

# MISCONDUCT OR MERE ERROR?: ADDRESSING THE MISUSE OF THE TERM “PROSECUTORIAL MISCONDUCT” IN ILLINOIS CRIMINAL CASES

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## I. INTRODUCTION

The United States Supreme Court has said, “[i]t is an unalterable fact that our judicial system, like the human beings who administer it, is fallible.”<sup>2</sup> Unfortunately, the commission of error will inevitably be a part of our legal system, as we are all – judges and attorneys – engaged in a human endeavor. The unavoidable commission of human error obviously extends further to the criminal justice arena.

When trial judges make mistakes at trial, such as improper admission of evidence or testimony, reviewing courts often refer to such error as “judicial” or “trial” error.<sup>3</sup> When criminal defense attorneys make “mistakes that fall below an objective standard and that ultimately prejudices their clients, reviewing courts refer to such conduct as ‘ineffective assistance of counsel.’”<sup>4</sup> Reversals or remands based on judicial error or ineffective assistance of counsel are typically reported as mere “legal technicalities,” or simply “inadequate presentation of a defense.”<sup>5</sup> However, all too often in Illinois, when prosecutors make mistakes or commit error in the trial process, defense counsel, defense advocates, and even at times reviewing courts refer to these errors as “prosecutorial misconduct,” regardless of intent or how that

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<sup>2</sup> *Herrera v. Collins*, 506 U.S. 390, 415 (1993).

<sup>3</sup> See *People v. Seby*, 2017 IL 119445 (failure to properly admonish *voir dire* was a trial error that amounted to plain error); see also *People v. Lake*, 2020 IL App (1st) 170309, ¶ 16.

<sup>4</sup> See *People v. Veach*, 2017 IL 120649; see also David J. Robinson & Brandon Zanotti, *Terminology Sometimes Proves to Be Inaccurate for Prosecutors*, CHICAGO DAILY LAW BULLETIN (Jan. 9, 2020), <https://www.chicagolawbulletin.com/prosecutorial-conduct-david-robinson-and-brandon-zanotti-20200109>.

<sup>5</sup> See *People v. Radford*, 2020 IL 123975, ¶¶ 73-75; see also *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910 (2017); Susan M. Treyz, *Criminal Malpractice: Privilege of the Innocent Plaintiff*, 59 FORDHAM L. REV. 719, 723 (1991); see generally Robinson & Zanotti, *supra* note 4.

error may or may not have prejudiced the defendant.<sup>6</sup> Calling a prosecutor's error "prosecutorial misconduct" when such error does not meet that label implies an intent to mislead, obstruct justice, or even subvert the criminal justice system.<sup>7</sup>

Until a recently published Illinois Appellate Court opinion, *People v. Williams*, courts have been remiss to admonish defense counsel for using the term "prosecutorial misconduct" when the acts at issue only amount, at most, to mere error, or alternatively, to encourage defense counsel to refrain from doing so.<sup>8</sup>

This article first aims to define what actions on the part of prosecutors amount to prosecutorial misconduct by discussing the role of intent and the use of a cumulative pattern of misconduct in the trial process which prejudices the defendant. Second, the article discusses multiple instances in Illinois over the past four years where the defense bar has accused prosecutors of misconduct when the acts at issue were nothing more than, at most, mere error on the part of the prosecutors. Finally, it discusses a recent Illinois Appellate Court decision that took aim at the pervasive use of the term "prosecutorial misconduct" when the actions underlying the claims did not call for it.<sup>9</sup>

## II. WHAT IS PROSECUTORIAL MISCONDUCT?

There is no statutory "listing" of what constitutes prosecutorial misconduct in Illinois. One online legal dictionary defines it as the "misconduct of a prosecutor who commits ethical or other violations in the process of trying to secure a conviction against the defendant."<sup>10</sup> The Innocence Project defines prosecutorial misconduct as "when a prosecutor intentionally breaks a law or a code of professional ethics while prosecuting a case."<sup>11</sup>

In Illinois, most forms of prosecutorial misconduct are defined or categorized based on judicial precedent, rules of evidence, and rules of procedure.<sup>12</sup> While there is no definitive standard for proving misconduct, Illinois courts have looked to "prosecutorial intent," as well as a pattern or

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<sup>6</sup> See *People v. Schlott*, 2019 IL App (3d) 160281, ¶ 52; see generally *Robinson & Zanotti*, *supra* note 4.

<sup>7</sup> See *Robinson & Zanotti*, *supra* note 4.

<sup>8</sup> *People v. Williams*, 2020 IL App (4th) 180554.

<sup>9</sup> *Id.*

<sup>10</sup> *Prosecutorial Misconduct*, THELAW.COM DICTIONARY, <https://dictionary.thelaw.com/prosecutorial-misconduct/> (last visited Mar. 26, 2021).

<sup>11</sup> Emma Zack, *Why Holding Prosecutors Accountable is So Difficult*, INNOCENCE PROJECT (Apr. 23, 2020), <https://innocenceproject.org/why-holding-prosecutors-accountable-is-so-difficult/>.

<sup>12</sup> See *People v. Blue*, 189 Ill. 2d 99, 137-40, 724 N.E.2d 920, 940-42 (2000); *People v. Johnson*, 208 Ill. 2d 53, 65, 803 N.E.2d 405, 412 (2003); see also 725 ILL. COMP. STAT. 5/114-10 (2020); see also Ill. R. Evidence 404(c).

cumulative effect of error and behavior to establish prosecutorial misconduct. This section will discuss the “cumulative effect” and “intent” elements of prosecutorial misconduct, as well as the most prevalent types of prosecutorial misconduct in Illinois.<sup>13</sup> This section will also touch upon the ramifications of prosecutorial misconduct on both the underlying case where the misconduct is alleged, and the attorney who committed the misconduct.

#### A. The “Cumulative Effect” Element of Prosecutorial Misconduct

Historically, Illinois courts that make findings of prosecutorial misconduct look to the defense’s showing of a “repeated pattern” or “cumulative effect” of intentional misconduct by the prosecutor that, in turn, prejudiced the defendant and denied him a fair trial.<sup>14</sup> Isolated allegations of misconduct without the showing of a repeated pattern or cumulative effect of misconduct are almost always referred to by the courts as prosecutorial error.<sup>15</sup> Arguably, the seminal Illinois Supreme Court cases relating to the “cumulative effect” element of prosecutorial misconduct are *People v. Blue*,<sup>16</sup> followed by *People v. Johnson*<sup>17</sup> and *People v. Wheeler*.<sup>18</sup>

In *People v. Blue*, the Illinois Supreme Court held that the cumulative effect of prosecutorial misconduct deprived the defendant of a fair trial.<sup>19</sup> It reversed the conviction, despite noting that the evidence of the defendant’s guilt was overwhelming.<sup>20</sup> The *Blue* court found a pervasive pattern of prosecutorial misconduct that occurred almost throughout the entire trial, ranging from “palpably hostile” exchanges with a witness, use of “testifying objections,” repeated violations of the “advocate-witness” rule, use of gory and graphic displays that served to inflame the passions of the jury, and encouraging the jury to return a verdict grounded in emotion.<sup>21</sup> By doing this, each of these errors casted doubt upon the reliability of the judicial process and allowed the jury to consider “evidence” not related to the alleged crimes thereby depriving the defendant of his right to a fair trial.<sup>22</sup>

In *People v. Johnson*, the court built on *Blue*’s cumulative effect analysis, even stating, “*Blue* represents an important step this court has taken to stem prosecutorial misconduct.”<sup>23</sup> The *Johnson* court found cumulative

<sup>13</sup> See discussion *infra* Sections III.A-III.C.

<sup>14</sup> See *Blue*, 189 Ill. 2d at 137-40, 724 N.E.2d at 940-42; *Johnson*, 208 Ill. 2d at 65, 803 N.E.2d at 412.

<sup>15</sup> See, e.g., *People v. Rodriguez*, 58 Ill. App. 3d 562, 567, 374 N.E.2d 904, 907 (1st Dist. 1978).

<sup>16</sup> *Blue*, 189 Ill. 2d at 137-40, 724 N.E.2d at 940-42.

<sup>17</sup> *Johnson*, 208 Ill. 2d at 65, 803 N.E.2d at 412.

<sup>18</sup> *People v. Wheeler*, 226 Ill. 2d 92, 122, 871 N.E.2d 728, 745 (2007).

<sup>19</sup> *Blue*, 189 Ill. 2d at 137-40, 724 N.E.2d at 940-42.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 134-36, 724 N.E.2d at 938-42.

<sup>22</sup> *Id.* at 139, 724 N.E.2d at 941.

