2019 IL App (4th) 160723-U

NO. 4-16-0723

FILED
April 4, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
MARCUS A. BURKE,	)	No. 15CF518
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas M. O'Shaughnessy,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding defendant failed to persuade (1) the evidence was insufficient to sustain his conviction for threatening a public official, (2) his contention of error suggesting the jury was improperly instructed on the elements of the charged offense of threatening a public official was reviewable under the plain-error doctrine, and (3) the trial court abused its discretion by allowing the State to present two audio recordings at his trial.

¶ 2 Following a jury trial, defendant, Marcus A. Burke, was convicted of aggravated discharge of a firearm and threatening a public official and sentenced to concurrently imposed terms of 15 years' and 8 years' imprisonment. Defendant appeals, arguing (1) the State failed to prove him guilty beyond a reasonable doubt of threatening a public official, (2) the jury was improperly instructed on the elements of the charged offense of threatening a public official, and (3) the trial court abused its discretion when it allowed the State to present two audio recordings

at his trial. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Information

¶ 5 In August 2015, the State charged defendant by information with aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(1) (West 2014)) (count I), unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2014)) (count II), and threatening a public official (720 ILCS 5/12-9 (West 2014)) (count III). Count II was later severed for purposes of trial and then dismissed as part of a plea agreement in another case.

¶ 6 B. Amended Information

¶ 7 In December 2015, the State filed a motion to amend the information, which the trial court granted over no objection. Count III of the amended information alleged:

> "[D]efendant ***[,] on or about [August 29, 2015], knowingly and willfully deliver[ed] or covey[ed], directly or indirectly, to Nathan Howie, a public official, by any means a communication containing a threat containing specific facts indicative of a unique threat not a generalized threat of harm to the person, family[,] or property of Nathan Howie that would place Nathan Howie, a public official, in reasonable apprehension of immediate or future bodily harm and the threat was conveyed because of the performance or nonperformance of some public duty, because of hostility of the person making the threat toward the status or position of the official, or because of any other factor related to the

official's public existence."

¶ 8 C. Motion *in Limine* to Bar Evidence of Phone Calls

¶ 9 In February 2016, defendant filed a motion *in limine* to bar evidence of phone calls from the county jail, which was later amended. In his amended motion, defendant requested, in part, the trial court bar the State from introducing a recording of a phone call between him and Kimberly Rowell on September 1, 2015, and a recording of a phone call between him and an unnamed individual on September 9, 2015. In support of the requested relief, defendant argued (1) the State could not lay a proper foundation for the recordings; (2) the recordings were irrelevant because at the time of the calls he was charged in two other cases, one of which involved a firearm, and it was unclear whether he was discussing the instant case during the calls; and (3) the recordings referred to inadmissible other-crimes evidence.

¶ 10 D. Jury Trial

¶ 11 In March 2016, the trial court held a three-day jury trial. The following is gleaned from the evidence presented.

¶ 12 1. *Officer Nathan Howie*

¶ 13 Police Officer Nathan Howie testified he had been an officer with the City of Danville Police Department for 21 years. On August 29, 2015, at approximately 9:30 p.m., Officer Howie was speaking with Police Commander Joshua Webb in a parking lot in the 400 block of Vermilion Street when he heard approximately 10 to 12 gunshots coming from one to two blocks away. After hearing the gunshots, he and Commander Webb drove in their respective vehicles two blocks east to Jackson Street.

¶ 14 Officer Howie approached the area from the south, and Commander Webb

approached the area from the north. Officer Howie parked his vehicle near a residence located at 432 North Jackson Street. Officer Howie observed three men walking toward the residence. He shined a spotlight on the residence and the three men and then he and Commander Webb, both wearing police uniforms, approached the men with their guns drawn. The three men were identified as defendant, Charles Eaton, and Yuri Lillard. They were checked for weapons, and none were discovered. The officers told the men to not leave until the investigation was completed. The men were not handcuffed. On cross-examination, Officer Howie acknowledged observing a fourth person, Christopher Echols, walking quickly into the residence from its porch.

¶ 15 After the three men were directed not to leave, Officer Howie approached the residence located at 432 North Jackson Street. At some point, he was joined by Commander Webb. Several individuals were discovered inside the residence, including Kaitlin Baird, Echols, Anthony Powell, and Myron Wright. On cross-examination, Officer Howie acknowledged both Powell and Wright behaved as if they did not want to speak with him. No search of the residence occurred.

¶ 16 Officer Howie returned to the three men outside. Officer Howie began a conversation with defendant about whether he heard or saw anything. Officer Howie testified defendant stated he had just arrived and had not heard anything. Officer Howie described defendant's "tone of voice" as "agitated" and noted defendant was "upset over being stopped and detained."

¶ 17 Officer Howie testified "at some point during the conversation, [defendant] told me that we had gotten away with shooting Bang in Fair Oaks several years ago, and that we would not get away with that again." Officer Howie testified "Bang" was a nickname for Aaron

Moss, a citizen who was shot and killed by a police officer approximately 8 to 10 years earlier in Fair Oaks. Officer Howie testified Moss was shot after he pulled a gun on an officer and several other officers had to be called to the scene due to a "large amount of people jumping on officers and things like that."

¶ 18 Officer Howie testified defendant, "after saying we would not get away with it again, *** said that we had better get bigger guns than the ones we had on our waist, because they had bigger guns and they would come after us." In response to this statement, Officer Howie told defendant "he had better not go down that path and not to threaten officers." When asked if defendant responded to this warning, Officer Howie testified: "Yes. He said that you never know when he may see us out someplace or at a movie theater, and you don't know what might happen there."

¶ 19 Officer Howie testified he took defendant's statements to be a threat. He noted the statements "raised my awareness a lot," particularly given the specificity about the prior incident. Officer Howie testified he had previously been subject to threats against him in his official capacity but described the threat by defendant as "different *** because of the specifics and even after telling him not to make the threats, they continued."

¶ 20 On cross-examination, Officer Howie identified a police report he prepared after the incident and testified about a statement written therein: " 'Burke told Officer Howie that we,' and I had in parenthesis, (police) end parenthesis, 'got away with shooting "Bang," ' in quotations, then parenthesis, (Aaron Moss) 'in Fair Oaks last time, but that would not happen again. Burke said the next time they would come after us.' " Officer Howie acknowledged he previously testified defendant indicated the police would not get away with it again even though

that was not the phrase used in the police report.

