2020 IL App (2d) 170750-U
No. 2-17-0750
Order filed April 8, 2020

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 15-CF-88
	)	
JEFFREY KELLER,	)	Honorable
	)	George J. Bakalis,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justice Bridges concurred in the judgment.
Presiding Justice Birkett specially concurred.

ORDER

¶ 1 *Held*: Alleged failure of police to inform defendant of reason for his arrest was not a basis to suppress evidence; trial court's finding that defendant did not invoke right to counsel until end of interrogation was not contrary to the manifest weight of the evidence; police adequately related *Miranda* warnings to defendant and defendant's waiver of those rights was valid; defendant failed to contemporaneously object to lack of adequate notice of overhear recordings and claims of prejudice purportedly flowing therefrom were speculative; alleged technical violations of statutory provisions governing overhears did not warrant suppression and, even assuming *arguendo* error occurred, it was harmless, as the evidence against defendant was overwhelming.

¶ 2 I. INTRODUCTION

¶ 3 Defendant, Jeffrey Keller, was convicted of first-degree murder following a jury trial in the circuit court of Du Page County. He was sentenced to 70 years' imprisonment. He now appeals, raising two issues. First, he argues that a statement he made to police was taken in violation of the strictures of *Miranda v. Arizona*, 384 U.S. 436 (1966), and on state law grounds. Second, he contends that the trial court erred in failing to suppress an eavesdrop recording due to various statutory violations. For the reasons that follow, we affirm.

¶ 4 II. BACKGROUND

¶ 5 Defendant was convicted of first-degree murder in relation to the shooting death of Nathaniel Fox, which occurred on December 22, 2013. Fox was shot in his garage as he attempted to exit his car. As the arguments raised by defendant concern only pretrial proceedings, we will limit our discussion of the facts to those pertinent to those issues. We turn first to the hearing on defendant's motion to suppress statements based on the alleged failure of the police to comply with *Miranda* and state law.

¶ 6 The State first called Detective Erin Gibler. On January 14, 2015, Gibler was working with the Du Page County Major Crimes Task Force. She was working with a group of detectives. They went to 1801 South Meyers Road in Oak Brook Terrace (where defendant's business, 8to18 Media, was located). They were trying to locate defendant and had been to that location periodically throughout the day. She was working with Detective Arsenault. They were in plain clothes and an unmarked car. At about 6 p.m., Arsenault observed an individual matching defendant's description in the window of the building. Gibler went into the building to confirm that defendant's business was located there. Gibler then took the elevator to a secure section of the underground garage. She observed defendant's car, a 2007 black Audi A6. She left to tell

Arsenault, blocking a door open with a rock so she could get back in. They contacted the Bloomingdale Police Department.

¶ 7 Within an hour, 8 to 10 additional officers arrived. Gibler added, "They were in plain clothes, but identified as police officers through their ballistic vests." Gibler and Arsenault put on body armor. The officers met in a public portion of the underground garage. They decided to stop defendant before he exited the garage, because they "did not want any type of vehicle pursuit." They were aware that defendant was suspected of having a gun and having used it to commit a murder. While they were still preparing to execute their plan, they observed defendant entering the garage. Defendant got into his car, backed up, and started driving toward the exit. Defendant observed the officers and stopped. Gibler approached defendant with her gun drawn. Other officers followed. Initially, she and three others approached defendant. Gibler identified herself and asked defendant to place his hands on the steering wheel. Defendant complied.

¶ 8 Gibler told defendant she was assisting the Bloomingdale Police Department on an investigation. She asked him to step out of the car. She explained that Bloomingdale detectives were on the way and wanted to speak with him. She asked defendant if he had any weapons; he replied that he did not. Defendant then consented to a pat-down search. Defendant was not handcuffed. The Bloomingdale detectives arrived in about one minute. Gibler introduced defendant to them. She then walked away. She stated that defendant was cooperative. Defendant never asked for a lawyer or invoked his right to remain silent. No one questioned defendant and no one advised him that he was under arrest.

¶ 9 On cross-examination, Gibler acknowledged that she did not prepare a written report documenting her involvement in the arrest of defendant. She was involved with the investigation from the time Fox was killed. A few days before defendant's arrest, they received a "substantial

tip" from Steven Schweigert. Gibler was aware that Schweigert had had a telephone conversation with defendant and an overhear was conducted by police. She knew what defendant looked like, where he lived and worked, and what kind of car he drove. Her assignment was to locate defendant and his vehicle.

