

NOTICE
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2018 IL App (5th) 140273-U

NO. 5-14-0273

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	St. Clair County.
)	
v.)	No. 09-CF-394
)	
DENNIS EDWARDS,)	Honorable
)	Randall W. Kelley,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE BARBERIS delivered the judgment of the court.
Justices Chapman and Cates concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant forfeited review of his claims regarding the circuit court's denial of his request to limit the State's use of impeachment evidence and rendered his claims unreviewable when he elected not to testify at trial.

¶ 2 The defendant, Dennis Edwards, appeals from a final judgment of conviction after a jury trial in St. Clair County. On appeal, the defendant argues that he was denied a fair trial where the circuit court discouraged him from testifying in his own defense by denying defense counsel's midtrial request to limit the State's use of impeachment evidence. Based on the foregoing, the defendant requests that this court vacate his conviction and remand for a new trial. We affirm.

¶ 3

BACKGROUND

¶ 4 On March 29, 2009, the Illinois State Police (ISP) began investigating the shooting death of 80-year-old Spencer Brewer (Brewer) after his body was discovered in his residence. Upon investigation, the ISP concluded that Brewer's residence had been burglarized. The ISP then received information implicating the defendant in the burglary and shooting death of Brewer. The defendant was then arrested, on an unrelated charge, and transported to ISP headquarters. Upon questioning, the defendant made incriminating statements to ISP agents relating to the burglary and shooting death of Brewer. The ISP recorded the defendant's interrogation and the video recording was converted onto two DVDs. The first DVD contained 5 hours and 28 minutes of footage, while the second DVD contained 43 minutes of footage. The DVDs were then turned over to the State.

¶ 5 In May 2009, a grand jury returned a two-count indictment against the defendant charging him with one count of first degree felony murder (720 ILCS 5/9-1(a)(3) (West 2006)) and one count of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2006)). The felony murder charge was predicated upon the defendant's alleged participation in the residential burglary (720 ILCS 5/19-3 (West 2006)) and shooting death of Brewer. With no objection from the State, the charges were severed on the defendant's motion. The State elected to first proceed on the unlawful possession of a weapon by a felon charge.

¶ 6 Prior to trial, defense counsel moved to suppress the statements that the defendant made to the ISP. Defense counsel alleged that the ISP had failed to honor the defendant's invocation of his fifth amendment right to counsel. At the suppression hearing, the State

argued that the defendant's rights had not been violated. The State also argued, in the alternative, that the defendant's statements were voluntary and admissible for impeachment purposes at trial. The court reserved ruling on the alleged violation of the defendant's fifth amendment right to counsel. However, the court agreed that the defendant's statements were voluntary and ruled that the statements could be used for purposes of impeachment. A written order summarizing the court's findings was filed on September 23, 2010.

¶ 7 The circuit court addressed the pending fifth amendment issue at a subsequent hearing. After further review of the video recording, the court found that the defendant had invoked his fifth amendment right to counsel at approximately 3:37 p.m., and that 44 minutes later, at 4:21 p.m., the ISP reinitiated questioning in violation of the defendant's rights. Accordingly, the court granted the defendant's motion to suppress as to all statements made by the defendant after he had invoked his right to counsel. A second written order summarizing the court's findings was filed on September 30, 2010.

¶ 8 The case proceeded to a jury trial on the unlawful possession of a weapon by a felon charge. The defendant was found guilty and appealed his conviction. While the defendant's appeal was pending, the remainder of the cause was reassigned to another judge, and the State proceeded on the first degree felony murder charge.

¶ 9 The State filed two separate notices regarding its intention to admit certain evidence for impeachment purposes in the event the defendant elected to testify at his trial on the first degree felony murder charge. The State first sought to introduce the defendant's four prior felony convictions. The State also sought to introduce a DVD

containing a redacted version of the defendant's statements (the recorded statement). The State, citing the suppression orders, alleged that the recorded statement could be admitted for impeachment purposes if the defendant testified and his trial testimony was inconsistent with the statements he made to the ISP following his arrest. The State further alleged that it had redacted potentially prejudicial material from the recorded statement.