¶ 21 After Officer Howie spoke with defendant, Sergeant Eric Kizer administered gunshot residue testing to Eaton, Lillard, and defendant. Officer Howie testified defendant resisted by pulling away and refusing to show his hands, which resulted in officers placing defendant in handcuffs and assisting in the administration of the testing. Gunshot residue testing was not administered to any of the individuals inside the residence.

¶ 22 2. *Commander Joshua Webb*

¶ 23 Police Commander Joshua Webb testified he had been an officer with the City of Danville Police Department for 12 years, serving as a commander for the previous 2 years. On August 29, 2015, at approximately 9:30 p.m., he was speaking with Officer Howie near the 400 block of Vermilion Street when he heard approximately 10 gunshots coming from approximately one block away. While proceeding towards the area where he heard the gunshots, Commander Webb received a dispatch call indicating shots were fired in the 400 block of Jackson Street, which was approximately two blocks from where he first heard the gunshots.

¶ 24 Commander Webb testified he arrived at the 400 block of Jackson Street approximately 30 seconds after hearing the gunshots. Upon his arrival, he observed three men outside. He and Officer Howie approached the men, explained why they were there, and searched the men for weapons. No weapons were found on the men. The men were identified as defendant, Eaton, and Lillard.

¶ 25 Commander Webb noticed an individual near his squad car was trying to get his attention. Commander went and spoke with the individual, who he identified as Frank McCullough. Commander Webb testified McCullough stated he observed the discharge of a

firearm in front of 432 and 439 North Jackson Street and then pointed to defendant and said, " 'That's the guy I saw doing the shooting.' " The identification occurred approximately 10 minutes after the gunshots.

¶ 26 Commander Webb searched the area outside 432 and 439 North Jackson Street. He discovered shell casings in each location, approximately 8 to 10 shell casings in total. He marked the shell casings to be photographed by a crime scene technician, Sergeant Kizer. He then went to speak with Officer Howie, who was inside the residence at 432 North Jackson Street. After that conversation, Commander Webb and Officer Howie returned to the three men outside.

¶ 27 Commander Webb testified Sergeant Kizer administered gunshot residue testing to the three men. Eaton and Lillard cooperated with testing. Commander Webb testified defendant initially indicated he would comply with testing but then declined to do so and attempted to walk away. The officers grabbed defendant and told him to walk to Sergeant Kizer for testing. Defendant resisted testing by making his hands into a fist. As a result, the officers took defendant into custody. Commander Webb testified they then "did the best we could at getting a gunshot residue test on [defendant]."

¶ 28 Commander Webb acknowledged seeing several individuals inside the residence at 432 North Jackson Street. He indicated he spoke with Powell, who appeared agitated and animated, and Wright, who appeared calm. Commander Webb acknowledged gunshot residue testing was not administered to any of the individuals inside the residence and no search of the residence occurred. Commander Webb testified additional testing and a search did not occur because of his conversation with McCullough.

¶ 29 3. *Frank McCullough*

¶ 30 Frank McCullough testified he lived at 440 North Jackson Street. He was at home on August 29, 2015, and at some point in the night he heard gunshots outside and a neighbor screaming for her son, E.T. After hearing the commotion, McCullough looked out his window and saw "more gunshots come from the young man that was standing in the street." The male shooter was alone, but other individuals were present outside. McCullough believed the shots were being fired in the direction where some men were playing basketball, in the area of 437 or 439 Jackson Street. McCullough testified the police arrived approximately 15 seconds after the gunshots and then he saw the shooter with the officers approximately 20 seconds later.

¶ 31 McCullough left his home and went to assist his neighbor with finding her son. After being unable to find E.T., McCullough called for an officer, Commander Webb. He told Commander Webb he saw the shooter and the shooter was with the other officer present. McCullough pointed out the shooter to Commander Webb. A few days after the shooting, McCullough went to the police station and gave a statement.

¶ 32 McCullough identified defendant in court as the shooter he pointed out to Commander Webb. McCullough testified he did not know what type of gun defendant had but believed it was a handgun. McCullough also testified defendant was dressed in the same clothes when the shooting occurred and when he was with the officers.

¶ 33 On cross-examination, McCullough acknowledged he spoke with Detective Patrick Carley on August 31, 2015, and told Detective Carley he did not exactly see the face of the shooter and indicated the shooter was wearing a dark shirt. McCullough testified he did not recall stating to Detective Carley he believed the shooter had dark skin. He also did not recall

telling Detective Carley somebody said the shooter went into the house and changed clothes. McCullough acknowledged when Detective Carley asked if he saw the gun in the shooter's hand, he said, " 'No, but I saw the fire coming from the gun.' " He testified he saw the muzzle flash from the gun but could not clearly see the type of gun.

¶ 34 4. *K.B.*

¶ 35 K.B. testified, on August 29, 2015, she was at 432 North Jackson Street along with several other individuals, including A.V., J.C., and Powell.

¶ 36 Around 8 p.m., K.B. went across the street to E.T.'s residence. When she and another individual, Q.S., were on the porch of E.T.'s residence, she heard gunshots. She observed a man wearing a hat, jeans, and a shirt doing the shooting. The man was standing by 432 North Jackson Street, separated from a group of other individuals who were outside. K.B. testified the man appeared "mad." She and others at E.T.'s residence ran to Carver Park. She later returned to Jackson Street and gave an officer her name but did not disclose any additional information.

¶ 37 On September 2, 2015, K.B. spoke with Detective Carley and Sergeant Josh Campbell and told them what she observed. K.B. was given a photographic lineup containing photographs of six men. She circled a photograph and indicated the man in the photograph was the shooter. The photograph depicts defendant.

¶ 38 K.B. identified defendant in court as the shooter. She testified she was able to clearly see defendant when he was shooting the weapon. She could not recall what type of weapon he had but believed it to be a handgun. She testified she did not know defendant before that night.

¶ 39 K.B. testified she later discovered bullet holes in the window and wall of E.T.'s residence. She acknowledged she did not tell the police about the bullet holes.

¶ 40 K.B. acknowledged she recently pleaded guilty to criminal trespass and was sentenced to supervision in a case where she was charged with criminal trespass and residential burglary. She testified she did not receive a plea deal for testifying in this case.

¶ 41 On cross-examination, K.B. acknowledged she told Detective Carley she met defendant on the day of the shooting. She also acknowledged she told Detective Carley defendant was taller, light-skinned, and wearing a white t-shirt and a white hat at the time of the shooting.

¶ 42 5. *Robert Berk*

¶ 43 Robert Berk, a qualified expert in the area of gunshot residue testing, testified he analyzed the gunshot residue kits administered to defendant, Eaton, and Lillard. Each kit had been administered against only the right hand of each man. Each kit showed negative results for direct exposure to gunshot residue.

