APPENDIX A

APPENDIX A

2020 IL 125091

IN THE

SUPREME COURT

OF

THE STATE OF ILLINOIS

(Docket No. 125091)

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v.
JOSEPH A. HOLLAHAN, Appellee.

Opinion filed September 24, 2020.

JUSTICE KARMEIER delivered the judgment of the court, with opinion.

Chief Justice Anne M. Burke and Justices Kilbride, Garman, Theis, Neville, and Michael J. Burke concurred in the judgment and opinion.

OPINION

¶ 1 The overarching issue in this appeal is whether the circuit court committed reversible error when, after the jury had retired to deliberate, the court granted the jury's request to review a video recording in evidence but played the video for the jury in the courtroom with the court, parties, and alternate jurors present. A divided appellate court answered that question in the affirmative. 2019 IL App (3d) 150556.

We allowed the State's petition for leave to appeal (Ill. S. Ct. R. 315 (eff. July 1, 2018)) and now reverse the judgment of the appellate court.

¶ 2 BACKGROUND

¶ 3 The defendant, Joseph A. Hollahan, was charged in the circuit court of Kankakee County with the offense of aggravated driving while under the influence of alcohol. 625 ILCS 5/11-501(a)(2), (d)(1)(A), (d)(2)(A) (West 2008). Defendant's initial jury trial ended in a mistrial when a video recording of the traffic stop was inadvertently played beyond the point of admissible evidence, exposing the jury to inadmissible evidence.

¶ 4 During defendant's second jury trial, a *redacted* video of the traffic stop was played for the jury.[1] The video depicted the manner of defendant's driving prior to the traffic stop and his interaction with the officer immediately after the stop, including field sobriety tests. Following the presentation of evidence, closing arguments, and instruction as to the applicable law, the jury retired to deliberate. Shortly thereafter, the jury asked to watch the video of defendant's traffic stop again. The trial court, in the exercise of its discretion, granted that request. The video was shown to the jury in the courtroom because the court did not have the "arrangement" necessary to allow the jury to view the video in the jury deliberation room. The court decided to allow defendant, the attorneys for defendant and the State, and two alternate jurors to remain in the courtroom while the jury watched the video. Defense counsel did not object to that procedure.[2] Before the jury was brought back into the courtroom, the court admonished defendant, the attorneys, and the alternate jurors that the jury would be watching the video and that "[n]o one will have any conversation." When the jury was brought back into the courtroom, the trial court addressed the jurors, stating:

> "Please come in and have a seat, we will not be talking to you other than to get the video, period. *** The jury has requested to see the video again. We do not have an arrangement to show it to you in your deliberation room. I have

[1]The evidence adduced at defendant's second trial is set forth in the appellate court's opinion (2019 IL App (3d) 150556). As it is not relevant to our disposition, we do not reiterate it here.

[2]When the trial judge advised defense counsel, "Right now we need to bring the jury in, they want to see the video," defense counsel simply responded, "Okay," without further comment.

instructed everyone to not say a word and we will play the video for you. If you need to have the sound adjusted or anything that we can do, all right?"

After watching the video, the jury returned to the jury room to resume deliberations. Less than an hour later, the jury found defendant guilty.

¶ 5 On appeal, defendant asked the appellate court to find the procedure employed by the circuit court to be plain error, as defendant did not object to it at the time or raise it as an issue in a post-trial motion. The appellate majority concluded that the procedure did indeed constitute structural error—necessarily second-prong plain error. 2019 IL App (3d) 150556, ¶ 29. The majority acknowledged that appellate panels had declined to find reversible error under similar circumstances in three prior decisions. See, *e.g.*, *People v. Lewis*, 2019 IL App (4th) 150637-B, ¶¶ 97-100 (finding no error where the trial court allowed a 911 recording to be replayed for the jury in the courtroom in the presence of the parties after deliberations had begun); *People v. Johnson*, 2015 IL App (3d) 130610, ¶¶ 20-21 (finding no prejudicial error where the trial court refused to allow the jury to take a surveillance videotape into the jury room and instead had the jury review the video in the courtroom in the presence of the judge, the defendant, the state's attorney, and defense counsel); *People v. Rouse*, 2014 IL App (1st) 121462, ¶¶ 78-79 (finding no error where the trial court allowed the jury to review surveillance footage in the presence of both parties and the trial judge, cautioning the jury not to engage in deliberations or discussions while in the courtroom). The majority believed those decisions were wrongly decided and declined to follow them. 2019 IL App (3d) 150556, ¶ 23.

¶ 6 The majority noted that, in *Johnson* and *Rouse*, those appellate panels, in finding no error, relied principally upon two factors: (1) the third parties who were present when the video was replayed for the jury were instructed not to communicate with the jurors while the video was being played (*Johnson*, 2015 IL App (3d) 130610, ¶ 20), and they made no attempt to do so (*id.*; see also *Rouse*, 2014 IL App (1st) 121462, ¶ 79), and (2) after reviewing the video in the courtroom, the jurors returned to the jury room where they resumed private and unfettered deliberations (*Johnson*, 2015 IL App (3d) 130610, ¶ 20; *Rouse*, 2014 IL App (1st) 121462, ¶ 79). 2019 IL App (3d) 150556, ¶ 23.

¶ 7 The majority, here, believed neither of those factors eliminated or mitigated the prejudicial impact upon "deliberations" that occurred *while the jurors were viewing the video*. *Id.* The majority stated:

> "In each case, the jurors had no opportunity to discuss the video as they were viewing it or to pause or replay any portions of the video that they found of particular importance. (Indeed, in *Rouse*, the trial court instructed the jury that they could not engage in any deliberations or have any discussions about what they were watching while the recording was played.) Accordingly, in each case, the procedure employed by the trial court directly impeded the jury's deliberations. The mere fact that the jury could have discussed the video later in the jury room is immaterial. In each case, the jury was prevented from controlling the video, from freely discussing it, and from debating any issues relating to the video while they were watching it." *Id.*

The majority added:

> "[O]ur appellate court['s] decisions in *Lewis*, *Rouse*, and *Johnson* fail to acknowledge that the mere presence of the trial judge, the parties, and their attorneys during jury deliberations improperly intrudes upon the privacy of jury deliberations and has an inherently intimidating and inhibiting effect upon such deliberations. [Citations.] Such intrusions on the jurors' ability to freely discuss and debate the evidence should be deemed presumptively prejudicial. See *Olano*, 507 U.S. at 739 (acknowledging that '[t]here may be cases' where an intrusion upon jury deliberations by third parties 'should be presumed prejudicial,' and ruling that such intrusions are prejudicial when they 'exert[ ] a "chilling" effect' on the jurors or 'operate as a restraint upon the regular jurors' freedom of expression and action.' (Internal quotation marks omitted.))." *Id.* ¶ 24.

¶ 8 The majority took issue, particularly, with the appellate court's decision in *Lewis*. See *id.* ¶¶ 23-28. One notable point of disagreement concerned the *Lewis* court's assessment of a "deliberating" jury's in-court review of evidence. The majority stated:

> "In *Lewis*, our appellate court went so far as to state that '[w]hen a deliberating jury returns to the courtroom and, in the presence of the judge, the parties, the

lawyers, and court personnel listens again, in silence, to an audio recording, *the jury does nothing different from what it did before, when the recording originally was played.*' (Emphasis added.) *Lewis*, 2019 IL App (4th) 150637-B, ¶ 98. However, a jury's viewing of a video recording during trial is critically different from its viewing of that same recording *during deliberations*." (Emphasis in original.) *Id.* ¶ 25.