¶ 10 Prior to trial, the defendant asserted that his appointed defense counsel was ineffective and requested that the circuit court allow him to proceed *pro se*. The defendant claimed that his defense counsel was dishonest in representing that the recorded statement had been suppressed. Defense counsel explained to the recently assigned judge that the previous judge had suppressed the recorded statement. Defense counsel further explained that the judge had ruled the entirety of the recorded statement could be used for impeachment purposes if the defendant testified inconsistently with the recorded statement. The defendant withdrew his complaints and elected to proceed with his previously appointed counsel. With no objection from the State, the court subsequently granted defense counsel's request to withdraw from the case, and another public defender was assigned to represent the defendant.

¶ 11 In April 2013, the circuit court heard arguments on the State's notices regarding the admission of the defendant's prior convictions and the recorded statement for impeachment purposes. The court ruled that one of the defendant's four prior felony convictions would be admissible for impeachment purposes. The court reserved ruling on the admissibility of the recorded statement due to technical difficulties. At a hearing later that month, newly appointed defense counsel informed the court that he and the State had

been working together in an effort to create an agreeable, redacted version of the recorded statement. Soon thereafter, the second judge assigned to the defendant's case was removed for cause, and the case was reassigned to a third judge.

¶ 12 In July 2013, defense counsel filed a motion for clarification regarding the two suppression orders entered in September 2010. Defense counsel alleged that the orders were contradictory. Defense counsel acknowledged that the first order, entered on September 23, 2010, allowed the recorded statement to be used for impeachment purposes; however, he noted that the second order, entered on September 30, 2010, granted the defendant's motion to suppress. Defense counsel posited that the latter order prohibited the State from using the recorded statement for any purposes at trial. Defense counsel also filed a notice of an alibi defense, identifying Beverly Brooks (Brooks) as the defendant's alibi witness. Defense counsel alleged that Brooks would testify that she was at her residence with the defendant at the time of the alleged crime.

¶ 13 Later that month, the newly assigned judge heard arguments on the defendant's motion for clarification. The judge took the matter under advisement, but inquired as to whether the parties had agreed on a final, redacted version of the recorded statement in the event it was ruled admissible for impeachment purposes. The State explained that the parties remained in dispute as to 10 segments of the recorded statement. The judge then discovered that the defendant was unaware that the State and defense counsel had been working to redact the recorded statement. The judge explained to the defendant that the State and defense counsel were disputing which portions of the recorded statement could be used for impeachment purposes if the defendant testified inconsistently at trial.

¶ 14 At a later hearing, the judge found that the suppression orders were consistent. The judge clarified that the September 30, 2010, suppression order precluded the State from using the recorded statement in its case-in-chief. The judge further clarified that the September 23, 2010, order permitted the State to use the recorded statement for impeachment purposes at trial. Defense counsel then claimed that further redactions of the recorded statement were necessary, and the matter was set for hearing.

¶ 15 At a pretrial hearing in November 2013, defense counsel informed the circuit court that the defendant did not wish to argue for further redactions, and requested that the recorded statement be shown, as redacted, on the date of the hearing. Defense counsel expressed disagreement with the defendant's decision. However, defense counsel believed that the defendant was entitled to make the decision because arguing for redactions would "intervene [*sic*]" with the defendant's right to testify. The defendant personally represented to the court that he believed that the recorded statement had been suppressed, and could not be used for any purpose at trial. In response, the court explained that the recorded statement could not be used in the State's case-in-chief, but could be used for impeachment purposes. The defendant disagreed, and affirmed that he did not want to argue for further redactions of the recorded statement. The final, redacted version of the recorded statement is not included in the record on appeal.