<sup>23</sup> *People v. Johnson*, 208 Ill. 2d 53, 65, 803 N.E.2d 405, 412 (2003).

prosecutorial misconduct in the form of the prosecutor presenting evidence that inflamed the jury's passions, such as the victim's bloody clothing and the emotionally charged testimony of the victim's father, and a "send a message to society" type of closing argument.<sup>24</sup> The *Johnson* court held that although these comments, taken in isolation, might otherwise be deemed proper, the cumulative effect of the comments and behavior amounted to prosecutorial misconduct.<sup>25</sup>

In *People v. Wheeler*, the court found prosecutorial misconduct in the cumulative effect of improper statements during closing argument.<sup>26</sup> The court held that the prosecutor improperly attempted to gain sympathy from the jury by implying that the State was disadvantaged due to the defendants each having two attorneys working in tandem as a team.<sup>27</sup> The court also found that the prosecutor repeatedly demeaned defense counsel and defense witnesses.<sup>28</sup> The court noted that the prosecutor made other improper statements to the jury, such as commenting that the jurors lived "sheltered lives" and that a different world existed "full of dangerous people" and "mean streets."<sup>29</sup> The prosecutor also made improper comments to the jury bolstering the State's law enforcement witnesses, calling those witnesses a "new breed of policeman" who are "educated, intelligent, and well-spoken," and who formed the "thin blue line" to protect the jurors.<sup>30</sup>

The *Wheeler* court stated that "a chief goal of the prosecutor's closing argument in this case was to inflame the passions and prejudices of the jury, uniting the interests of the jurors in their own safety with that of the interests of the State in convicting defendant."<sup>31</sup> The court further noted that the prosecutor "was not content to rely upon the strength of the State's evidence. He did not make a few solitary improper remarks. Instead, he utilized improper remarks, some unsupported by the evidence, to advance an 'us-versus-them' theme."<sup>32</sup>

As seen in the *Blue*, *Johnson*, and *Wheeler* cases, repeated or cumulative patterns of prosecutorial misconduct, even when the facts alone warrant guilty verdicts, can result in convictions being overturned.<sup>33</sup>

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<sup>24</sup> *Johnson*, 208 Ill. 2d at 72-87, 803 N.E.2d at 416-25.

<sup>25</sup> *Id.* at 76, 803 N.E.2d at 419.

<sup>26</sup> *Wheeler*, 226 Ill. 2d, at 131-34, 871 N.E.2d at 749-51.

<sup>27</sup> *Id.* at 123-24, 871 N.E.2d at 745-46.

<sup>28</sup> *Id.* at 125-27, 871 N.E.2d at 746-47.

<sup>29</sup> *Id.* at 129, 871 N.E.2d at 748.

<sup>30</sup> *Id.* at 129-30, 871 N.E.2d at 748-49.

<sup>31</sup> *Id.* at 130-31, 871 N.E.2d at 749-50.

<sup>32</sup> *Id.*

<sup>33</sup> See *Blue*, 189 Ill. 2d 99, 724 N.E.2d 920; *Johnson*, 208 Ill. 2d at 65, 803 N.E.2d at 412; *Wheeler*, 226 Ill. 2d at 122, 871 N.E.2d at 745.

## B. The “Intent” Element of Prosecutorial Misconduct

The issue of “prosecutorial intent” became the subject of a recent Illinois Appellate Court decision discussing prosecutorial misconduct. In *People v. Rebollar-Vergara*, the court affirmed the defendant’s conviction of murder on an accountability theory, further holding that the defendant showed “no evidence that [the prosecutors or law enforcement] deliberately attempted to mislead the grand jury.”<sup>34</sup>

In *Rebollar-Vergara*, the police officer witness testifying to the grand jury answered “yes” to several questions that allegedly conveyed that the defendant confessed to murder, and that he flashed gang signs at the crime scene, implying he was a member of a street gang.<sup>35</sup> The defendant argued that no evidence was ever presented indicating he confessed to the murder, or that he flashed gang signs.<sup>36</sup> The witness in the grand jury stated, “they did make confessions,” implying that the defendant confessed to being involved in the murder.<sup>37</sup>

The *Rebollar-Vergara* court acknowledged that the witness’s statements to the grand jury were ambiguous, but noted that said statements were not necessarily false.<sup>38</sup> The court held that even if the defendant was not one of those in question on surveillance footage flashing gang signs, the witness’s testimony did not cause actual and substantial prejudice to the defendant.<sup>39</sup> The court stated that the validity of the indictment did not turn on whether the defendant explicitly confessed to being accountable for the conduct of the actual murderer, or whether he flashed gang signs to the victim because the court could not determine that the grand jury would not have indicted the defendant without the complained-of testimony and the remaining testimony supported the determination of probable cause.<sup>40</sup>

While the defendant in *Rebollar-Vergara* accused the prosecutor of deception and misleading the grand jury, the court held otherwise, stating, “[a]t worst, the colloquy before the grand jury could be interpreted as an imprecise representation of defendant’s and [the accused murderer’s] statements to the police and hand gestures toward [the victim].”<sup>41</sup>

One justice in *Rebollar-Vergara* specially concurred, emphasizing that the prosecutor’s presentation of the evidence to the grand jury was “poor,”

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<sup>34</sup> *People v. Rebollar-Vergara*, 2019 IL App (2d) 140871, ¶ 76.

<sup>35</sup> *Id.* ¶ 57.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* ¶ 58.

<sup>38</sup> *Id.* ¶ 59.

<sup>39</sup> *Id.* ¶ 62.

<sup>40</sup> *Id.* ¶ 63.

<sup>41</sup> *Id.* ¶ 76.

but that nothing was shown to suggest any of the State actors knew the conduct was inaccurate.<sup>42</sup>

The opinion and concurrence in *Rebollar-Vergara* place much emphasis on the need for intent to be present by the State for a claim of prosecutorial misconduct to pass muster. An even more recent Illinois Appellate Court decision from 2020, *People v. Scott* (discussed in more detail later), echoes *Rebollar-Vergara's* intent element being necessary for a successful claim of prosecutorial misconduct.<sup>43</sup>

### C. Types of Prosecutorial Misconduct in Illinois

While there are many forms of behavior and comments by prosecutors that can constitute actual misconduct, the following are the most widely discussed and alleged forms of prosecutorial misconduct in Illinois.

#### 1. *Prosecutorial Misconduct in Grand Jury Deliberations*

Prosecutorial misconduct during grand jury deliberations has been addressed in Illinois and is usually alleged in the context of a defendant seeking to dismiss an indictment.<sup>44</sup>

The most common basis for arguing a dismissal of an indictment based on prosecutorial misconduct stems from violating the secrecy of the proceedings,<sup>45</sup> deliberately or intentionally misleading the grand jury,<sup>46</sup> using perjured or false testimony,<sup>47</sup> presenting deceptive or inaccurate evidence,<sup>48</sup> or applying undue pressure or coercion to the point where the indictment is essentially the decision of the prosecutor and not the grand jury.<sup>49</sup> All of these forms of misconduct inherently carry with them an element of intent on the part of the prosecutor.<sup>50</sup>

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<sup>42</sup> *Id.* ¶¶ 111-12.

<sup>43</sup> *See* *People v. Scott*, 2020 IL App (3d) 170584-U.

<sup>44</sup> *See, e.g.*, *People v. J.H.*, 136 Ill. 2d 1, 9, 554 N.E.2d 961, 964 (1990).

<sup>45</sup> *See, e.g.*, *People v. Fassler*, 153 Ill. 2d 49, 54, 605 N.E.2d 576, 579 (1992).

<sup>46</sup> *See, e.g.*, *Rebollar-Vergara*, 2019 IL App (2d) 140871, ¶ 75; *People v. Barton*, 190 Ill. App. 3d 701, 709, 546 N.E.2d 1091, 1096 (5th Dist. 1989); *People v. DiVincenzo*, 183 Ill. 2d 239, 257, 700 N.E.2d 981, 991 (1998); *see also* *United States v. Estepa*, 471 F.2d 1132, 1136 (2d Cir. 1972) (holding that a prosecutor cannot mislead a grand jury into thinking it is hearing witness testimony when it is actually hearing an account of whose hearsay nature is concealed).

<sup>47</sup> *See, e.g.*, *People v. Legore*, 2013 IL App (2d) 111038, ¶ 23; *People v. Oliver*, 368 Ill. App. 3d 690, 694-95, 859 N.E.2d 38, 43 (2d Dist. 2006).

<sup>48</sup> *See, e.g.*, *Oliver*, 368 Ill. App. 3d at 691-92, 859 N.E.2d at 40-41; *People v. Creque*, 72 Ill. 2d 515, 521-22, 382 N.E.2d 793, 795-96 (1978); *People v. Boone*, 148 Ill. 440, 452, 36 N.E. 99, 102-03 (1894).

<sup>49</sup> *See, e.g.*, *People v. Curoc*, 97 Ill. App. 3d 258, 267, 422 N.E.2d 931, 938 (1st Dist. 1981); *United States v. Hodge*, 496 F.2d 87, 88 (5th Cir. 1974).

<sup>50</sup> *See, e.g.*, *Oliver*, 368 Ill. App. 3d at 694, 859 N.E.2d at 43.