¶ 44 6. *Sergeant Eric Kizer*

¶ 45 Sergeant Eric Kizer testified he was previously a crime scene technician for the City of Danville Police Department. On August 29, 2015, at approximately 9:45 p.m., he reported to 432 North Jackson Street to photograph and collect evidence and to administer gunshot residue testing to certain individuals. Sergeant Kizer identified photographs of four shell casings he collected from 432 North Jackson Street and three shell casings he collected from across the street from that address. He also identified gunshot residue testing kits he administered to defendant, Eaton, and Lillard.

¶ 46 At 10:23 p.m., Sergeant Kizer administered gunshot residue testing to defendant. Sergeant Kizer testified defendant answered his questions and indicated he was right-handed. Once Sergeant Kizer began to administer the test, defendant pulled away. Officers then restrained defendant and placed him in handcuffs. Defendant clenched his right hand to make a fist. Sergeant Kizer testified he tried to complete testing as best he could. He indicated he only tested the right hand of defendant because of defendant's answer indicating his right hand was his dominant hand.

¶ 47 7. *Q.S.*

¶ 48 Q.S. testified, on August 29, 2015, he went to E.T.'s residence to play basketball. K.B., Q.S.'s younger brother, and other girls were present at E.T.'s residence. Q.S. initially testified he was present at E.T.'s residence for no longer than 10 minutes and nothing happened while he was there. He later testified about the shooting.

¶ 49 Q.S. testified he was playing basketball outside E.T.'s residence when the shooting occurred. He did not recall whether it was light or dark outside at the time of the shooting. He testified some girls, including K.S., were on the front porch of E.T.'s residence during the shooting. When asked if he saw the shooter, Q.S. testified, "No, not really." When asked to describe what he meant by "not really," Q.S. testified he "[j]ust seen some tattoos." He recalled the shooter having tattoos on his arms. He also recalled the shooter was wearing "black sweats" and was standing across the street. Q.S. testified the shots struck E.T.'s residence. After the shooting began, Q.S. ran to Carver Park with K.S. He did not speak to a police officer that night.

¶ 50 On August 31, 2015, Q.S. spoke with Detective Carley and Sergeant Campbell.

When asked if he told Detective Carley he observed a taller, light-skinned black male possibly with a black hat standing in the street and holding a gun in the air, Q.S. testified he did not. Q.S. testified he told Detective Carley a black male pointed a gun toward him and his friends and started shooting while walking towards E.T.'s residence. Q.S. testified he also told Detective Carley he probably could not identify the shooter. Q.S. acknowledged Detective Carley and Sergeant Campbell showed him a photographic lineup containing photographs of six men, and he signed the instructions indicating he did not have to identify an individual. He testified he was told to sign the instructions and the officers did not read him the instructions. Q.S. acknowledged he circled one of the six photographs. He testified he did so because it was a person that looked "closest" to the shooter. The photograph depicts defendant.

¶ 51 Q.S. testified he could not identify the shooter at trial because the incident occurred "[s]o long ago."

¶ 52 8. *E.T.*

¶ 53 E.T. testified, on August 29, 2015, he was at his residence playing basketball with Q.S. K.S. and other girls were also present. Approximately 15 minutes after Q.S. arrived, E.T. heard gunshots. E.T. testified he and the others were on the front porch when the shots occurred and the shooter was across the street. After hearing the gunshots, everyone ran to Carver Park. E.T. spoke with an officer later that evening and told the officer he did not get a good look at the shooter. E.T. testified he was unable to describe or identify the shooter to the officer.

¶ 54 E.T. acknowledged he spoke with Detective Carley and Sergeant Campbell on September 2 and 23, 2015. E.T. testified he did not tell the officers during the September 2, 2015, meeting he observed a taller, light-skinned black male with a white shirt and white hat

standing across the street by the sidewalk on the night of the incident. He acknowledged he stated he observed a black male start to shoot towards him and his friends. E.T. testified he did not tell the officers he knew the shooter. E.T. acknowledged he was shown a photographic lineup containing photographs of six men during the September 23, 2015, meeting and then placed a checkmark next to two of the photographs. He asserted he put the checkmarks on those photographs because the officers were leading him to do so. He also asserted the officers told him to place a checkmark on the individuals he saw across the street on the evening of the shooting, and he believed he saw the two individuals in the photographs across the street. One of the two photographs depicts defendant.

¶ 55 On cross-examination, E.T. testified he told the officers he saw "a couple light-skinned dudes over there with a couple white shirts." E.T. further testified he did not tell the officers he knew the race of the individual shooting at him nor did he indicate the shooter changed his shirt from a white to a black one.

¶ 56 9. *Detective Patrick Carley*

¶ 57 Detective Patrick Carley testified he took several statements concerning the August 29, 2015, shooting.

¶ 58 On September 2, 2015, Detective Carley took a statement from K.B. and showed her a photographic lineup. Detective Carley testified K.B. identified a photograph of defendant as the shooter.

¶ 59 On August 31, 2015, Detective Carley took a statement from Q.S. and showed him a photographic lineup. Detective Carley testified Q.S. stated he observed a taller, light-skinned black male, possibly with a black hat, standing across the street holding a gun in the air.

Detective Carley testified he reviewed the photographic lineup instructions with Q.S. and then Q.S. circled a photograph while he was alone in a room. Detective Carley testified he later asked Q.S. if the photograph he circled was the person who shot at him and Q.S. answered in the affirmative.

¶ 60 On September 2, 2015, Detective Carley took a statement from E.T. and showed him a photographic lineup. Detective Carley testified E.T. advised he observed a taller, light-skinned black male with a white shirt and white hat standing across the street by the sidewalk. E.T. also advised he recognized one of the guys as the shooter but he was not wearing a black shirt and must have changed it. Detective Carley testified he asked E.T. if the person the police arrested was the same person that shot at him and E.T. indicated in the affirmative. Detective Carley testified he reviewed the photographic lineup instructions with E.T. He acknowledged the instructions were no longer attached to the photographic lineup given to E.T. Detective Carley testified he did not tell or otherwise suggest E.T. should select someone from the photographs. Detective Carley testified he asked E.T. if any of the photographs looked like the shooter and E.T. stated he was unsure if he could identify the shooter.

¶ 61 On August 31, 2015, Detective Carley took a statement from McCullough. Detective Carley testified McCullough stated he could only see the street in front of 432 Jackson Street from his home and he did not exactly see the shooter's face. McCullough further stated the shooter was wearing a dark shirt and was possibly dark-skinned.