¶ 16 The case proceeded to trial, where the State sought to prove that the defendant and his two nephews shot and killed 80-year-old Brewer while burglarizing his home in the early morning hours of March 29, 2009. After the State rested, the defendant informed the circuit court that he planned to testify in his own defense. The court then admonished

the defendant regarding his right to testify. The State sought to clarify that the recorded statement could be used for impeachment purposes if the defendant testified inconsistently with the prior statement he had made to the ISP. In response, defense counsel reiterated the defendant's disagreement with the use of the recorded statement for any purpose, but counsel explained that the defendant understood that the recorded statement would only be used for impeachment purposes. The following colloquy took place between defense counsel and the court:

"MR. BARICEVIC [Defense Counsel]: However, we would argue that the State can only use the DVD for the specific instances where it is impeaching [the defendant], and should not be permitted to play the entire DVD, only the factual discrepancies with the Court. I mean the conver—we have a redacted version.

THE COURT: There is a redacted version. Are you talking about that being redacted even further?

MR. BARICEVIC: Well, I just—the State I believe will attempt to play the entire two hour and 20 minute DVD. I think only the minute portions where [the defendant] contradicts what he may have said in the past, should be used.

THE COURT: No. That's contrary to [the original judge's] order, contrary to the order that I entered, which was in agreement with [the original judge's] order."

The court stated it would presume that defense counsel's statements "reiterated" the defendant's objection to the use of the recorded statement for any purpose, and defense counsel affirmed the court's presumption. The court then informed the defendant that he would be afforded the opportunity to raise the issue on appeal.

¶ 17 The defense then called Brooks, the defendant's alibi witness. Brooks testified that she had been at her residence with the defendant at the time the offense allegedly took place. Brooks remembered the night of March 29, 2009, because it was her birthday. Brooks further recounted that she was at her residence when the defendant arrived around

12:30 or 1 a.m. Brooks and the defendant talked until approximately 2 or 3 a.m., drank wine, and then both fell asleep. Brooks recalled that the defendant left around 8 a.m. the next morning and returned with several small gifts at approximately 9:30 a.m.

¶ 18 On cross-examination, Brooks admitted that she did not inform the police that she had been at her residence with the defendant the night of the alleged murder. However, Brooks explained that she attempted to contact an officer, but the officer never returned her calls. It was also revealed that Brooks visited the defendant 157 times in the St. Clair County jail subsequent to his arrest in 2009.

¶ 19 Defense counsel was then granted a brief recess to discuss the defendant's intent to testify. After the recess, defense counsel informed the circuit court that the defendant had decided not to testify. The court again admonished the defendant regarding his right to testify, and the court confirmed that the defendant was afforded adequate time to consult with defense counsel. The court proceeded to ask if there was anything the court could do to change the defendant's mind, and the defendant replied in the negative. The court then found that the defendant's decision not to testify was voluntary, knowing, and intelligent. The defense rested. The State never sought to admit the defendant's recorded statement into evidence and did not refer to the recorded statement during its opening statement or closing arguments.

¶ 20 The defendant was found guilty of first degree felony murder, but the jury determined that the State had not proven, beyond a reasonable doubt, that the defendant had personally fired the shot that killed Brewer. The court subsequently sentenced the

defendant to a term of 30 years' imprisonment. The defendant filed a timely notice of appeal.

¶ 21

ANALYSIS

¶ 22 On appeal, the defendant claims that the circuit court erred in denying defense counsel's midtrial request to limit the State's use of the recorded statement for impeachment purposes. The defendant also claims that the court "chilled" his constitutional right to testify in denying defense counsel's request. In response, the State raises arguments of forfeiture and waiver asserting that the defendant failed to preserve his claim for review.

