

20-5109  
IN THE

UNITED STATES SUPREME COURT

GANAA OTGOO

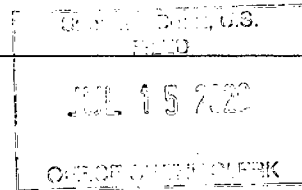
aka. YUCHIN OTGONNAMAR

PETITIONER,

-VS-

STATE OF ILLINOIS

RESPONDENT, "et al."



ON PETITION FOR A WRIT OF CERTIORARI TO

ILLINOIS SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

*Ganna Otgoo*

*aka. Yuchin Otgonnamar*

Petitioner, Pro Se

A# 097-374-540

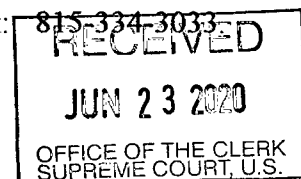
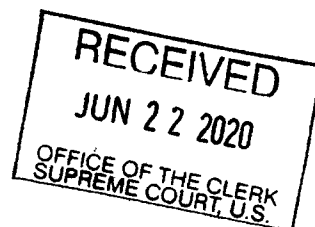
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TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT

May it please the Honorable Justices of the United States Supreme Court

**LEGAL QUESTIONS PRESENTED**

- 1) Grant Certiorari to decide legal questions whether State Court actions denied Petitioner's Rights under Federal Law, denied Petitioner "Fair and Impartial Trial" under Federal Constitutional Rights.
- 2) Whether State prove or has failed to prove beyond a reasonable doubt that the individual who committed the CTA Skokie battery who is depicted in the video is the Petitioner.
- 3) Whether the decision of the state court that decided Petitioner's case is existence of a conflict between decisions of another state court decision of which review is sought, the importance of the case not only to petitioner but to others similarly situated wrongful convictions. An important function is to resolve disagreements among lower courts about specific legal questions presented.

## **LIST OF PARTIES**

- 1) Mr. Kwame Raoul, Illinois Attorney General,  
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- 2) Ms. Kimberly M. Foxx, State's Attorney,  
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## **STATUTES AND RULES**

### **720 ILCS 5/12-3.05(c) Aggravated Battery**

(c) Offense based on location of conduct. A person commits aggravated battery when, in committing a battery, other than by the discharge of a firearm, he or she is or the person battered is on or about a public way, public property, a public place of accommodation or amusement, a sports venue, or a domestic violence shelter.

720 ILCS 5/12-3.05(c) (West 2014)

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GANAA OTGOO

aka. YUCHIN OTGONNAMAR

PETITIONER,

-VS-

STATE OF ILLINOIS

RESPONDENT, “et al.”

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**PETITION FOR WRIT OF CERTIORARI**

Supreme Court Rules 10-14, Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS AND PROCEEDINGS BELOW**

The opinion of the highest state court Illinois Supreme Court denied petition for leave to appeal appears at Appendix C, to the petition.

The opinion of the Illinois Appellate Court appears at Appendix A, and Illinois Appellate Court decision denied petition for rehearing, appears at Appendix B, to the petition and is unpublished.

On October 7, 2015, petitioner was found guilty of aggravated battery on public property.

Petitioner was subsequently sentenced to 5 years prison term upon this wrongful conviction and he appealed this wrongful conviction to the Illinois Appellate Court First District.

On December 23, 2019, Illinois Appellate Court delivered its opinion in said appeal, affirming the judgment of conviction and sentence.

On February 10, 2020, Illinois Appellate Court denied Petition For ReHearing.

On May 27, 2020, Illinois Supreme Court denied Petition For Leave to Appeal.

## **JURISDICTION**

Petitioner fully exhausted state court remedies, appealed to the Illinois Appellate Court and appealed to Highest state court Illinois Supreme Court.

The date on which the highest state court, Illinois Supreme Court denied petition for leave to appeal was on May 27, 2020. A copy of that decision appears at Appendix C.

The Petition for Writ of Certiorari is timely within 90 days from the Illinois Supreme Court's denial of a timely filed petition for leave to appeal.

The jurisdiction of this Honorable Supreme Court is invoked under 28 U.S.C. 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Every criminal defendant has the right to a fair and impartial trial untainted by bias or prejudice caused by irrelevant evidence or improper argument.

**United States Constitutional Amendment XIV.** Ill. Const. 1970, art. I, 2.

People V. Blue, 189 Ill. 2d 99, 138-40 (2000). Indeed, though a criminal trial is an adversarial proceeding, prosecutors have a duty as public officials to safeguard a defendant's constitutionally protected right to a fair and impartial trial. **United States Constitutional Amendment XIV.**

Prosecutorial misconduct that deliberately undermines the process by which a jury determines a defendant's guilt must not be tolerated. People V. Wheeler, 226 Ill. 2d 92, 122-123 (2007).

Prosecutors may comment on facts in evidence or on reasonable inferences drawn from that evidence, but prosecutors may not misstate either the law or the evidence. People V. Carbajal, 2013 IL App (2d) 111018, 29; People V. Chavez, 327 Ill. App. 3d 18, 27 (1st Dist. 2001).

Thus, while a prosecutor may "strike hard blows, he is not at liberty to strike foul ones."

**Berger V. United States, 295 U.S. 78, 88 (1935).** Even when no error by itself requires reversal, relief may be warranted where the cumulative effect of multiple errors deprived the defendant of a fair and impartial trial. People V. Davidson, 235 Ill. App. 3d 605, 613 (1st Dist. 1992).

In reviewing alleged improper comments of a prosecutor, reviewing court may consider the cumulative effect rather than assessing the prejudicial effect of each isolated comment.

People V. Quiver, 205 Ill. App. 3d 1067, 1072 (1st Dist. 1990). Because it is undisputed from the trial record that the prosecutor elicited the described testimony and made the described remarks, this Court is not required to weigh evidence or witness credibility, but instead is asked to settle a purely legal question. Therefore, the standard of review should be de novo.

Wheeler, 226 Ill. 2d at 121.

## **STATEMENT OF THE CASE**

On March 28, 2014, Armando Velez was assaulted on the CTA Yellow Line train in Skokie.

CTA video recording of the incident shows Velez riding in the same train car as a man wearing a large jacket with patches, a turtleneck sweater, and a baseball cap pulled low over his face.

Velez assailant was not immediately apprehended.

Five hours later, Ganaa Otgoo was arrested in Chicago, for an incident unrelated to the Yellow Line battery. Police officer Loiacono arrested Otgoo after observing him fighting two men on the street at the intersection of Milwaukee, Diversey and Kimball Avenues.

While leaving a court appearance for the Chicago case (for which the charges were later dropped) Otgoo was arrested by Skokie police and charged with two counts of aggravated battery and one count of unlawful restraint in connection with the attack on Velez.

### **Pretrial Proceedings**

State moved in limine to admit evidence of other crimes, seeking to admit the March 29, 2014 incident in Chicago, and 13 previous crimes, three of which resulted in conviction.

At August 17, 2015 hearing on the motion, trial judge ruled that State would be allowed to introduce evidence of the March 29, 2014 incident in Chicago through live testimony.

Also prior to trial, the defense moved in limine to bar testimony identifying Otgoo from CTA surveillance video and to bar introduction of public bulletins or documents with photographs or information about the incident. At a September 9, 2015 hearing on the motion, defense counsel argued that identity of the assailant is a question of fact for the jury to decide.

After some discussion, State said it would elicit opinion testimony from police officer Loiacono, the arresting officer from the Chicago incident, regarding the identity of the assailant in the video, without eliciting any conclusory remarks.

## Jury Trial

At Otgoo's jury trial, on the record Armando Velez testified that between 5:30 pm to 8:15 pm he had three beers at his friends house and nothing to eat and he was riding the Yellow Line home from his friend's house around 8:15 pm when he noticed a man "talking obscenities" and acting erratically. Velez told the man to be quiet, and in response the man walked over to him, pulled Velez's clothing over his head, and began hitting him in the face. Man then kicked him in the chest so that he fell to the ground and continued kicking him in the face. On the record Velez testified that after the incident, he sustained bruises and cuts on his face and bleeding.

Velez got off the train, and he spoke with a Chicago police officer who told him he would need to seek help in Skokie, where the incident occurred. On the record Velez also testified that he didn't show his injuries to Chicago police because wasn't visible at that time. Velez then returned home and, later that night, he went to the hospital for his injuries. On the record, Velez, responded when trial counsel asked him if he had sobered up, that yes, he had.