Again, citing the United States Supreme Court's decision in *United States v. Olano*, 507 U.S. 725 (1992), the appellate court stated the generic principle that, once deliberations have begun, the jurors must be shielded from any outside influences that improperly impede or inhibit their deliberations. 2019 IL App (3d) 150556, ¶ 25.

¶ 9 Justice Carter, dissenting, found no error at all, certainly no plain error. *Id.* ¶ 37 (Carter, J., dissenting). Citing this court's opinion in *People v. Williams*, 97 Ill. 2d 252, 292 (1983), he noted that whether evidentiary items should be taken to the jury room during deliberations is a matter within the discretion of the trial court and the trial court's decision on the matter is not reversed absent an abuse of discretion to the prejudice of the defendant. 2019 IL App (3d) 150556, ¶ 38 (Carter, J., dissenting). Citing, *inter alia*, the appellate court's opinion in *Lewis*, he observed, "Similarly, the mode and manner in which a trial court allows a jury to review a piece of evidence during jury deliberations falls within the scope of the court's inherent authority to manage its courtroom and is a matter of the court's discretion." *Id.* Justice Carter noted, with respect to the burden of the defendant in plain error review: "[W]hen the issue is unpreserved—as in the instant case—the burden of establishing prejudice remains on the defendant and does not shift to the State. *McLaurin*, 235 Ill. 2d at 497-98; see also *Olano*, 507 U.S. at 740-41." *Id.* ¶ 40. Applying those principles, Justice Carter would have concluded the defendant had not shown that either the trial judge, the attorneys, the defendant, or the alternate jurors engaged in a prejudicial communication with any juror about a matter pending before the jury or that improper extraneous information reached the jury. *Id.* ¶ 41. Thus, there was, in his view, no basis for reversal.

¶ 10 ANALYSIS

¶ 11 We begin our analysis with general principles of review applicable in this context. "It is well-established that whether evidentiary items *** should be taken to the jury room rests within the discretion of the trial judge, whose decision will not be disturbed unless there was an abuse of discretion to the prejudice of the defendant." *People v. Hudson*, 157 Ill. 2d 401, 439 (1993). Moreover, the trial court has the discretion to grant or deny the jury's request to review evidence. *People v. Kliner*, 185 Ill. 2d 81, 163 (1998).

¶ 12 Since defendant failed to preserve this issue for review via contemporaneous objection and inclusion of the issue in a post-trial motion, we are concerned here with plain error review. Illinois Supreme Court Rule 615(a) provides as follows:

> "(a) Insubstantial and Substantial Errors on Appeal. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court."[3]

The plain error doctrine is applicable 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. Thompson*, 238 Ill. 2d 598, 613 (2010) (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)).

¶ 13 Both sides of the divided appellate panel in this case cited the Supreme Court's decision in *Olano* to support aspects of their respective positions. So, we begin with a discussion of *Olano* and the principles espoused therein—principles that this court has determined are not significantly different from our own when it comes to plain error review. See *People v. Herron*, 215 Ill. 2d 167, 186 (2005) ("[T]he plain-error standard in *** *Olano*, *** at its core, *** is the same standard we already use.

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[3]Rule 52(b) of the Federal Rules of Criminal Procedure is the federal counterpart to our Rule 615(a).

Ultimately, plain error involves the same considerations in federal and state court."). We note that remedial application of the plain error doctrine is *discretionary* in both the federal and state systems. See *Olano*, 507 U.S. at 732 ("Rule 52(b) leaves the decision to correct the forfeited error within the sound discretion of the court of appeals"); *People v. Clark*, 2016 IL 118845, ¶ 42 ("[R]emedial application of the plain error doctrine is discretionary.").

¶ 14 The claimed error in *Olano* concerned the presence of alternate jurors in the jury room while the jury was deliberating. Federal Rule of Criminal Procedure 24(c) provided in pertinent part: " 'An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.' " (Emphasis omitted.) *United States v. Olano*, 934 F.2d 1425, 1436 (9th Cir. 1991) (quoting Fed. R. Crim. P. 24(c)).[4] Because the defendants had not objected to the alternates' presence during deliberations in their case, the court of appeals engaged in "plain error" review pursuant to Rule 52(b). *Id.* The court relied on the "language of Rule 24(c), Rule 23(b), the Advisory Committee Notes to Rule 23, and related Ninth Circuit precedent" to hold that Rule 24(c) barred alternate jurors from attending jury deliberations unless the defendant, on the record, explicitly consented to their attendance. *Id.* at 1436-37. The court of appeals found that Rule 24(c) was violated because the district court did not obtain individual waivers from each defendant personally, either orally or in writing. *Id.* at 1438. It then concluded that the presence of alternates in violation of Rule 24(c) was "inherently prejudicial" and reversible *per se*. *Id.* at 1438-39. The court of appeals holding was premised upon the concern that the alternate jurors might not have followed the district court's prohibition on participation and, even if they did not participate *orally*, their "attitudes" may have been " 'conveyed by facial expressions, gestures or the like, [and thus] may have had some effect upon the decision of one or more jurors.' " *Id.* at 1438 (quoting *United States v. Virginia Erection Corp.*, 335 F.2d 868, 872 (4th Cir. 1964)).

¶ 15 The United States Supreme Court reversed the judgment of the court of appeals. First, the Court equivocated as to whether there even was an "error" to be considered pursuant to plain error review:

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[4]Rule 24(c) has since been amended to eliminate this requirement.

"The presence of alternate jurors during jury deliberations is no doubt a deviation from Rule 24(c). The Rule explicitly states: 'An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.' It is a separate question whether such deviation amounts to 'error' when the defendant consents to the alternates' presence. The Government supposes that there was indeed an 'error' in this case, on the premise that Rule 24(c) is nonwaivable, see Reply Brief for United States 9, n.4, and we assume without deciding that this premise is correct. The Government also essentially concedes that the 'error' was 'plain.' " *Olano*, 507 U.S. at 737.

¶ 16 Proceeding on the *assumption* that there *was* error, the Court then considered whether the error

" 'affect[ed] substantial rights' within the meaning of Rule 52(b), and conclud[ed] that it did not. The presence of alternate jurors during jury deliberations is not the kind of error that 'affect[s] substantial rights' independent of its prejudicial impact. Nor have respondents made a specific showing of prejudice. *** [W]e see no reason to presume prejudice here." *Id.*

The Court found that a showing of prejudice was required: "Assuming *arguendo* that certain errors 'affec[t] substantial rights' independent of prejudice, the instant violation of Rule 24(c) is not such an error." *Id.* The Court observed that it had generally analyzed outside intrusions upon the jury for prejudicial impact, and it saw no reason to deviate from that course in the case *sub judice*. *Id.* at 738-39.