¶ 23 Before addressing the State's specific arguments, we discuss the concerns motivating the doctrines of forfeiture and waiver. Although the terms are often used interchangeably, forfeiture and waiver are distinct legal doctrines. *People v. Hughes*, 2015 IL 117242, ¶ 37. Forfeiture is the failure to timely comply with procedural requirements, while waiver is the voluntary relinquishment of a known right. *Id.* "[F]orfeiture rules exist to encourage defendants to raise issues in the trial court, thereby ensuring both that the trial court has an opportunity to correct any errors prior to appeal and that the defendant does not obtain a reversal through his or her own inaction." *People v. Denson*, 2014 IL 116231, ¶ 13. Whereas, waiver principles exist to discourage a defendant from raising errors on appeal that resulted from a defendant's affirmative, or strategic, conduct during the circuit court proceedings. See *People v. Bowens*, 407 Ill. App. 3d 1094, 1098 (2011). While a reviewing court may bypass normal forfeiture under certain circumstances, review of a claimed error that resulted from a defendant's

intentional conduct, which goes beyond normal forfeiture, runs contrary to "notions of fair play." *People v. Villarreal*, 198 Ill. 2d 209, 227 (2001).

¶ 24 The State specifically contends that the defendant forfeited his claims by failing to make a proper objection at trial and by failing to include the claims in his posttrial motion. The State also contends that the defendant's claims are unreviewable because he elected not to testify at trial. We agree.

¶ 25 We note that the State's first argument concerns forfeiture and the defendant's failure to properly raise the claims before the circuit court. Generally, to preserve an issue, a defendant must object at trial and raise the claim in a written posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Here, defense counsel's general midtrial request that "only the minute portions where [the defendant] contradicts what he may have said in the past, should be used" was insufficient to preserve the specific claims raised by the defendant on appeal. In addition, the defendant failed to include the specific claims in his written posttrial motion. Accordingly, we agree that the defendant procedurally forfeited review of the claims raised on appeal.

¶ 26 Nevertheless, the defendant urges that this court should review his claims, despite his procedural forfeiture, where the circuit court assured the defendant that his claims would be reviewable on appeal and his claims involve a constitutional issue. We note, however, that while the defendant's procedural forfeiture could be excused under certain circumstances (see *Enoch*, 122 Ill. 2d 176), the State's additional argument regarding the defendant's election not to testify raises distinct concerns that may preclude further review of the defendant's claims. These concerns are set forth in *People v. Averett*, 237

Ill. 2d 1 (2010), *People v. Patrick*, 233 Ill. 2d 62 (2009), and *People v. Whitehead*, 116 Ill. 2d 425 (1987). In *Averett*, our supreme court concluded that a defendant's decision not to testify "goes beyond normal forfeiture," holding that the defendant's claim regarding improper impeachment with a prior conviction was "unreviewable," even for plain error. *Averett*, 237 Ill. 2d at 19 (citing *Patrick*, 233 Ill. 2d at 79). In *Patrick*, our supreme court reasoned that the defendant "must take the risk and present the testimony" or "'adopt an alternative strategy,' " but the defendant could not "'have it both ways by altering their trial strategy to make the best of the trial court's order, depriving the reviewing court of a reviewable record, and still maintain that the order was erroneously entered.'" *Patrick*, 233 Ill. 2d at 79 (quoting *Whitehead*, 116 Ill. 2d at 443-44). As such, the State's second argument raises concerns motivating the doctrine of waiver and the sufficiency of the record.

¶ 27 Thus, we next address whether the defendant's election not to testify in the present case precludes this court from reviewing the merits of his claims on appeal. The State contends that the defendant was required to testify in order for the issue to be reviewable on appeal pursuant to *Luce v. United States*, 469 U.S. 38 (1984), and *Whitehead*, 116 Ill. 2d 425. The defendant asserts that the cases cited by the State are distinguishable and that he was not required to testify in order to preserve his claim for review pursuant to *People v. Easley*, 148 Ill. 2d 281 (1992). We review *de novo* this question of law. *People v. Chapman*, 194 Ill. 2d 186, 217 (2000).