¶ 10 After she entered the building where defendant's business was located, she noted that there were video cameras in the building, including in the garage. There was a camera covering the area where defendant was arrested. She did not ask building staff about the cameras prior to the time they confronted defendant. Gibler believed that defendant might be dangerous, as he was suspected of murder and might have a gun. Gibler agreed that defendant was not free to leave the garage. Eventually, she observed defendant walking toward his vehicle. Defendant got into his car and began to leave; however, he stopped 20 to 30 feet from the exit door. Gibler entered the garage, followed by a number of other officers, through a service door with her gun drawn. Some of the officers had rifles. She identified herself and asked to see defendant's hands. She was "loud" but "[n]ot yelling." She asked defendant to step out of the vehicle and defendant complied. Once defendant exited the car, she holstered her weapon. Defendant stated he did not have any weapons and consented to a pat-down search. Defendant was not free to leave. Some officers still had guns in their hands, but none were pointed at defendant. Bloomingdale police officers, in plain clothes, arrived. She introduced them to defendant and walked away. The Bloomingdale officers told defendant they wanted to discuss an investigation with him, but they did not state what type of investigation while Gibler was present.

¶ 11 The State next called Detective David Spradling, of the Bloomingdale Police Department. On January 14, 2015, he was on duty investigating the murder of Nathaniel Fox. He was notified by the Major Crimes Task Force that defendant had been located. He drove to the location that

they indicated in an unmarked 2008 Crown Victoria. The vehicle had no markings and no cage. He was accompanied by Detective Hill. They parked outside the building where defendant was believed to be and waited. They were notified that the task force officers had made contact with defendant, and they went to that location. They parked in a nonsecure section of the parking garage and walked to the secure area where defendant was. They met Gibler, and she introduced them to defendant.

¶ 12 Hill told defendant that they were working on a case and defendant's name had come up during the course of the investigation. They asked defendant to accompany them to the Bloomingdale Police Department, and defendant agreed. They walked back to their car with defendant and left. Defendant was not handcuffed at any time during the trip. Defendant and Hill rode in the back seat, and Spradling drove. Spradling thought that Hill might have patted defendant down before getting into the car. The trip to the police department took 20 minutes. During the trip, Hill and defendant discussed defendant's business. They did not speak about the murder. They escorted defendant into the building via the juvenile entrance door, which is "secure to get in but not secure to get out" and took defendant to an interview room. Spradling described it as a "cinder block room with a table" and three chairs. From the time they arrived, an audio and video recording was made. They did not advise defendant of his *Miranda* rights prior to arriving at the station. Defendant did not ask for a lawyer or indicate that he did not want to speak to the police during the trip. Spradling did not recall defendant stating that he did not want to go to the police station and suggesting that they speak in his office.

¶ 13 Spradling testified that when he went to meet with defendant, he (Spradling) was wearing a long jacket, shirt, tie, and dress pants. He was not wearing anything that indicated he was a

police officer. Hill was dressed the same way. Spradling explained, "It was our intent to be nonthreatening at that point to try to convince [defendant] to come back with us voluntarily."

¶ 14 On cross-examination, Spradling stated that the murder of Fox occurred on December 22, 2014. He was assigned as an investigator that evening. No suspect had been identified prior to Schweigert contacting the police. Spradling related that Schweigert had implicated defendant in Fox's murder. They obtained an order for an overhear, and Spradling listened to that conversation.

¶ 15 Prior to making contact with defendant on January 14, 2015, Spradling, Hill, and State's Attorney Diamond discussed how they intended to interact with defendant. They decided not to wear uniforms so as to be as nonthreatening as possible. They hoped that defendant would agree to come with them, talk to them, and make incriminating statements. When he arrived at defendant's location, he observed 8 to 10 officers in tactical gear. However, Gibler and defendant were standing near the rear of defendant's car, and Gibler was the only officer within five feet of defendant. When asked whether "part of the plan" was to not tell defendant he was under arrest, Spradling replied, "Yeah, I believe so." He did not recall whether it was "part of the plan" to not "tell him what the nature of the crime was" or that defendant was being investigated regarding the Fox murder. Spradling did not recall Hill saying that they could speak with defendant at defendant's office or defendant saying he'd prefer to speak with the police at his office. He did not remember defendant requesting to speak with an attorney. Defendant was not free to leave. During the ride to Bloomingdale, Hill and defendant mostly spoke about defendant's business, though they may have briefly talked about baseball. At some point, defendant expressed that he did not know where Bloomingdale was (Spradling clarified that this may have been after they arrived). He did not recall Hill saying to defendant, "Oh come on. You know where Bloomingdale is at. You've been to Bloomingdale before."