¶ 17 The Court acknowledged, "[i]n theory, the presence of alternate jurors during jury deliberations might prejudice a defendant in two different ways: either because the alternates actually participated in the deliberations, verbally or through 'body language'; or because the alternates' presence exerted a 'chilling' effect on the regular jurors." *Id.* at 739. The Court observed that, if the alternates abided by the trial court's instructions, neither of those scenarios would be cause for concern. However, nonetheless, the Court concluded that the defendants—though required to do so—had "made no specific showing that the alternate jurors in this case either participated in the jury's deliberations or 'chilled' deliberation by the regular jurors." *Id.*

¶ 18 Thus, without deciding whether there was prerequisite error in allowing non-jurors (the alternates) to be present in the jury room *while the jurors were actually deliberating*, the Supreme Court concluded, without a showing of prejudice—either through non-juror participation verbally or through "body language," or a "chilling effect" on the regular jurors—the defendant had not demonstrated plain, reversible error. That "even if" analysis still leaves open the question of whether the presence of non-jurors, while video evidence is being replayed for the jurors in the courtroom, is error at all.

¶ 19 In defendant's brief—long on the number of general propositions, short on in-depth discussion of any—defendant cites cases for the proposition that other states and federal courts allow deliberating juries to privately review admitted recordings without restrictions or supervision. It is worth noting that the *defendants* in those cases challenged the trial courts' actions in that regard and the trial courts' actions were upheld after abuse-of-discretion review. Those cases do *not* stand for the proposition that review by the jury *must* take place privately and without restriction, only that it *may*.

¶ 20 *State v. Castellanos*, 935 P.2d 1353, 1355 (Wash. 1997), cited by defendant, is illustrative. Therein, the Supreme Court of Washington held the decision to allow the jury unlimited access to body wire tape recordings of drug transactions and playback equipment during deliberations was not an abuse of discretion. In reaching that result, the court stated:

> "[I]n *State v. Frazier*, 99 Wash.2d 180, 188, 661 P.2d 126 (1983) this court held 'a tape recorded statement of the defendant and a properly authenticated transcript thereof may, within the sound discretion of the trial court, be admitted as exhibits and reviewed by the jury during its deliberations.' At issue in *Frazier* was a tape recording of an oral statement the defendant had previously given the police. We stated 'such exhibits [may] go to the jury if, in the sound discretion of the trial court, the exhibits are found to bear directly on the charge and are not unduly prejudicial.' *Id.* at 189, 661 P.2d 126. We concluded:
>
> > 'It does not appear to us that the admission of a tape recording as an exhibit, in and of itself, overly emphasizes the importance of that evidence. Nor is its admission in any way an impermissible comment on the evidence by the judge. *Since the jury could have refreshed its recollection of the contents of*

> *the taped statement by rehearing the tape in open court with the trial judge's permission ... we see no reason to automatically prevent the jury from taking such exhibits into the jury room.* While trial court judges should continue to be aware of the potential for overemphasizing the importance of such evidence and should prevent such exhibits from going to the jury if unduly prejudicial, we think that decision is best left to the sound discretion of the trial judge.' " (Emphasis added.) *Id.*

The *Castellanos* court concluded:

> "We also noted steps taken by the trial court in *Frazier* to avoid undue prejudice. These included allowing the taped statement to be admitted as a jury exhibit without further comment and without a playback machine. *Id.* at 191, 661 P.2d 126. This forced the jury to request additional replays of the tape, and thus 'the trial court judge assured himself that he would be apprised of and would retain some degree of control over the number of times the jury could review that particular piece of evidence.' *Id.* However we did not foreclose the trial court from an alternative approach." *Id.*

¶ 21 In other words, the trial court *could* send the recording to the jury room without restriction or supervision, but it was not required to do so.

¶ 22 In fact, as the State notes in its brief, two state supreme courts, after conducting extensive surveys of cases in other jurisdictions, concluded—consistent with the analysis in *Lewis* and *Rouse*—that "[c]ourts in other jurisdictions have *** found no abuse of discretion by the trial court in allowing the jury to review or rehear recorded evidence in open court" (*State v. Davidson*, 509 S.W.3d 156, 203 (Tenn. 2016)), that it is, in fact, "universally accepted" that a trial court may allow the jury, during deliberations, to return to open court to review a tape recording admitted in evidence (*State v. Hughes*, 691 S.E.2d 813, 826-27 (W. Va. 2010)). See also *State v. Garland*, 942 N.W.2d 732 (Minn. 2020).

¶ 23 Considering those authorities and the Supreme Court's analysis in *Olano*, we find defendant has demonstrated no prejudice attributable to "clear or obvious error"—for purposes of plain error review—in the way the trial court chose to proceed in this case. As in *Olano*, this defendant has not shown that any non-jurors in the courtroom participated "verbally"—the trial court specifically advised those

present that there would be "no conversation"—or through "body language." Nor is there any indication that the presence of non-jurors "chilled" deliberation by the regular jurors. The analysis of *Olano*, in circumstances arguably comparable to those now before this court, requires a showing of prejudice by a defendant claiming plain error; prejudice will not be presumed. This defendant has made no showing of prejudice.

¶ 24 That assumes there even *was* error in the way the trial court proceeded. We do not so find. Defendant assumes that "deliberations" were ongoing when the court brought the jurors back into the courtroom and allowed them another viewing of the video in the presence of non-jurors.

¶ 25 We reject that assumption as well. In that regard, we reject, specifically, the notion that deliberations, once begun, cannot be suspended by the trial court. Clearly, a court may, after submission of the case to the jury, suspend deliberations and bring the jury back into the courtroom for supplemental instruction, when warranted, or even allow the jurors to separate temporarily outside the presence of a court officer with proper admonishments. The latter is specifically provided for by Illinois Supreme Court Rule 436 (eff. July 1, 1997), which states as follows:

> "(a) In criminal cases, either before *or after submission of the cause* to the jury for determination, the trial court may, in its discretion, keep the jury together in the charge of an officer of the court, or the court may allow the jurors to separate temporarily outside the presence of a court officer, overnight, on weekends, on holidays, or in emergencies.
>
> (b) The jurors shall, whether permitted to separate or kept in charge of officers, be admonished by the trial court that it is their duty (1) not to converse with anyone else on any subject connected with the trial until they are discharged; (2) not to knowingly read or listen to outside comments or news accounts of the procedure until they are discharged; (3) not to discuss among themselves any subject connected with the trial, or form or express any opinion on the cause until it is submitted to them for deliberation; and (4) not to view the place where the offense was allegedly committed." (Emphasis added.)

Obviously, the process of jury deliberation does not continue when the individual jurors are separated and at home with their families. We believe it is appropriate,

in this context, to make clear that "jury deliberation" is not some uncontrollable chain reaction—as defendant would have it that, once set in motion, is beyond the power of the trial court to suspend, control, and circumscribe as the court reasonably sees fit in the exercise of its discretion. Moreover, "jury deliberation" is a *collective* process that necessarily entails communicative interchange amongst the members of the jury.[5] Nothing of record in this case suggests that took place in the courtroom while the jurors were watching the video replay. When the court had the jury brought back into the courtroom, the court explained: "We do not have an arrangement to show [the video] to you in *your deliberation room*." (Emphasis added.) Implicit in that statement is the understanding that deliberations were appropriate in that location and no other. The court also advised the jury that it had "instructed everyone to not say a word." There is no suggestion of record that anyone *did* say a word—not the court, not the attorneys, and not the jurors. More to the point, there is no suggestion that the jurors communicated amongst themselves while in the courtroom. In short, deliberations did not take place while the jury was reviewing the video.

