discussions before announcing that a jury had been selected. *Id.*

Although the court reporter did not create a contemporaneous transcript, the trial judge made a record of the sidebar discussions after

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finishing jury selection and excusing the venire members from the courtroom. The court explained that it had discussed "challenges for cause and for peremptory challenges" at the sidebars in order to save time (presumably by avoiding the need to excuse the venire members from the courtroom). R162-63. The court identified by name seven venire members who had been peremptorily challenged by either the People or the defense and two other venire members whom the parties agreed to excuse for cause, including one, Michael Gonzalez, "for failure to disclose a murder case." *Id.* Attorneys for both sides confirmed that there was nothing further to put on the record. R163. Neither the court nor the parties mentioned a tenth venire member, Dennis Eakright, who had also been excused after telling the court that he might be unable to serve because he had suffered a recent accident and was taking medication that made it difficult for him to focus. R150-51.

The People's evidence at trial consisted of testimony by DiCera and Cherry, describing their encounter with defendant, R171-232, and expert testimony identifying the contents of the bags found in defendant's car as 1.5 grams of phencyclidine (PCP), R221, 263-68. To establish that defendant was an armed habitual criminal, the People needed to prove that he possessed a firearm and had been convicted of two qualifying felonies. 720 ILCS 5/24-1.7. The latter requirement was satisfied because the parties stipulated that defendant had two qualifying convictions. R271.

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Defense counsel cross-examined the police witnesses, highlighting the facts that the officers (1) did not activate the video recording equipment in their vehicle before approaching defendant and thus had no recording of the incident, (2) did not observe defendant holding the bags of PCP, and (3) did not make any contemporaneous record of defendant's post-arrest statement that he had "plenty more guns." R191-203 (cross-examination of Cherry); R223-31 (cross-examination of DiCera). In closing, counsel emphasized these facts and argued that, in the absence of any video, photographic, DNA, or fingerprint evidence, the officers' testimony left a reasonable doubt about whether defendant knowingly possessed the gun and drugs. R286-96.

The jury found defendant guilty of being an armed habitual criminal but acquitted him of possession of a controlled substance. R332. The trial court sentenced defendant to 10 years in prison. A4; R374.

Defendant appealed, arguing that his counsel had been ineffective for failing to object to his exclusion from the sidebar discussions during voir dire. A7-8. The appellate court affirmed, A8-10, and this Court granted defendant leave to appeal.

ARGUMENT

The appellate court correctly affirmed defendant's armed habitual criminal conviction over his contention that his attorneys were ineffective for failing to object to the trial court's voir dire procedure. Defendant asserts that his exclusion from the voir dire sidebar discussions "violated his right to be present for all critical portions of his own trial." Def. Br. 5. Defendant

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acknowledges that he did not object to the voir dire procedure at trial, but he does not request that this Court review his constitutional claim under the plain error standard. Any such argument would be foreclosed by *People v. Bean*, which held that a defendant's exclusion from portions of voir dire did not rise to the level of plain error unless his absence resulted in the selection of a biased jury and thus denied him a fair trial. 137 Ill. 2d 65, 80-85 (1990). Since defendant acknowledges that he has no evidence that any member of the jury harbored any bias against him, Def. Br. 14, he cannot establish plain error.

Instead, defendant takes a different tack by arguing that his counsel was ineffective for not objecting to the sidebars. Def. Br. 5. But this claim fails because defendant cannot establish either that (1) his attorney's performance fell below an objective standard of reasonableness, or (2) counsel's conduct resulted in prejudice, *People v. Bailey*, 232 Ill. 2d 285, 289 (2009) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)), both of which are necessary elements of such a claim.

I. Defendant's Attorneys Did Not Perform Deficiently Because There Was No Basis for Objecting to the Voir Dire Procedure.

Defendant cannot show that his lawyers rendered deficient performance. To prevail on an ineffective-assistance-of-counsel claim, a defendant must prove that his attorney's representation "was so inadequate that counsel was not functioning as the 'counsel' guaranteed by the sixth amendment." *People v. Dupree*, 2018 IL 122307, ¶ 44 (internal quotations

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omitted). "'Counsel's performance is measured by an objective standard of competence under prevailing professional norms,'" and "'the defendant must overcome the strong presumption that the challenged . . . inaction may have been the product of sound trial strategy.'" *People v. Manning*, 241 Ill. 2d 319, 326-27 (2011) (quoting *People v. Smith*, 195 Ill. 2d 179, 188 (2000)).