¶ 16 Once they arrived, Spradling escorted defendant into the police station. Defendant was in custody at this time. They brought defendant to an eight-by-eight interview room. The interrogation lasted two to two-and-a-half hours, during which time the door was "generally shut."

¶ 17 Defendant's first witness was John Giocomelli. He testified that he is the chief engineer of the building that defendant's business was located in. Cameras cover the garage. Anyone can access the secure portion of the garage via the elevator. The service door is locked from the outside only. There was a video surveillance system in use in the building in January 2015. It was working, but sometimes would malfunction. He typically leaves at 4 p.m., and he did not know the police were coming to the building to apprehend defendant on January 14, 2015. He left that day at his usual time and had not noticed any problems with the video system. He returned at about 7:30 p.m. at the request of the police. He met with two officers; he did not recall their names, but one was female and one was male. When he entered his office, he noted the video screen was blank. He surmised that they stopped working after 4 p.m., as they were working when he left. The officers asked for video recordings from December 2014; however, the system only stores two weeks of recordings, so it was not available. He did not recall the officers asking for recordings from the day of defendant's arrest. On cross-examination, Giocomelli testified that they were having a problem with the video system three or four times per month and he has to reset it. They replaced a DVR player in November 2015, and the problem resolved.

¶ 18 Defendant next called Philip Lekousis, who works in the same building where defendant's business was located. He was familiar with defendant. On January 14, 2015, he was leaving work. His car was parked in the secure section of the garage. As he walked down a hallway leading to the garage, he encountered three or four individuals dressed in tactical gear. He walked by them and went to his car. They were armed. As he was walking to his car, he saw "at least half a dozen

law enforcement individuals that came rushing through both doors" (through a pedestrian door and a garage door). They "enter[ed] the garage really aggressively." Defendant's car was near the exit door. The main door had opened as defendant approached it. Lekousis observed that the exit was blocked by a number of vehicles. There were no emergency lights on the vehicles. There was a lot of yelling initially. They "took [defendant] out of the car and put him up against the wall behind his car in the garage." There were at least four officers near defendant at this time. Lekousis was about 20 feet away when defendant was put against the wall. The officers had "some sort of rifles." As the officers brought defendant to a vehicle to leave, one officer walked on each side of defendant, holding an arm, and one walked behind defendant. On cross-examination, Lekousis testified that these events were "pretty shocking" to him. The police had defendant against the wall, with defendant's hands "up against the wall," and they were patting him down. Lekousis was certain defendant was against a wall and not a car.

¶ 19 Defendant next called Jason Nobles, who also works in the building where defendant was arrested. He knew defendant from working in the building. On January 14, 2015, Nobles was leaving work. He took the elevator to the parking garage. He had parked in the public, nonsecure section of the garage. As he was walking through the secure section, he saw "[a] lot of cops." The garage doors were open. Defendant was standing near the garage door. Nobles walked out through the door. There were 8 to 10 police officers present, and they were in plain clothes. The officers were armed. Nobles heard them speaking in loud voices. He thought defendant was "against the wall, but [he was] not a hundred percent certain on that." On cross-examination, Nobles clarified that he had seen defendant in the building, but did not really know him.

¶ 20 Defendant next called Detective Jeff Hill. He was part of the Major Crimes Task Force and investigated the murder of Fox. Several days before defendant's arrest, they received a lead

from Steven Schweigert. Hill monitored a conversation between defendant and Schweigert. Search warrants were obtained for defendant's house, car, and business. They received a call that defendant had been located, and he and Detective Spradling drove to a parking lot just south of the building defendant worked in. They were dressed in plain clothes and armed. Subsequently, they drove to and parked in the public section of the parking garage in defendant's building. They walked to where defendant was. Hill testified that he did not have his weapon drawn. There were several other officers present. Defendant was not free to leave. Hill "walked up to [defendant] and talked to him very nicely that I wanted him to come voluntarily." Hill told defendant that "I [had] an investigation that I needed him to help me out with." Hill did not tell defendant which investigation he was talking about. Defendant agreed to accompany Hill. Hill did not recall defendant saying he'd prefer to speak to the police in his office. Defendant never asked for an attorney.