¶ 62 10. *Evidence Custodian Bruce Stark*

¶ 63 Evidence Custodian Bruce Stark testified he was responsible with handling the evidence in this case. Stark identified the shell casings he recovered from the evidence lockers as

.22-caliber shell casings.

¶ 64 11. *Captain Ray Lewellyn*

¶ 65 Captain Ray Lewellyn testified he was in charge of the county jail. As part of his responsibilities, he kept track of visitation records. He identified a visitations log that showed defendant was visited by Kimberly Rowell on September 1, 2015. Captain Lewellyn testified the visitor and the inmate are separated by glass and may communicate through a telephone during visitations. He further testified the telephone conversations are recorded by an inmate telephone system, Securus. Captain Lewellyn also kept track of where inmates are held. He identified a document from the jail management system indicating defendant was being held in "T-Block" on September 9, 2015. Captain Lewellyn testified inmates in "T-Block" were able to make phone calls, which were recorded.

¶ 66 12. *Motion* in Limine *to Bar Evidence of Phone Calls*

¶ 67 At various points throughout defendant's trial, the trial court addressed defendant's motion *in limine* to bar evidence of phone calls from the county jail. The State ultimately sought to introduce recordings of only portions of two phone calls. Specifically, the State sought to introduce a portion of the September 1, 2015, call beginning at 4 minutes and 19 seconds and ending at 8 minutes and 31 seconds and a portion of the September 9, 2015, call beginning at 3 minutes and 5 seconds and ending at 7 minutes and 20 seconds. Defendant objected to the introduction of any portion of the calls, arguing (1) the State could not lay a proper foundation, (2) the calls were irrelevant, and (3) the calls introduced impermissible other-crimes evidence.

¶ 68 Defendant's content-based objections were primarily based on his assertion the

phone calls related to his other pending case as opposed to the instant case. In support, defendant noted (1) no gun was found in either case; (2) a call referred to Lillard as his "rappie," which he asserted meant codefendant, and Lillard was not his codefendant in this case; and (3) a call referred to "Studio 25," and Studio 25 related to another case. The State disagreed with defendant, maintaining the phone calls directly related to this case. The State indicated it provided the trial court with "a copy of the discovery" from the other case against defendant. After indicating it provided the court with the discovery, the State noted: "there was not a gunshot residue test done in that case." In response, defendant's counsel noted: "there was no gun found, just like in this case." We note the discovery tendered to the court is not contained in the record on appeal.

¶ 69 The trial court ruled it would allow the State to introduce a portion of the September 1 and 9, 2015, phone calls. Specifically, the court ruled it would allow the State to introduce a portion of the September 1, 2015, call beginning at 6 minutes and 9 seconds and ending at 8 minutes and 14 seconds and a portion of the September 9, 2015, call beginning at 3 minutes and 5 seconds and ending at 3 minutes and 44 seconds. The court stated it found the statements contained in those portions of the calls referenced this case. The court made clear its ruling was subject to the State laying a proper foundation.

¶ 70 After the trial court overruled defendant's objections, the State presented foundational testimony outside the presence of the jury.

¶ 71 Sergeant Josh Campbell testified he reviewed two audio recordings on State's exhibit No. 17 and identified those recordings as containing a portion of a September 9, 2015, phone call from "T-Block" and a portion of a September 1, 2015, phone call from a visitation.

Sergeant Campbell testified he discovered the calls and preserved them.

¶ 72 As to the September 9, 2015, phone call, Sergeant Campbell testified he was listening to recordings of phone calls from "T-Block" and heard in a phone call a male inmate ask a female to make a phone call for "Marcus Burke." The female referred to the male inmate as "Chase," and the male inmate referred to the female as "Haley." Sergeant Campbell determined male inmates named "Chase Miles" and "Marcus Burke" were being held in "T-Block" at the time of the call. Sergeant Campbell testified Haley told Chase she had a woman on the phone that Chase asked her to call for Burke. Chase gave the phone to Burke. Burke told Haley to place the other call on speakerphone. Haley placed the other call on speakerphone, allowing Burke to communicate with the woman.

¶ 73 Sergeant Campbell testified he could identify the voice of "Burke" as defendant's voice in the September 9, 2015, call because he reviewed a September 1, 2015, visitation between defendant and Kimberly Rowell. Specifically, he indicated he reviewed an audio recording of the visitation along with a corresponding video recording and was able to match the person in the video recording with the voice in the audio recording. Sergeant Campbell also testified the document from the jail management system indicating defendant was being held in "T-Block" on September 9, 2015, as well as the topic of the conversation in the September 9, 2015, call assisted in the identification. As to the topic of the conversation, Sergeant Campbell noted the male, Burke, questioned if the police had obtained possession of his pistol. When asked to describe how this inquiry assisted in the identification, Sergeant Campbell testified:

> "There was an incident with [Lillard] and [Powell] a couple days after this had taken place. [Lillard] and [Powell] were at the house

> on Jackson where [defendant] had been on the night that this happened, where they had dropped a handgun outside of Studio 25, and it was recovered by the police, and that was discussed in the phone call."

¶ 74 As to the September 1, 2015, phone call, Sergeant Campbell testified he reviewed an audio recording of the visitation along with a corresponding video recording and identified defendant and a female named Kimberly Rowell. Sergeant Campbell also testified the visitations log that showed defendant was visited by Kimberly Rowell on September 1, 2015, as well as the topic of the conversation in the September 1, 2015, call assisted in the identification. As to the topic of the conversation, Sergeant Campbell noted the male referenced (1) having gunshot residue testing administered only to his right hand and the fact he was left-handed and (2) a "violation of a probation hearing." Sergeant Campbell testified he found the first reference unique because he had never seen a case where gunshot residue testing was only administered against one hand and the second reference unique because he was able "to confirm with Vermilion County court records that [defendant] did have a violation hearing."

¶ 75 On cross-examination, Sergeant Campbell was questioned more about the incident occurring days after the shooting. Sergeant Campbell testified the police had found a .40-caliber handgun from that incident. He further testified a .22-caliber pistol could not shoot a .40-caliber bullet. On redirect examination, the State asked Sergeant Campbell if he was aware of the type of shell casings found in this case, and Sergeant Campbell answered, "9 millimeter."