Jury also heard from officer Loiacono, Chicago police officer who arrested Otgoo in Chicago on March 29, 2014. According to officer Loiacono, at the time he was arrested, Otgoo was wearing large oversized leather-like jacket with multiple patches. Officer Loiacono also testified that he never inventory large oversized leather-like jacket with multiple patches and jacket was not in the inventory or police report. March 29, 2014 Chicago police took a photograph of Otgoo and booking mug shot Otgoo not wearing large oversized leather-like jacket with multiple patches. Officer Loiacono's partner officer John Repas, never testified at jury trial or never testified about large oversized leather-like jacket with multiple patches. Officer Loiacono claimed that, when he and his partner officer John Repas, arrived at the scene, Otgoo was hitting two men in the face and torso.

Officer Loiacono stated that the two men were larger than Otgoo, and that they were not returning any blows, only attempting to protect themselves. Officer Loiacono stated that the names of the victims were Uri Nowicki and Jan Klubek. Officer Loiacono described Otgoo's behavior as "irate, belligerent and extremely aggressive" and told the jury that, once in the squad car "he was calling us bitches, pussies and told us to fuck you". Furthermore, officer Loiacono said that Otgoo did not cooperate with the officers and refused to give them his name.

Officer Loiacono explained that he received a call from Detective Lebow from the Skokie Police Department asking for help identifying the assailant in the CTA case, and that he met with Lebow and looked at still images of the CTA recording of the incident.

The following exchange occurred between the State and officer Loiacono regarding Otgoo's identification:

Q: And what did you tell Officer Lebow about the images and the still photographs that he showed to you?

A: Based on the defendant's stature, the oversized coat he was wearing, his physical height and I determined that he was the individual that I had arrested on March 29th 2014.

Defense counsel objected to this statement, and trial court sustained the objection.

Defense moved for a mistrial based on the jury having heard this identification in violation of the defense motion in limine, but trial court declined the defense's request and proceeded with trial.

Otgoo testified that he did not commit the CTA battery. After Otgoo's testimony, the State announced its intention to impeach Otgoo's credibility through evidence of a prior conviction for aggravated battery of a peace officer.

After argument from both parties, trial court allowed the conviction to be introduced.

State told the jury:

Yes, your Honor. At this time the State would like to introduce a certified statement of conviction under Case No. 08 CR 13763 which shows the People of the State of Illinois versus Otgonnamar Yuchin was convicted of the felony offense of aggravated battery causing bodily harm to a peace officer on August 27, 2008.

In closing arguments, State discussed Otgoo's 2008 conviction, arguing that the evidence is "permitted because it shows that the individual does not follow the rules of civilized society".

State repeated the argument that a prior conviction is relevant to show Otgoo's "contravention of the rules of society" over the defense's objection. State also argued that Velez's life changed forever after the incident, as he was fearful of wearing hoodies or riding the CTA at night.

Defense's closing argument focused on weaknesses in Velez' identification ability and on raising doubt as to whether the Chicago incident perpetrator was the same person as the CTA offender.

Defense argued that State said that oversized distinctive jacket is the defendant identity and so that piece of the puzzle is going to his identity but no evidence of any oversized distinctive jacket and no chain of custody evidence. State was not able to introduce the jacket State don't have the jacket and jacket was not inventoried and Jacket was not put on police report.

March 29, 2014 Chicago police took a photograph and defendant were not wearing the oversized distinctive jacket. Defense also argued that charge of aggravated battery, State has failed to prove beyond the reasonable doubt that the individual who committed the battery who is depicted in the video is the defendant. The jury found Otgoo guilty of aggravated battery on public property and acquitted him of aggravated battery on a individual 60 years or older.



### Post-Trial Proceedings and Sentencing

Defense filed motion for new trial, arguing, among other things, that prosecution should not have been permitted to introduce the evidence of the March 29, 2014 incident in Chicago, as that incident, rather than CTA incident, became the focus of the trial and trial with trial.

Defense also argued that trial court should have granted the defense motion for mistrial after officer Loiacano identified Otgoo as the individual in the surveillance tape. Trial judge denied the motion for new trial. At sentencing, State called witnesses to testify as to various other bad acts attributed to Otgoo, most of which did not result in conviction, and reintroduced the certified statement of the 2008 aggravated battery conviction introduced at trial and recalled Officer Loiacono to again describe the Chicago incident.

Otgoo was sentenced to five years in the Illinois Department of Corrections.

## ILLINOIS APPELLATE COURT DECISION

Justice Hyman delivered the judgment of the court.

Presiding Justice Griffin and Justice Walker concurred in the judgment.

### ORDER

Held: The trial court properly admitted testimony regarding defendant's arrest, five hours after the assault, for fighting at a different location; the trial court did not abuse its discretion in admitting defendant's aggravated battery conviction for impeachment because its probative value was not substantially outweighed by any undue prejudice; and the alleged prosecutorial misconduct did not prejudice the defendant and there was no cumulative effect of any alleged error on the guilty verdict.

We affirm. Testimony about the Chicago battery five hours after the Skokie battery was probative of the investigation process that led to Otgoo's identification. When Otgoo testified, he put his credibility in issue, and trial court properly allowed State to impeach him with evidence of an arrest in 2008. No error occurred during the State's direct examination of the arresting officer or Velez; the State's remarks in closing were not inflammatory or prejudicial to Otgoo; in any case, jury instructions cured any alleged error. (Appellate Court Decision, page 2 and 3). Here, jury was instructed to consider the other crimes for the limited purpose of identification, no "mini-trial" of the Chicago fight occurred, and the officer's testimony explained the police investigation that resulted in Otgoo's arrest. (page 12). Loiacono's testimony about the later arrest was not unfairly prejudicial. (page 13). Otgoo complains that the fact of his 2008 conviction for aggravated battery to a police officer was not fully explained to the jury (Otgoo states he spit on the officer), but the law requires the conviction to be named (page 15). It follows then, that the trial court in its discretion properly allowed the impeachment evidence. It matters not whether battery to a police officer was spitting or using a bat or some other means of battery. Thus, Otgoo cannot establish error for the admission of the evidence, and no error occurred, let alone plain error. (page 15).

The sustained objection to Loiacono's identification answer indicates the question was improper; the jury was instructed to disregard both the question and Loiacono's answer.

We find the trial court's ruling on the motion in limine was not violated. (Page 18).

Because there was overwhelming evidence of the defendant's guilt, this error was not so prejudicial as to have denied a fair trial and held harmless. (See, Appendix A.)

**ILLINOIS APPELLATE COURT DECISION  
DENIED PETITION FOR REHEARING**

JUSTICE HYMAN delivered the judgment of the court.

Presiding Justice Griffin and Justice Walker concurred in the judgment.

**ORDER**

Held: The trial court improperly admitted testimony regarding defendant's actions toward the arresting officers during a separate incident five hours after the assault, for fighting at a different location; the error was harmless because the evidence was not closely balanced and the jury was properly instructed. The trial court did not abuse its discretion in admitting defendant's aggravated battery conviction for impeachment because its probative value was not substantially outweighed by any undue prejudice; and the alleged prosecutorial misconduct did not prejudice the defendant and there was no cumulative effect of any alleged error on the guilty verdict.

We affirm.

(See, Appendix B.)

## REASONS FOR GRANTING THE WRIT

### A.

- I. Ganaa Otgoo was denied a fair and impartial trial where the State was permitted to introduce other crimes evidence, ostensibly for the purpose of identification, but which also unnecessarily informed the jury that Otgoo was arrested five hours after the battery at issue for publicly fist fighting with two strangers and that he was shouting profanities and refusing to cooperate with police officers.**

Prior to trial, State moved to admit evidence of several other crimes including a fight Otgoo was involved in five hours the incident in this case. Defense argued that the facts of the Chicago case were more prejudicial than probative and largely unnecessary to explain the circumstances surrounding Otgoo's identification and eventual arrest in this case. Trial judge ruled that the State would be allowed to introduce evidence of the March 29, 2014 incident in Chicago, and refused to impose any limitation on testimony from the officers or victims.

The error stemming from this testimony was fully preserved. First, the defense objected to the testimony at argument on State's motion to introduce other crimes, where they argued that it would be more prejudicial than probative to bring in the other crimes evidence just to explain why Otgoo was at the courthouse when he came to be arrested. Defense also argued at this motion that the specific facts of the case should be excluded and objected to the admission of live testimony of the incident. Furthermore, the error is preserved in the defenses motion for new trial, where counsel argued that the evidence of the Chicago incident should not have been admitted, as it "became the focus of the prosecution of the case at trial and trial with trial.