¶ 21 They walked defendant to their car. Hill and defendant sat in the back seat. It took 15 to 20 minutes to get to the Bloomingdale police station. On the way to there, defendant and Hill talked about defendant's business and "a little bit about him playing baseball" as a kid. Neither Hill nor Spradling asked defendant if he knew where Bloomingdale was while they were in the car. Defendant did not ask for an attorney during the trip, and he did not ask to make a telephone call.

¶ 22 When they arrived at the police station, they took defendant directly to an interview room. Hill identified a document that contained the *Miranda* warning given to defendant. In the waiver section, it does not state that the purpose of the document is to indicate that the rights were read to defendant. Nevertheless, Hill stated that he told defendant that by signing the document, it means that they read it to defendant and defendant understood his rights. Hill also told defendant that

this was "a normal process" and "standard." Hill never specifically asked if defendant was waiving his rights. Spradling told defendant that he could stop talking at any time. At one point, defendant stated that he did not want to talk any further. Hill asked what he meant by that. Hill explained that it was unclear whether defendant was invoking his right to remain silent or simply wanted to take a break. Subsequently, defendant asked to have an attorney present. Hill explained that they could no longer talk. Hill then sat with defendant in silence for a while.

¶ 23 Defendant next testified. He stated that he was 53 years old. He has a Bachelor of Science in business from Indiana University. He owned a business called 8to18 Media. On January 14, 2015, he left his office at 7 or 7:30 p.m. He went to the secure section of the parking garage and got into his car, a black Audi A6. As he approached the garage door, he noted a flashing light on top of a car outside, and several police officers with weapons drawn and aimed at defendant rushed in. He estimated that there were between 10 and 15 officers. He saw both handguns and long guns. The officers were wearing bullet-proof vests. Defendant stopped immediately. A woman approached, yelling that defendant should park the car and put his hands on the steering wheel. Defendant described her tone as "forceful." He did not feel free to leave. The female officer identified herself. She told defendant to slowly get out of the car, and he complied. She then stated that she needed to frisk defendant. She asked defendant to stand against a wall. Defendant placed his hands against the wall, and she patted him down. Defendant noted a number of police vehicles blocking the exit to the garage.

¶ 24 Detective Hill arrived and spoke with defendant. Hill stated he needed to speak with defendant about an investigation. Defendant did not feel free to leave. Hill stated they could speak at the police station or at defendant's office. Defendant testified that he stated he "would prefer to do it here in the office or at the station in the morning with an attorney." Spradling approached.

Hill told Spradling that defendant wanted to do the interview in his office, and Spradling said that that would not work. They said they needed go to the Bloomingdale police station. Defendant asked if he could follow the officers to the station, and they said no. They told defendant that he had to come with them. Defendant asked if he could park his car, and they said no to that as well. They then said, "So we're going to go down to the station. Is that okay." Defendant said, "[O]kay." Defendant did not believe he could refuse to go to the station. As they walked to the car, one officer was "just in front of [his] left shoulder" and the other was "just behind [his] right shoulder." They were very close, but defendant was not handcuffed.

¶ 25 As they got into the car, defendant asked for his cell phone so he could call an attorney. Hill said that was not possible and that they would talk about it at the station. Defendant did not recall Hill using the word "voluntarily" when he asked defendant to go to the station. On the way to the station, Hill asked defendant about his business. Defendant asked where they were going, and Hill said Bloomingdale. Defendant asked where Bloomingdale was. Hill stated: "Well, you know where Bloomingdale is. You've been to Bloomingdale. Why were you in Bloomingdale?" Defendant explained that he was confusing Bloomingdale with Bolingbrook.

¶ 26 They arrived at the station, and the officers escorted defendant in. Defendant again asked for his phone, as he wanted to call his attorney. Hill said the phone was not an option. The police did not offer defendant an opportunity to use one of their phones. Defendant acknowledged that "[a]t the scene," the police told him they wanted him to come to the station as "they were investigating a homicide." They did not, however, tell him "the nature of the homicide or any other details at that point." The detectives brought defendant to an interview room. They told defendant where to sit. During the initial discussions with Hill, defendant had questions about the *Miranda* warnings. Defendant was not sure if by signing the form, he was simply acknowledging

that the warnings had been discussed or if he was waiving those rights. Hill cut defendant off repeatedly. Defendant stated that "it felt deceptive." Hill told defendant "the only way you're going to find out about why you're you're here [*sic*] is if you sign that document." Defendant eventually signed the *Miranda* form. On multiple occasions, defendant attempted to express something about his rights, and Hill would interrupt and redirect defendant away from the subject. Defendant testified that he had intended to assert his rights at multiple points. At one point, defendant stated, "I'm not going to answer." The detectives did not stop questioning him.