Challenges to grand jury proceedings are limited,<sup>51</sup> but such challenges can be brought if the indictment’s procurement was through the types of prosecutorial misconduct just discussed in this sub-section regarding misconduct in grand juries.<sup>52</sup>

## 2. “Brady” Violations

Illinois courts have long held that *Brady* violations amount to prosecutorial misconduct.<sup>53</sup> The term “*Brady* violation” is defined as the suppression by the prosecution of evidence favorable to an accused upon request where the evidence is material either to the guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.<sup>54</sup>

The prosecution has a constitutional obligation to disclose evidence that is both favorable to the accused and material either to guilt or to punishment.<sup>55</sup> Evidence is material “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”<sup>56</sup>

To successfully show a *Brady* violation, the defendant must make a showing on three propositions: (1) the evidence was suppressed by the State either willfully or inadvertently; (2) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; and (3) the accused was prejudiced because the evidence is material to guilt or punishment.<sup>57</sup>

Prosecutorial misconduct in the form of a *Brady* violation can result in a reversal of conviction,<sup>58</sup> as well as sanctions or disciplinary action for the

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<sup>51</sup> In general, a defendant may not challenge the validity of an indictment returned by a legally constituted grand jury, nor seek to challenge the sufficiency of the evidence considered by a grand jury if some evidence was presented. *See, e.g.*, *People v. Rodgers*, 92 Ill. 2d 283, 287, 442 N.E.2d 240, 242 (1982); *People v. Seehausen*, 193 Ill. App. 3d 754, 757-58, 550 N.E.2d 702, 705-06 (2d Dist. 1990).

<sup>52</sup> *See, e.g.*, *People v. Linzy*, 78 Ill. 2d 106, 108, 398 N.E.2d 1, 2 (1979).

<sup>53</sup> *See, e.g.*, *People v. Duncan*, 2014 IL App (1st) 130878-U, ¶ 32 (“Illinois courts have long recognized that a criminal defendant’s right to due process and a fair trial is violated by the prosecution’s failure to disclose material evidence favorable to the defense and that such claims are cognizable in post-conviction proceedings.”); *see also* *People v. Harris*, 206 Ill. 2d 1, 44, 794 N.E.2d 314, 341 (2002).

<sup>54</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (after the defendant was convicted of murder and sentenced to death, he learned that the State withheld a statement in which another individual admitted to the actual crime, whereby the Supreme Court held that suppression of evidence favorable to an accused upon requested violated the Due Process Clause of the Fourteenth Amendment.); *see also* *People v. Simpson*, 204 Ill. 2d 536, 554, 792 N.E.2d 265, 279 (2001).

<sup>55</sup> *People v. Sanchez*, 169 Ill. 2d 472, 483-85, 662 N.E.2d 1199, 1206-07 (1996).

<sup>56</sup> *People v. Burt*, 205 Ill. 2d 28, 47, 792 N.E.2d 1250, 1263 (2001).

<sup>57</sup> *People v. Jarrett*, 399 Ill. App. 3d 715, 727-28, 927 N.E.2d 754, 766-67 (1st Dist. 2010).

<sup>58</sup> *See, e.g.*, *People v. Coleman*, 183 Ill. 2d 366, 396, 701 N.E.2d 1063, 1079 (1998).

prosecutor.<sup>59</sup> It could be argued that an inadvertent, as opposed to a willful *Brady* violation would amount to reversible trial error, but not a finding of actual misconduct.

### 3. “*Batson*” Violations

Illinois courts have also considered *Batson* violations to constitute misconduct.<sup>60</sup>

In *Batson v. Kentucky*, the prosecutor used his peremptory challenges to strike all four black persons on the venire, so that a jury composed only of white persons was selected in the State’s trial against a black man.<sup>61</sup>

The *Batson* court held: (1) that the Equal Protection Clause forbids prosecutors to peremptorily challenge potential jurors based solely on account of their race or on the assumption that black jurors as a group will be unable to impartially consider the prosecution’s case against a black defendant; (2) that a criminal defendant may establish a prima facie case of purposeful racial discrimination in the selection of the jury based solely on evidence concerning the prosecutor’s exercise of peremptory challenges at the defendant’s trial, without showing repeated instances of such discriminatory conduct over a number of cases; and (3) that once a defendant makes such a prima facie showing, the burden shifts to the prosecution to come forward with a race-neutral explanation for challenging the jurors which relates to the particular case to be tried.<sup>62</sup>

Just as with a successful showing that a *Brady* violation was committed, prosecutorial misconduct in the form of a *Batson* violation can also result in case reversal,<sup>63</sup> and arguably also sanctions or discipline for the prosecutor.<sup>64</sup> Because a requisite for proving commission of a *Batson* violation is a challenge to a juror based on his race, the element of intent on the part of the

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<sup>59</sup> See, e.g., *In re Murphy and Campbell*, 2007 Ill. Atty. Reg. Disc. LEXIS 140 (2007); see also Rosalyn B. Kaplan, *Two Illinois Prosecutors Disciplined for Brady Violations During May Term of Supreme Court*, STANDING COMM. ON GOV’T LAW, Ill. State Bar Assoc., Sept. 2007, at 6-7, <https://www.isba.org/sites/default/files/sections/newsletter/%20September%20200717.pdf>; see also Ill. S. Ct. R. 412(c), along with Committee Comments thereto; see also Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for “Brady” Violations: A Paper Tiger*, 65 N.C.L. REV. 693 (Apr. 1987).

<sup>60</sup> See *People v. Wright*, 2019 IL App (1st) 161404-U; see also *People v. Williams*, 2020 IL App (4th) 180554, ¶ 74 (“This court considers...*Batson* violations...to be misconduct.”).

<sup>61</sup> *Batson v. Kentucky*, 476 U.S. 79, 82 (1986).

<sup>62</sup> *Batson*, 476 U.S. at 82; for Illinois case analyses related to *Batson*, see also *People v. Williams*, 209 Ill. 2d 227, 807 N.E.2d 448 (2004); and *People v. Munson*, 171 Ill. 2d 158, 662 N.E.2d 1265 (1996).

<sup>63</sup> See, e.g., *People v. McDonald*, 125 Ill. 2d 182, 530 N.E.2d 1351 (1988); see also *People v. Bradshaw*, 2020 IL App (3d) 180027.

<sup>64</sup> The author found no such disciplinary proceedings in Illinois that stemmed from a prosecutor committing a “*Batson*” violation.



prosecutor must be present here unlike a *Brady* violation, which can be inadvertent.

#### 4. *Prosecutorial Misconduct During Opening Statements*

The purpose of an opening statement is to apprise the jury of what each party expects the evidence to prove, and may include a discussion of the expected evidence and reasonable inferences from the evidence.<sup>65</sup> No statement may be made in an opening statement which the prosecutor does not intend to prove or cannot prove.<sup>66</sup> Thus, it is improper for a prosecutor to comment during opening statements that certain testimony will be introduced at trial and then fail to produce it.<sup>67</sup>

Reversible error occurs only where the prosecutor’s opening comments are attributable to deliberate misconduct of the prosecutor and result in substantial prejudice to the defendant.<sup>68</sup> Further, as discussed earlier, a pattern or “cumulative effect” of error seems to be necessary for an Illinois court to find that prosecutorial misconduct occurred in opening statements.

#### 5. *Prosecutorial Misconduct in Witness Examination*

Defendants in criminal trials are entitled to fair trials, free from prejudicial comments by the prosecution.<sup>69</sup> In addition to comments, a prosecutor can overstep bounds through conduct, such as improper questioning of witnesses.<sup>70</sup>

On cross-examination of a defendant, repeatedly pursuing improper lines of questioning can reach the point of prosecutorial misconduct when such questioning demeans, ridicules, or prejudices the defendant.<sup>71</sup> One such example of this kind of improper cross-examination is when a prosecutor repeatedly asks a defendant for his opinion on the veracity of other witnesses, as such questioning not only demeans and ridicules the defendant, but intrudes on the jury’s function to assess witness credibility.<sup>72</sup>

Another type of prosecutorial misconduct in witness examination occurs when a prosecutor repeatedly attempts to impeach the testimony of a

<sup>65</sup> See *People v. Ali*, 2011 IL App (5th) 090652-U, ¶ 20.

<sup>66</sup> *People v. Kliner*, 185 Ill. 2d 81, 126, 705 N.E.2d 850, 874 (1998).

<sup>67</sup> *People v. Rogers*, 42 Ill. App. 3d 499, 501-02, 356 N.E.2d 413, 415-16 (3d Dist. 1976).

<sup>68</sup> See *Kliner*, 185 Ill. 2d at 126, 705 N.E.2d at 874.

<sup>69</sup> *People v. Billups*, 318 Ill. App. 3d 948, 957-58, 742 N.E.2d 1261, 1269-70 (4th Dist. 2001).

<sup>70</sup> See *People v. Young*, 347 Ill. App. 3d 909, 925, 807 N.E.2d 1125, 1139 (1st Dist. 2004).

<sup>71</sup> See *Young*, 347 Ill. App. 3d at 926, 807 N.E.2d at 1139.