Generally, other crimes evidence is inadmissible if it is meant to demonstrate a defendant's propensity to engage in criminal activity. *People V. McKibbins*, 96 Ill. 2d 176, 182 (1983). Evidence of other crimes may be admissible for another relevant purpose, including identity. For other crimes evidence to be admissible, it must be relevant and the probative value must outweigh the prejudicial effect. *People V. Bedoya*, 325 Ill. App. 3d 926, 937 (1<sup>st</sup> Dist. 2011). *People V. Nunley*, 271 Ill. App. 3d 427, 431 (1<sup>st</sup> Dist. 1995). It is the duty of the trial court to take care to protect against prejudice and guard against overkill when admitting other crimes evidence. *People V. McCray*, 273 Ill. App. 3d 396, 402-403 (1<sup>st</sup> Dist. 1995).

People V. Olson, 96 Ill. App. 3d 196, 197-198 (2<sup>nd</sup> Dist. 1981) ("the court must balance relevance of evidence against its tendency to inflame and prejudice the jury").

A ruling allowing the introduction of evidence of other crimes will be upheld unless it represents an abuse of discretion. People V. Maxwell, 148 Ill. 3d 116, 131 (1992).

Here, the trial court failed to limit unfair prejudice to Otgoo and allowed the admission of information that plainly constituted overkill.

State also, however, elicited irrelevant, inflammatory testimony that went far beyond mere identification. Officer Loiacono explained that he received a call for a battery in progress, and arrived at the scene to see Otgoo attacking another man:

A: I observed an individual being battered by another individual.

Q: And when you say battering, what did you actually see?

A: He was hitting him with his arms.

Q: And when you say hitting, who are you referring to?

A: I'm referring to the defendant.

Q: All right. and he was hitting another individual?

A: Correct.

Q: Okay, and you saw the defendant you said hitting another individual, is that correct?

A: I did.

Q: Where did you-on what part of that other individual's body did you see the defendant hitting him?

A: The lower face and torso.

Q: As you approached, approximately how many strikes did you see the defendant inflict on this other individual?

A: I can't be for certain but it was definitely at least two or three.

Q: And as you approached, did you see the individual that the defendant was hitting returning any blows?

A: I did not.

Q: What was the individual doing?

A: He was attempting to protect himself.

Q: As you pulled up in your squad car prior to you exiting it, was the defendant still punching the individual?

A: Yes.

Q: And as you sit there, do you recall the name of the victim, the one that the defendant was punching?

A: Yes.

Q: And what was his name?

A: Uri Nowicki.

Q: And he was with another individual; is that correct?

A: He was.

Q: Do you remember that other individual's name?

A: Jan Klubek.

State then went on to elicit testimony regarding Otgoo's behavior once he was arrested.

Officer Loiacono described Otgoo's attitude as "irate, belligerent and extremely aggressive" and said that, once in the squad car, Otgoo was calling both officers "bitches" and "pussies" and telling them, "fuck you". Officer Loiacono also said that Otgoo did not cooperate with the officers and refused to give them his name.

People V. Nunley is instructive. In this case, a defendant was on trial for murder, and the State elicited testimony from his mother that he had previously stabbed her and killed her dog.

People V. Nunley, 271 Ill. App. 3d 427, 431(1<sup>st</sup> Dist. 1995). Defendant had confessed to the murder in the case at bar when being interrogated for incident with his mother and her dog, and other crimes evidence was purportedly relevant to establish a continuing narrative of events. *Id.* At 432. Although the appellate court agreed that the evidence of other crimes was necessary to explain his confession, the "detailed and repetitive manner in which the evidence was presented greatly exceeded what was required to accomplish this purpose." *Id.*

Thus, the court in Nunley reversed the defendant's conviction, stating that the other crimes evidence unduly prejudiced defendant and prevented him from having a fair trial. *Id.* at 433.

See, also People V. Bedoya, 325 Ill. App. 3d 926, 939-940 (1<sup>st</sup> Dist. 2011) (inflammatory and unduly prejudicial in a murder trial to admit detailed evidence that, an hour before the murder, defendant fired his gun at three buildings out the window of his car).

In arguing that March 29, 2014 evidence was admissible and did not need to be purged of prejudicial and irrelevant detail, State relied on People V. Rutledge. Rutledge is distinguishable from this case.

In Rutledge, the defendant was on trial for aggravated battery of a police officer and the trial court admitted evidence of an attempted assault immediately prior to the battery. *People V. Rutledge*, 409 Ill. App. 3d 22, 23 (1<sup>st</sup> Dist. 2011). Prior to battering the officer, the defendant had been trying to sexually assault a woman in his car. *Id.* The woman escaped, ran to an off duty officer for help, and the defendant followed and punched the officer, as he had become agitated that the officer was thwarting his assault attempts. *Id.* at 23-24. Appellate court in Rutledge ruled that the evidence was proper, reasoning that the defendant's actions in the car were integral to explaining the circumstances surrounding the assault and, without this evidence, there was no explanation for defendant's conduct towards the officer. *Id.* at 25-26.

Unlike Rutledge, where crime committed could not have been explained without the details of the prior incident, Otgoo's behavior during the March 29, 2014 Chicago incident has no relationship to the CTA battery. The incident occurred five hours later, in a different city and involved totally unrelated people. There was no relevant purpose for the State to elicit such detailed testimony of the events of the Chicago incident. The names of the victims, the manner in which Otgoo was allegedly punching them, his small size relative to the larger victims, the notion that Otgoo was "irate, belligerent, and extremely aggressive" and was calling the officers "pussies" "bitches" and "telling them to fuck you" has no bearing on officer Loiacono's ability to help the Skokie officers identify Otgoo. This information is irrelevant to the case at bar. Evidence is also highly prejudicial in that Otgoo was on trial for an offense very similar to the one detailed by officer Loiacono physical violence against a stranger, public use of profanity, and an unprovoked attack. Furthermore, the offense occurred a mere five hours after the incident at issue. Evidence "greatly exceeded what was required" to accomplish the purpose of explaining officer Loiacono's involvement in identifying Otgoo and was unnecessary for any purpose but its potential to portray Otgoo as unpredictable and aggressive. *Nunley*, 271 Ill. App.3d. at 432. Furthermore, as this error was preserved, the State bears the burden of persuasion with respect to prejudice. *People V. Thurow*, 203 Ill. 3d 352, 363(2003).

*United States V. Olano*, 507 U.S. 725,734 (1993). In other words, State must prove beyond a reasonable doubt that the jury verdict would have been the same absent the error. *Id.* Thus, in this circumstance, State bears the burden of proving that, without having heard the prejudicial details of the Chicago fist fight, the jury would not have found Otgoo guilty.

Given the similarity of this offense to the case at bar and the prejudicial and extensive details of Otgoo's belligerent fight and aggression towards police officers, this burden is too high for the State to overcome. Although the limiting instruction dictated that the March 29<sup>th</sup> 2014 incident was to be considered only for identification, the evidence far exceeded what was necessary to explain why Otgoo was arrested. Jury heard about Otgoo beating up strangers, hitting them in the face and torso, the victim's names, the specific profanities he was shouting at officers, and his refusal to cooperate. None of this information illuminated the issue of identification to the jury. When evidence is admitted that includes unfairly excessive details, a limiting instruction is insufficient to cure the prejudicial effect of the admission. *People V. Boyd*, 336 Ill. App. 3d 84, 94 (1<sup>st</sup> Dist. 2006). Here, information introduced exceeded the purpose of explaining officer Loiacono's identification ability, and no limiting instructions can overcome the prejudicial effect of this inflammatory information. Thus, by the admission of this evidence, Otgoo was prevented from receiving a fair and impartial trial and reversal is necessary.