¶ 27 On cross-examination, defendant acknowledged that he had seen the recording of the interview. Defendant testified that he graduated from business school at Indiana and had worked in the business world for over 20 years. He agreed that he is "not stupid." He reads a lot and tries to get his children to read. Defendant acknowledged that he understood what the words "right to remain silent" generally mean. He added that under the circumstances of the interrogation, it was different. Defendant agreed that when Hill first spoke with him, Hill stated that it was in reference to a homicide investigation, but he later clarified that this did not happen until they were at the police station.

¶ 28 The State called Detective Hill in rebuttal. He testified that, after the interview concluded, they did a pat-down search of defendant. Hill found a cell phone in one of defendant's pants pockets. On cross-examination, Hill stated he did not recall defendant asking to use a cell phone.

¶ 29 The State also called Detective Spradling. On January 13, 2015, he met with Schweigert. He identified the recording of the conversations between defendant and Schweigert that were the subject of the police overhear.

¶ 30 The State's final witness in rebuttal was Thomas Krefft. Krefft is a Hinsdale police officer. On April 11, 2010, he responded to a domestic dispute. As a result, defendant was placed under

arrest for the offense of domestic battery. Krefft advised defendant he was under arrest, placed him in handcuffs, and performed a cursory search of defendant's person. Defendant was transported to the Hinsdale police station and placed in the booking area. At the beginning of the booking process, Krefft read defendant his *Miranda* rights from a form. Defendant signed the *Miranda* form under the heading, "Acknowledgement and Waiver of Rights." Krefft then asked defendant if he was willing to speak with him. Defendant declined, stating "[t]hat he didn't want to say anything." Krefft served defendant with a two-count complaint charging him with domestic battery, and he fingerprinted defendant as well.

¶ 31 The trial court denied defendant's motion to suppress, explaining its reasoning in a memorandum opinion. The trial court first found that defendant was arrested when confronted by the police in the parking garage because a reasonable person would not have felt free to leave under the circumstances. The trial court cited the number of officers involved, the display of weapons, that there was some physical contact between the officers and defendant, and the tone of the officer's verbal directions to defendant.

¶ 32 The trial court next considered the adequacy of the *Miranda* warnings given to defendant. It found that "Officer Hill's recitation of the warnings was done in a manner which downplayed the importance of the warnings." It continued, "His comments, such as it just means that I read them to you, its normal procedure which he does with a lot of people, are all comments in the courts [*sic*] mind[,] made in an attempt to minimize the import of the warnings." However, it concluded, "That being said, however, the question is whether the rights were given which the court finds they were."

¶ 33 The trial court then turned to the question of whether defendant voluntarily waived his rights. It noted that Spradling told defendant he could stop speaking at any time and that a waiver

means he is willing to talk to the police. Further, defendant did sign the waiver form. It stated, "[T]he admonitions given, although not given in a manner the court would prefer to see done, did convey to the defendant what his rights were." The trial court further noted defendant's level of education and the fact that he had previously been arrested, had his *Miranda* rights read to him, and had invoked his right to silence. Moreover, that defendant ultimately invoked his right to silence during the interrogation by Hill and Spradling showed that he understood this right. The trial court also found defendant's claim that he had asked to call an attorney prior to the interrogation incredible, particularly in light of the fact that he had a cell phone in his pocket.

¶ 34 Finally, the trial court held that the police did not violate section 103-1(b) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/103-1(b) (West 2014)), which provides: "After an arrest without a warrant the person making the arrest shall inform the person arrested of the nature of the offense on which the arrest is based." It found it sufficient that the police told defendant that they wished to speak with him regarding a homicide investigation.

¶ 35 Defendant also appeals the trial court's denial of his motion to suppress the eavesdrop recordings. Facts pertinent to that issue are brief and will be discussed in that portion of this disposition.

¶ 36 III. ANALYSIS

¶ 37 Defendant first contends that the trial court erred in denying his motion to suppress statements. Defendant argues that suppression was warranted due to: (1) the police's failure to inform him of the reason he was being arrested, (2) his requests for an attorney being ignored, (3) the police's failure to properly *Mirandize* him, and (4) his waiver of those rights not being made knowingly. Defendant also asserts that the trial court should have granted his motion to suppress

the recordings made during overhears of his telephone conversations with Schweigert because of the police's failure to comply with various statutory provisions.