<sup>72</sup> See *People v. Schaffer*, 2014 IL App (1st) 113493, ¶ 49 (conviction was reversed when prosecutor repeatedly asked the defendant in cross-examination to comment on the veracity of multiple witnesses, despite continued and sustained objections to such questioning); see also *People v. Martin*, 271 Ill. App. 3d 346, 356, 648 N.E.2d 992, 1000 (1st Dist. 1995).

defendant by questioning him about a collateral act of misconduct,<sup>73</sup> or repeatedly questioning the defendant about unrelated matters that prejudice him.<sup>74</sup> For example, in *People v. Hicks*, the court found there was prosecutorial misconduct when the prosecutor repeatedly asked the defendant questions about his character, his indulgence in drugs and alcohol, and his alleged use of weapons, even after the court had admonished the prosecutor.<sup>75</sup>

Yet another type of prosecutorial misconduct in witness examination occurs when a prosecutor repeatedly asks improper questions that assume facts not in evidence, or repeatedly asks “loaded questions.”<sup>76</sup> This occurred in *People v. Aguirre*, where the prosecutor asked questions designed to elicit a response that would have violated an *in limine* order and argued that someone was “willing to take the fall” for the defendant despite that fact not being in evidence.<sup>77</sup>

In all of the above-listed forms of prosecutorial misconduct that can occur in witness examination, it should be noted that a repeated course of this behavior appears necessary for a finding of prosecutorial misconduct, which is in line with the holdings of *Blue*, *Johnson*, and *Wheeler*.<sup>78</sup>

## 6. Prosecutorial Overreaching

The definition of prosecutorial overreaching is “prosecutorial misconduct specifically designed to cause or provoke a mistrial in order to obtain a second, more favorable opportunity to convict the accused.”<sup>79</sup> The “specifically designed” language designated by the courts implies that intent on the part of the prosecutor is a necessary element for proving misconduct in the form of prosecutorial overreaching.<sup>80</sup>

<sup>73</sup> See *People v. Starks*, 116 Ill. App. 3d 384, 390-91, 451 N.E.2d 1298, 1303 (1st Dist. 1983).

<sup>74</sup> See *People v. Hicks*, 133 Ill. App. 2d 424, 431, 273 N.E.2d 450, 456 (1st Dist. 1971); see also *People v. Liapis*, 3 Ill. App. 3d 864, 868, 279 N.E.2d 368, 371 (1st Dist. 1972) (prosecutorial misconduct was found when the prosecutor continued to engage in questioning about the defendant’s sexual immorality despite it having no bearing on the case); see also *People v. Scaggs*, 111 Ill. App. 3d 633, 636, 444 N.E.2d 674, 676-77 (1st Dist. 1982) (prosecutorial misconduct was found when the prosecutor repeatedly made improper comments, including comments about the defendant’s sexual immorality, comments about why the defendant did not call a particular witness, comments minimizing the reasonable doubt standard as a mere *pro forma* detail, and repeated questioning about an irrelevant and prejudicial matter).

<sup>75</sup> *Hicks* 133 Ill. App. 2d at 431, 273 N.E.2d at 456.

<sup>76</sup> See *People v. Aguirre*, 291 Ill. App. 3d 1028, 1035-36, 684 N.E.2d 1372, 1376 (2d Dist. 1997).

<sup>77</sup> *Id.*

<sup>78</sup> See *Blue*, 189 Ill. 2d at 140-41, 724 N.E.2d at 942; see also *Johnson*, 208 Ill. 2d at 62, 803 N.E.2d at 410-11; see also *Wheeler*, 226 Ill. 2d at 130, 871 N.E.2d at 749.

<sup>79</sup> *People v. Brown*, 222 Ill. App. 3d 703, 711, 584 N.E.2d 355, 361 (1st Dist. 1991); see also *United States v. Dinitz*, 424 U.S. 600, 611 (1976).

<sup>80</sup> See *Brown*, 222 Ill. App. 3d at 711, 584 N.E.2d at 361 (finding conduct motivated by “bad faith to harass or prejudice” to constitute prosecutorial misconduct).

Illinois courts have held that prosecutorial overreaching cannot be condoned.<sup>81</sup> Such overreaching signals a breakdown in the integrity of judicial proceedings.<sup>82</sup> Illinois courts have further held that when prosecutorial overreaching occurs, the defendant’s interest in the finality of the case overrides society’s interest in law enforcement, and re-prosecution is barred.<sup>83</sup>

### 7. *Prosecutorial Misconduct During Closing Argument*

When a defendant makes a claim that misconduct occurred in the prosecutor’s closing argument, Illinois courts consider the closing arguments of both the prosecutor and defense counsel in their entirety, so the prosecutor’s remarks can be placed in context.<sup>84</sup> An example of this comes from *People v. Caffey*, where the alleged improper comments from the prosecutor occurred because the prosecutor was responding to the defense’s closing argument.<sup>85</sup> As such, because the comments were not only in response to the defense’s closing argument, but also proper, no misconduct occurred.<sup>86</sup>

Wide latitude is afforded a prosecutor in making her closing argument, and she can comment on the evidence and draw all legitimate inferences deductible therefrom, even if said comments are unfavorable to the defendant.<sup>87</sup> A prosecutor may also respond to comments made by defense counsel in closing argument that clearly invite a response.<sup>88</sup> For example, in *People v. Foy*, the court rejected the defendant’s argument that the State’s use of evidence in closing argument amounted to prosecutorial misconduct, holding two of the three challenged statements to be reasonable inferences drawn from testimony.<sup>89</sup> The third challenged statement, while improper, was cured by jury instruction.<sup>90</sup>

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<sup>81</sup> See *People v. Pendleton*, 75 Ill. App. 3d 580, 594, 394 N.E. 496, 506 (1st Dist. 1979).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*; see also *People v. Hawks*, 386 Ill. App. 3d 844, 846, 899 N.E. 632, 634 (4th Dist. 2008).

<sup>84</sup> *People v. Caffey*, 205 Ill. 2d 52, 104, 792 N.E.2d 1163, 1196-97 (2001) (quoting *People v. Kitchen*, 159 Ill. 2d 1, 636 N.E.2d 433 (1994)); see also *People v. Phillips*, 392 Ill. App. 3d 243, 275, 911 N.E.2d 462, 491 (1st Dist. 2009).

<sup>85</sup> *Caffey*, 205 Ill. 2d at 132, 792 N.E.2d at 1212.

<sup>86</sup> *Id.*

<sup>87</sup> *People v. Pasch*, 152 Ill. 2d 133, 184, 604 N.E.2d 294, 315 (1992).

<sup>88</sup> *People v. Foy*, 2020 IL App (1st) 172477-U, ¶ 64 (quoting *People v. Johnson*, 208 Ill. 2d 53, 62, 803 N.E.2d 405, 410-11 (2003)).

<sup>89</sup> *Id.* ¶¶ 69- 73 (finding the State’s comment regarding the downward trajectory to be a reasonable inference based on medical examiner testimony based on if the victim was falling when the shot was fired, as well as the State’s comment regarding the victim being twice shot in the back based on the medical examiner testifying that the victim was shot from the “left slightly back” and was not facing the defendant’s gun when shot).

<sup>90</sup> *Id.* ¶¶ 68-75.

Prosecutors may not engage in inflammatory closing arguments aimed solely to arouse the passions of the jury.<sup>91</sup> However, the mere use of strong language does not rise to the level of prosecutorial misconduct.<sup>92</sup> In closing argument, the prosecutor may “reflect unfavorably on the defendant, denounce his wickedness, and even indulge in invective.”<sup>93</sup> In *People v. Schlott* (discussed in more detail later), the prosecutor summarized the defense’s closing argument as alleging the victim to be “a whore or a liar” which the court found to be accurate, albeit strong, language which was not prosecutorial misconduct.<sup>94</sup>

Prosecutorial misconduct in closing argument can warrant reversal of the case, and a new trial, if the prosecutor’s comments are deemed a material factor in a defendant’s conviction.<sup>95</sup> Just as with misconduct found in opening statements and witness examination, Illinois courts seem to require a “cumulative effect” of improper comments that prejudiced the defendant in closing argument in order to make a finding of prosecutorial misconduct.<sup>96</sup>

#### a. *The Consequences of Prosecutorial Misconduct*

A finding of prosecutorial misconduct can have ramifications on the disposition of the underlying case at issue, predominantly in the form of a reversal of a defendant’s conviction.<sup>97</sup> As seen from the *Blue*, *Johnson*, and *Wheeler* cases, the cumulative effect of prosecutorial misconduct and trial error that deprives a defendant of a fundamentally fair trial will warrant a reversal of conviction.<sup>98</sup> As stated by the court in *Johnson*, when referencing the consequences of a pervasive and cumulative effect of prosecutorial misconduct:

<sup>91</sup> *People v. Nicholas*, 218 Ill. 2d 104, 121, 842 N.E.2d 674, 685 (2005); *see also* *People v. Armstrong*, 183 Ill. 2d 130, 145, 700 N.E.2d 960, 966 (1998).

<sup>92</sup> *People v. Schlott*, 2019 IL App (3d) 160281, ¶ 54.

<sup>93</sup> *People v. Moore*, 9 Ill. 2d 224, 232, 137 N.E.2d 246, 250 (1956); *see also* *People v. Delgado*, 30 Ill. App. 3d 890, 897, 333 N.E.2d 633, 639 (2d Dist. 1975) (prosecutor’s referral to the defendant as “reprehensible” in closing argument was not improper misconduct); *see also* *People v. Arbuckle*, 75 Ill. App. 3d 826, 836, 393 N.E.2d 1296, 1304 (2d Dist. 1979) (prosecutor’s casting aspersions upon the defendant’s character is a legitimate closing argument tactic).