¶ 28 In *Luce*, the defendant challenged the lower court's denial of his motion to preclude the State from using his prior conviction for impeachment at trial. *Luce*, 469

U.S. at 40. The defendant also claimed that the court's denial motivated his decision not to testify. *Id.* at 42. On review, the Supreme Court noted that a reviewing court is "handicapped in any effort to rule on subtle evidentiary questions outside a factual context." *Id.* at 41. The Court further observed that a reviewing court could not perform the fact-specific balancing test required under Federal Rule 609(a)(1) without knowing "the precise nature" of the defendant's testimony, "which is unknowable" when the defendant chooses not to testify. *Id.*

¶ 29 In addressing the defendant's claim that the disputed ruling motivated his decision not to testify, the *Luce* Court reasoned that "a reviewing court cannot assume that the adverse ruling motivated a defendant's decision not to testify," as a defendant's decision rarely turns on one factor alone. *Id.* at 42. The Court further reasoned that practically every adverse *in limine* ruling "would result in the windfall of automatic reversal" if the ruling kept a defendant from testifying. *Id.* The Court observed that requiring a defendant to testify in order to preserve a claim of improper impeachment with a prior conviction would "enable the reviewing court to determine the impact any erroneous impeachment may have had in light of the record as a whole" and would "discourage making such motions solely to 'plant' reversible error in the event of conviction." *Id.* Thus, the Court held "that to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." *Id.* at 43.

¶ 30 In *Whitehead*, the Illinois Supreme Court adopted the logic of *Luce* in addressing the defendant's challenge to the circuit court's denial of two motions *in limine* regarding impeachment evidence. *Whitehead*, 116 Ill. 2d at 444. The defendant moved to preclude

the State from questioning a defense witness about the defendant's prior admissions regarding other crimes and from using the admissions to discredit the defendant's trial testimony. *Id.* at 442-43. The court denied the defendant's motions, refused to accept the defendant's offer of proof setting forth the substance of his direct testimony, and noted that the State's ability to raise the prior admissions would depend upon the actual testimony elicited on direct examination. *Id.* at 443. Noting that neither the defendant nor his expert testified at trial, our supreme court concluded that it could not "determine whether the trial court would have erroneously permitted the State to raise the substance" of the disputed evidence on cross-examination. *Id.* Our supreme court cautioned against "reviewing hypothetical cross-examination" and explained:

"Counsel must stand on their objections and call the witnesses, thus opening the possibility that an erroneous decision on the scope of examination might occur and require review by a reviewing court, or forgo calling the witnesses and adopt an alternative strategy. But defense counsel may not have it both ways by altering their trial strategy to make the best of the trial court's order, depriving the reviewing court of a reviewable record, and still maintain that the order was erroneously entered." *Id.* at 443-44.

The defendant further claimed that he dropped his insanity defense and did not testify at trial because the circuit court denied the motions. *Id.* at 444. The *Whitehead* court rejected these arguments, citing *Luce*, and held that the defendant was required to testify in order to preserve his claims for review. *Id.*

¶ 31 In *Easley*, our supreme court reviewed the defendant's challenge to the circuit court's ruling, which allowed the State to use the defendant's suppressed statement for impeachment purposes at trial, although the defendant did not testify at trial. *Easley*, 148 Ill. 2d at 310. The defendant in *Easley* asserted that his statement was inadmissible for

purposes of impeachment because it was involuntary, and its use violated the due process clause of the fourteenth amendment. *Id.* at 307. The defendant also claimed that he did not testify because of the court's ruling. *Id.* In distinguishing *Luce*, the *Easley* court determined that the lower court had ruled on the merits of the constitutional issues, and that those issues involved legal considerations, as opposed to the factual considerations contemplated by the *Luce* Court. *Id.* at 310. Thus, our supreme court concluded that the defendant was not required to testify at trial to preserve the constitutional issues raised on appeal. *Id.*

¶ 32 We observe that the disputed ruling in the present case is more comparable to those challenged in *Luce* and *Whitehead*. While both *Easley* and the present case involve rulings regarding impeachment with a suppressed statement, the defendant in *Easley* challenged the original suppression order arguing that the defendant's statement was involuntary and inadmissible for impeachment purposes. In contrast, the defendant, here, concedes that legal issue, acknowledging that his statement was voluntary and that the circuit court's initial ruling allowing impeachment with the recorded statement was consistent with legal precedent. The defendant's challenge, instead, centers on the court's denial of defense counsel's midtrial request to limit the scope of permissible impeachment evidence. The court denied defense counsel's request without having heard the defendant's trial testimony and without the State having made a request to introduce the recorded statement for impeachment purposes at trial. Thus, as in *Luce* and *Whitehead*, the evidentiary ruling was made outside of a factual context and the recorded statement was never actually introduced into evidence.