¶ 38 A. MOTION TO SUPPRESS STATEMENTS

¶ 39 We review a trial court's decision on a motion to suppress evidence using a mixed standard. *People v. Lee*, 214 Ill. 2d 476, 483 (2005). Findings of historical fact are reviewed using the manifest-weight standard. *Id*. A decision is contrary to the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *In re Faith B.*, 359 Ill. App. 3d 571, 573 (2005). However, "we review *de novo* the ultimate question of whether the evidence should be suppressed." *Lee*, 214 Ill. 2d at 484. Initially, we note that the trial court found defendant was arrested at the time he encountered police in the parking garage. The State does not dispute this finding, and, in any event, we could not say it was against the manifest weight of the evidence. Defendant asserts several bases as to why his statements should have been suppressed.

¶ 40 1. Failure To Inform Defendant Of The Reason For His Arrest

¶ 41 Defendant first contends that the police violated his statutory right to be informed of the reason he was being arrested. Defendant points to section 103-1(b) of the Code (725 ILCS 5/103-1(b) (West 2014)), which provides: "After an arrest without a warrant the person making the arrest shall inform the person arrested of the nature of the offense on which the arrest is based." Defendant contends that a violation of this section warrants suppression of evidence flowing from the arrest.

¶ 42 Initially, we note that, as defendant acknowledges, when he was first confronted in the parking garage, the police told him they wanted to speak to him because "they were investigating a homicide." The trial court found that this was sufficient to satisfy the statute. We cannot say this finding is contrary to the manifest weight of the evidence.

¶ 43 The State argues that suppression is not the remedy for a violation of this statute. In support, it cites *People v. McGuire*, 35 Ill. 2d 219 (1966). There, the supreme court held that suppression was not the remedy for a violation of section 103-7 of the Code (Ill. Rev. Stat. 1963, chap. 38, pars. 103-7 (now codified as amended at 725 ILCS 5/103-7 (West 2014))). Section 103-7 requires the posting of notices of certain rights provided for in article 103, which is the same article in which the section at issue here appears. The supreme court noted the legislature has specified the remedy for a violation of the provisions of article 103 in section 103-8: "Any peace officer who intentionally prevents the exercise by an accused of any right conferred by this Article or who intentionally fails to perform any act required of him by this Article shall be guilty of official misconduct and may be punished in accordance with Section 33-3 of the Criminal Code of 2012." 725 ILCS 5/103-8 (West 2014).

¶ 44 Similarly, in this case, the remedy for a violation of section 103-1(b) is the remedy set forth in section 103-8. Indeed, section 103-1 expressly provides this: "Any peace officer or employee who knowingly or intentionally fails to comply with any provision of this Section, except subsection (b-5) of this Section, is guilty of official misconduct as provided in Section 103-8; provided however, that nothing contained in this Section shall preclude prosecution of a peace officer or employee under another section of this Code." 725 ILCS 5/103-1(h) (West 2014)). Thus, the reasoning of *McGuire* applies here; the remedy for a violation of section 103-1(b) is provided for by statute and is not suppression.

¶ 45 Defendant attempts to characterize the portion of *McGuire* upon which we rely here as *dicta*, as it was an alternative basis for the supreme court's resolution of that case (the court had first held that notice was not required to be posted where defendant was being held (a hospital) (*McGuire*, 35 Ill. 2d at 225)). However, it is well established that "an expression of opinion upon

a point in a case argued by counsel and deliberately passed upon by the court, though not essential to the disposition of the cause, if *dictum*, is a judicial *dictum*." *Cates v. Cates*, 156 Ill. 2d 76, 80 (1993). The supreme court added, "[J]udicial *dictum* is entitled to much weight." As an analysis of the statutory language at issue in that case, we find this passage of *McGuire*, if *dicta* at all, is clearly of the judicial sort. Moreover, the reasoning is persuasive, particularly in light of defendant's inability to identify any authority holding that the remedy for a violation of section 103-1(b) is suppression. Defendant does cite some foreign authority construing statutes of other states; however, in light of our supreme court's analysis of article 103 in *McGuire*, there is no need to resort to foreign cases. As such, this argument must fail.