**II. Ganaa Otgoo was denied a fair and impartial trial where State was permitted to impeach Otgoo with a prior conviction that was more prejudicial than probative as it was similar to the charge at issue and had no bearing on Otgoo's credibility and where State told the jury that prior conviction was for "aggravated battery to a peace officer causing bodily harm," which misled the jury as to the true nature of his offense.**

After Otgoo testified, State announced its intention to introduce a certified statement of his prior conviction for aggravated battery to a peace officer. Trial court allowed the introduction over the defense's objection, simply stating that the conviction was "probative". In rebuttal, State told the jury, "At this time the State would like to introduce a certified statement of conviction under case No. 08 CR 13763 which shows the People of the State of Illinois versus Otgonnamar Yuchin was convicted of the felony offense of aggravated battery causing bodily harm to a peace officer on August 27<sup>th</sup> 2008". Two problems arise from this evidence. The 2008 conviction should not have been introduced in the first place, as it had limited relationship to Otgoo's credibility as a witness and was nearly identical to the crime at issue. Further, State misrepresented the nature of the prior conviction, as it announced that the offense was "aggravated battery to a peace officer causing bodily harm" when the prior conviction was merely for spitting on an officer. In terms of initial admissibility, a judge's ruling on the admissibility of other crimes evidence is reviewed for an abuse of discretion. *People V. Wilson*, 214 Ill. 2d 127, 136 (2005).



In terms of the State's misrepresentation of the offense, because it is undisputed from the trial record that the prosecutor made the described remarks, this Court is not required to weigh evidence or witness credibility, but instead is asked to settle a purely legal question. Therefore, the standard of review should be de novo. *People V. Wheeler*, 226 Ill. 2d 92, 121 (2007).

#### **A. Montgomery issue**

Under Montgomery rule, defendant's conviction is admissible to impeach his credibility if the offense was punishable by death or imprisonment in excess of one year or involved a crime of dishonesty, unless trial court concludes that the probative value of the conviction does not substantially outweigh the danger of unfair prejudice. *People V. Montgomery*, 47 Ill. 2d 510, 516 (1971). Circuit court is expected to balance the probative value of a prior conviction against the prejudicial impact of the conviction upon the jury. *People V. McKibbins*, 96 Ill. 2d 176, (1983). Focus of the Montgomery rule is on crimes which bear on the defendant's truthfulness as a witness. *People V. Cox*, 195 Ill. 2d 378, 384 (2001). *Id.* Trial judge must be especially cautious when prior conviction is for the same conduct for which the accused is on trial.

*People V. Atkinson*, 186 Ill. 2d 450, 463 (1999). "As one trial judge put it, the defendant is a dead duck once he is on trial before a jury and you present that he was convicted...If the conviction is in any way close, the jury is going to hang him on that record, not on the evidence." *Montgomery*, 47 Ill. 2d at 514. Illinois Supreme Court has voiced its concern about lower courts mechanically applying the Montgomery rule to allow impeachment of a testifying defendant with virtually all types of prior felony conviction and emphasizes that the court must conduct a balancing test of probative value versus unfair prejudice before admitting prior convictions for impeachment purposes. *People V. Williams*, 173 Ill. 2d 48, 81-82 (1996).

A ruling allowing the introduction of evidence of other crimes will be upheld unless it represents an abuse of discretion. *People V. Maxwell*, 148 Ill. 3d 116, 130 (1992).

*People V. Adams* is instructive. In a trial for armed violence, attempted murder, and aggravated battery, a defendant's prior aggravated battery and possession of a controlled substance convictions were introduced as impeachment evidence after the defendant testified.

*People V. Adams*, 281 Ill. App. 3d 339, 345 (1<sup>st</sup> Dist. 1996). Appellate court in *Adams* found that these convictions were improperly admitted, as they were highly prejudicial and not probative of the defendant's credibility. *Id.* at 344-345. Furthermore, appellate court expounded on the principle that, under *Montgomery*, the proper focus of admission of impeachment

evidence should be crimes which bear upon the defendant's truthfulness as a witness. Id. at 344. Court also took issue with the similarity between the two crimes, stating that the introduction "could have persuaded the jury that 'if he did it before, he probably did so this time.'" Id. at 345. Court therefore held that, because of the lack of bearing on credibility, and high risk of prejudice due to the similarity of the crimes, convictions should not have been admitted. Id. at 345. Here, defense objected to the introduction of the prior conviction, arguing that letting the jury hear about the prior aggravated battery conviction at aggravated battery trial, would be more prejudicial than probative. Court simply stated that the offense was "probative and allowable under the law" and allowed State to admit the aggravated battery conviction at aggravated battery trial. Court did not balance the probative value against the prejudicial effect, as dictated by Montgomery. Furthermore, had the court performed the proper balancing test, it would have been revealed that the prejudicial effect outweighed the probative value. First, in terms of prejudice, the prior conviction for aggravated battery of a peace officer is nearly identical to the trial charge of aggravated battery on public property. This type of evidence "over persuades the jury which might convict only because it feels he is a bad person deserving punishment".

People V. Thingvold, 145 Ill. 2d at 452. Other crimes evidence should not lead to a "mini-trial" on the other offenses. People V. McKibbins, 96 Ill. 2d 176, 186-87 (1983).

The introduction of this charge "could have persuaded the jury that **'if he did it before, he probably did so this time'**". Adams, 281 Ill. App. 3d at 345. The prejudice to Otgoo from the introduction of this evidence was even more egregious in light of the State's closing argument, in which the State argued repeatedly that the past conviction shows Otgoo "does not follow the rules of civilized society" See, Argument III (3). This is a pure propensity argument- the State is urging the jury to reason that, because Otgoo was convicted of aggravated battery of a peace officer in 2008, he has no regard for society and probably committed the battery at issue.

See, Williams, 173 Ill. 2d at 82 (impermissible to argue that prior conviction is probative of guilt rather than defendant's credibility as a witness). Along with being highly prejudicial, crime has limited probative value. There is no special relationship between a conviction for aggravated battery and a lack of credibility on the witness stand. Because prior conviction for aggravated battery is highly prejudicial in an aggravated battery trial, and because conviction had limited bearing on Otgoo's credibility as a witness and was used by the prosecutor to make an improper propensity argument, admission of the conviction was an harmful error and reversal is necessary.

**B. The prosecutor misrepresented to the jury that Otgoo had injured a police officer.**

At trial, State told the jury “Otgoo was convicted of the felony offense of aggravated battery causing bodily harm to a peace officer on August 27, 2008”. In so doing, the prosecutor prejudiced Otgoo by informing the jury that he physically injured a peace officer, which is false. State knew this contention was false, as it detailed the prior offense in its motion to admit other crimes, stating that, after being arrested for fighting:

Otgoo was transported back to the 14<sup>th</sup> Chicago Police District for processing, where he spat in the face of a second victim, P.O. Louis Luna. Defendant was charged with Aggravated Battery to a Peace Officer under 08 CR-13765. He pled guilty and received 18 months felony probation on August 27, 2008.

State further discussed this charge at sentencing:

And after the defendant was being-done being treated, he was transported back to the 14<sup>th</sup> Police District for processing and he spat in the face of Officer Luis Luna which ended up being the basis for the felony aggravated battery to the police officer.

A prosecutor is never entitled to misstate the law or facts of the case. *People V. Carbajal*, 2013 IL App (2d) 111018, 29. *People V. Wheeler*, 226 Ill. 2d 92, 121-22 (2007). In this case, the semantic difference between “aggravated battery of a peace officer” and “aggravated battery causing bodily harm to a peace officer” holds important legal significance. Statute under which Otgoo was convicted in 2008, 720 ILCS 5/12-4(b)(18) lists aggravated battery of a peace officer as a battery where the individual “knows the individual harmed to be an officer or employee of the State of Illinois...engaged in the performance of his or her authorized duties as such officer and employee” and includes “physical contact of an insulting or provoking nature with an individual” in the definition of battery. 720 ILCS 5/12-4(b)(18). By misstating the name of the offense as aggravated battery causing bodily harm to a peace officer, the prosecutor told the jury that Otgoo's conviction was for physically harming a police officer, when, in reality, the statute indicates that Otgoo could have been convicted for merely making “insulting or provoking” contact with an officer. This dissemination of misleading information prejudices Otgoo because, in actuality, Otgoo's conviction stemmed from spitting at an officer, not physically harming one. State was aware of the nature of the offense, as it included the detail that Otgoo “spat in the face of a second victim, P.O. Louis Luna” in the motion to admit other crimes. Furthermore, the prosecutor repeated that the charge was spitting, stating, “he spat in the face of Officer Louis Luna which ended up being the basis for the felony aggravated battery to the police officer”.

Thus, prosecutor's statement that Otgoo was convicted of "aggravated battery causing bodily harm to a peace officer" was untrue, and told the jury that the prior conviction was more serious than it actually was. The prosecutor disseminated false information to the jury, designed to portray Otgoo as a serious prior offender who injures law enforcement officers. This is plainly prejudicial, unethical, and undermined Otgoo's ability to receive a fair and impartial trial.