¶ 33 As such, even assuming *arguendo* that this court could reach the merits of the defendant's forfeited claims, we would be unable to review the defendant's alleged error. We acknowledge that the admission of the impeachment evidence in *Luce* and *Whitehead* involved a fact-specific balancing test, whereas the admission of the recorded statement, here, would have involved the circuit court's determination as to whether the recorded statement was inconsistent with the defendant's trial testimony. See *Grunewald v. United States*, 353 U.S. 391 (1957) (a criminal defendant may be impeached with a prior inconsistent statement only if a court is satisfied that the prior statement is inconsistent with his trial testimony). We note, however, that we would similarly be hindered in reviewing the court's determination in this regard without knowing the precise nature of the defendant's trial testimony.

¶ 34 To the extent the defendant insists that his trial testimony is unnecessary for this court to determine whether the disputed ruling was erroneous as a matter of law, he fails to recognize that the circuit court could have amended the disputed ruling prior to the actual admission of the recorded statement into evidence. Because the defendant elected not to testify at trial, however, the recorded statement was never admitted into evidence and the record was never fully developed to support the defendant's claimed error. As a result, this court is unable to determine whether the court would have erroneously permitted the State to use the recorded statement for impeachment purposes because the admission of the recorded statement was conditioned upon the substance of the defendant's unknown trial testimony. See *Whitehead*, 116 Ill. 2d at 444. Accordingly, even if we were to bypass, or excuse, the defendant's procedural forfeiture, the

defendant's strategic decision not to testify rendered the record insufficient for our review of his claimed error on appeal.

¶ 35 We also find it noteworthy that the defendant failed to include the final, redacted version of the recorded statement in the record on appeal. Instead, the record includes DVDs containing the entirety of the defendant's interview with police. It is well-settled that the defendant, as the appellant, must ensure the record is clear and sufficiently complete to substantiate the claims of error he intends to raise on appeal. *People v. Carter*, 2015 IL 117709, ¶ 19.

¶ 36 Lastly, we are not persuaded by the defendant's claim that the circuit court's ruling "impinged upon" his constitutional right to testify. Although the defendant may have considered the court's ruling in electing not to testify, his constitutional right to testify was not violated by any deterrent effect posed by the risk of being impeached with his prior inconsistent statement. See *Averett*, 237 Ill. 2d at 16. In situations, as here, where a defendant is deciding whether to testify without knowing whether the unwanted evidence will be admitted until his direct testimony is presented, our supreme court has cautioned that "defendants must take the risk and present the testimony for the issue to be reviewable" on appeal. *Patrick*, 233 Ill. 2d at 79. Moreover, the court, here, twice admonished the defendant of his right to testify at trial and even asked the defendant if there was anything the court could do to change the defendant's mind regarding his decision not to testify. Despite having the opportunity to state his reasoning on the record, the defendant replied in the negative making no mention of the recorded statement. For

these reasons, we reject the defendant's claim that the court's ruling "impinged upon" his constitutional right to testify.

¶ 37

CONCLUSION

¶ 38 For the aforementioned reasons, we conclude that the defendant forfeited review of his claims regarding the circuit court's denial of his request to limit the State's use of impeachment evidence, and we honor his procedural forfeiture where the defendant's decision not to testify precludes this court from reviewing the merits of his claimed error. Thus, the order of the circuit court of St. Clair County is hereby affirmed.

¶ 39 Affirmed.