<sup>94</sup> *Schlott*, 2019 IL App (3d) 160281, ¶ 54.

<sup>95</sup> *See, e.g.*, *People v. Linscott*, 142 Ill. 2d 22, 28, 566 N.E.2d 1355, 1358 (1991) (when discussing materiality, the court stated, “If 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 defendant’s conviction, a new trial should be granted.”).

<sup>96</sup> *See* *People v. Johnson*, 208 Ill. 2d 53, 62, 803 N.E.2d 405, 412 (2007) (“[A] pattern of intentional prosecutorial misconduct may so undermine the integrity of judicial proceedings as to support reversal under the plain-error doctrine.”); *see also* *People v. Libberton*, 346 Ill. App. 3d 912, 933, 807 N.E.2d 1, 19 (2d Dist. 2003) (“In *Johnson* and *Blue*, the court found that the defendants . . . were deprived of their right to a fundamentally fair trial due to the cumulative effect of prosecutorial misconduct . . .”).

<sup>97</sup> *See, e.g.*, *People v. Blue*, 189 Ill. 2d 99, 724 N.E.2d 920 (2000).

<sup>98</sup> *Id.*; *Johnson*, 208 Ill. 2d 53, 803 N.E.2d 405; *Wheeler*, 226 Ill. 2d 92, 130 N.E.2d 728.

Our system of justice requires that a defendant’s guilt or innocence be determined based upon relevant evidence and legal principles, upon the application of reason and deliberation by a jury, not the expression of misdirected emotion or outrage by a mob...We mean it as no hollow warning when we say that prosecutors risk the reversal of otherwise proper convictions when they engage in conduct of this kind.<sup>99</sup>

A finding of prosecutorial misconduct can also result in suspension of an attorney’s law license or censure from the Illinois Attorney Registration and Disciplinary Commission (ARDC), albeit such cases are rare.<sup>100</sup> In those ARDC cases where law license suspension or censure have occurred due to a prosecutor’s misconduct, the findings have mostly shown a pattern of repeated misconduct over the course of multiple trials.<sup>101</sup>

### III. ILLINOIS DEFENSE APPEALS HAVE A PERVASIVE PATTERN OF ALLEGING PROSECUTORIAL MISCONDUCT RATHER THAN MERE ERROR

This section discusses ten Illinois appellate cases over the past four years where the defendant alleged prosecutorial misconduct, and where the court found the acts in question were not misconduct, or alternatively constituted nothing more than error. Additionally, this section discusses why the misapplication and overuse of the term is detrimental to the integrity of the criminal justice system.

#### A. Ten Recent Illinois Cases Alleging Prosecutorial Misconduct

##### 1. *People v. Urban*

In *People v. Urban*, the defendant alleged prosecutorial misconduct because the State improperly asked a minor victim-witness leading and suggestive questions that purportedly rendered the young boy’s testimony unreliable.<sup>102</sup> The court held that the defendant’s prosecutorial misconduct claim was “without merit,” noting that it was reasonable for the trial court to conclude that the prosecutor’s leading questions were necessary because the

<sup>99</sup> *Johnson*, 208 Ill. 2d at 87-88, 803 N.E.2d at 425-26.

<sup>100</sup> *See, e.g.*, In re Weber, 2012 Ill. Atty. Reg. Disc. LEXIS 75 (2012) (prosecutor was censured for making repeated and intentional improper arguments constituting prosecutorial misconduct in multiple cases); In re Kakac, 2008 Ill. Atty. Reg. Disc. LEXIS 358 (2008) (prosecutor’s law license was suspended for thirty days for multiple findings of misconduct, including a *Brady* violation, failure to correct knowingly false testimony, and intentional misrepresentation of evidence).

<sup>101</sup> *See, e.g.*, In re Weber, 2012 Ill. Atty. Reg. Disc. LEXIS 75 (2012); In re Kakac, 2008 Ill. Atty. Reg. Disc. LEXIS 358 (2008).

<sup>102</sup> *People v. Urban*, 2020 IL App (5th) 170076-U, ¶ 67.

minor was emotionally conflicted and reluctant to testify, but also required to testify.<sup>103</sup> The *Urban* court noted established legal maxims that, “[a]llowing leading questions, when examining children of tender years, is clearly within the discretion of the trial court,”<sup>104</sup> and that “[r]equiring a child victim of sexual abuse to testify in open court is a traumatic experience for the victim that often necessitates the use of leading questions.”<sup>105</sup>

## 2. *People v. Schlott*

In *People v. Schlott*, the defendant argued that several allegedly inflammatory comments made by the prosecutors in their closing arguments amounted to prosecutorial misconduct.<sup>106</sup> The defendant argued that the State twice made comments in closing argument asking the jury to “make him sorry,” and “make him pay” for his actions.<sup>107</sup> The *Schlott* court held that neither of these comments were “inflammatory calls for vengeance from the jury, but references and replies to defendant’s own words,” and thus did not amount to prosecutorial misconduct.<sup>108</sup>

The defendant in *Schlott* also alleged misconduct in the State’s closing argument when the prosecutor stated the following: “[Defense counsel] spent a lot of his argument talking about [the victim], and apparently she’s a whore or a liar or some other reason we can’t believe whatever she’s saying.”<sup>109</sup> The prosecutor continued: “[I]f you were to listen to this argument regarding the cheating and whether there was cheating or whether there was not cheating—thankfully we live in America where you are not allowed to behead people who have cheated on you, because that’s exactly the argument that’s been put forth.”<sup>110</sup> The court held that the prosecutor’s comments insinuating that the defense counsel portrayed the victim as a “whore” or “liar” was in fact an accurate assessment, and that the “beheading” comment was also not improper, but rather evoked images of actual evidence from the case.<sup>111</sup> The *Schlott* court further stated that it was “absurd to suggest that the State could not reference beheading in closing argument.”<sup>112</sup>

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<sup>103</sup> *Id.* ¶¶ 1, 72.

<sup>104</sup> *Id.* ¶ 71 (quoting *People v. Ridgeway*, 194 Ill. App. 3d 81, 885, 551 N.E.2d 790, 792 (4th Dist. 1990)).

<sup>105</sup> *Id.*; see also *People v. Calusinski*, 314 Ill. App. 3d 955, 959 N.E.2d 420 (2d Dist. 2000).

<sup>106</sup> *Schlott*, 2019 IL App (3d) 160281, ¶ 52.

<sup>107</sup> *Id.* ¶ 56.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* ¶ 53.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* ¶¶ 54-55.

<sup>112</sup> *Schlott*, 2019 IL App (3d) 160281, ¶ 55.

### 3. *People v. Sims*

In *People v. Sims*, the defendant alleged misconduct in the context of the prosecutor’s comments in closing argument.<sup>113</sup> The *Sims* prosecutor asked the jury about whether defendant was the kind of person “we want walking the streets with a handgun.”<sup>114</sup> The prosecutor also stated:

Gun violence is rampant in this community. It’s a serious problem. It’s a serious problem when felons have guns. It’s not a victimless crime. It’s an offense against society. Because there is so much violence revolving around guns, we do our best to take them off the street one gun at a time.<sup>115</sup>

The defendant in *Sims* argued that these comments by the prosecutor deprived him of a fair trial, and that the prosecutor improperly characterized him as a “bad person” and “appealed to societal interests.”<sup>116</sup>

The *Sims* court found no error or misconduct in the prosecutor’s statements in closing argument.<sup>117</sup> The court found that the comment about whether the defendant was the type of person “we want walking the streets with a handgun” was within the bounds of proper argument, as the prosecutor’s description of the defendant immediately preceding that question was supported by the evidence.<sup>118</sup> The *Sims* court reiterated established precedent that, when supported by the evidence, a prosecutor may comment unfavorably on the defendant and his crime.<sup>119</sup> Further, the court noted that the prosecutor in closing argument, “is permitted to dwell upon the results of a crime and to comment upon its effect upon the community.”<sup>120</sup> The *Sims* court also stated that a prosecutor may “comment unfavorably on the evil effects of the crime committed.”<sup>121</sup>

### 4. *People v. Scott*

In *People v. Scott*, the defendant was convicted of first degree murder for striking a man on the head with a machete with the intent to kill him.<sup>122</sup> On appeal, the defendant alleged prosecutorial misconduct in that the prosecutor: failed to produce evidence mentioned in opening statement;

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<sup>113</sup> *People v. Sims*, 2019 IL App (3d) 170417, ¶ 47.

<sup>114</sup> *Id.* ¶ 50.

<sup>115</sup> *Id.* ¶ 20.

<sup>116</sup> *Id.* ¶ 45.

<sup>117</sup> *Id.* ¶ 60.

<sup>118</sup> *Id.* ¶ 50.

<sup>119</sup> *Sims*, 2019 IL App (3d) 170417, ¶ 46 (quoting *People v. Jackson*, 84 Ill. 2d 350, 360, 418 N.E.2d 739, 744 (1981)).