### **C. Prejudice and Plain Error**

Although neither the Montgomery issue nor the State's misrepresentation of Otgoo's prior conviction were preserved, both issues are reviewable for plain error. Plain error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred, and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred, and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People V. Piatkowski*, 225 Ill.2d 551, 564-565 (2007). Ill. Sup. Ct. Rule 615(a).

The first prong of plain error is met here. Evidence is closely balanced regarding the identity of the CTA assailant. The face of the individual on the CTA video is almost completely obscured by a hat, and upper body was covered by oversized jacket and Velez' testimony regarding the identity is called into question by the fact that on the record Velez testified that between 5:30 pm and to 8:15 pm Velez' had 3 beers at his friends house and nothing to eat and he was riding the Yellow Line home from his friend's house around 8:15 pm and his own face was covered with his clothing while he was being attacked and 3 weeks after the incident Velez' identified Otgoo, as the offender in a five-person lineup. Three asian and Two hispanic in a Five-person lineup. Also controversial is police officer Loiacono's statement that Otgoo was wearing the large oversized leather-like jacket with multiple patches, when he was arrested on March 29<sup>th</sup> 2014 as he was in the CTA video. The large oversized leather-like jacket with multiple patches, at issue was not presented at jury trial, and on the record Officer Loiacono testified that he never inventory the oversized jacket and no evidence of any jacket in the inventory or police report and March 29<sup>th</sup> 2014 in the booking photograph, Otgoo was not wearing large oversized leather-like jacket with multiple patches. Officer Loiacono's partner police officer John Repas, never testified at jury trial or never testified about large oversized leather-like jacket with multiple patches.

Thus, a main identifying piece of the large oversized leather-like jacket with multiple patches is based purely on police officer Loiacono's unsubstantiated claim that Otgoo was wearing the oversized jacket on the March 29<sup>th</sup> 2014 in Chicago. Finally, were it not for officer Loiacono's prejudicial conclusive identification testimony—the introduction of which is being challenged here—it is likely that the jury would not have decided that Otgoo was the CTA assailant. With regard to the Montgomery issue, it is likely that the prejudice caused by the improper allowance of the 2008 aggravated battery conviction at aggravated battery trial, the jury is going to hang him on that record, not on the evidence.” Montgomery, 47 Ill.2d at 514.

It is likely that the prejudice caused by the improper allowance of the 2008 aggravated battery conviction at aggravated battery trial, caused the jury to conclude that Otgoo was guilty based on 2008 aggravated battery conviction, “if he did it before, he probably did so this time.”

Adams, 281 Ill.App.3d at 345. The second issue, the misrepresentation of the prior conviction, is even more likely to have caused the jury to find Otgoo guilty, as the misrepresentation falsely depicted Otgoo as a violent offender who had previously injured a police officer. In light of the other evidence presented in this case, including testimony from officer Loiacono that Otgoo was belligerent with him and with his fellow officer John Repas, false contention that Otgoo physically injured an officer paints a picture of an individual likely to attack the police.

Furthermore, as discussed above, bringing in an aggravated battery charge in an aggravated battery case is highly prejudicial in terms of suggesting propensity of the Otgoo to commit crimes to the jury. Where it not for the State's improper and dishonest prior conviction evidence—the introduction of which is being challenged here—it is likely that the jury would not have decided that Otgoo was the CTA assailant.

With regard to the second prong, the improper admission of prior conviction impeachment evidence and the use of this evidence to misrepresent Otgoo's past crime affected Otgoo's substantial rights. The introduction of impeachment evidence suggesting propensity of the defendant to commit crimes rather than credibility undermines a fairness of a trial.

See, People V. Bramlett, 276 Ill.App. 3d 201, 206. (4<sup>th</sup> Dist. 1995). Both the erroneous admission of prior conviction evidence and the misstatement that Otgoo had injured an officer concern a potential for unfairness warranting plain error review. Id. (Court reviewed the admission of prior conviction impeachment evidence under plain error review).

People V. Jackson, 2012 IL App (1<sup>st</sup>) 102035, 16-20 (reversing conviction under plain error where the prosecutor misstated the evidence to the jury).

See, also People V. Naylor, 372 Ill. App. 3d 1, 6 (1<sup>st</sup> Dist. 2007) (erroneous introduction of prior conviction is plain error when it “may have influenced the trial court’s credibility determination of the defendant”).

**III. Ganaa Otgoo was denied a fair and impartial trial where the State 1) deliberately elicited irrelevant and highly prejudicial other crime evidence testimony from police officer Loiacono in violation of the trial court’s ruling on a motion in limine, 2) elicited irrelevant testimony from complainant Armando Velez about his psychological harm and made inflammatory remarks regarding Velez’s mental trauma, and 3) invited the jury to draw impermissible inferences from Otgoo’s prior conviction.**

At jury trial, State made numerous improper comments which denied Otgoo a fair and impartial trial. First, Otgoo was prejudiced by officer Loiaconos testimony conclusively identifying Otgoo as the CTA assailant, in violation of the trial court’s order on the defense’s motion in limine. Otgoo was further prejudiced when State told the jury that Otgoo’s prior conviction should be looked at as evidence that Otgoo does not follow the rules of society, suggesting propensity to commit crimes. Finally, prosecutor made inflammatory remarks and elicited irrelevant testimony from complainant Armando Velez about his mental and emotional trauma. The cumulative effect of these errors prevented Otgoo from receiving fair and impartial trial, therefore, reversal is necessary. Every criminal defendant has the right to a fair and impartial trial untainted by bias or prejudice caused by irrelevant evidence or improper argument. U.S. Const. amend. XIV; Ill. Const. 1970, art. I, 2; People V. Blue, 189 Ill. 2d 99, 138-40 (2000). Indeed, though a criminal trial is an adversarial proceeding, prosecutors have a duty as public officials to safeguard a defendant’s constitutionally protected right to a fair trial. U.S. Const. amend XIV. Ill. Const. 1970, art. I, 2. People V. Lyles, 106 Ill. 2d 373, 411-412 (1985). Prosecutorial misconduct that deliberately undermines the process by which a jury determines a defendant’s guilt must not be tolerated. People V. Wheeler, 226 Ill. 2d 92, 122-123 (2007). Prosecutors may comment on facts in evidence or on reasonable inferences drawn from that evidence, but prosecutors may not misstate either the law or the evidence. People V. Carbajal, 2013 IL App (2d) 111018, 29; People V. Chavez, 327 Ill. App. 3d 18, 27 (1<sup>st</sup> Dist. 2001).

Thus, while a prosecutor may "strike hard blows, he is not at liberty to strike foul ones." *Berger V. United States*, 295 U.S. 78, 88 (1935). Even when no error by itself requires reversal, relief may be warranted where the cumulative effect of multiple errors deprived the defendant of a fair trial. *People V. Davidson*, 235 Ill. App. 3d 605, 613(1<sup>st</sup> Dist.1992). In reviewing alleged improper comments of a prosecutor, reviewing court may consider the cumulative effect rather than assessing the prejudicial effect of each isolated comment. *People V. Quiver*, 205 Ill. App. 3d 1067, 1072 (1<sup>st</sup> Dist. 1990). Because it is undisputed from the trial record that the prosecutor elicited the described testimony and made the described remarks, this Court is not required to weigh evidence or witness credibility, but instead is asked to settle a purely legal question. Therefore, the standard of review should be de novo. *Wheeler*, 226 Ill. 2d at 121.

**1) The State elicited irrelevant and highly prejudicial other crime evidence testimony from police officer Loiacono in violation of the trial court's ruling on the defense motion in limine.**

Other crime evidence testimony of police officer Loiacono prejudiced Otgoo in front of the jury. Officer Loiacono's testimony was meant to be limited to opinion testimony in accordance with the trial court's ruling on the defenses motion in limine asking that officer Loiacono not be permitted to testify that he was able to make conclusive identification of Otgoo based on viewing the CTA tape of the incident. At a hearing on the motion, the State represented that it would only elicit testimony from officer Loiacono that he believed that Otgoo was the defendant, without allowing the officer to make a conclusive identification. Nevertheless, at jury trial, Officer Loiacono did make a conclusive identification of Otgoo based on the videotape. This testimony violated the ruling on the motion in limine and its prejudicial effect cannot be undone, despite court sustaining the defense's objection. Identification was also improper in its disregard for the safeguards provided by *People V. Thompson*, regarding lay witness identification by a police officer. *People V. Thompson*, 2016 Ill 11867 59, 70.