¶ 26 CONCLUSION

¶ 27 Because deliberations were not taking place in this case while the jurors were watching the video in the presence of non-jurors and there was no communication with non-jurors, there was no error. We reiterate, with respect to our analysis of prejudice *supra*, that this case presents circumstances different from *Olano* insofar as the non-jurors in that case—the alternates—were *in* the jury room *while actual deliberations were taking place*. We note, however, even apart from that distinction, the Supreme Court, in *Olano*, did not find the presence of non-jurors in

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[5]"Deliberation" by a jury is a *collective* process. "As *Black's Law Dictionary* 459 (8th ed. 2004) states, 'deliberation' by a jury refers to 'the process by which a jury reaches a verdict, as by analyzing, discussing, and weighing the evidence.' See also 89 CJS 425 § 790 (2001) (defining 'deliberation' as 'a collective process, not the solitary ruminations of individual jurors'); 89 CJS 426 § 791 (2001) (noting that premature jury deliberations are improper, in part, because 'they are likely to involve only a subset of the jury, contrary to the goal of collective deliberations')." *State v. Vega*, 139 P.3d 260, 263 n.4 (Or. 2006). The essence of jury deliberation is the joint or collective exchange of views among individual jurors so that the verdict reached is the product of that collective interchange. See *State v. Morgan*, 84 A.3d 251, 259 (N.J. 2013).

the jury room to be plain, reversible error, where no communication took place between jurors and non-jurors.

¶ 28 In sum, we find there was no error. However, even if there were, defendant has not shown that he was prejudiced by the procedure employed by the circuit court. For the reasons stated herein, we reverse the judgment of the appellate court and affirm the judgment of the circuit court.

¶ 29 Appellate court judgment reversed.

¶ 30 Circuit court judgment affirmed.

APPENDIX - B

APPENDIX B

2019 IL App (3d) 150556

Opinion filed June 20, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

PEOPLE OF THE STATE OF ILLINOIS	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
Plaintiff-Appellee,	)	Kankakee County, Illinois,
	)	
v.	)	Appeal No. 3-15-0556
	)	Circuit No. 09-CF-630
JOSEPH A. HOLLAHAN,	)	
	)	Honorable
Defendant-Appellant.	)	Susan S. Tungate,
	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court, with opinion.
Justice McDade concurred in the judgment and opinion.
Justice Carter dissented, with opinion.

OPINION

¶ 1 After a jury trial, the defendant was convicted of aggravated driving while under the influence of alcohol (Aggravated DUI) (625 ILCS 5/11-501(a)(2), (d)(1)(A), (d)(2)(A) (West 2008) and sentenced to a one-year term of imprisonment. He appeals his conviction, arguing that the trial court committed reversible error when, in response to the jury's request during deliberations to view the videotape of the defendant's field sobriety tests for a second time, the trial court had the jury watch the video in the courtroom while the court, the defendant, the attorneys for the defendant and the State, and two alternate jurors were present. The defendant

also argues that the trial court improperly assessed a $500 public defender fee under section 113-3.1 of the Illinois Code of Criminal Procedure (750 ILCS 5/113-3.1 (West 2008)) without conducting a hearing on the defendant's ability to pay, as required by the statute, and without giving the defendant proper notice and an opportunity to be heard on the issue.

¶ 2 FACTS

¶ 3 The defendant was charged by indictment with aggravated DUI, a class 4 felony. The offense was alleged to have occurred in Kankakee on August 29, 2009. Private counsel entered an appearance for the defendant on January 19, 2010. However, on October 24, 2011, the trial court appointed a public defender to represent the defendant because the defendant claimed he had no money.

¶ 4 The defendant's first trial ended in a mistrial. His subsequent jury trial commenced on April 21, 2015. Illinois State Police Trooper Timothy Davis was the State's only witness. Davis testified that, at about midnight on August 29, 2009, he was in Kankakee traveling northbound on Washington Avenue near Hickory Street when he saw a vehicle ahead of him start to enter a left turn lane and then jerk back into its lane. The vehicle later stopped at a red light. At that time, Davis observed that the vehicle's rear license plate light was not operational and that the rear license plate had a plastic cover on it. When the stoplight turned green, the vehicle proceeded northbound, drove onto a double yellow line, then straddled a lane divider line, and then failed to yield to a fire truck that was traveling southbound with its emergency lights flashing.

¶ 5 At that time, Davis effected a traffic stop. Davis testified that the vehicle did not initially pull over even though there was a stretch along the street where the driver could have done so. After the vehicle stopped, Davis spoke to the defendant, who was the driver of the vehicle, and to

a passenger who was in the front seat. When he spoke with the defendant, Davis detected a strong odor of an alcoholic beverage on the defendant's breath and noticed that the defendant had glassy, bloodshot eyes and slightly slurred speech. Davis testified that the defendant told him that he had drunk four beers.

¶ 6 Davis asked the defendant to perform three field sobriety tests: the Horizontal Gaze Nystagmus test, the "walk and turn" test, and the "one leg stand" test. The defendant's performance of these tests were recorded on videotape. A redacted version of the recording was copied to a DVD and played to the jury during the defendant's trial without objection from the defendant. Based on his scoring of the defendant's performance on the three field sobriety tests, and on his observations of the defendant's driving and conduct, Davis concluded that there was alcohol in the defendant's system and that the defendant was impaired. Davis arrested the defendant for DUI. Davis stated that, after the defendant was taken to jail, he refused to take a breathalyzer and became belligerent.

¶ 7 Following Davis's testimony, the State introduced an abstract of the defendant's driving record into evidence outside of the presence of the jury. The abstract showed numerous prior traffic violations by the defendant, including a suspension of the defendant's license in 1998 for DUI in violation of section 11-501(a)(2) of the Illinois Vehicle Code (625 ILCS 5/11-501(a)(2) (West 1998), and another conviction for the same offense in 2000.

¶ 8 The defendant testified that, shortly before he was pulled over by Davis on August 29, 2009, he jerked his car back from the left turn lane because he was giving his passenger a ride to an unfamiliar address and he realized that he was about to make a wrong turn. He stated that he did not yield to the fire truck because it had just "whipped" around the corner, giving the defendant no time to react. The defendant claimed that he pulled over right away when he saw

the police lights. He stated that he refused to take the breathalyzer test at the jail because he was already under arrest.

¶ 9 After closing arguments, the trial court instructed the jury on the applicable law. The court admonished the jurors that "[l]awyers, parties, and witnesses are not permitted to speak with you about any subject, even if unrelated to the case, until after the case is over and you are discharged from your duties as jurors." After the jury instructions, but prior to the start of the jury's deliberations, the trial court informed the jury that the bailiff could not discuss the case with the jurors, offer his opinion as to the facts or the law, or demonstrate the use of any exhibit, and he admonished the jurors not to ask the bailiff to do any of these things.

¶ 10 The jury then retired to deliberate. Shortly thereafter, the jury asked to watch the videotape of the defendant's traffic stop again. The trial court decided to show the video to the jury in the courtroom because the court did not have the "arrangement" necessary to allow the jury to view the video in the jury room. The court also decided to allow the defendant, the attorneys for the defendant and the State, and two alternate jurors to remain in the courtroom while the jury watched the video. The defendant's counsel did not object to this procedure. Before the jury was brought back into the courtroom, the trial court admonished the defendant, the attorneys, and the alternate jurors that the jury would be watching the video and that "[n]o one will have any conversation." After the jury was brought back into the courtroom, the trial court addressed the jurors, stating:

> "Please come in and have a seat, we will not be talking to you other than to get the video, period. *** The jury has requested to see the video again. We do not have an arrangement to show it to you in your deliberation room. I have

instructed everyone to not say a word and we will play the video for you. If you need to have the sound adjusted or anything that we can do, all right?"