¶ 46 2. Invocation of Right to Counsel

¶ 47 Defendant next contends that he invoked his right to counsel in the parking garage, during the trip to the Bloomingdale police station, and at the police station as well. Defendant correctly points out that when a suspect invokes his right to counsel, all questioning must stop. *People v. Winsett*, 153 Ill. 2d 335, 349 (1992) (citing *Miranda*, 384 U.S. at 474). The problem for defendant here is that the trial court found incredible defendant's claim that he invoked his right to counsel prior to essentially the end of the interrogation.

¶ 48 As noted, we apply the manifest-weight standard in reviewing a trial court's finding regarding an issue of historical fact. *Lee*, 214 Ill. 2d at 483. We owe great deference to the trial court's determinations regarding issues of fact and credibility. *People v. McDonough*, 239 Ill. 2d 260, 266 (2010). This is because the trial court, having observed the testimony of witnesses firsthand, is in a better position to assess and weigh the evidence. *People v. Sorenson*, 196 Ill. 2d 425, 431 (2001).

¶ 49 Here, on this issue, the trial court found as follows:

> "The final question centers around whether the defendant made a request for an attorney prior to being *Mirandized* or after but prior to indicating he no longer wished to speak with the police. He testified that he requested an attorney while at the scene and during transport to the police station. He testified he asked for his cellphone to make such a call but that this was denied to him. The court finds this testimony is not credible for several reasons. First, as shown later in the video, defendant had a cellphone on his person throughout the interrogation, second when the taped interview began he made no reference to having asked for an attorney nor made a request for an attorney while the interview was being taped."

Initially, we note that the trial court's articulated reasons for rejecting defendant's testimony are reasonable. In addition, we note that Spradling, Hill, and Gibler testified that defendant did not ask for an attorney. Thus, there was a direct conflict in the testimony. Resolving such conflicts is primarily a matter for the trier of fact—here, the trial court. *People v. Frazier*, 248 Ill. App. 3d 6, 13 (1993). Defendant makes a general attack on the officers' credibility and asserts that asking for an attorney under the circumstances present would have been "common sense"; however, he has provided us with no persuasive reason why the trial court was required to accept his testimony over that of three police officers. As such, the factual predicate for defendant's argument—that he requested counsel prior to the interrogation—is lacking, and this argument must fail.

¶ 50 3. *Miranda*

¶ 51 Defendant next criticizes the manner in which the *Miranda* warnings were delivered to him. Defendant contends that the police presented the *Miranda* warnings to him in a way that was designed to minimize their importance. Defendant points out that Hill told defendant that he would read him the warnings "real quick." He stated that warnings were "normal," "standard," and "that

this was a normal process." Hill acknowledged cutting off defendant at times. The trial court agreed with defendant's characterization of the officer's reading of the warnings:

> "It is clear that Officer Hill's recitation of the warnings was done in a manner which downplayed the importance of the warnings. His comments, such as it just means that I read them to you, its normal procedure which he does with a lot of people, are all comments in the courts mind made in an attempt to minimize the import of the warnings."

The trial court went on to find that despite the manner in which they were presented, the warnings "did convey to defendant what his rights were."

¶ 52 We are unaware of any rule of law that holds that the police are required to do anything more than present a defendant with the necessary information, and defendant cites nothing to this effect. He does cite *Moran v. Burbine*, 475 U.S. 412 (1986); however, that case actually undermines his position. As defendant notes, in *Moran*, the Supreme Court suggested that conduct more egregious than falsely telling an attorney that his client faced no imminent questioning would rise to the level of a due process violation. *Id.* at 432. Defendant's implication is that the conduct in this case would exceed such a threshold. However, conveying the *Miranda* warnings in a less-than-enthusiastic manner does not appear to us to reach the level of deliberately lying to a suspect's attorney. Moreover, a rule based on the tone of the warnings or the relative enthusiasm with which they were delivered would be incredibly difficult to apply.

¶ 53 In short, we find this argument wholly unpersuasive. The trial court's decision that the warnings as given by the police were adequate is not contrary to the manifest weight of the evidence.