¶ 76 The trial court examined Sergeant Campbell. The court inquired about the recording system for the phone calls. Sergeant Campbell testified: "The jail calls are recorded

through a service called Securus, and I am not familiar with the video. I know they are totally separate entities, but I don't know what the video service is called." Sergeant Campbell further testified the Securus system was in proper operating mode at the time of the calls in this case and the calls were preserved with no changes, additions, or deletions. The court also inquired about the content of the recordings. Sergeant Campbell testified he was able to identify defendant's voice. He testified he became familiar with defendant's voice by reviewing the audio recording of the visitation along with the corresponding video recording and by considering the topic of the conversations in the phone calls. When asked if he knew defendant before this case, Sergeant Campbell testified: "I definitely knew him, but I couldn't honestly say that just listening to a jail call without the content, that I would have been able to say with 100 percent certainty that that was Marcus Burke."

¶ 77 The State moved to admit State's exhibit No. 17 and the two recordings contained therein based on the testimony of Sergeant Campbell and Captain Lewellyn, the record placing defendant in "T-Block" on September 9, 2015, and the record showing a visitation occurred on September 1, 2015. Defendant objected, arguing (1) Sergeant Campbell did not specifically indicate he recognized defendant's voice and (2) the foundation was "speculative." Defendant further reasserted his content-based objections, arguing, in part, Sergeant Campbell's testimony showed the gun discussed in the recording did not relate to this case. Defendant stood on his "continuing objection."

¶ 78 The trial court overruled defendant's objections. With respect to defendant's renewed content-based objections, the court noted the female in the recording stated the police did *not* have the pistol. The court found this supported its finding the call related to this case as

opposed to defendant's other case where the gun was recovered by the police.

¶ 79 13. *Sergeant Josh Campbell and Audio Recordings*

¶ 80 Sergeant Josh Campbell testified, in the presence of the jury, he assisted with the investigation of the August 29, 2015, shooting. He identified several photographs, some of which showed bullet holes through or next to a window at 439 Jackson Street. He also identified State's exhibit No. 17, as a digital video disc (DVD) containing two recordings of phone calls from the county jail. He testified the recordings contained conversations involving defendant from September 1 and 9, 2015. Following this testimony, State's exhibit No. 17 was admitted into evidence, and the two recordings contained therein were published to the jury.

¶ 81 In the September 1, 2015, phone call, defendant says they "charged me with shoot." He then states they "did the hands shit but that ain't shit because I'm not right handed." In the September 9, 2015, phone call defendant asks if a female on the phone saw "where his motherfucking pistol went." The female then asks if defendant's "rappie" told him what happened and that she did not want to tell him over the phone. Defendant asked if "the police got it." The female said someone said the police had it but that person was lying. Defendant asked if "they got it that night." The female indicates something about a "studio." Defendant attempts to clarify by questioning "they didn't get it the night that I got arrested though." The female responds, "No." Defendant then responds, "[A]lright, that all that matters."

¶ 82 14. *Relevant Jury Instructions*

¶ 83 Over no objection, State's Instruction Nos. 14A and 15 were given to the jury. State's Instruction No. 14A provides as follows:

"A person commits the offense of [t]hreatening a [p]ublic

[o]fficial when he knowingly delivers or conveys, directly or indirectly, to a public official by any means a communication containing a threat, containing specific facts indicative of a unique threat to the sworn law enforcement officer and not a generalized threat of harm, that would place the public official in reasonable apprehension of immediate or future bodily harm and the threat was conveyed because of the performance or nonperformance of some public duty or the threat was conveyed because of the hostility of the person making the threat toward the status or position of the public official or the threat was conveyed because of any other factor relating to the official's public existence."

State's Instruction No. 15 provides, in relevant part, as follows:

"To sustain the charge of [t]hreatening a [p]ublic [o]fficial the State must prove the following propositions:

* * *

Third Proposition: That the threat was conveyed because of the performance or nonperformance of some public duty or that the threat was conveyed because of the hostility of the person making the threat toward the status or position of the public official or that the threat was conveyed because of any other factor relating to the official's public existence." (Emphasis in original.)

¶ 84 15. *Jury's Verdict*

¶ 85 Following closing arguments and deliberations, the jury found defendant guilty of aggravated discharge of a firearm and threatening a public official.

¶ 86 E. Posttrial Motions and Sentencing

¶ 87 In April 2016, defendant filed a motion for a new trial, arguing, in part, (1) the State failed to prove him guilty beyond a reasonable doubt and (2) the trial court erred by allowing the State to present the audio recordings to the jury. Following a June 2016 hearing, the court denied defendant's motion for a new trial and then sentenced him to concurrently imposed terms of 15 years' imprisonment for aggravated discharge of a firearm and 8 years' imprisonment for threatening a public official. Defendant filed a motion to reconsider his sentence, which the court later denied.

¶ 88 This appeal followed.

¶ 89 II. ANALYSIS

¶ 90 On appeal, defendant argues (1) the State failed to prove him guilty beyond a reasonable doubt of threatening a public official, (2) the jury was improperly instructed on the elements of the charged offense of threatening a public official, and (3) the trial court abused its discretion when it allowed the State to present the audio recordings to the jury. The State disagrees with each of defendant's arguments.

¶ 91 A. Sufficiency of the Evidence

¶ 92 Defendant argues the State failed to prove him guilty beyond a reasonable doubt of threatening a public official. Specifically, defendant suggests (1) he did not convey a threat, (2) even if he conveyed a threat it was not a "true threat," and (3) even if he conveyed a "true

threat," it was not sufficiently specific as is necessary to convict when the threat is directed at a sworn law enforcement officer.

¶ 93 When considering a challenge to the sufficiency of the evidence, we ask whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense proved beyond a reasonable doubt. *People v. Ward*, 154 Ill. 2d 272, 326, 609 N.E.2d 252, 275 (1992). The jury, as the trier of fact in this case, was responsible for determining witnesses' credibility, weighing the testimony, and drawing reasonable inferences from the evidence. *People v. Jophlin*, 2018 IL App (4th) 150802, ¶ 38, 99 N.E.3d 597. We will reverse a defendant's conviction on appeal "only where the evidence is so improbable and unsatisfactory it creates a reasonable doubt as to [the] defendant's guilt." *Id.*

¶ 94 Defendant was charged under section 12-9 of the Criminal Code of 2012 (720 ILCS 5/12-9 (West 2014)), which states, in relevant part, the following:

> "(a) A person commits threatening a public official *** when:
>
> (1) that person knowingly delivers or conveys, directly or indirectly, to a public official *** by any means a communication:
>
> (i) containing a threat that would place the public official *** in reasonable apprehension of immediate or future bodily harm ***; [and]
>
> * * *

> (2) the threat was conveyed because of the performance or nonperformance of some public duty ***, because of hostility of the person making the threat toward the status or position of the public official *** , or because of any other factor related to the official's public existence.
>
> (a-5) For purposes of a threat to a sworn law enforcement officer, the threat must contain specific facts indicative of a unique threat to the person *** of the officer and not a generalized threat of harm."

