FOURTH DIVISION
June 30, 2016

No. 1-13-3981

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 16070
	)	
ALVIN PERKINS,	)	Honorable
	)	Luciano Panici,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: Where the trial court used the wrong standard when it determined a murder victim's statements were admissible under the forfeiture-by-wrongdoing doctrine, and in doing so the trial court did not consider whether defendant acted with the intent to prevent the victim from testifying, we must remand this matter to the trial court for a hearing using the correct standard.

¶ 2 Defendant Alvin Perkins was charged with the first-degree murder of his ex-girlfriend and neighbor, Teresa Iacovetti, who was shot in the face on June 26, 2007. Teresa died from her injuries several days later. Within the hours after being shot, Teresa identified defendant as the shooter to three police officers, and those identifications were admitted into evidence at a jury trial. Following the trial, Perkins was convicted of first-degree murder and was sentenced to 35 years in the penitentiary for murder and a consecutive sentence of 35 years for personally discharging the firearm that caused Teresa's death. Defendant now appeals his conviction claiming that the trial court improperly admitted Teresa's hearsay statements at trial and improperly denied his request to represent himself during the proceedings. For the reasons that follow, we remand this matter to the trial court with instructions.

¶ 3 Background

¶ 4 Defendant Alvin Perkins was charged by indictment with the first-degree murder of his ex-girlfriend and neighbor, Teresa Iacovetti, who was shot on June 26, 2007 and died several days later. On September 23, 2009, just as defense counsel presented a motion to preclude the death penalty, defendant objected to his counsel's representation and indicated that he wanted to represent himself. The court denied defendant's request to represent himself.

¶ 5 Prior to trial, defendant filed a motion *in limine* to exclude as hearsay the three statements from Teresa, now deceased, to the police identifying defendant as the person who shot her. The shooting itself occurred at approximately 12:20 a.m. on June 26, 2007. The first statement was made to Officer Salinas while Teresa was in the emergency room trauma center at approximately 1:46 a.m. In this statement, Teresa identified defendant as her shooter. The second statement was made to Officer Riegler at approximately 2 a.m. Officer Riegler asked Teresa who shot her, and she named defendant, Alvin Perkins. She then twice stated, "I can't believe Alvin shot me."

The third statement was made later that day, between 9 a.m. and 2 p.m. to Detective Mikal El-Amin; again Teresa identified defendant as her shooter. Detective El-Amin asked Teresa what happened, and Teresa told him that she was watering plants in the yard when she saw defendant enter the yard from the alley. She stated when defendant came to the yard, he said, "I told you what was going to happen, bit**." He then raised a gun and shot her in the face. She said she fell to the ground and realized she was bleeding heavily. Her son came to the yard, and then a neighbor came over and used a hose to wash some of the blood off her face.

¶ 6 In arguing the admissibility of the statements, the parties argued them as two discrete motions: the first concerning the identifications Teresa made to Officers Salinas and Riegler, and the second regarding Teresa's statement later in the day made to Detective El-Amin, which was more detailed.

¶ 7 With respect to the first two statements, the defense argued that to admit those hearsay statements would violate defendant's Sixth Amendment rights. The State in turn argued that the statements were admissible as either excited utterances or dying declarations. At the hearing on the admissibility of the statements, the parties proffered statements contained in the police reports and did not present any witnesses. The court admitted the first two statements as either dying declarations or excited utterances finding that there was not enough time for Teresa to fabricate a story.

¶ 8 With respect to the third, more detailed statement, the State argued that this identification was admissible pursuant to the statutory forfeiture-by-wrongdoing exception to the hearsay rule found in 725 ILCS 5/115-10.7 (West 2012). Significantly, the State argued that under subsection (d) of the statute, if it could prove by a preponderance of the evidence that defendant murdered Teresa, they did not need to show that defendant’s purpose for committing the murder was to

create the unavailability of a witness for the exception to apply and the statement to be admitted. Even if the State did have to show a motive, the State contended that defendant was motivated to kill Teresa to silence her from testifying about the fact that he was violating an order of protection by contacting her on the night of the shooting, and had a previously stricken criminal damage to property case that alleged defendant attempted to pry open Teresa's door about a month earlier. The defense responded by arguing that the State's argument as to defendant's motive was illogical—it did not make sense for defendant to create a situation where he violated an order of protection so that he then had to kill Teresa. Further, the defense argued that the criminal damage to property case had been stricken and could not automatically be reinstated. .

¶ 9 The State introduced evidence related to an incident that occurred earlier in May 2007. Officer Salinas testified that on May 6, 2007, he had been discharged to Teresa's house for a call regarding criminal damage to property. Officer Salinas spoke with Teresa and Travis Mitchell, then arrested defendant at his apartment, located directly behind Teresa's house. As Officer Salinas was processing defendant, defendant said out loud, "I know what I am going to have to do when I get out of jail."