At the pretrial hearing on the defense's motion in limine, both attorney's and the judge made the following agreement:

Defense: Judge, It's our position that the State should be prohibited from presenting any testimony by any witness, either an officer or civilian, that he or she has watched video evidence of the incident in question and that he or she can make an identification, a conclusive identification that the individual depicted on the video is the defendant. It's our position that that usurps the role of the jury, that is for the-that is the ultimate issue in this case and it is solely for the finder of

fact to determine that, that any statement by a witness should be limited to a statement that he or she believes that the person depicted on the video is the defendant or is of the opinion that the person-"

State: We will agree to that.

Judge: Okay. I think that is a fair agreement.

Trial Court reiterated the agreement as follows:

So my ruling is we're going to-the officers are going to testify that they believe or it is their opinion from viewing whatever they viewed that it was the Defendant versus saying yes, it was the Defendant...

At jury trial, State directly violated this agreement by eliciting the following testimony from police officer Loiacono:

State: And what did you tell Officer Lebow about the images and the still photographs that he showed to you?

Officer Loiacono: Based on the Defendant's stature, the oversized coat that he was wearing, his physical height and I determined that he was the individual I had arrested on March 29<sup>th</sup>

Defense: Objection.

Court: Sustained.

State then went on to elicit testimony that Officer Loiacono "believed" that Otgoo was the man depicted in the video, but the damage was already done. Officer Loiacono's testimony that he viewed the videotape of the CTA incident and was able to "determine" that the individual was Otgoo due to his previous contact with him directly violated the motion in limine mandating that officer Loiacono was only allowed to testify that he "believed" Otgoo was the CTA offender. Officer Loiacono's testimony did the very thing the parties agreed would be unfairly prejudicial—usurp the role of the jury in identifying Otgoo. Although the defense timely objected to officer Loiacono's statement and the objection was sustained, the sustained objection cannot overcome the prejudice caused by the jury hearing the identification. *People V. Rivera*, 277 Ill. App. 3d 811, 819 (1<sup>st</sup> Dist. 1996) (a sustained objection was insufficient to cure the error caused by the jury hearing a hearsay identification of defendant). Sustaining objections to improper comments cannot always remove the prejudice. *Id.* Courts have used many descriptive phrases to illustrate the point that substantial prejudice does not vanish from the human mind simply because a judge says it should: Driving a nail into a board and then pulling the nail out does not remove the hole. *People V. Rivera*, 277 Ill. App. 3d 811, 819 (1<sup>st</sup> Dist. 1996). quoting *People V. Cepek*, 357 Ill. 560, 570 (1934).



The naive assumption that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be unmitigated fiction. Quoting *People V. Burns*, 171 Ill. App. 3d 178, 185 (1988) (quoting Judge Learned Hand). To suggest that the jury disregard such explosive evidence is, in the words of Judge Learned Hand, 'a recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else.' *Id.*

Quoting *People V. Hernandez*, 121 Ill. 2d 293, 318 (1988). Here, the jury was unable to un-hear officer Loiacono's identification of Otgoo as the assailant, despite the sustained objection. Fact that his identification was conclusive, combined with the fact that the parties agreed and case law indicates that juries will substitute their judgment for that of officers who make identifications, indicates substantial prejudice. Jury here would be unable to perform "mental gymnastics" required to disregard officer Loiacono's prejudicial statement. Effect of the prejudice was not cured by the sustained objection, and officer Loiacono's identification undermined the fairness of Otgoo's jury trial. In *People V. Thompson*, Illinois Supreme Court noted that lay identification testimony from a police officer is dangerous in its tendency to invade the province of the jury. *People V. Thompson*, 2016 Ill 11867 54. For this reason, Thompson provides guidelines for admission of law enforcement identification evidence, which include limiting the officer's testimony to a brief account of how he knows the defendant, and informing the jury that it should make the ultimate determination as to the identity of the victim, rather than relying on an officer's opinion as fact. Thompson, 59, 70. Thompson illustrates the importance of insuring that the jury exercises its own judgment in identifying the defendant. Here, the most obvious reason why the jury would have relied on police officer Loiacono's opinion as fact is that he presented it as such—stating that he "determined" Otgoo was pictured in the video. Trial court did not inform the jury that they needed to make the ultimate determination of Otgoo's identity rather than relying on the police officer Loiacono. Although they instructed the jury to disregard officer Loiacono's statement after the defense's objection was sustained, this instruction is insufficient to cure the substantial prejudice this harmful error caused. The idea that the jury ignored officer Loiacono's forceful, certain statement merely because of a sustained objection is "unmitigated fiction". *People V. Burns*, 171 Ill. App. 3d 178, 185 (1<sup>st</sup> Dist. 1988). Further, rather than limiting police officer Loiacono's identification testimony, the state elicited every detail of the night police officer Loiacono met Otgoo, discussing where and how Otgoo was punching two larger men, stating that he was shouting expletives at the police officers, acting "extremely irate and

belligerent" and acting uncooperative. Thus, the identification also prejudiced Otgoo by its inflammatory details. See, Argument I. Because officer Loiacono's identification testimony violated the ruling on the motion in limine, usurped the jury's role as finder of fact, and included extraneous prejudicial details, Otgoo did not receive a fair and impartial trial.

**2) The State elicited irrelevant testimony from complainant Armando Velez and made inflammatory remarks in closing argument regarding the psychological harm suffered by Velez.**

State asked Velez questions that would elicit testimony designed to draw sympathy from the jurors but which had no bearing on Otgoo's guilt or innocence. Velez testified extensively about injuries sustained during the CTA attack. State deliberately eliciting testimony from Velez highlighting the psychological fallout resulting from the attack:

Q: Before I get to that, after this incident—earlier you said that the last time you took the trian was March 28<sup>th</sup> 2014, is that correct ?

A: That's correct.

Q: Have you taken the Skokie Swift since then ?

A: No.

Q: And why not ?

A: Scared, don't feel secure.

Q: Do you still take public transportation the same way you did before this incident on March 28<sup>th</sup> ?

A: Only during the day.

State also introduced a photograph of Velez at the hospital after the attack and made a point to ask Velez about his change of clothes in the photo:

Q: Sir, I notice—well, what are you wearing at this time ?

A: I'm wearing a sweater and shirt.

Q: And why is it that you're wearing different clothes ?

A: Because I will never wear a hoodie again.

Q: Have you worn a hoodie since this incident ?

A: No.

The testimony regarding Velez' fear of CTA and hoodies, and the comments in closing argument are even more egregious, as they have no relevance in terms of Otgoo's guilt or innocence, or even his identity. See, *People V. Liner*, 356 Ill. App. 3d 284, 295 (5<sup>th</sup> Dist. 2005) (Testimony

from the victim that she suffered medical problems, was worried, and took anxiety medication resulting from the crime had no bearing on guilt or innocence and, thus, was irrelevant).

State focused on Velez' life, highlighting the negative changes caused by the battery, his older age, and the fact that he cared for his elderly mother, in an attempt to sway the juror's emotions. This information is irrelevant and obscures the issue of Otgoo's identity. Whether Velez' life changed forever due to the battery has no tendency to make it more or less probable that Otgoo was the perpetrator of the battery. *People V. Bedoya*, 325 Ill. App. 3d 926, 937 (1<sup>st</sup> Dist. 2001) (evidence is relevant if it has the tendency to make the existence of a fact that is of consequence in the case more probable or less probable than it would be without the evidence).

Thus, State used the evidence solely to elicit sympathy for Velez and persuade the jurors to convict Otgoo based on emotion. This conduct prevented Otgoo from having a fair and impartial trial.

**3) In closing arguments, the State invited the jury to draw the impermissible inference that Otgoo's prior conviction should be considered as evidence that he "does not follow the rules of civilized society," suggesting a propensity to commit crimes.**

In closing argument, State repeatedly made the prejudicial and improper argument that Otgoo's prior conviction, which was admitted to impeach the credibility of his testimony, was evidence that he "does not follow the rules of civilized society". These remarks resulted in improper prejudice and warrant a new trial, either on their own or in conjunction with the myriad instances of improper prosecutorial comments throughout the trial as outlined above. Where a prosecutor engages in misconduct during opening statements or closing argument, reversal and remand for a new trial is warranted where the remarks substantially prejudiced the defendant. *People V. Jones*, 2016 IL App (1<sup>st</sup>) 141008, 22-23. *People V. Jackson*, 2012 IL App (1<sup>st</sup>) 102035, 18.