¶ 11 After watching the video, the jury returned to the jury room to resume deliberations. Less than an hour later, the jury found the defendant guilty.

¶ 12 During the sentencing hearing, the State asked that the defendant be assessed a $500 public defender fee under section 113-3.1 of the Illinois Code of Criminal Procedure (750 ILCS 5/113-3.1 (West 2008)). The trial court imposed the fee requested by the State without conducting a hearing on the defendant's ability to pay such a fee. The trial court sentenced the defendant to a one-year term of imprisonment. The defendant filed a timely motion to reconsider his sentence, which the trial court denied.

¶ 13 This appeal followed.

¶ 14 ANALYSIS

¶ 15 1. The jury's viewing of the video during deliberations

¶ 16 The defendant argues that the trial court committed reversible error when, in response to the jury's request during deliberations to see the video a second time, the trial court had the jury watch the video in the courtroom while the court, the defendant, the attorneys for the defendant and the State, and two alternate jurors were present.

¶ 17 Because the defendant did not object to the procedure employed by the trial court or raise the issue in a posttrial motion, he asks us to review the issue under the plain error doctrine. The State argues that plain error review is unavailable here because the defendant "acquiesced to" the procedure chosen by the trial court, thereby inviting any error resulting from that procedure and forfeiting appellate review of any such error. As the State correctly notes, where a party acquiesces in proceeding in a given manner, "he is not in a position to claim he was prejudiced

thereby." *People v. Villarreal*, 198 Ill. 2d 209, 227 (2001). However, plain-error review is forfeited only if the defendant *invites* the error or *affirmatively agrees* to the procedure he later challenges on appeal. *People v. Harding*, 2012 IL App (2d) 101011, ¶ 17.[1] Merely failing to object to a procedure proposed by the trial court or by the opposing party does not amount to invited error. *People v. Coan*, 2016 IL App (2d) 151036, ¶ 24 (rejecting the State's invited error argument where the State tendered the jury instruction at issue and the defendant failed to object); *Harvey*, 211 Ill. 2d at 384–87 (rejecting the State's argument that one of the defendants invited error by failing to object to the use of certain evidence at trial). If the mere failure to object amounted to invited error, plain error review would never be available and the plain error rule would be rendered a nullity.

¶ 18 In this case, although defense counsel failed to object when the video was shown to the jury in the presence of the trial court, the parties and their counsel, and the alternate jurors, he did not request or expressly agree to that procedure. Accordingly, we may review the procedure employed by the trial court for plain error.

¶ 19 In addressing claims of error under the plain error doctrine, we employ a two-part analysis. The first step in the analysis is to determine whether a "plain error" occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 564–65, 565 (2007). The word "plain" here "is synonymous with 'clear' and is the equivalent of 'obvious.' " *Id.* at 565 n. 2. If we determine that the trial court committed a clear or obvious (or "plain") error, we then proceed to a second step, which is to

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[1] See also *People v. Harvey*, 211 Ill. 2d 368, 385 (2004); *People v. Carter*, 208 Ill. 2d 309, 319 (2003) ("Under the doctrine of invited error, an accused may not *request to proceed* in one manner and then later contend on appeal that the course of action was in error.") (emphasis added); *People v. Smith*, 406 Ill. App. 3d 879, 886-87 (2010) ("The purpose of the invited error doctrine is to prevent a defendant from unfairly receiving a second trial based on an error which *he injected* into the proceedings.") (emphasis added); *Villarreal*, 198 Ill. 2d at 227-28 (holding that the defendant could not attack verdict forms he submitted at trial on appeal); *People v. Patrick*, 233 Ill. 2d 62, 77 (2009) (holding that the defendant invited the alleged error by tendering the jury instruction he later challenged on appeal).

determine whether the error is reversible. Plain errors are reversible only when (1) "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) the 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." *Piatkowski*, 225 Ill. 2d at 565; *People v. Herron*, 215 Ill. 2d 167, 179 (2005).

¶ 20 In this case, the trial court plainly erred by having the jury watch the video in the courtroom in the presence of the trial court, the prosecutor, the defendant, and defense counsel. It is a basic principle of our justice system that jury deliberations shall remain private and secret. *People v. Johnson*, 2015 IL App (3d) 130610, ¶ 17. The primary purpose of this rule is to protect the jurors from improper influence. *United States v. Olano*, 507 U.S. 725, 737–738 (1993); *Johnson*, 2015 IL App (3d) 130610, ¶ 17. Accordingly, although the trial court has the discretion to determine whether to grant a jury's request to review evidence and the manner in which such evidence may be viewed by the jury (*People v. McKinley*, 2017 IL App (3d) 140752, ¶ 16), a trial court abuses its discretion if allows the jury to review evidence in a manner that results in an improper influence upon the jury's deliberations (see *Olano*, 507 U.S. at 738 (internal quotation omitted); *McKinley*, 2017 IL App (3d) 140752, ¶ 16). Courts review an improper intrusion upon jury deliberations for its prejudicial impact (*Johnson*, 2015 IL App (3d) 130610, ¶¶ 17-19) and will reverse only if the intrusion "affect[ed] the jury's deliberations and thereby its verdict" (*Olano*, 507 U.S. at 738). An improper intrusion upon jury deliberations by a third party is prejudicial when it impedes or inhibits the jurors' deliberations. See, *e.g.*, *Olano*, 507 U.S. at 738 (noting that the presence of alternate jurors in the jury room during juror deliberations could

prejudice the defendant if the presence of the alternates "exert[s] a chilling effect" on the jurors or "operate[s] as a restraint upon the regular jurors' freedom of expression and action").

¶ 21 The presence of the trial court, the defendant, the prosecutor, and defense counsel during jury deliberations in this case clearly inhibited the jurors' deliberations and restrained their freedom of expression and action. As Justice McDade correctly noted in her dissent in *Johnson*, "it is hard to imagine a more intrusive, more chilling presence in the deliberations than the opposing parties—the defendant with his attorney and the State in the person of the State's Attorney—and the trial judge." *Johnson*, 2015 IL App (3d) 130610, ¶ 49 (McDade, J., dissenting). The State's attorney, the defendant, and the defendant's counsel each has a direct interest in the outcome of the litigation. Moreover, the trial court serves as an authoritative figure who presides over the litigation. The presence of these parties during jury deliberations is inherently intimidating to jurors and would almost certainly have inhibited their deliberations while the video was being played. It is extremely unlikely that any juror would have felt free to discuss the details of the video and its possible impact on his or her decision in the presence of these parties. *Johnson*, 2015 IL App (3d) 130610, ¶ 52 (McDade, J., dissenting) (noting that jurors would have felt inhibited from discussing a video played in the presence of the prosecutor, the defendant, and defense counsel for fear that any discussion of the video "may result in criticism of judgment from the[se] non-neutral parties and counsel"); see also *id.* ¶ 53 (McDade, J., dissenting) ("It is naïve *** to assume that a normal citizen/juror is not somewhat nervous when attempting to carry out [his or her] fact-finding function in the presence of the judge" during deliberations).