¶ 95 The evidence, when viewed in the light most favorable to the prosecution, showed Officer Howie, a 21-year veteran police officer with the City of Danville Police Department, reported to the scene shortly after hearing approximately 10 to 12 gunshots. Upon his arrival, Officer Howie stopped three individuals, including defendant, who were outside. Officer Howie began a conversation with defendant. During the conversation, defendant brought up an incident from years earlier where a police officer killed a citizen and then suggested the police "had gotten away with [the] shooting *** [and] that [the police] would not get away with that again." Defendant then compared the guns on the waists of the officers present to the guns he and his cohorts possessed and asserted the officers "had better get bigger guns *** because *** [he and his cohorts] would come after [the officers]." In response to this direct comparison and assertion of the need to get bigger guns, Officer Howie warned defendant "he had better not go down that path and not to threaten officers." Officer Howie testified defendant continued by stating "that you never know when he may see us out someplace or at a movie theater, and you don't know

what might happen there." Officer Howie understood defendant's statements to be a threat. Officer Howie had previously been subject to threats against him in his official capacity but described the threat by defendant as "different *** because of the specifics and even after telling him not to make the threats, they continued."

¶ 96 Defendant asserts this evidence fails to show he conveyed a threat. First, he notes he did not issue an "explicit" threat. Defendant fails, however, to cite any authority to suggest an explicit threat is required. The statutory language does not exclude veiled threats of bodily harm. See *id.* (referring to "a threat that would place the public official *** in reasonable apprehension of immediate or future bodily harm"). Second, defendant suggests Officer Howie's warning not to threaten officers and the decision not to make an arrest for threatening a public official shows Officer Howie did not subjectively believe the statements were a threat. Setting aside the fact defendant fails to point to anything in the record to support his suggestion Officer Howie did not make an arrest for threatening a public official, Officer Howie testified he found defendant's statements to be a threat. The jury could reasonably find Officer Howie subjectively believed defendant's statements were a threat based on this testimony. Finally, defendant suggests his statements could have meant nonphysical retaliation, such as public condemnation for police actions or an exchange of opinions if he or someone he knew encountered a police officer while out in the community. The jury was responsible for drawing reasonable inferences from the evidence. Viewing defendant's statements in the context in which they were issued, we find a rational trier of fact could find a threat was conveyed—that defendant intended to shoot a firearm at Officer Howie.

¶ 97 Defendant asserts even if he conveyed a threat, it was not a "true threat" because the threat was conditioned on the police unlawfully killing another citizen and then not facing repercussions for doing so. See *People v. Dye*, 2015 IL App (4th) 130799, ¶ 8, 37 N.E.3d 465 (holding the State must prove a threat is a "true threat" under section 12-9 or else the prosecution would violate the first amendment); *Virginia v. Black*, 538 U.S. 343, 359 (2003) (" 'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."). Defendant did not overtly condition his threat on the occurrence of the police unlawfully killing another citizen and then not facing repercussions for doing so. While defendant's initial statement by itself may support defendant's argument, his follow up statements suggests he did not intend any such condition. Viewing defendant's statements in the context in which they were issued, we find a rational trier of fact could find the threat was not conditioned on the occurrence of the police unlawfully killing another citizen and then not facing repercussions for doing so.

¶ 98 Defendant asserts even if he conveyed a "true threat," it was not sufficiently specific as is necessary to convict when a threat is directed at a sworn law enforcement officer because he did not indicate he knew where Officer Howie lived or frequented. See 720 ILCS 5/12-9(a-5) (West 2014) ("For purposes of a threat to a sworn law enforcement officer, the threat must contain specific facts indicative of a unique threat to the person *** of the officer and not a generalized threat of harm.") Defendant's knowledge of such information was not necessary. Shortly after Officer Howie responded to a shooting and found defendant outside, defendant conveyed a threat indicating he intended to shoot Officer Howie with a firearm. Defendant further suggested, even if the shooting did not immediately occur, it could occur in the future at a

place such as a movie theatre. Viewing defendant's statements in the context in which they were issued, we find a rational trier of fact could find the threat contained specific facts indicative of a unique threat to Officer Howie and not a generalized threat of harm.

¶ 99 Defendant was agitated and upset about being stopped. He spontaneously brought up a police shooting from years earlier that he believed the police "got away with." He asserted he had access to bigger guns than the officer, which may have prompted the officer to believe those weapons were located nearby, and the threat was immediate. Then defendant suggested later retaliation when the officer was out in the community at a movie theater, for example. Defendant fails to persuade the evidence is not sufficient to sustain his conviction for threatening a public official.

¶ 100 B. Jury Instructions

¶ 101 Defendant argues "the jury was improperly instructed on the elements of the charged offense of threatening a public official." Specifically, defendant contends the final phrase in State's Instruction No. 14A and the third proposition in State's Instruction No. 15 improperly stated the law.

¶ 102 As an initial matter, defendant concedes he forfeited his argument by failing to raise it before the trial court. He asserts his forfeiture may be excused under the plain-error doctrine. Under the plain-error doctrine, a reviewing court may disregard a defendant's forfeiture and consider an unpreserved claim of error where:

> " '(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, 939 N.E.2d 403, 413 (2010) (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007)).

Under both prongs of the plain-error doctrine, the defendant bears the burden of persuasion. *People v. Wilmington*, 2013 IL 112938, ¶ 43, 983 N.E.2d 1015.

¶ 103 The first step under the plain-error doctrine requires us to determine whether a clear or obvious error occurred. *People v. Eppinger*, 2013 IL 114121, ¶ 19, 984 N.E.2d 475. "The purpose of jury instructions is to provide the jury with the correct legal principles applicable to the evidence, so that the jury may reach a correct conclusion according to the law and the evidence." *People v. Bannister*, 232 Ill. 2d 52, 81, 902 N.E.2d 571, 589 (2008). While the decision to give certain jury instructions will generally not be reversed on appeal absent an abuse of discretion, the issue of whether the jury instructions accurately conveyed the applicable law is reviewed *de novo*. *People v. Hale*, 2012 IL App (4th) 100949, ¶ 19, 967 N.E.2d 476.

¶ 104 To support his argument that the final phrase in State's Instruction No. 14A and the third proposition in State's Instruction No. 15 improperly stated the law, defendant relies on Illinois Pattern Jury Instructions, Criminal, Nos. 11.49 and 11.50 (approved May 2, 2014) (hereinafter IPI Criminal No. 11.49, 11.50). Defendant asserts a review of these pattern jury instructions shows the drafters' clear intent that only one of the three available phrases be given to the jury. In support of this assertion, defendant notes: (1) the word "or" appears in brackets,

(2) each proposition redundantly begins with the phrase "the threat was conveyed because of," and (3) each proposition ends with the punctuation of a period instead of a comma.