¶ 10 Finally, the State was permitted to introduce a plenary order of protection Teresa had against defendant that was in place at the time of the shooting. The court ultimately found the third identification was admissible under the forfeiture-by-wrongdoing doctrine and the State had met its burden where there was no requirement in the statute that it make a finding that defendant's act in shooting Teresa was intended to procure the absence of Teresa as a witness. After a jury trial, defendant was convicted of murder.

¶ 11 Analysis

¶ 12 Admissibility of Teresa's Statements of Identification

¶ 13 In his appeal, defendant raises both hearsay arguments and confrontation clause arguments in support of his argument that the three statements of identification made by Teresa were improperly admitted at trial. When the admissibility of statements is at issue, and the defendant raises both state hearsay claims and constitutional confrontation clause claims, our supreme court has instructed that reviewing courts must first determine whether the statements are admissible under state hearsay laws before deciding any constitutional issues. *In re E.H.*, 224 Ill. 2d 172, 179-80 (2006) ("Only once the statement has first been found admissible as an evidentiary matter should constitutional objections—including *Crawford*-based confrontation clause claims—be dealt with. [Citations.] This is the only analytical 'flow chart' that comports with the rule that courts must avoid considering constitutional questions where the case can be decided on nonconstitutional grounds."); see also *People v. Melchor*, 226 Ill. 2d 24, 34 (2007). Therefore, we address defendant's hearsay claims first.

¶ 14 For the first time on appeal, the State argues that all of Teresa's statements could have been admitted under the forfeiture-by-wrongdoing doctrine, and that if the trial court erred in admitting the statements as excited utterances or dying declarations the judgment of the trial court could be affirmed if the statements were properly admitted under the forfeiture-by-wrongdoing doctrine. We may affirm the trial court when correct for any reason appearing in the record. *People v. Merz*, 122 Ill. App. 3d 972, 976 (1984). Therefore, we address the admissibility of all of Teresa's statements under the forfeiture-by-wrongdoing doctrine below.

¶ 15 Forfeiture-by-Wrongdoing Doctrine

¶ 16 The Illinois supreme court adopted the Illinois Rules of Evidence, which became effective on January 1, 2011. The Illinois Rules of Evidence codified the existing rules of evidence in this state, including the common-law doctrine of forfeiture by wrongdoing. Illinois

Rule of Evidence 804(b)(5) provides an exception to the rule against hearsay for "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Ill. R. Evid. 804(b)(5) (eff. Jan.1, 2011). The reliability of the statement sought to be admitted is not an element of Illinois Rule of Evidence 804(b)(5). *People v. Peterson,* 2012 IL App (3d) 100514–B, ¶ 23. When the State raises the doctrine of forfeiture by wrongdoing, it must prove both the wrongdoing and the intent to procure the unavailability of the declarant. Ill. R. Evid. 804(b)(5) (eff. Jan. 1, 2011). The State's burden of proof is by a preponderance of the evidence. *People v. Stechly*, 225 Ill. 2d 246, 278 (2007). The doctrine of forfeiture by wrongdoing is a common-law doctrine. *People v. Hanson,* 238 Ill. 2d 74, 96 (2010). "The common-law forfeiture rule was aimed at removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them—in other words, it is grounded in the ability of courts to protect the integrity of their proceedings." (Internal quotation marks and citation omitted.) *Giles v. California*, 554 U.S. 353, 374 (2008). The doctrine was codified at the federal level by Federal Rule of Evidence 804(b)(6), as an exception to the rule against hearsay. Fed. R. Evid. 804(b)(6); *Davis v. Washington,* 547 U.S. 813, 833 (2006); *Hanson,* 238 Ill. 2d at 97. We review the court's admission of hearsay statements under the forfeiture-by-wrongdoing exception for an abuse of discretion. *Hanson,* 238 Ill. 2d at 96. An abuse of discretion occurs where the trial court's ruling is arbitrary, fanciful or unreasonable, or where no reasonable person would take the view adopted by the court. *People v. Illgen,* 145 Ill. 2d 353, 364 (1991). An abuse of discretion may also occur when the court applies the wrong standard. *In re Marriage of Betsy M.*, 2015 IL App (1st) 151358, ¶ 46; *Shulte v. Flowers,* 2013 IL App (4th) 120132, ¶ 23

¶ 17 In *Crawford*, the Supreme Court recognized that, in addition to serving as an exception to the hearsay rule, the doctrine also extinguishes confrontation claims on equitable grounds. *Crawford v. Washington*, 541 U.S. 36, 62 (2004); *Davis*, 547 U.S. at 833 ("one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation"). In 2007, the Illinois Supreme Court recognized that the federal rule is coextensive with the common-law doctrine. *Hanson*, 238 Ill. 2d at 97 (citing *Stechly*, 225 Ill. 2d at 272-73). *Stechly* makes it clear that as applied in Illinois, the doctrine is "coextensive with" Federal Rule 804(b)(6). *Stechly*, 225 Ill. 2d at 272-73.