¶ 22 Any reasonable doubt on this question was removed by the trial court's statement to the jury in this case. After the jury was brought back into the courtroom to watch the video in the

presence of the parties and their counsel, the judge made the following statement to the jury: "I have instructed everyone to not say a word and we will play the video for you. If you need to have the sound adjusted or anything that we can do, all right?" This statement conveyed several things to the jury. First, it suggested that no one (including any juror) was to speak while the video was being played. Although the trial court did not explicitly bar the jurors from speaking, the court's statement to the jury created the impression that the video would be played in silence, and the court did not explicitly give the jurors permission to break that silence by discussing the video while it was being played. In addition, the trial court's statement informed the jurors that they would not have the ability to control the playing of the video. The trial court told the jury that "we will play the video for you" and suggested that "we" (not the jurors themselves) could adjust the sound if necessary. The court did not give the jurors the opportunity to pause the video or replay any parts they might have wanted to view or discuss in greater detail. This further inhibited the jury's deliberative process. In sum, the procedure employed by the trial court effectively precluded the jurors from engaging in any deliberations while the video was being shown and likely limited their ability to focus sufficiently on the particular portions of the video that gave them concern.

¶ 23 We acknowledge that our appellate court has declined to find reversible error under similar circumstances in three prior decisions. See, *e.g.*, *People v. Lewis*, 2019 IL App (4th) 150637-B, ¶¶ 97-100 (finding no error where the trial court allowed a 911 recording to be replayed for the jury in the courtroom in the presence of the parties during deliberations); *Johnson*, 2015 IL App (3d) 130610, ¶¶ 20-21 (finding no prejudicial error where the trial court refused to allow the jury to take a surveillance videotape into the jury room and instead had the jury review the video in the courtroom during deliberations in the presence of the judge, the

defendant, the State's attorney, and defense counsel); *People v. Rouse*, 2014 Il App (1st) 121462, ¶¶ 78-79 (finding no error where the trial court allowed the jury to view surveillance footage in the presence of both parties and the trial judge during deliberations).[2] We find those decisions to be wrongly decided and we decline to follow them. In finding no error in *Johnson* and *Rouse*, our appellate court relied principally upon the facts that: (1) the third parties who were present when the video was replayed for the jury were instructed not to communicate with the jurors while the video was being played (*Johnson*, 2015 IL App (3d) 130610, ¶ 20), and they made no attempt to do so (*id.*; see also *Rouse*, 2014 IL App (1st) 121462, ¶ 79); and (2) after reviewing the video in the courtroom, the jurors returned to the jury room where they resumed private and unfettered deliberations (*Johnson*, 2015 IL App (3d) 130610, ¶ 20; *Rouse*, 2014 IL App (1st) 121462, ¶ 79). However, neither of those facts eliminated or mitigated the prejudicial impact upon deliberations that occurred *while the jurors were viewing the video.* In each case, the jurors had no opportunity to discuss the video as they were viewing it or to pause or replay any portions of the video that they found of particular importance. (Indeed, in *Rouse*, the trial court instructed the jury that they court not engage in any deliberations or have any discussions about what they were watching while the recording was played.) Accordingly, in each case, the procedure employed by the trial court directly impeded the jury's deliberations. The mere fact that the jury could have discussed the video later in the jury room is immaterial. In each case, the jury was

[2] In *McKinley*, a majority of the court found that the trial court erred by allowing the prosecutor, the defendant, defense counsel, and the bailiff to be present while the jury viewed a videotape during its deliberations. *McKinley*, 2017 IL App (3d) 140752, ¶¶ 32-36 (O'Brien, J., specially concurring); *id.* ¶¶ 38-44 (Holdridge, J., dissenting). However, the defendant failed to raise the issue before the trial court, and Justice O'Brien found that the trial court's error did not rise to the level of reversible plain error. *Id.* ¶ 36 (O'Brien, J., specially concurring). Justice Carter found no error (*McKinley*, 2017 IL App (3d) 140752 ¶¶ 22-23) and no reversible plain error (*id.* ¶ 25-27). Accordingly, the majority affirmed the defendant's conviction in *McKinley*.

prevented from controlling the video, from freely discussing it, and from debating any issues relating to the video while they were watching it.

¶ 24 Moreover, our appellate courts' decisions in *Lewis*, *Rouse*, and *Johnson* fail to acknowledge that the mere presence of the trial judge, the parties, and their attorneys during jury deliberations improperly intrudes upon the privacy of jury deliberations and has an inherently intimidating and inhibiting effect upon such deliberations. See *Johnson*, 2015 IL App (3d) 130610, ¶ 52 (McDade, J., dissenting); *McKinley*, 2017 IL App (3d) 140752, ¶¶ 32-35 (O'Brien, J., specially concurring). Such intrusions on the jurors' ability to freely discuss and debate the evidence should be deemed presumptively prejudicial. See *Olano*, 507 U.S. at 739 (acknowledging that "[t]here may be cases" where an intrusion upon jury deliberations by third parties "should be presumed prejudicial," and ruling that such intrusions are prejudicial when they "exert[] a chilling effect" on the jurors or "operate as a restraint upon the regular jurors' freedom of expression and action." (Internal quotation marks omitted); see also *Johnson*, 2015 IL App (3d) 130610, ¶ 52 (McDade, J., dissenting).[3]

¶ 25 In *Johnson* and *Lewis*, our appellate court suggested that replaying a video or audio recording for the jury during deliberations in the presence of the parties, their counsel, and the trial court was not prejudicial error because the jury had already reviewed the recording under identical circumstances during the trial. *Johnson*, 2015 IL App (3d) 130610, ¶ 20; *Lewis*, 2019

[3] In *Olano*, the United States Supreme Court declined to presume prejudice where two alternate jurors were present throughout the jury's deliberations but there was no showing that the alternate jurors either participated in or "chilled" the jury's deliberations. *Olano*, 507 U.S. at 739. However, *Olano* is distinguishable. The alternate jurors in *Olano* were neutral, disinterested parties who were "indistinguishable from the 12 regular jurors" until the close of trial. *Id.* at 740. The third parties who were present during the jury deliberations in this case were very different. The parties and their counsel had a direct interest in the outcome of the case, and the trial court was an authoritative, intimidating figure who was not a finder of fact and did not share the same standing as the jurors. See *Johnson*, 2015 IL App (3d) 130610, ¶ 50 (McDade, J., dissenting). Accordingly, the argument for presuming prejudice in this case is far more compelling than it was in *Olano*.

IL App (4th) 150637-B, ¶ 98. In *Lewis*, our appellate court went so far as to state that "[w]hen a deliberating jury returns to the courtroom and, in the presence of the judge, the parties, the lawyers, and court personnel listens again, in silence, to an audio recording, *the jury does nothing different from what it did before, when the recording originally was played.*" *Lewis*, 2019 IL App (4th) 150637-B, ¶ 98. However, a jury's viewing of a video recording during trial is critically different from its viewing of that same recording *during deliberations*. Unlike public trials, jury deliberations must occur in privacy and secrecy. *Johnson*, 2015 IL App (3d) 130610, ¶ 17. Once deliberations begin, the jurors must be shielded from any outside influences that improperly impede or inhibit their deliberations. *Olano*, 507 U.S. at 737–738; *Johnson*, 2015 IL App (3d) 130610, ¶ 17. If a trial court fails to protect the jurors from such influences (as in this case), it commits reversible error. *Olano*, 507 U.S. at 738; *Johnson*, 2015 IL App (3d) 130610, ¶¶ 17-19.