¶ 105 IPI Criminal No. 11.49 provides, in relevant part, as follows:

> "A person commits the offense of threatening a [public official] when he knowingly delivers or conveys, directly or indirectly, to a [public official] by any means a communication containing a threat
>
> [1] that would place the [public official] in reasonable apprehension of immediate or future [bodily harm]
>
> [or]
>
> [2] that would place the [public official] in reasonable apprehension that damage will occur to property in the custody, care, or control of the [public official]
>
> and
>
> [1] the threat was conveyed because of the performance or nonperformance of some [public duty].
>
> [or]
>
> [2] the threat was conveyed because of the hostility of the person making the threat toward the status or position of [the public official].
>
> [or]

[3] the threat was conveyed because of any other factor relating to the official's public existence."

¶ 106 IPI Criminal No. 11.50 provides, in relevant part, as follows:

"To sustain the charge of threatening a [public official] the State must prove the following propositions:

First Proposition: That the defendant knowingly delivered or conveyed, directly or indirectly, to a [public official] by any means a communication containing a threat

[1] that would place the [public official] in reasonable apprehension of immediate or future [bodily harm];

[or]

[2] that would place the [public official] in reasonable apprehension that damage will occur to property in the custody, care, or control of the [public official];

and

Second Proposition: That ____ was a [public official] at the time of the threat;

and

[1] *Third Proposition:* That the threat was conveyed because of the performance or nonperformance of some [public duty].

[or]

[2] *Third Proposition:* That the threat was conveyed because of the hostility of the person making the threat toward the status or position of the [public official].

[or]

[3] *Third Proposition:* That the threat was conveyed because of any other factor relating to the official's public existence.

and

Fourth Proposition: That when the defendant conveyed the threat, he knew ____ was then [a public official]." (Emphases in original.)

¶ 107 Defendant fails to persuade the jury was improperly instructed on the elements of the charged offense of threatening a public official. First, defendant fails to address the statutory language. The final phrase in State's Instruction No. 14A and the third proposition in State's Instruction No. 15 follow the statutory language. See 720 ILCS 5/12-9(a)(2) (West 2014) (stating a person commits the offense of threatening a public official if that person conveys a threat to a public official "because of the performance or nonperformance of some public duty ***, because of hostility of the person making the threat toward the status or position of the public official ***, or because of any other factor related to the official's public existence"). Second, defendant fails to show the punctuation and redundancy in the pattern jury instructions show the drafters's clear intent that only one of the three available phrases be given to the jury. The committee notes to both IPI Criminal No. 11.49 and IPI Criminal No. 11.50 state: "Use applicable bracketed

material." This suggests the drafters of the pattern jury instructions anticipated in cases where all three alternatives are charged the word "or" would be applicable and should be included.

¶ 108 Defendant also makes a brief argument suggesting the State needed to charge him with three different counts of threatening a police official if it intended to present its three alternative theories to the jury. In support of this argument, defendant provides a parenthetical citation to *People v. Johnson*, 231 Ill. App. 3d 412, 424, 595 N.E.2d 1381, 1390 (1992), for the proposition duplicity occurs when two or more offenses are charged in the same count. Defendant fails to explain why the charge in this case would amount to two or more offenses being charged in the same count as opposed to a single offense that could be established in more than one way. See *id.* (" 'Duplicity' occurs when two or more offenses are charged in the same count, not from charging a single offense in more than one way or where different acts contribute to the same offense."). Because defendant fails to provide a well-developed argument, we decline to consider it further. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (requiring an appellant's brief to include "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on").

¶ 109 Defendant fails to persuade his contention of error suggesting the jury was improperly instructed on the elements of the charged offense of threatening a public official is reviewable under the plain-error doctrine.

¶ 110 C. Audio Recordings

¶ 111 Defendant argues the trial court abused its discretion when it allowed the State to present the audio recordings to the jury.

¶ 112 1. *Standard of Review*

¶ 113 "The admission of evidence is within the sound discretion of a trial court, and a reviewing court will not reverse the trial court absent a showing of an abuse of that discretion." *People v. Becker*, 239 Ill. 2d 215, 234, 940 N.E.2d 1131, 1142 (2010). An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful, or unreasonable or where no reasonable person would agree with the position of the trial court. *Id.*

¶ 114 2. *Relevance*

¶ 115 Defendant asserts the trial court abused its discretion when it allowed the State to present the audio recordings to the jury because the recordings were irrelevant. Defendant contends the recordings were irrelevant because (1) the gun discussed in the September 9, 2015, call related to his other pending case and (2) the gunshot residue testing discussed in the September 1, 2015, call could have related to his other pending case.

¶ 116 "Relevance is a threshold requirement that must be met by every item of evidence." *People v. Dabbs*, 239 Ill. 2d 277, 289, 940 N.E.2d 1088, 1096 (2010). Illinois Rule of Evidence 401 (eff. Jan. 1, 2011) states "[r]elvant [e]vidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The determination as to what is relevant evidence is a matter within the trial court's sound discretion, and we will not disturb the trial court's determination absent an abuse of that discretion. *People v. Garcia*, 2012 IL App (2d) 100656, ¶ 17, 971 N.E.2d 1150.

¶ 117 Defendant contends the September 9, 2015, phone call was irrelevant because the gun discussed therein related to his other pending case. In support, defendant relies on Sergeant Campbell's testimony suggesting the referenced gun was a gun dropped by Lillard and Powell

outside Studio 25. Sergeant Campbell testified, however, Lillard and Powell "had dropped a handgun outside of Studio 25, and it was recovered by the police." No gun was discovered in this case. In the September 9, 2015, call, the female tells defendant the police did not get his gun the night he was arrested. Based on the evidence of record, we cannot say the trial court's determination the gun discussed in the September 9, 2015, call related to this case is arbitrary, fanciful, or unreasonable.

¶ 118 Defendant contends the September 1, 2015, phone call was irrelevant because the gunshot residue testing discussed therein could have related to his other pending case. In support, defendant relies on the absence of any indication in the record both of his hands were tested for gunshot residue in his other pending case. Sergeant Kizer testified he administered gunshot residue testing to only defendant's right hand because defendant stated his right hand was his dominant hand. Sergeant Campbell testified he had never seen a case where gunshot residue testing was only administered against one hand. Based on the evidence of record, we cannot say trial court's determination the gunshot residue testing discussed in the September 1, 2015, call, related to this case is arbitrary, fanciful, or unreasonable.