¶ 18 In this case, defendant argues the trial court used the wrong standard when it admitted Teresa's statement under the forfeiture-by-wrongdoing doctrine because the trial court did not find that defendant's actions were intended to procure the absence of Teresa as a witness. In ruling that the statements were admissible pursuant to the statute, the trial court noted its interpretation of the statute and stated: "Basically it is saying, as I read the statute, if the State is able to prove that the defendant, by a preponderance of the evidence, killed the witness, then that's all they have to prove." It appears that the trial court also admitted the statements pursuant to common law forfeiture by wrongdoing. In his ruling, the trial court judge stated:

> "All right. Forfeiture by wrongdoing under the common law, okay, as the Supreme Court has pointed out already, and also where the Supreme Court has recognized, that the doctrine serves as exception to the hearsay rule. Not only does it serve as an exception to the hearsay rule, but it also extinguishes any confrontation claims under Crawford. There is no Crawford violation if it is wrongful—if it is forfeiture by wrongdoing under

> the common law. So Crawford is done away with. It is no longer an issue. The other question is whether or not it should be admitted into evidence under that specific statute. I believe that it does meet the requirements. Therefore, I am going to allow those two statements."

¶ 19 Here, the trial court judge never made a finding of fact regarding whether defendant, by his actions, intended to procure Teresa's absence at trial, which is a requirement for the application of the forfeiture-by-wrongdoing doctrine under the Supreme Court's ruling in *Giles*. See *Giles*, 554 U.S. at 377 (finding intent to prevent one from being a witness a requirement under the forfeiture-by-wrongdoing doctrine and remanding the case to the lower court to consider the defendant's intent when he killed the victim.). "[A] trial judge is presumed to know the law and only when the record affirmatively shows otherwise will relief be warranted." *People v. Hernandez*, 2012 IL App (1st) 092841, ¶ 95. Here, however, the record not only shows that the trial court judge did not make a finding of fact as to defendant's intent at the time he killed Teresa, but that the trial court judge commented at one point in his oral ruling that "if the State is able to prove that the defendant, by a preponderance of the evidence, killed the witness, then that's all they have to prove." Based on this record, we cannot presume that the trial court judge knew that intent to kill the witness to prevent her from testifying at trial was a requirement under the forfeiture-by-wrongdoing doctrine. Thus, given that the Supreme Court has held that intent to prevent someone from being a witness is a necessary requirement under the forfeiture-by-wrongdoing doctrine, we must remand this matter to the trial court for a hearing to determine whether the State has proven by a preponderance of the evidence that defendant shot Teresa with the intent of procuring her unavailability as a witness. See *Stechly*, 225 Ill. 2d

at 311 (hearing required on remand to determine whether the forfeiture-by-wrongdoing doctrine applied; State's burden of proof on remand is by a preponderance of the evidence).

¶ 20 We recognize that the State argues that the record before us is sufficient to sustain a finding of intent under the forfeiture-by-wrongdoing doctrine. However, we decline to make any finding here as doing so would remove the State's burden of persuasion on the issue of intent. *Stechly,* 225 Ill. 2d at 278 (the State must prove both the wrongdoing and the intent to procure the unavailability of the declarant by a preponderance of the evidence). Further, the trial court is in a better position to observe the witnesses and resolve any apparent conflicts in the record. *People v. Frazier*, 248 Ill. App. 3d 6, 13 (1993) (Because the trial court hears the testimony, observes the witnesses, and has the opportunity to observe their demeanor, it is in the best position to judge the witnesses' credibility, determine the weight to be accorded their testimony, decide the inferences to be drawn from the evidence, and resolve any conflicts in the evidence). Further, in keeping with Illinois Supreme Court case law, we believe the better course is to remand this matter for a hearing conducted under the proper standard of review on the issue of intent—a preponderance of the evidence. See *In re D.T.*, 212 Ill. 2d 347, 367 (2004).

¶ 21 Following a hearing on remand by the trial court on the admissibility of the statements under the forfeiture-by-wrongdoing doctrine, we will address the remaining issues including any issue that may arise on remand from the hearing.

¶ 22 Conclusion

¶ 23 For the reasons stated above, we remand this matter to the trial court for a hearing on the forfeiture-by-wrongdoing doctrine and, specifically, for the court to determine whether the State has established by a preponderance of the evidence that defendant shot Teresa with the intent of procuring her from testifying as a witness against him.

¶ 24 Case remanded with directions; jurisdiction retained.