*People V. Linscott*, 142 Ill. 2d 22, 28 (1991). Stated differently, if the reviewing court cannot say that the prosecutor's improper conduct did not contribute to the conviction, or if the jury could have reached a contrary verdict had the improper remarks not been made, the court should order a new trial. *Linscott*, 142 Ill. 2d at 28. *Jones*, at 22-23. Moreover, where the cumulative effect of prosecutorial misconduct casts doubt on the integrity of the verdict, a new trial is required.

*People V. Abadia*, 328 Ill. App. 3d 669, 685-86 (1<sup>st</sup> Dist. 2001);

*People V. Roman*, 323 Ill. App. 3d 988, 1001 (1<sup>st</sup> Dist. 2001).

State's said the following regarding Otgoo's 2008 conviction:

State: If you'll recall in rebuttal, the final piece of evidence you heard in this case was the defendant's conviction for aggravated battery of a peace officer in 2008. As the instruction says you're not allowed to consider that as evidence that he was more likely to have committed this crime. That's improper, you're not allowed to do that. This jury instruction tells you what you can do with that evidence, and let me explain to you why we feel that evidence is important and why we presented it to you.

Defense: Your honor, I'm going to object to this line of argument.

The Court: Overruled.

State: There are rules of a civil society; we all know them. And one of the rules is that when you tell somebody something—particularly when it's important, you're telling the truth. Another facet of that rule is—and in particular in a court of law, one of the rules of a civilized society, when you get up there and swear under oath that you are going to tell the truth, you're going to tell the truth. The evidence of a prior conviction of a criminal felony is permitted because it shows that the individual does not follow the rules of a civilized society. One of the rules of a civilized society is you don't commit an aggravated battery on a police officer. That evidence is permitted for you to consider the credibility of the defendant when he gets on the witness stand. He admitted that he lies from the witness stand, that he uses names all over the place. But when he gets up there under oath and says, I didn't beat Armondo Velez, it wasn't me, you are entitled to consider the fact that he's previously been convicted of a felony crime in contravention of the rules of society on the issue of whether-

Defense: I object.

Court: I'm sorry, Counsel, that will be overruled.

State: On the issue of whether when he got out there and took that oath, he was telling the truth.

Prosecutor's invitation to the jury to presume that, because Otgoo has a prior conviction, he lives in "contravention of the rules of society" was irrelevant and prejudicial. Under *Montgomery*, a defendant's conviction is admissible to impeach his credibility if the offense was punishable by death or imprisonment in excess of one year or involved a crime of dishonesty unless the trial court concludes that the probative value of the conviction does not substantially outweigh the danger of unfair prejudice. *People V. Montgomery*, 37 Ill. 2d 510, 516 (1971). Focus of the *Montgomery* rule is on crimes which bear on the defendant's truthfulness as a witness. *People V. Cox*, 195 Ill. 2d 378, 384 (2001). The reasoning that any type of felony indicates a disrespect for societal order and thus adversely affects a defendant's veracity does not comport with the *Montgomery* principle. *People V. Williams*, 161 Ill. 2d 1, 39 (1994).

Here, Otgoo's 2008 conviction for aggravated battery to a peace officer was admitted by the trial court to impeach his credibility. In Argument II, Otgoo contends that the conviction is unfairly prejudicial, that its relevance in terms of credibility is limited, and that prosecutor misrepresented to the jury that Otgoo had injured an police officer and therefore, that crime should not have been admitted at all. There is separate issue arising, however, in the way the prior conviction was utilized by the prosecutor in closing statements once it was allowed in for impeachment purposes. State urged the jury to conclude that Otgoo, having committed an aggravated battery on a peace officer, does not follow the rules of society. The elaborate, repeated references to the "rules of civilized society" and the nature of Otgoo's 2008 aggravated battery to peace officer conviction, despite to deny, implied to the jury that he was an uncivilized rule-breaker with a propensity the State's disingenuous attempts to commit crime. *People V. Williams*, contains an apt warning against arguments like State's in this case. Illinois Supreme Court, concerned with lower court's mechanical, overinclusive admission of prior convictions under *Montgomery*, explained to the trial courts that "the reasoning that any type of felony indicates a disrespect for societal order and thus adversely affects a defendant's veracity does not comport with the *Montgomery* principle." *Williams* 161 Ill. 2d at 39. This warning, while given in the context of trial court evidence admission rules, is applicable to the State's comments. State's urging of the jury to look at Otgoo's past conviction as evidence that he does not follow the rules of society does not comport with the spirit of *Montgomery*. This line of reasoning insinuates that, because Otgoo does not follow the rules of society he is likely to commit a crime. Prior conviction evidence, then, was used by prosecutor to argue propensity. It is well settled that prior conviction evidence cannot be admitted to show defendants propensity to commit crime at issue. *Williams*, 161 Ill. 2d at 39. *People V. Lindgren*, 27 Ill. 2d 129, 137 (1980). *People V. Pruitt*, 165 Ill. App. 3d 947, 953 (1<sup>st</sup> Dist. 1988). Despite State's disingenuous comment that the conviction could not be used to show that Otgoo is "more likely" to have attacked Velez its argument did exactly that. Presenting Otgoo's 2008 aggravated battery conviction at the aggravated battery trial as evidence that he does not follow the "rules of society" is a back door method of portraying Otgoo as a deviant criminal with a propensity to break the law. Thus, State's comments prevented Otgoo from receiving a fair and impartial trial.

1. The O'Neil's 2008 conviction for aggravated battery to a peace officer was affirmed. The court to uphold was credible. In Argument II, O'Neil contends that the conviction is not proper because the jury was not instructed that the defendant's intent was to harm a peace officer. The court finds that the jury was properly instructed and that the conviction is affirmed. The court also finds that the defendant's intent was to harm a peace officer and that the conviction is affirmed.

2. The court finds that the defendant's intent was to harm a peace officer and that the conviction is affirmed. The court also finds that the defendant's intent was to harm a peace officer and that the conviction is affirmed. The court also finds that the defendant's intent was to harm a peace officer and that the conviction is affirmed. The court also finds that the defendant's intent was to harm a peace officer and that the conviction is affirmed.

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#### **4) Prejudice and Plain error**

Police Officer Loiacono's identification testimony.

The harmful error produced by police officer Loiacono's statement that he "determined" Otgoo was the CTA assailant was completely preserved. First, defense filed a motion in limine asking that no officer be allowed to testify to a conclusive identification of Otgoo. Next, the defense objected at trial when police officer Loiacono violated the motion in limine and made a conclusive identification. Furthermore, defense made a motion for mistrial based on this comment. Finally, the defense's motion for new trial states that the court erred in denying a mistrial based on police officer Loiacono's conclusive identification of Otgoo.

Thus, State bears burden of persuasion with respect to prejudice.

United States V. Olano, 507 U.S. 725, 734 (1993).

People V. Thurow, 203 Ill. 3d 352, 363 (2003).

In other words, the State must prove beyond a reasonable doubt that the jury verdict would have been the same absent the error. *Id.* Thus, with regard to police officer Loiacono's conclusive identification testimony, State must prove here that the jury would have found Otgoo guilty even without officer Loiacono violating the motion in limine and stating conclusively that Otgoo was the CTA assailant. State cannot prove this. As explained in Thompson, law enforcement identification evidence has a strong tendency to usurp the role of the jury in identifying an offender. *People V. Thompson*, 2016 Ill 11867 54. Thus, by officer Loiacono identifying Otgoo conclusively, the jurors likely substituted officer Loiacono's judgment for their own, deciding Otgoo was guilty without fulfilling their role as finders of fact. Had the jury not heard police officer Loiacono's prejudicial conclusive identification of Otgoo, jury would not have identified Otgoo as the offender. Further, as explained on Argument II, the evidence here is closely balanced regarding whether Otgoo is the offender, as the offender's face was obscured in the CTA video and there were issues regarding Velez' identification ability.

#### **State's Improper Comments**

At jury trial, State made improper comments which constituted a pattern of prosecutorial misconduct. State's misstatement that Otgoo was convicted of "aggravated battery causing bodily harm to a peace officer," elicitation of improper testimony, and making an improper closing argument regarding Velez' mental trauma, were not preserved.