¶ 119 The recordings of the September 1 and 9, 2015, phone calls tended to corroborate the eyewitnesses who identified defendant as the shooter. Defendant fails to persuade the trial court abused its discretion by finding the recordings were relevant.

¶ 120 3. *Other-Crimes Evidence*

¶ 121 Defendant asserts, even if the audio recordings were relevant, the trial court abused its discretion when it allowed the State to present the recordings to the jury because the recordings contained impermissible other-crimes evidence. Defendant complains the September

9, 2015, phone call presented impermissible other-crimes evidence as it included a statement indicating he had a "rappie" and a discussion about a gun involved in a different shooting. Defendant also complains the September 1, 2015, phone call presented impermissible other-crimes evidence as it included a discussion about gunshot residue testing that could have related to his other pending case.

¶ 122 Under Illinois Rule of Evidence 402 (eff. Jan. 1, 2011), all relevant evidence is admissible except as otherwise provided by law. "Other-crimes evidence" is inadmissible if it is relevant only to demonstrate a defendant's propensity to engage in criminal activity. *People v. Spyres*, 359 Ill. App. 3d 1108, 1112, 835 N.E.2d 974, 977 (2005). "The term 'other-crimes evidence' encompasses misconduct or criminal acts that occurred either before or after the allegedly criminal conduct for which the defendant is standing trial." *Id.*

¶ 123 For the reasons previously discussed, defendant has failed to show the trial court erred in determining the gun discussed in the September 9, 2015, phone call and the gunshot residue testing discussed in the September 1, 2015, call related to this case. Given that finding, the discussions about the gun and the gunshot residue testing do not constitute other-crimes evidence. We also find the reference to a "rappie" by itself does not constitute other-crimes evidence. The brief reference, without any explanation, does not describe any misconduct or criminal acts committed by defendant.

¶ 124 Defendant fails to persuade the recordings contained impermissible other-crimes evidence.

¶ 125 4. *Foundation*

¶ 126 Defendant asserts, even if the audio recordings were relevant and admissible, the trial court abused its discretion when it allowed the State to present the recordings to the jury because the State failed to present a sufficient foundation. Defendant contends the foundation was lacking because (1) there was no testimony as to the name or competency of the operator of the Securus system and (2) Sergeant Campbell failed to sufficiently identify defendant as a speaker in the recordings.

¶ 127 As an initial matter, the State asserts defendant forfeited his specific complaints about the foundation by failing to raise them below. See *People v. Woods*, 214 Ill. 2d 455, 470, 828 N.E.2d 247, 257 (2005) (emphasizing the forfeiture rule is "particularly appropriate when a defendant argues that the State failed to lay the proper technical foundation for the admission of evidence [as] a defendant's lack of a timely and specific objection deprives the State of the opportunity to correct any deficiency in the foundational proof at the trial level."). Defendant disagrees, maintaining his continuing objection based on his motion *in limine* was sufficient to preserve his claim of error. Alternatively, defendant asserts his forfeiture may be excused under the plain-error doctrine. Forfeiture aside, defendant fails to show the foundation for the recordings was lacking.

¶ 128 Generally, the proponent of an audio recording can present a sufficient foundation by having "a participant to the conversation or a person who heard the conversation while it was taking place identif[y] the voices of the people in the conversation and testif[y] that the tape accurately portrays the conversation." *In re C.H.*, 398 Ill. App. 3d 603, 607, 925 N.E.2d 1260, 1264 (2010). In those cases where no such witness exists, the proponent of an audio recording

can still present a sufficient foundation under the "silent witness theory." *People v. Viramontes*, 2017 IL App (1st) 142085, ¶ 69, 69 N.E.3d 446.

¶ 129 In *People v. Taylor*, 2011 IL 110067, ¶ 32, 956 N.E.2d 431, our supreme court held a videotape recording might be admissible under the silent witness theory if the proponent of the evidence shows sufficient proof of the reliability of the process that produced the recording. In determining whether sufficient proof was presented in that case, the court considered several factors: "(1) the device's capability for recording and general reliability; (2) competency of the operator; (3) proper operation of the device; (4) showing the manner in which the recording was preserved (chain of custody); (5) identification of the persons, locale, or objects depicted; and (6) explanation of any copying or duplication process." *Id.* ¶ 35. The court made clear this list of factors was "nonexclusive" and "[e]ach case must be evaluated on its own and depending on the facts of the case, some of the factors may not be relevant or additional factors may need to be considered." *Id.* The court further stated, "The dispositive issue in every case is the accuracy and reliability of the process that produced the recording." *Id.*

¶ 130 Defendant contends the foundation was lacking because there was no testimony as to the name or competency of the operator of the Securus system. Sergeant Campbell testified (1) the phone calls were recorded through the Securus system, (2) the Securus system was in proper operating mode at the time of the phone calls, and (3) the recordings of the phone calls were preserved with no changes, additions, or deletions. Regardless of the absence of any evidence as to the name or competency of the operator of the Securus system, we find the evidence presented sufficiently showed the accuracy and reliability of the process that produced the recordings.

¶ 131 Defendant contends the foundation was lacking because Sergeant Campbell failed to sufficiently identify defendant as a speaker in the recordings. Defendant does not dispute Sergeant Campbell testified he was able to identify defendant's voice in the recordings; instead, he complains about the manner in which Sergeant Campbell became familiar with defendant's voice. Specifically, defendant complains about Sergeant Campbell's reliance on the video recording when he was unable to testify to the reliability of that recording.

¶ 132 Sergeant Campbell explained he became familiar with defendant's voice by reviewing several items: (1) the audio recordings of the September 1 and 9, 2015, phone calls; (2) a video recording of the September 1, 2015, phone call; (3) a document indicating defendant had a visitation on September 1, 2015; and (4) a document indicating defendant was held in "T-Block" on September 9, 2015. In addition to his reliance on the video recording of the September 1, 2015, phone call, Sergeant Campbell indicated he became familiar with defendant's voice by considering the unique statements in the audio recordings and how they related to defendant's pending cases. Setting aside Sergeant Campbell's reliance on the video recording, defendant presents no argument as to why Sergeant Campbell could not become sufficiently familiar with defendant's voice by listening to the audio recordings and considering the unique topics discussed therein.

¶ 133 Defendant fails to persuade the trial court abused its discretion by allowing the State to present the audio recordings to the jury.

¶ 134 III. CONCLUSION

¶ 135 We affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2016).

¶ 136 Affirmed.