Defendant argues that his attorney should have objected to a voir dire procedure that excluded defendant from the sidebar discussions. But counsel is not ineffective for failing to make a meritless objection. *People v. Rogers*, 2021 IL 126163, ¶ 32. Illinois courts have repeatedly held that there is no constitutional right to be present during a sidebar discussion about objections to potential jurors. *People v. Gentry*, 351 Ill. App. 3d 872, 882-84 (4th Dist. 2004) (*in camera* meetings and sidebar discussion about objections to venire members did not violate defendant's right to a fair trial); *People v. Beacham*, 189 Ill. App. 3d 483, 491-92 (1st Dist. 1989) (decision to hear challenges to venire members in chambers without defendant present did not "critically infringe[his] constitutional rights"); *People v. Spears*, 169 Ill. App. 3d 470, 483 (1st Dist. 1988) (sidebar during voir dire to discuss challenges to venire members "is not a critical stage of trial requiring defendant's presence").[2]

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[2] *People v. Oliver*, 2012 IL App (1st) 102531, cited by defendant, Def. Br. 11, does not conflict with *Gentry*, *Beacham*, and *Spears*. In *Oliver*, the appellate court assumed the truth of defendant's postconviction allegation that his lawyer falsely told the trial court that he had consulted with defendant and defendant had agreed to waive his presence at a voir dire conference. 2012 IL App (1st) 102531, ¶ 16. The *Oliver* court observed briefly that this allegation appeared to state the gist of a constitutional claim but went on to affirm the

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Federal courts have reached a similar consensus. *See United States v. Reyes*, 764 F.3d 1184, 1192 (9th Cir. 2014) (no violation of defendant's rights where attorney communicated peremptory strikes to judge without defendant present); *United States v. Curtis*, 635 F.3d 704, 715-16 (5th Cir. 2011) (same); *United States v. Gayles*, 1 F.3d 735, 738 (8th Cir. 1993) (same).[3]

Defendant argues that this Court should reject the holdings of *Gentry*, *Beacham*, and *Spears* and instead hold that criminal defendants have a personal right to participate in sidebar discussions during voir dire. Def. Br. 10-11. But even assuming that the Court would consider such an argument in a future case where the issue was properly preserved for review, here, defendant's attorneys "could not have been deficient for failing to make an objection where binding precedent would have made such an objection meritless." *Rogers*, 2021 IL 126163, ¶ 32.

Defendant also tries to distinguish these appellate court cases on their facts, arguing that in each case, "the record affirmatively demonstrated" that counsel had an opportunity to discuss venire challenges with their clients

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first stage dismissal of the postconviction petition because defendant failed to allege prejudice. *Id.* ¶¶ 22-23.

[3] Defendant cites *Bean* for the proposition that there is some difference between the federal and state constitutional right to be present at trial. Def. Br. 7. But any purported differences had no impact on the result in *Bean*. *See* 137 Ill. 2d at 80-85 (concluding that defendant suffered no constitutional deprivation, after analyzing the case under both the federal and state constitutional standards). Nor does defendant explain how the distinction has any impact in his case.

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prior to communicating the challenges to the judge at sidebar. Def. Br. 17. But the record before this Court is undeveloped because defendant raised his claim for the first time in the appellate court. Only he and his attorneys know the extent to which they were able to confer about the venire members. *Contra Spears*, 169 Ill. App. 3d at 482-83 (defendant raised his objection to voir dire sidebars in post-trial motion; trial court held hearing, at which counsel described his communications with defendant).

Moreover, defendant's argument rests on a misreading of case law. This Court held in *Bean* that "defendant's broad right of presence was improperly denied," where the trial judge questioned venire members in chambers without defendant. 137 Ill. 2d at 81; *but see id.* (affirming conviction because defendant suffered no prejudice). And in *People v. Mallett*, the Court held that only defendant, and not his attorney, could waive defendant's right to be present in the courtroom to hear and confront trial witnesses during their testimony. 30 Ill. 2d 136, 141-42 (1964). In this case, by contrast, defendant was present in the courtroom throughout the trial, including for the questioning of all venire members and impaneling of the jury.[4]

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[4] This Court's subsequent decisions cast doubt on the continuing vitality of *Mallett*. In *People v. Campbell*, the Court held that counsel can make a tactical decision to waive his client's right to confront witnesses without obtaining affirmative agreement from the client. 208 Ill. 2d 203, 220-21 (2003). However, the Court need not decide whether *Mallett* was effectively overruled by *Campbell* because, as explained, the holding of *Mallett* has no application to facts of this case.