<sup>120</sup> *Id.* ¶ 48 (quoting *People v. Johnson*, 73 Ill. App. 3d 431, 435, 392 N.E.2d 587, 591 (1st Dist. 1979)).

<sup>121</sup> *Id.* (citing *People v. Nicholas*, 218 Ill. 2d 104, 121, 842 N.E.2d 674, 685 (2005)).

<sup>122</sup> *People v. Scott*, 2020 IL App (3d) 170584-U, ¶ 5.

engaged in improper leading of witnesses on direct examination; shifted the burden of proof in rebuttal argument; improperly commented on a witness' credibility; and misstated evidence in closing arguments by stating that the defendant "regularly carried knives."<sup>123</sup> The court addressed each allegation of prosecutorial misconduct.<sup>124</sup>

The first allegation of misconduct in *Scott* stemmed from statements made by the prosecutor in the opening statement, namely that the evidence would show: how the defendant "regularly carried knives"; how police were led to the defendant as a suspect; and how the defendant denied being at the victim's home on the night of the homicide.<sup>125</sup> The defendant argued that the evidence supporting these statements was never presented at trial, and not presenting such evidence amounted to prosecutorial misconduct.<sup>126</sup>

Regarding the "regularly carried knives" comment, the court acknowledged that multiple witnesses testified about the defendant and the knives he possessed or used in the past.<sup>127</sup> Therefore, the comment was a reasonable inference based upon the evidence.<sup>128</sup> Regarding the comment about the police investigation, the court noted that while the prosecution did not provide specific testimony showing why the police came to investigate the defendant, the trial court did instruct the jury before opening statements and at the close of evidence that the jury should disregard any statements not supported by the evidence.<sup>129</sup> The court held that the defendant failed to show how this omission amounted to "deliberate misconduct" or "prejudiced the defendant."<sup>130</sup> The court also held that while the State's comment about the defendant denying being at the victim's home was never specifically presented in evidence, this act also did not amount to deliberate misconduct or prejudice to the defendant.<sup>131</sup> The *Scott* court further found that the prosecutor's leading questions to two witnesses on direct examination did not amount to prosecutorial misconduct because some of the alleged leading questions were not leading at all, and that the other questions that were deemed leading were allowable within the trial court's discretion as they did not harm or cause prejudice to the defendant.<sup>132</sup>

The defendant in *Scott* also alleged prosecutorial misconduct in the form of "burden shifting" during closing argument when the prosecutor stated, "I'm not going to read too many of these instructions, but I think two

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<sup>123</sup> *Id.* ¶ 3.

<sup>124</sup> *Id.* ¶¶ 59-81.

<sup>125</sup> *Id.* ¶ 63.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* ¶ 65.

<sup>128</sup> *Scott*, 2020 IL App (3d) 170584-U, ¶ 65.

<sup>129</sup> *Id.* ¶ 66.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* ¶ 67.

<sup>132</sup> *Id.* ¶¶ 68-75.



are appropriate based on [defense counsel’s] burden.”<sup>133</sup> The defendant alleged further “burden shifting” based on the prosecutor’s comment to the jury that they did not hear any evidence showing the State’s witnesses were lying.<sup>134</sup> The court found no prosecutorial misconduct in the form of “burden shifting” in these statements, noting that it looked to the entirety of the closing argument as a whole and that the use of the word “burden” by the prosecutor should be considered a “slip of the tongue.”<sup>135</sup> Lastly, the *Scott* court found that the prosecutor’s re-use of the phrase indicating that the defendant “regularly carried knives” in the State’s closing argument was a reasonable inference from the evidence and thus, not prosecutorial misconduct.<sup>136</sup>

##### 5. *People v. Calabrese*

In *People v. Calabrese*, the defendant was convicted of arson and criminal damage to property.<sup>137</sup> On appeal, the defendant alleged prosecutorial misconduct in that: the prosecutor made improper remarks during closing argument; the prosecutor improperly continued a line of questioning about the tone of the defendant’s voice; and the prosecutor’s questions to the defendant about his text communications were improper impeachment because the State never perfected the impeachment by introducing the text messages on which the questions were based.<sup>138</sup> The defendant argued that the cumulative effect of this alleged prosecutorial misconduct denied him a fair trial.<sup>139</sup>

The statement in closing argument that gave rise to the defendant’s claim of misconduct was, “When [the defendant’s then-wife] filed for an order of protection against the defendant, the defendant found a way to get back into the house.”<sup>140</sup> The defendant argued that the prosecutor’s remark implicated that the defendant’s return “was part of a malicious and illegal effort to control [the defendant’s then-wife].”<sup>141</sup> The court found no error in this statement, let alone misconduct, as the prosecutor’s comment was consistent with the evidence and proper given the wide latitude prosecutors are given in presenting their closing arguments to comment on the evidence and draw legitimate inferences therefrom.<sup>142</sup>

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<sup>133</sup> *Id.* ¶ 77.

<sup>134</sup> *Scott*, 2020 IL App (3d) 170584-U, ¶ 77.

<sup>135</sup> *Id.* ¶ 78.

<sup>136</sup> *Id.* ¶ 80.

<sup>137</sup> *People v. Calabrese*, 2020 IL App (1st) 172828-U, ¶ 2.

<sup>138</sup> *Id.* ¶ 63.

<sup>139</sup> *Id.* ¶ 47.

<sup>140</sup> *Id.* ¶ 78.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

The *Calabrese* court did find the prosecutor's continued line of questioning about the tone of defendant's voice after sustained objections improper but held that the line of questioning was not misconduct that rose to the level of prejudicing the defendant.<sup>143</sup> Regarding the claim of misconduct in the form of the prosecutor not perfecting impeachment by introducing the text messages on which the questions were based, the court again found no prosecutorial misconduct, as there was no prejudice to the defendant with those questions.<sup>144</sup>

#### 6. *People v. Owens*

In *People v. Owens*, the defendant was convicted of first-degree murder and appealed the conviction, alleging, *inter alia*, prosecutorial misconduct in that the prosecutor: repeatedly misstated evidence in closing argument; improperly defined and minimized the reasonable doubt standard; and diverted the jury's attention from the defendant's action to an evaluation of him as a person.<sup>145</sup> The *Owens* court found all prosecutorial misconduct allegations to "lack merit."<sup>146</sup>

The defendant in *Owens* argued that the four alleged misstatements by the prosecutor in closing argument improperly undermined the defendant's credibility by falsely portraying him as the sole witness to testify to numerous facts supporting his assertion that he acted in self-defense.<sup>147</sup> The State conceded on appeal that the "prosecutor's recollection of the evidence" was "inaccurate," but argued that it did not result in substantial prejudice to the defendant.<sup>148</sup> The court agreed with the State, and found these four misstatements did not amount to misconduct or result in substantial prejudice to the defendant.<sup>149</sup>

The defendant in *Owens* also argued that the prosecutor improperly defined reasonable doubt in closing argument when the following comment was made:

Reasonable doubt. That's our burden, ladies and gentlemen, and we accept that burden. It is not beyond a shadow of doubt. It is not beyond a scintilla of a doubt. It is not beyond all doubt. It is beyond a reasonable doubt. . . [the defendant] is trying to hold us to a higher burden. We have the burden and we accept it, and we have made the burden in this case. And the burden of

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<sup>143</sup> *Calabrese*, 2020 IL App (1st) 172828-U, ¶¶ 79-90.

<sup>144</sup> *Id.* ¶¶ 91-94.

<sup>145</sup> *People v. Owens*, 2019 IL App (1st) 161537-U, ¶ 43.

<sup>146</sup> *Id.* ¶ 1.

<sup>147</sup> *Id.* ¶ 48.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* ¶ 49.

reasonable doubt was overcome when the defendant shot and killed [the victim] in cold blood.<sup>150</sup>

The defendant argued that these comments “minimized the State’s burden of proving [the case] beyond a reasonable doubt,” and thus amounted to prosecutorial misconduct.<sup>151</sup> The court found no prosecutorial misconduct in this statement, holding that it was within the bounds of proper argument and citing to a string of cases where similar comments were properly made.<sup>152</sup>

Lastly, the defendant in *Owens* accused the prosecutor of misconduct by referring to him as a “thug” in closing argument.<sup>153</sup> The court disagreed, stating that, taken in context, the word “thug” alone “does not divert the jury’s attention to an evaluation of [the defendant] as a person.”<sup>154</sup>

### 7. *People v. Cornejo*

In *People v. Cornejo*, the defendant argued that the prosecutor engaged in prosecutorial misconduct in closing argument by improperly referring to prior consistent statements of two separate witnesses, thus wrongly bolstering the witnesses’ credibility.<sup>155</sup> The defendant claimed that the prosecutor referring to the two witnesses as credible just because they repeated their stories multiple times was improper.<sup>156</sup>

The *Cornejo* court rejected the defendant’s misconduct claim, stating that it was clear from the prosecutor’s challenged comments, when taken in the context of the entire closing argument, that they were not intended to encourage the jury to improperly consider the prior consistent statements of the witnesses.<sup>157</sup> The court noted that the prosecutor did not actually describe the substance of the prior statements given by the two witnesses, but merely stated in passing that the witnesses had previously given their statements.<sup>158</sup>

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<sup>150</sup> *Id.* ¶ 51.