¶ 26 Our appellate court has also suggested that the trial court's authority to allow a deliberating jury to review audio or video evidence in the presence of the parties, their attorneys, and the trial judge flows directly from the trial court's discretion to manage its courtroom. *McKinley*, 2017 IL App (3d) 140752, ¶ 22 ("the mode and manner in which a circuit court allows a jury to review a piece of evidence *** [such as a video recording] falls directly within the scope of the court's inherent authority to control its courtroom"); see also *Lewis*, 2019 IL App (4th) 150637-B, ¶ 99. We disagree. Although a trial court generally has discretion to determine whether to grant a jury's request to review evidence and the mode and manner in which such evidence may be viewed by the jury, the court abuses its discretion and commits reversible error if it allows the jury to review evidence in a manner that improperly inhibits the jury's deliberations. *Olano*, 507 U.S. at 738 (internal quotation omitted); see also *McKinley*,

2017 IL App (3d) 140752, ¶ 41 (Holdridge, J., dissenting); see generally *McKinley*, 2017 IL App (3d) 140752, ¶ 16.

¶ 27 In *Lewis*, our appellate court also ruled that "[a]llowing a deliberating jury to listen to a recording again in the courtroom instead of the jury room avoids problems with equipment and the skills necessary to operate the equipment" *** "and also minimizes the risk of breakage or the erasure of the recording." (Internal quotation marks omitted.) *Lewis*, 2019 IL App (4th) 150637-B, ¶ 97. For this reason, among the other reasons discussed above, the *Lewis* court ruled categorically that allowing the jury to hear a recording again in the courtroom during deliberations in the presence of the parties, their counsel, and the trial judge is not prejudicial error (provided that the jury has been instructed not to deliberate during the playing of the recording and the third parties are instructed not to communicate with the jurors or otherwise influence them). *Id.* ("we now reject outright the argument that this procedure is *** erroneous, let alone structurally erroneous"); see also *id.* at ¶ 99 ("we conclude that if a jury, during its deliberations, requests to see or hear a recording again, the trial court need not send the recording and equipment into the jury room but instead may, in its discretion, have the jury brought back into the courtroom for a replaying of the recording"). The *Lewis* court further ruled that, "if the court chooses to have the recording replayed in the courtroom, the court, parties, and counsel must be present to view or hear the evidence, and the court should instruct the jury not to discuss the evidence while in the courtroom." *Id.* We find these rulings in *Lewis* to be both erroneous and troubling. As an initial matter, we find it difficult to believe that, with all of the digital and other "user-friendly" technology currently available (such as laptop computers and tablets, to name only a few), a trial court cannot arrange for the jury to view video or audio evidence in the jury room without risking the destruction of evidence or other technical difficulties. The fact that

this problem recurs so often in this State is inexplicable. In our view, if a trial court decides to grant a jury's request to review audio or video evidence during deliberations, the only acceptable practice is to arrange for the jury to view the evidence at issue in private, preferably by bringing a laptop, tablet, or some similar device into the jury room. The *Lewis* court's ruling will make that less likely to occur.

¶ 28 But even if, for some reason, a video or audio recording must be played for a deliberating jury in the courtroom, the jury should view the video in private, not in the presence of the parties, their attorneys, or the trial judge. In ruling otherwise, the *Lewis* court appeared to assume that anything that occurs in the courtroom, even jury deliberations, is a "court proceeding" requiring the presence of the judge and the parties. See *Lewis*, 2019 IL App (4th) 150637-B, ¶ 99. We disagree. As noted above, jury deliberations must be conducted privately and in secret so as to insulate the jury from improper influence. *Olano*, 507 U.S. at 737-38. The parties have no right to be present for such deliberations, regardless of where they occur. The mere fact that a portion of jury deliberations occurs in the courtroom does not transform those deliberations into a public trial proceeding. See generally *People v. Gore*, 2018 Il App (3d) 150627, ¶¶ 33-35 (ruling that a criminal defendant's right to a public trial does not apply to a portion of the proceedings wherein the trial court answers questions posed by the jury during deliberations); see also *State v. Magnano*, 326 P.3d 845, 851 (Wash. App. 2014) (trial court did not violate the defendant's public trial right when it closed the courtroom while a 9-1-1- recording was replayed to the jury during jury deliberations in order to protect the secrecy of the jury's deliberations). Nor does it entitle the defendant or any other third party to be present during those deliberations. The defendant has the right to be present and to participate in any communication between the trial judge and the jury that occurs after deliberations have begun. *People v. Coleman*, 391 Ill. App.

3d 963 (2009). This includes the right to be present for any arguments as to whether the trial court should grant a deliberating jury's request to review video or audio evidence. However, once a trial court decides to grant the jury's request, the jury should be allowed to view any such evidence in private because the viewing constitutes a part of the jury's deliberations. The defendant has no right to be present at that time.

¶ 29 Moreover, we find that the procedure employed by the trial court in this case amounted to structural error, and is therefore reversible under the plain error doctrine. A structural error is "a systemic error" which serves to "erode the integrity of the judicial process and undermine the fairness of the defendant's trial." (Internal quotation marks omitted.) *People v. Thompson*, 238 Ill. 2d 598, 613–14 (2010). "An error is typically designated as structural only if it necessarily renders a criminal trial fundamentally unfair or an unreliable means of determining guilt or innocence." *Thompson*, 238 Ill. 2d at 609; see also *People v. Henderson*, 2017 IL App (3d) 150550, ¶ 47; *People v. Matthews*, 2017 IL App (4th) 150911, ¶ 43. As noted above, the presence of the parties, their attorneys, and trial judge during jury deliberations was inherently intimidating and necessarily impeded or inhibited the jurors' free discussion and deliberation as the video was being shown to them. This inhibiting effect upon the jurors' deliberations was exacerbated by the trial court's assertion of control over the playing of the video and by its statement to the jury, which suggested that the jurors were not free to talk as the video was being played. Anything that intrudes upon the privacy of jury deliberations and impedes or inhibits impedes the jurors' freedom of expression and action during deliberations in this manner renders the trial an unreliable means of determining guilt or innocence. We decline to follow prior decisions of our appellate court that hold or suggest otherwise.[4]

[4] In finding no structural error under circumstances similar to those presented here, our appellate court cited *Thompson* for the proposition that structural errors have been found "only in a limited class of cases" and suggested that only the six types of errors expressly referenced in *Thompson* may be

¶ 30 The dissent correctly notes that an intrusion into a jury's deliberations constitutes reversible error only if the defendant is prejudiced by the intrusion. *Infra* ¶ 40. However, the dissent assumes that a defendant may establish such prejudice under the circumstances presented in this case only by showing either that: (1) one of the non-jurors that was present during the jury's deliberations "engaged in a prejudicial communication with [a] juror about a matter pending before the jury"; or that (2) "improper extraneous information reached the jury." *Infra* ¶ 40. We disagree. As shown above, the mere presence of the trial judge, the parties, and their attorneys during jury deliberations improperly intrudes upon the privacy of jury deliberations and has an inherently intimidating and inhibiting effect upon such deliberations. Such intrusions on the jurors' ability to freely discuss and debate the evidence should be deemed presumptively prejudicial (See *Olano*, 507 U.S. at 739), regardless of whether they involve any express communications or the transmission of "extraneous information." Moreover, the prejudice created by the presence of the trial judge, the parties, and their attorneys during jury deliberations was compounded in this case by the trial judge's comments to the jurors and the procedure subsequently employed by the court, both of which effectively denied the jury the ability to control the video, to comment on any portion of the video, or to deliberate about what they were watching as the video was being shown. This impeded the jury's deliberations on a matter of obvious concern to the jury, thereby prejudicing the defendant. Accordingly, the trial court committed reversible error.