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Thus, neither *Bean* nor *Mallett* supports defendant's sweeping argument that he had a right to participate in every sidebar discussion during voir dire and that his attorney had no power to waive his presence. Def. Br. 11. Moreover, his argument would require the Court to (1) expand the constitutional holding in *Bean* to provide defendants with a right to participate in sidebar discussions, thus overruling *Gentry*, *Beacham*, and *Spears*, and (2) expand *Mallett* to require courts to obtain a knowing and voluntary waiver from defendants before engaging in sidebar discussions. Such a rule would unnecessarily burden trial courts because sidebar discussions are a perfectly ordinary part of trial procedure. *See, e.g.*, 1A Criminal Defense Techniques § 24A.06 (Matthew Bender & Co. 2021) ("Oftentimes the practitioner will seemingly spend more time at side-bar and bench conferences than doing anything else. [The practitioner should e]xplain to the client and/or witness that a side-bar conference is merely a way to clear up legal issues and does not concern him."). As a general matter, counsel can be expected to represent a defendant's interests during sidebars, without the need to arrange for the defendant's presence. And there is no authority for the proposition that defendant must personally waive his presence each time the judge wishes to discuss a legal issue with the lawyers without taking the time to excuse the jury from the courtroom.

And even assuming the correctness of defendant's legal argument — that he had a right to be present for the sidebar discussions — he is still not

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entitled to relief in this direct appeal because the argument rests on a series of factual assumptions that find no support in the record. He asserts without any evidence that (1) "the circuit court excluded [him] from the selection of the jury," Def. Br. 5; (2) "only the attorneys were allowed to be present" during sidebar discussions, *id.*; (3) "[t]he circuit court never informed the parties ahead of time that it would be using this procedure," *id.*; (4) he had no "idea that the jury selection was actually taking place during these sidebars until after the fact," *id.*; and (5) he had no "opportunity to consult with counsel" about which venire members to strike, *id.* at 9-10.

In fact, the record shows only that during voir dire, the judge asked to "see the attorneys" at sidebar, and during the sidebar discussions, each side discussed challenges to venire members. R84, 98, 114, 131, 150-51, 157, 160, 163. The record is silent on whether the parties discussed the voir dire procedure prior to trial, whether defendant was offered an opportunity to participate in the venire challenges, or whether defendant discussed the procedure or the individual venire members with counsel.

Strickland instructs that counsel be "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." 466 U.S. at 690. Thus, in the absence of evidence about the reasons for counsel's conduct, the Court should presume that defendant's attorney discussed the voir dire procedure with him before trial and provided him with the opportunity to discuss the venire

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members at counsel table. Nothing in this record contradicts such a presumption.

Defendant's contrary assumptions — which effectively flip the *Strickland* presumption on its head — are especially inappropriate here, where the record shows overall zealous and capable representation by defendant's attorneys. *See Harrington v. Richter*, 562 U.S. 86, 111 (2011) ("[I]t is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy."). After all, the jury acquitted defendant of the drug possession charge, presumably because it agreed with counsel's argument that the People's evidence did not prove knowing possession beyond a reasonable doubt.

To the extent that defendant has evidence to rebut the *Strickland* presumption, he can raise his ineffective assistance claim in a postconviction petition. *See People v. Bew*, 228 Ill. 2d 122, 135 (2008) (where defendant fails to prove ineffective assistance on insufficient direct-appeal record, he may still raise the same claim, supported by additional evidence, in a postconviction petition). Such claims are "better suited to collateral proceedings . . . when the record is incomplete or inadequate for resolving the claim." *People v. Veach*, 2017 IL 120649, ¶ 46. Neither defendant nor the People have had an opportunity to develop a record of the conversations between counsel and defendant about voir dire. At the very least, this Court

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should not accept defendant's factual assumptions without requiring him to come forward with evidence in a postconviction proceeding.

In short, defendant has failed to show that his attorneys rendered constitutionally deficient performance, so his conviction should be affirmed.

II. Defendant Suffered No Prejudice from his Attorneys' Conduct.

As the appellate court correctly held, defendant's claim also fails because he cannot show prejudice. A8-9. "As a rule," a defendant cannot prevail on a *Strickland* claim without showing that his attorney's error "prejudiced the defense." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910-11 (2017). Such a showing is necessary because the purported Sixth Amendment violation "is not 'complete' until the defendant is prejudiced." *Id.*

Ordinarily, "prejudice means 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 1911 (quoting *Strickland*, 466 U.S. at 694). Defendant does not attempt to show such a probability. Indeed, there is no reason to think that anything about the proceeding would have been different had defendant participated in the sidebar discussions. Defendant had no power to overrule his counsel's strategic judgment about "what jurors to accept or strike." *Campbell*, ['; (explaining that "'counsel has the right to make the ultimate decision with respect to matters of tactics and strategy after consulting with client'") (quoting *People v. Ramey*, 152 Ill. 2d 41, 54 (1992)). Defendant does not contend that he would have advised his attorney to challenge or refrain from challenging any particular venire members. Nor does he identify any

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reason to believe that a different jury would have acquitted him of being an armed habitual criminal, especially in light of the unrebutted testimony — and his own admission — that he illegally possessed firearms.