<sup>151</sup> *Owens*, 2019 IL App (1st) 161537-U, ¶ 51.

<sup>152</sup> *Id.* ¶ 52.

<sup>153</sup> *Id.* ¶¶ 54-55.

<sup>154</sup> *Id.* ¶ 55.

<sup>155</sup> *People v. Cornejo*, 2020 IL App (1st) 180199, ¶ 44 (the court also discussed a second prosecutorial misconduct claim stemming from claims that the prosecutor improperly questioned the defendant at trial. The court held that the prosecutor’s questioning of the defendant did amount to error, but the error was not substantial enough to warrant reversal. The court did not address whether it considered the prosecutor’s error as amounting to prosecutorial misconduct.).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

### 8. *People v. McNeal*

In *People v. McNeal*, the defendant was convicted of being an armed habitual criminal.<sup>159</sup> On appeal, he argued that the State committed prosecutorial misconduct in its opening statement and in closing argument, including making inflammatory and burden-shifting comments.<sup>160</sup>

The defendant in *McNeal* first argued that the prosecutor committed misconduct when he made comments in opening statement and closing argument about a non-testifying witness.<sup>161</sup> During opening statement, the prosecutor stated:

You'll hear how the officers detained [the defendant] right there and talked to a woman who was inside of the apartment, and after talking to that woman, they went into a room, this room that was in that apartment, and you'll hear them describe what the room looks like. And you'll hear how it looked like a child's room, and they looked underneath the bed, and there right underneath the bed, nothing covering it up, was that gun with the big brown handle.<sup>162</sup>

In closing argument, and based on the testimony referenced in opening statement, the prosecutor commented, "Officer Callahan goes in, speaks to that woman, after speaking to her, *he knows where to go*, he goes right to that bedroom, and there he recovers the gun."<sup>163</sup> The woman referenced in both statements did not testify at trial.<sup>164</sup>

The *McNeal* court held that the prosecutor did not commit misconduct in making the statements about the non-testifying woman, as the comments were reasonable inferences drawn from the facts in evidence.<sup>165</sup> The court stated that it "was reasonable to infer that the officer knew where to go from his testimony that he 'just looked under the bed' and retrieved the gun."<sup>166</sup>

In closing argument, the prosecutor made further comments about the non-testifying witness, essentially alleging that she and the defendant were friends and that her apartment is where the defendant fled immediately after the purported crime occurred.<sup>167</sup> The prosecutor asked rhetorically, "[w]ho is this person to the defendant?," and noted that said person was not at trial to

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<sup>159</sup> *People v. McNeal*, 2019 IL App (1st) 180015, ¶ 1.

<sup>160</sup> *Id.* ¶ 2.

<sup>161</sup> *Id.* ¶ 46.

<sup>162</sup> *Id.* ¶ 48.

<sup>163</sup> *Id.* ¶ 49 (emphasis in original quotation.).

<sup>164</sup> *Id.* ¶ 46.

<sup>165</sup> *McNeal*, 2019 IL App (1st) 180015, ¶ 50.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* ¶¶ 55-58.

testify.<sup>168</sup> The defendant argued these comments were prosecutorial misconduct in the form of “burden shifting.”<sup>169</sup>

The *McNeal* court disagreed, finding no prosecutorial misconduct.<sup>170</sup> The court noted that the fact that the defendant, when chased by the police, made a beeline to the particular apartment in question and was immediately let in, was established by evidence at trial, and thus, the jury and the prosecutor could reasonably draw inferences that the defendant knew and was friends with the occupant of the apartment.<sup>171</sup> The court also commented that while the defendant argued that the inference was an attempt at “burden shifting,” it could also be considered an explanation by the prosecution as to why the State did not call the woman in question as a witness.<sup>172</sup>

Lastly, the defendant in *McNeal* argued that the prosecutor committed misconduct by making comments in closing argument which served to inflame the passions of the jury.<sup>173</sup> In closing argument, the State made multiple references to the gun in question being found in a child’s room.<sup>174</sup> The court found that these comments served a legitimate purpose in that they furthered aspects of the State’s argument and that the comments did not serve to inflame the passions of the jury.<sup>175</sup> Therefore, the comments did not amount to misconduct.<sup>176</sup>

### 9. *People v. Trice*

In *People v. Trice*, the defendant was convicted of delivery of a controlled substance and appealed on the grounds of alleged prosecutorial misconduct that he claimed occurred “throughout [the] entire trial.”<sup>177</sup>

In *Trice*, the prosecutor asked the State’s own witness questions regarding the witness’s past drug use, presumably to lessen the prejudicial effect of such testimony on cross-examination.<sup>178</sup> The defendant alleged this line of questioning amounted to misconduct, but the court disagreed, stating that “a witness’s credibility is relevant, and the State may, on direct examination, elicit testimony explaining the facts regarding a potential basis for impeachment.”<sup>179</sup> The *Trice* court further noted that the defendant never

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<sup>168</sup> *Id.* ¶ 55.

<sup>169</sup> *Id.* ¶ 59.

<sup>170</sup> *Id.* ¶ 60.

<sup>171</sup> *McNeal*, 2019 IL App (1st) 180015, ¶ 60.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* ¶ 62.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* ¶ 72.

<sup>176</sup> *Id.*

<sup>177</sup> *People v. Trice*, 2017 IL App (4th) 150429, ¶¶ 1-2, 49.

<sup>178</sup> *Id.* ¶¶ 53-55.

<sup>179</sup> *Id.* ¶ 55.

explained his position on why he believed the prosecutor's anticipatory disclosure of these facts and attempt to "pull the sting" amounted to misconduct.<sup>180</sup>

10. *People v. Nolan*

In *People v. Nolan*, the defendant was indicted by a grand jury for possession of cannabis with intent to deliver.<sup>181</sup> He submitted a motion to the trial court to dismiss the indictment based on prosecutorial misconduct during the grand jury proceedings, namely that the prosecutor presented the grand jury with false or misleading evidence.<sup>182</sup> Only one witness, a police officer, testified to the grand jury, speaking only twenty nine words and answering predominantly leading questions.<sup>183</sup> At the hearing on the defendant's motion to dismiss the indictment, only the defendant testified, and stated that what the officer stated to the grand jury was incorrect.<sup>184</sup> The trial court, seemingly concerned with the perfunctory way the grand jury deliberations were held, granted the defendant's motion to dismiss the indictment on the alleged grounds, further stating, "it's like the prosecutor in this case testified."<sup>185</sup>

On appeal, the trial court's decision was reversed.<sup>186</sup> The State argued, and the appellate court agreed, that it was up to the jury to determine at trial who to believe between the officer and the defendant, and maintained that no false or misleading evidence was presented to the grand jury.<sup>187</sup> The trial court also opined that the prosecutor could have called the officer to testify at the motion to dismiss indictment hearing in an effort to rebut the defendant's position, but the appellate court stated that "requiring the State to re-present its case at that hearing would negate the grand jury's historic independence in performing its vital functions."<sup>188</sup> Finally, concerning the leading nature of the prosecutor's questioning of the officer, the court held simply that leading questions are permissible in grand jury proceedings, noting that there is "no 'requirement that testimony before a grand jury cannot consist of monosyllabic responses.'"<sup>189</sup>

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<sup>180</sup> *Id.*

<sup>181</sup> *People v. Nolan*, 2019 IL App (2d) 180354, ¶ 1.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* ¶¶ 2, 23.

<sup>184</sup> *Id.* ¶ 6.

<sup>185</sup> *Id.* ¶¶ 7, 23.

<sup>186</sup> *Id.* ¶ 26.

<sup>187</sup> *Nolan*, 2019 IL App (2d) 180354, ¶ 22.

<sup>188</sup> *Id.* ¶ 21.

<sup>189</sup> *Id.* ¶ 23 (quoting *People v. Hirsch*, 221 Ill. App. 3d 772, 779, 582 N.E.2d 1228, 1232 (1st Dist. 1991)).

Of the ten referenced Illinois Appellate Court opinions above, four were from the First Judicial District, one from the Second Judicial District, three from the Third Judicial District, one from the Fourth Judicial District, and one from the Fifth Judicial District.<sup>190</sup> Many more cases were found in the four year survey period, as well as beyond this timeframe, wherein the defense bar accused the prosecutor of misconduct when the acts in question did not rise to that level, or resulted in, at most, mere error.<sup>191</sup> Rushing to label mere error as such results in the upper levels of the Illinois Court system being inundated with cases that disparage prosecutors unnecessarily as well as an infliction of damage to the roles prosecutors serve in our community.

#### B. Why the Misuse of the Term “Prosecutorial Misconduct” is Damaging

As seen earlier, the term “prosecutorial misconduct” is often misused by criminal defendants on appeal. Misapplying the pejorative term “prosecutorial misconduct” to actions or statements which, at most, account for nothing more than prosecutorial error allows for a failure to distinguish between trial mistakes and intentional bad acts carried out by unscrupulous state actors. Repeatedly looking to mere trial errors by prosecutors in isolation, regardless of ascertaining any element of intent, and then applying the term “prosecutorial misconduct” to those actions or comments serves no meaningful purpose in our criminal justice system other than to create an abundance of Appellate and Supreme Court decisions where the defense bar needlessly disparages prosecutors with these allegations.