¶ 31 2. The Public Defender Fee

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considered structural. *Matthews*, 2017 IL App (4th) 150911, ¶¶ 43-44. However, in *People v. Clark*, 2016 IL 118845, ¶ 46 our supreme court noted that it has not restricted structural plain error in this manner. See also *People v. Sanders*, 2016 IL App (3d) 130511, ¶¶ 16-17.

¶ 32 The defendant also argues that the trial court erred by assessing a $500 public defender fee under section 113-3.1 of the Illinois Code of Criminal Procedure (750 ILCS 5/113-3.1 (West 200)) without conducting a hearing on the defendant's ability to pay that fee, as required by the statute, and without providing him with adequate notice that it planned to assess such a fee. The defendant contends that, if this court affirms his conviction, it should vacate the public defender fee outright. The State confesses error on this issue but argues that we should remand for a hearing on the defendant's ability to pay the public defender fee rather than vacate the fee outright. Because we are reversing defendant's conviction and remanding for a new trial, we need not address whether the public defender fee imposed as a part of defendant's sentence should be vacated, with or without a hearing on remand.

¶ 33 CONCLUSION

¶ 34 For the reasons set forth above, we reverse the judgment of the circuit court of Kankakee County and remand for a new trial.

¶ 35 Reversed; cause remanded.

¶ 36 JUSTICE CARTER, dissenting.

¶ 37 I respectfully dissent from the ruling and analysis expressed in the majority opinion in the present case. I would find that defendant has failed to establish that either error or plain error occurred here. See *People v. McLaurin*, 235 Ill. 2d 478, 497 (2009) ("[T]he key question in determining whether an 'intrusion' into the jury room constitutes error is whether the defendant was prejudiced by the intrusion."); *Johnson*, 2015 IL App (3d) 130610, ¶ 19 ("[W]e review outside jury intrusions for prejudicial impact.").

¶ 38 The issue of whether evidentiary items should be taken to jury room during deliberations is a matter within the discretion of the trial court, and the trial court's decision on the matter is

not reversed absent an abuse of discretion to the prejudice of the defendant. *People v. Williams*, 97 Ill. 2d 252, 292 (1983). Similarly, the mode and manner in which a trial court allows a jury to review a piece of evidence during jury deliberations falls within the scope of the court's inherent authority to manage its courtroom and is a matter of the court's discretion. *McKinley*, 2017 IL App (3d) 140752, ¶ 22. See also Lewis, 2019 IL App (4th) 150637-B, ¶ 97 (holding that where a deliberating jury requests to have an audio or video recording played again, the trial court has discretion to either send the evidence to the jury room or bring the jury into the courtroom to play the recording); *Rouse*, 2014 IL App (1st) 121462, ¶ 78 (holding that it was within the trial court's discretion to allow the jury to view a video recording in the presence of both parties and the judge).

¶ 39 Here, defendant essentially argues that the mode and manner in which the trial court allowed the jury to view the video constituted error because the presence of the judge, the attorneys, the defendant, and the two alternate jurors had a chilling effect on jury deliberations. Defendant's claim that the jury was exposed to improper information or influence is comparable to the body of law regarding impeachment of a jury verdict. A jury verdict may not be impeached by an affidavit or testimony from a juror regarding the motive, method, or process by which the jury reached its verdict. See, *e.g.*, *People v. Hobley*, 182 Ill. 2d 404, 457 (1998). However, a jury verdict may be impeached based on evidence of improper extraneous influences on the jury. *Id.* at 458. Where a defendant seeks to impeach a jury verdict based on an outside influence or communication, reversal is not warranted unless the defendant was prejudiced. See id.; *People v. Harris*, 123 Ill. 2d 113, 132 (1988); *People v. Holmes*, 69 Ill. 2d 507, 514-19 (1978); *People v. Willmer*, 396 Ill. App. 3d 175, 181 (2009); *People v. Collins*, 351 Ill. App. 3d 175, 179 (2004). See also *People v. Kuntu*, 188 Ill. 2d 157, 162 (1999) (holding that a letter sent

from a juror to a state's attorney after the trial indicating that the juror had a personal relationship with the state's attorney was not conclusive evidence that the defendant's right to a fair trial had been prejudiced); *Parker v. Gladden*, 385 U.S. 363, 365 (1966) (holding that reversal was warranted where a bailiff told jurors that the defendant was guilty because the bailiff's statements were prejudicial and violated the defendant's constitutional rights).

¶ 40 Generally, a rebuttable presumption of prejudice arises when a defendant shows that a third party has communicated with a juror about a matter pending before the jury or that the jury has been exposed to improper extraneous information that relates directly to something at issue in the case that may have influenced the verdict. *Harris*, 123 Ill. 2d at 132; *Collins*, 351 Ill. App. 3d at 179-80; *Willmer*, 396 Ill. App. 3d at 181. While allegations of prejudicial outside influences are sufficient to raise a presumption of prejudice and shift the burden to the State, allegations that a juror "may have been exposed to extraneous information of an unknown nature" are not sufficient to raise a presumption of prejudice. *People v. Williams*, 209 Ill. 2d 227, 242 (2004). When a defendant has made a showing sufficient to raise a presumption of prejudice, the State may rebut the presumption by showing that the improper communication or extraneous information was harmless. *Harris*, 123 Ill. 2d at 132; *Hobley*, 182 Ill. 2d at 462; *Collins*, 351 Ill. App. 3d at 179-80. However, when the issue is unpreserved—as in the instant case—the burden of establishing prejudice remains on the defendant and does not shift to the State. *McLaurin*, 235 Ill. 2d at 497-98. See also *Olano*, 507 U.S. at 740-41.

¶ 41 Applying the above principles to the instant case, the defendant has not shown that either the trial judge, the attorneys, the defendant, or the alternate jurors engaged in a prejudicial communication with any juror about a matter pending before the jury or that improper extraneous information reached the jury. At most, defendant has shown that the procedure the

court employed to play the video during jury deliberations created a situation where it was possible for one of those persons to have an improper communication with the jury. The mere possibility of an improper communication, however, is insufficient to show that defendant was prejudiced. As such, I would find that defendant has not shown that the court abused its discretion by using the procedure which it followed in the present case. With all due respect, I believe the majority's position on this issue is a radical departure from the traditional way reviewing courts have treated questions involving the integrity of jury deliberations.

¶ 42 I recognize that I concurred in the judgment and opinion in *Henderson*, 2017 IL App (3d) 150550, ¶ 46, in which we held that error occurred where the trial court allowed the jury to review evidence in the presence of an employee of the State's Attorney's office and a court bailiff. *Id.* Upon further consideration of this issue, I do not believe that the presence of the employee of the State's Attorney's office and the bailiff, without more, showed that defendant was prejudiced. However, I would still find that error occurred in *Henderson* because the trial court failed to consult the parties regarding the jury's request to review the evidence or the mode and manner in which the court would allow the evidence to be reviewed.