In *Weaver*, the United States Supreme Court assumed, without deciding, that a criminal defendant could establish *Strickland* prejudice by showing that his attorney's failure to preserve a structural error "rendered the trial fundamentally unfair." 137 S. Ct. at 1911. Here, the appellate court applied a similar prejudice standard, asking whether defendant could show that, in light of his exclusion from the sidebar discussions, "he was not tried by an impartial jury." A8-9. In choosing that standard, the appellate court looked to *Bean*, which, as explained, held that a defendant's exclusion from voir dire does not affect the fairness of his trial unless he can show that the exclusion deprived him of an impartial jury. 137 Ill. 2d at 80-85. And as the appellate court correctly held, defendant does not argue that any of "the chosen jurors were *not* impartial." A9 (emphasis in original).

This Court need not decide which formulation of the prejudice standard applies because defendant concedes that he cannot satisfy either one. Def. Br. 6 ("acknowledge[ing] that [defendant] cannot show prejudice in order to meet the second prong of the *Strickland* test"); *id.* at 14 (conceding that the venire members' answers to the judge's questions did not "give[ ] rise to the appearance of juror bias"); *id.* at 19 (defendant "cannot possibly prove prejudice"). Instead, he asks the Court to presume that he suffered prejudice,

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because "he has no means by which to assess or argue prejudice." *Id*. at 13. According to defendant, the lack of a verbatim transcript of the sidebar discussions prevents him from learning of any errors that might have occurred.

But the underlying premise of defendant's argument — that the sidebar discussions impermissibly occurred "off-the-record and in secret," *id.* at 16 — is incorrect. As soon as the jury had been selected and left the courtroom, the judge made a record of the parties' challenges to the venire. R162-63. Defendant does not suggest — nor is there any authority for the proposition — that he has a constitutional right to have the sidebar discussions regarding those challenges transcribed. *See People v. Houston*, 363 Ill. App. 3d 567, 572 (3d Dist. 2006) (no due process right to court reporter during voir dire) (citing *People v. Culbreath*, 343 Ill. App. 3d 998 (4th Dist. 2003)); *cf. United States v. Gagnon*, 470 U.S. 522, 526 (1985) ("The defense has no constitutional right to be present at every interaction between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication.").

And while defendant invokes Illinois Supreme Court Rule 608(a)(7), Def. Br. 5, that rule provides merely that a record should be taken "of the proceedings regarding the selection of the jury." Ill. S. Ct. R. 608(a)(7). Here, the trial court complied with the rule by having a court reporter present throughout voir dire to produce verbatim transcripts of the questioning and

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impaneling of the jury, as well as of the trial court's recitation of the parties' challenges. No basis exists for reading the rule to require verbatim transcripts of every sidebar discussion that occurs during jury selection. Although perhaps desirable to transcribe sidebar discussions, it may be impracticable to do so in some circumstances. And because defendant did not develop the record below, there is no way to know why the court reporter did not transcribe the sidebars here.

And even if the rules did require a verbatim transcript, defense counsel can waive the requirement. *See Houston*, 363 Ill. App. 3d at 572 (Rule 608 requirements are waivable). Counsel appears to have agreed in this case to hold the sidebars without a court reporter, but, again, defendant has not developed a record of what transpired. Moreover, when, as here, a verbatim transcript is unavailable, Rule 323 outlines a procedure for an appellant to compile a "bystander's report" "from the best available sources, including recollection." Ill. S. Ct. R. 323(c). If defendant had any reason to think such a report would have been useful in this appeal, he could have asked the trial court to hold a hearing, *id.*, but he has never attempted to avail himself of Rule 323.

More importantly, the lack of a transcript does not absolve defendant of his burden under *Strickland*. "'Surmounting *Strickland*'s high bar is never an easy task.'" *People v. Johnson*, 2021 IL 126291, ¶ 53 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)). Ineffective-assistance-of-counsel claims

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are often based on facts outside the record, potentially requiring investigation by a pro se litigant. This Court recently reaffirmed in *Johnson* that prejudice "cannot be based on mere conjecture or speculation." 2021 IL 126291, ¶ 58 (internal quotations omitted). There, the Court refused to presume prejudice where counsel had been deficient in failing to have certain DNA evidence examined, thus leaving it to defendant to obtain DNA testing and show the test results would have been exculpatory. *Id.* ¶¶ 56-58. Defendant here faces no greater hurdle to proving prejudice than the defendant in *Johnson* or any other prisoner raising a *Strickland* claim. Where the facts are not of record, he must investigate and raise the issue in a postconviction petition.