Defense objected to the State's improper argument that Otgoo breaks society's rules at trial, but the objection did not appear in the motion for new trial. Nevertheless, the error produced by this pattern of prosecutorial misconduct is properly reviewable under the plain error doctrine.

The plain error doctrine allows a reviewing court to consider unpreserved error (1) a clear or obvious error occurred, and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred, and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People V. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Ill. Sup. Ct. Rule 615 (a).

Both prongs are met here. Evidence is closely balanced regarding the identity of the CTA assailant. The face of the individual on the CTA video is almost completely obscured by a hat, and upper body was covered by oversized jacket and Velez' testimony regarding the identity is called into question by the fact that, on the record Velez testified that between 5:30 pm and to 8:15pm he had 3 beers at his friends house and nothing to eat and he was riding the Yellow Line home from his friends house around 8:15 pm and Velez' own face was covered with his clothing while he was being attacked and 3 weeks after the incident Velez identified Otgoo, as the offender in a Five-person line-up. Three asian and Two hispanic in a Five-person line-up. Furthermore, large oversized leather-like jacket with multiple patches, police officer Loiacono used to identify Otgoo and when officer Loiacono was arrested on March 29<sup>th</sup> 2014 as he was in the CTA video, oversized jacket was not presented at Otgoo's jury trial. On the record police officer Loiacono testified that he never inventory the oversized jacket and no evidence of any oversized jacket in the inventory or police report and March 29<sup>th</sup> 2014 in the booking photograph, Otgoo was not wearing large oversized leather-like jacket with multiple patches. Officer Loiacono's partner police officer John Repas, never testified at Otgoo's jury trial or never testified about same large oversized leather-like jacket with multiple patches. Thus, a main identifying piece of the large oversized leather-like jacket is based purely on officer Loiacono's unsubstantiated claim that Otgoo was wearing the jacket on the March 29<sup>th</sup> 2014 in Chicago. Finally, were it not for officer Loiacono's prejudicial conclusive identification testimony—the introduction of which is being challenged here—it is likely that the jury would not have decided that Otgoo was the CTA assailant. With regard to the second prong, the improper prosecutorial comments and jury trial questioning affected Otgoo's substantial rights.



Improper attempts to sway the emotion of the jurors through discussion of Velez' mental trauma, to mislead the jury by stating that Otgoo physically harmed an officer, and to prove criminal propensity by arguing that Otgoo cannot follow society's rules constitute a pattern of prosecutorial misconduct. An argument that serves no purpose but to inflame the jury constitutes harmful error. *People V. Blue*, 189 Ill. 2d 99, 128 (2000)(finding plain error where prosecutor made closing argument designed to elicit sympathy for victim police officer's family and for police). Illinois Supreme Court has concluded that "a pattern of intentional prosecutorial misconduct may so seriously undermine the integrity of judicial proceedings as to support reversal under the plain-error doctrine." *People V. Johnson*, 208 Ill. 2d 53, 64 (2003).

Further, the cumulative effect of multiple prosecutorial errors undermines a defendant's right to a fair trial and endangers the integrity of the judicial process. *People V. Young*, 347 Ill. App. 3d 909, 926-927 (1<sup>st</sup> Dist. 2004). Here, the prosecutor's improper comments in closing arguments, elicitation of prejudicial and irrelevant testimony, and intentionally misleading the jury regarding the nature of Otgoo's 2008 aggravated battery conviction constitute a pattern of intentional prosecutorial misconduct which undermined the fairness of Otgoo's jury trial.

Thus, the second prong of plain error is satisfied and these claims are properly reviewable even if unpreserved by trial counsel.

**IV. Charge of aggravated battery on a public property, State has failed to prove beyond a reasonable doubt that the individual who committed the CTA Skokie battery who is depicted in the video is the petitioner Otgoo. Insufficient evidence supports Otgoo's aggravated battery on a public property conviction and evidence is so improbable and unsatisfactory and unreasonable that it justifies a reasonable doubt of the Otgoo's guilt.**

Identity of the CTA Skokie battery assailant is called into question whether petitioner Otgoo is the offender. The face of the individual on the CTA video is almost completely obscured by a hat, and upper body was covered by oversized jacket and Velez's testimony regarding the identity is called into question by the fact that, on the record Velez testified that between 5:30 pm and to 8:15 pm Velez had 3 beers at his friends house and nothing to eat and Velez was riding the CTA, Yellow Line home from his friends house around 8:15 pm and Velez's own face was covered with his clothing while he was being attacked and on the record Velez responded when trial counsel asked Velez if he had sobered up, that yes, he had and 3 weeks after the incident

Three asian and Two hispanic in a Five-person line-up. At Otgoo's jury trial the State's told the jury that oversized distinctive jacket is the defendant's identity and so that piece of the puzzle is going to defendant's identity. Also controversial is Chicago police officer Loiacono's statement that Otgoo was wearing the large oversized leather-like jacket with multiple patches, when he was arrested on March 29<sup>th</sup> 2014 as he was in the CTA video. Furthermore, large oversized leather-like jacket with multiple patches, Chicago police officer Loiacono used to identify Otgoo, the large oversized leather-like jacket with multiple patches, at issue was not presented at Otgoo's jury trial. On the record Chicago police officer Loiacono testified that he never inventory the oversized jacket and no evidence of any oversized jacket in the police inventory or police report and March 29<sup>th</sup> 2014 in the booking photograph, Otgoo was not wearing large oversized leather-like jacket with multiple patches. Officer Loiacono's partner officer John Repas, never testified at Otgoo's jury trial or never testified about large oversized leather-like jacket with multiple patches. Thus, a main identifying piece of the large oversized leather-like jacket is based purely on officer Loiacono's unsubstantiated claim that Otgoo was wearing the oversized jacket on the March 29<sup>th</sup> 2014 in Chicago. Finally, were it not for Chicago police officer Loiaconos prejudicial conclusive identification testimony, Otgoo will never arrested by Skokie police detectives in the first place and it is likely that the jury would not have decided that Otgoo was the CTA Skokie assailant. State's carries the burden of proving beyond a reasonable doubt each element of an offense. Charge of aggravated battery on a public property, State has failed to prove beyond a reasonable doubt that the individual who committed the CTA Skokie battery who is depicted in the video is the petitioner Otgoo.

**Burks V. United States, 437 U.S. (1978)**

Insufficient evidence supports Otgoo's aggravated battery on a public property conviction and evidence is so improbable and unsatisfactory and unreasonable that it justifies a reasonable doubt of the Otgoo's guilt.

Reversal is necessary.

**V. Otgoo was improperly assessed the Electronic Citation fee when he was not found guilty of a traffic, municipal, misdemeanor, or conservation offense.**

Otgoo was improperly assessed the Electronic Citation Fee at sentencing, and this fee must be vacated. Although Otgoo did not challenge the fines, fees, and costs order in a post-sentencing motion, on appeal a reviewing court may modify the order without remanding the case back to the circuit court. Ill. S. Ct. R. 615(b)(1).

Illinois Supreme Court has specifically held that the erroneous imposition of a monetary assessment is reversible under the second prong of the plain error doctrine because it affects "...the fairness of the proceeding and the integrity of the judicial process."

People V. Lewis, 234 Ill. 2d 32, 47-49 (2009) (holding that the trial judge committed plain error by improperly imposing a street value fine without adequate evidence).

The propriety of the imposition of fines and fees is reviewed de novo. People V. Jones, 223 Ill. 2d 569, 580 (2006) (Whether an assessment is a fine or a fee is a question of statutory interpretation; it is therefore subject to de novo review). Otgoo was improperly assessed the \$5 Electronic Citation Fee, because the charge only applies to traffic, misdemeanor, municipal ordinance, and conservation cases, and is inapplicable to his felony conviction for aggravated battery on public property. 705 ILCS 105/27. 3e.

People V. Moore, 2014 IL App (1<sup>st</sup>) 112592-B, 46 (\$5 electronic citation fee does not apply to felonies); People V. Robinson, 2015 IL App (1<sup>st</sup>) 130837, 115 (vacating the fee where the defendant's offense did not fall into an enumerated category). This fee must be vacated.

### CONCLUSION

Wherefore, petitioner, pro se, respectfully prays that Honorable United States Supreme Court please grant his Petition for Writ of Certiorari and Reverse his wrongful conviction.

Date;

June 10, 2020

Respectfully submitted,

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