The Illinois Supreme Court has stated the following: “[t]he American criminal trial, as the means of determining the guilt or innocence of an accused, is not perfect... However, the American criminal justice system, like perhaps no other system in the world, provides the maximum protection necessary to guard against mistakes being made.”<sup>192</sup> The court in this particular opinion further stated, “Have mistakes been made? Will mistakes be made? Certainly.”<sup>193</sup>

<sup>190</sup> Illinois’ Appellate Court is divided into five geographic areas, called Judicial Districts. See *Map of Illinois Judicial Districts*, ADMIN. OFF. OF ILL. CTS., <http://illinoiscourts.gov/AppellateCourt/DistrictMap.asp> (last visited Mar. 9, 2021). The author wanted to show at least one example of the type of cases surveyed from each of the five judicial districts, indicating that the issue is not strictly relegated to one particular region of the state.

<sup>191</sup> See, e.g., *People v. Long*, 2018 IL App (4th) 150919; *People v. Cook*, 2018 IL App (1st) 142134; *People v. Day*, 2019 IL App (4th) 160217-B; *People v. Foy*, 2020 IL App (1st) 172477-U; *People v. Phillips*, 2020 IL App (1st) 173094-U; *People v. Holmon*, 2019 IL App (5th) 160207; *People v. Holt*, 2019 IL App (3d) 160504-B; *People v. Anderson*, 2018 IL App (4th) 160037; see also, e.g., *People v. Gonzalez*, 388 Ill. App. 3d 566, 900 N.E.2d 1165 (1st Dist. 2008).

<sup>192</sup> *People v. Bull*, 185 Ill. 2d 179, 215, 705 N.E.2d 824, 842 (1998).

<sup>193</sup> *Id.*

Prosecutors in Illinois serve important roles, both in upholding and enforcing the state's constitution and laws and helping to ensure the safety of the community. When prosecutors inevitably commit error at trial or say or do something that does not sit well with the defense, for purposes of appeal, the defense bar should look at the intent and the effect of the statements or actions in question before immediately rushing to a charge of prosecutorial misconduct. The criminal justice system relies on advocates for both the state and the defense to zealously, diligently, and with integrity, "use all of their forensic skills to persuade the jury of the wisdom or justice of their respective positions."<sup>194</sup> This includes an accurate allegation of error instead of misconduct when the facts warrant as such.

#### IV. ADDRESSING THE MISUSE OF ALLEGING PROSECUTORIAL MISCONDUCT: *PEOPLE V. WILLIAMS*

Following many years of misuse of the term prosecutorial misconduct by many defense advocates, the 2020 Illinois Appellate Court opinion of *People v. Williams*, authored by Justice Robert Steigmann, sought to clarify the distinction between prosecutorial misconduct and mere error.<sup>195</sup>

In *Williams*, the defendant was found guilty on two counts of aggravated battery.<sup>196</sup> On appeal, the defendant argued that the prosecutor committed prosecutorial misconduct by: (1) showing photographs of the victim's injuries during opening statement, saying, "this is what happens when the defendant commits crimes;" (2) "insinuating that defendant intimidated witnesses;" (3) calling on the jury to "send a message" or "take a stand" against crime with its verdict; (4) attempting to focus the jury's outrage on the defendant for "kicking someone when they were down;" (5) arguing that "the only way to find [the defendant] not guilty would be to find that all of the State's witnesses were lying;" and (6) accusing defense counsel of "twisting the evidence."<sup>197</sup>

Regarding the prosecutor showing photographs during opening statement, the court noted that while this was a strange trial tactic, and one that should only be done after a pretrial conference or via a motion *in limine*, such action was not prosecutorial misconduct.<sup>198</sup> The court further found that the prosecutor's statement when showing these photographs – "this is what happens when the defendant commits crimes" – was also not misconduct,

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<sup>194</sup> *People v. Montgomery*, 373 Ill. App. 3d 1104, 1118, 872 N.E.2d 403, 415 (4th Dist. 2007).

<sup>195</sup> *People v. Williams*, 2020 IL App (4th) 180554.

<sup>196</sup> *Id.* ¶ 2.

<sup>197</sup> *Id.* ¶ 61.

<sup>198</sup> *Id.* ¶¶ 63-68.



despite the defendant’s argument that the State was insinuating the defendant had a history of violent crime.<sup>199</sup>

Regarding the claim that the State’s insinuation that the defendant intimidated witnesses amounted to misconduct, the court also disagreed, stating that the defendant received his remedy by the trial court sustaining defense objections to the State’s comments.<sup>200</sup>

Lastly, regarding the rest of the defendant’s claims of prosecutorial misconduct, the court dismissed those as well – both on individual grounds and the comments taken all together, going so far as to state that “[f]elony criminal trials are serious matters with high stakes...We continue to be disinclined to become the ‘speech police’ by imposing unnecessary restrictions upon closing arguments in criminal cases, and we encourage counsel to vigorously advocate for their position.”<sup>201</sup> The court not only held that the State’s comments were not improper, but “continue[d] to encourage vigorous advocacy from both sides in closing arguments” in criminal cases.<sup>202</sup>

Following the *Williams* court’s dismissals of the defendant’s claims of prosecutorial misconduct, it went further to include a sub-section titled “What is Misconduct?”<sup>203</sup> The court noted that the defendant accused the State of prosecutorial misconduct on multiple occasions and used this sub-section to delineate misconduct from mere error.<sup>204</sup>

The *Williams* court stated the definition of “misconduct” as “dereliction of duty; unlawful, dishonest, or improper behavior, esp. by someone in a position of authority or trust,” and, “[a]n attorney’s dishonesty or attempt to persuade a court or jury by using deceptive or reprehensible methods.”<sup>205</sup> The court specifically listed *Brady* and *Batson* violations as actions that it considered prosecutorial misconduct.<sup>206</sup>

The *Williams* court then noted that, even taken as true, it would not consider the defendant’s allegations in the case to constitute prosecutorial misconduct, explaining as follows:

When a trial judge makes an erroneous ruling, is that judicial misconduct? Or when defense counsel asks an improper question, is that attorney misconduct? With very rare exceptions, the answer is no. The same thinking should apply to claims that the prosecutor did something erroneous. We

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<sup>199</sup> *Id.* ¶ 68.

<sup>200</sup> *Id.* ¶ 69.

<sup>201</sup> *Williams*, 2020 IL App (4th) 180554, ¶ 71 (quoting *People v. Dunlap*, 2011 IL App (4th) 100595, ¶ 28).

<sup>202</sup> *Id.* ¶ 72.

<sup>203</sup> *Id.* ¶ 73.

<sup>204</sup> *Id.* ¶ 74.

<sup>205</sup> *Id.* (citing *Misconduct*, BLACK’S LAW DICTIONARY (11th ed. 2019)).

<sup>206</sup> *Id.*

encourage defendants to allege prosecutorial misconduct occurred only when the circumstances justify that pejorative description.<sup>207</sup>

It is hopeful that those practicing on the defense bar in Illinois – and beyond – take heed of the message sent in *Williams* regarding improper allegations of prosecutorial misconduct, and that this admonition will lead to less unfounded claims of misconduct.

## V. CONCLUSION

As stated by the Illinois Supreme Court in *Johnson*, “pervasive prosecutorial misconduct clearly undermines the trustworthiness and reputation of the judicial process, affecting the very integrity of the judicial process itself.”<sup>208</sup> The overuse and misuse of the disparaging term “prosecutorial misconduct,” when the facts at issue indicate nothing more than, at most, mere error, also affects the integrity of the judicial process by unnecessarily maligning the character of prosecutors engaged in public service on behalf of the State of Illinois. True prosecutorial misconduct should be abhorred and addressed with the appropriate remedy, including reversal of trial conviction and even when warranted, disciplinary action against the prosecutor engaged in such misconduct. However, what we have been seeing in Illinois is a pervasive misapplication of the term “prosecutorial misconduct.” The court in *Williams* confirmed this pattern of misuse and encouraged the defense bar to only allege prosecutorial misconduct when the circumstances truly dictate that it occurred.<sup>209</sup>

There is ample case law in Illinois that addresses what constitutes true prosecutorial misconduct, and when to allege that it occurred. Criminal defense counsel should look to the admonition in *People v. Williams* and be cognizant of what the underlying facts warrant before making such a potentially harmful allegation.<sup>210</sup> The criminal justice system in Illinois deserves it.

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<sup>207</sup> *Williams*, 2020 IL App (th) 180554, ¶¶ 74-75.

<sup>208</sup> *Johnson*, 208 Ill. 2d 53, 85, 803 N.E.2d at 418 (quoting *Blue*, 189 Ill 2d at 134, 724 N.E.2d at 938).

<sup>209</sup> *Williams*, 2020 IL App (4th) 180554, ¶ 75.

<sup>210</sup> *Id.*