Defendant cites a trio of cases for the proposition that prejudice should be presumed where "the very nature of the errors at issue render it impossible to assess prejudice." Def. Br. 12-13 (citing *Weaver*, 137 S. Ct. 1899; *Vasquez v. Hillery*, 474 U.S. 254 (1986); *People v. Spreitzer*, 123 Ill. 2d 1 (1988)). But none of these decisions adopts such a presumption. On the contrary, as explained, *Weaver* held that a defendant who alleges ineffective assistance of counsel for failing to preserve an objection to a structural error must still establish prejudice by, at minimum, showing that his trial was fundamentally unfair. 137 S. Ct. at 1910-11. *Vasquez* and *Spreitzer* are similarly inapposite. For starters, neither analyzed a *Strickland* claim. And both involved allegations of bias sufficient to render a trial fundamentally unfair. In *Vasquez*, the defendant obtained federal habeas relief after

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establishing that the indictment in his case "had been issued by a grand jury from which blacks had been systematically excluded." 474 U.S. at 256, 263. *Spreitzer* discussed this Court's rule that defense counsel's prior or contemporaneous association with the prosecution or the victim creates a "disabling" "per se" conflict. 123 Ill. 2d at 15-17. Here, defendant presented no evidence, or even allegations, of bias that affected the fairness of his trial.

Defendant's other arguments in favor of a presumption of prejudice are equally unpersuasive. He suggests that something nefarious *might have* occurred during the sidebar discussions. Def. Br. 14-16. By way of example, he posits that the People "could have excluded every black venire member . . . without any race-neutral reason," in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). Of course, if the People had committed a *Batson* violation, defendant would know because he was present in court to see which venire members were excused; the record also reveals their identities. Defendant goes on to suggest that "the judge could have arbitrarily denied defense counsel's attempts to exercise a peremptory challenge." Def. Br. 14. But "[t]his court presumes that a trial judge knows and follows the law unless the record affirmatively indicates otherwise." *See In re Jonathon C.B.*, 2011 IL 107750, ¶ 72. Defense counsel is entitled to a similar presumption under *Strickland*. 466 U.S. at 690. Nothing in this record suggests that the judge made errors or that counsel failed to make appropriate objections.

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Defendant makes a further leap of logic in arguing that other "important information" about the venire members, such as their prior convictions or charges, might have been discussed during the sidebars but not placed on the record. Def. Br. 15-16. But, as defendant acknowledges, the trial judge did make a record of the fact that the parties discussed a prior "murder case" involving venire member Gonzalez. R163. And there is no reason to think the judge would not have made a similar record if such information had been discussed about other potential jurors.

Defendant also complains that the judge did not put on the record that venire member Eakright had been excused. Def. Br. 17. But the record elsewhere makes clear what occurred. Eakright was excused after telling the court that he was taking medication that made it difficult for him to focus. R150-51. Moreover, Eakright's excusal had no effect on defendant's trial because the parties had already selected twelve jurors by the time Eakright was questioned. *See* R328-30 (trial court dismissing alternate jurors, including Juror Arif, who was questioned before Eakright).

Nor is there merit to the argument that the lack of a verbatim transcript of the sidebar discussions "prevents [ ] defendant from receiving a full and fair appeal." Def. Br. 18. In *People v. Stark*, this Court held that under the unusual circumstance of that case, the lack of an adequate record entitled defendant to a new suppression hearing: the defendant preserved an objection to the admission of his confession; the record supported his

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allegations in part; but an "essential" transcript of the testimony from the original hearing had been lost through no fault of defendant. 33 Ill. 2d 616, 620-21 (1966). Unlike in *Stark*, defendant here has not preserved his claim of error; the record does not provide any reason to suspect that he was prejudiced; and he cannot show that a verbatim transcript is essential, especially considering that the judge made a record of the sidebar discussions.

In sum, defendant's *Strickland* claim fails for lack of any showing of prejudice, in addition to the failure to show deficient performance.

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CONCLUSION

This Court should affirm defendant's conviction.

November 16, 2021

Respectfully submitted,

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is 20 pages.

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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On November 16, 2021, the foregoing **Brief of Respondent-Appellee People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my email address to the email addresses below:

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

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