¶ 54 4. Waiver

¶ 55 Defendant also contends that his waiver of his *Miranda* rights was not knowing or voluntary. Of course, any waiver of a constitutional right must be performed knowingly, voluntarily, and intelligently. *People v. Bernasco*, 138 Ill. 2d 349, 357 (1990). The supreme court clarified that a suspect need not "understand far-reaching legal and strategic effects of waiving one's rights, or to appreciate how widely or deeply an interrogation may probe, or to withstand the influence of stress or fancy; but to waive rights intelligently and knowingly, one must at least understand basically what those rights encompass and minimally what their waiver will entail." *Id.* at 363. Further, "[i]n determining whether a defendant knowingly and intelligently waived his or her *Miranda* rights, a court considers the totality of the circumstances, including the characteristics of the defendant and the details of the interrogation, without any one factor or circumstance controlling." *People v. Mahaffey*, 165 Ill. 2d 445, 462 (1995). Whether a waiver is knowing and voluntary presents a question of fact subject to review using the manifest-weight standard. *People v. Soto*, 2017 IL App (1st) 140893, ¶ 69.

¶ 56 The trial court determined that defendant's waiver was valid. It first noted that, during the interrogation, "defendant asked to differentiate between understanding the rights as opposed to waiving them." Hill then told defendant that "it just meant that he had read the rights to him." Defendant persisted, and Spradling "explained that a waiver means defendant is willing to talk with the police at that time and understands his rights" and that defendant could stop talking at any time. Defendant then signed the waiver of rights form. The trial court further observed, "Here the admonitions given, although not given in a manner the court would prefer to see done, did convey to the defendant what his rights were." Moreover, defendant was college educated, and, we note, had successfully run several businesses for years. In other words, there were indicia that defendant was intelligent. Additionally, defendant had been previously arrested, had his rights explained to

them, and had invoked his right to silence. Finally, the trial court found, "The understanding of his rights is further supported by the fact that at some point in the interview he exercised his right to be silent." The trial court's findings here are reasonable and based on evidence in the record.

¶ 57 Defendant relies on *People v. Redmon*, 127 Ill. App. 3d 342 (1984), in arguing that he did not understand his rights. In *Redmon*, the defendant expressly stated that he did not understand his rights, which defendant points to as a similarity with this case. Defendant also asserts that *Redmon* is similar because he did not have "significant experience with the criminal justice system." We do not believe defendant is fairly characterizing his own experience with the justice system. While there was only one other incident, it was extremely relevant—defendant was *Mirandized* and invoked his right to silence. More importantly, the defendant in *Redmon* was 17 years' old at the time of his arrest and a psychologist opined that he had an IQ of 70 or 71 "and fell into the category of borderline mental deficiency." *Id.* at 346. Indeed, much of the discussion in *Redmon* focused on the defendant's mental capacity. *Id.* at 347-350. Here, defendant is a college educated businessman and over 50 years' old. *Redmon* is easily distinguishable.

¶ 58 In sum, the trial court could reasonably determine that defendant's waiver was knowing, intelligent, and voluntary. The police conveyed the warnings to defendant, a college-educated businessman. Defendant had been arrested and invoked his right to silence previously. Further, defendant invoked his rights and terminated the interrogation in this case. Under such circumstances, we cannot find the trial court's decision is contrary to the manifest weight of the evidence.

¶ 59 B. MOTION TO SUPPRESS RECORDINGS

¶ 60 In a series of motions, defendant asked the trial court to suppress the recordings of the overhears of the telephone conversation between him and Schweigert. Defendant identifies three

alleged violations based on the relevant statutes governing overhears: (1) the state did not disclose the recordings in a timely fashion; (2) that the recordings were not returned to the judge that issued the order authorizing the overhear; and (3) that the recordings were not returned to a judge and sealed immediately after the order expired (we will address the last two in a single section of this disposition, as they raise related issues). As noted above, a trial court's decision on a motion to suppress evidence is reviewed using a mixed standard. *Lee*, 214 Ill. 2d at 483. Findings of historical fact are reviewed using the manifest-weight standard, and "we review *de novo* the ultimate question of whether the evidence should be suppressed." *Lee*, 214 Ill. 2d at 483-84. A finding is against to the manifest weight of the evidence where an opposite conclusion is clearly evident. *Faith B.*, 359 Ill. App. 3d at 573. We decline the State's invitation to apply the abuse-of-discretion standard based on defendant's characterizations of its motions as one for sanctions or one based on lack of foundation as defendant's motions are, in fact, suppression motions. We will first address the substance of defendant's three asserted bases for suppression; we will then turn to the question of remedy.

¶ 61 1. Timely Notice

¶ 62 We first turn to defendant's argument that the State did not give timely notice before using the recordings in a proceeding. Section 108A-8(c) of the Code (725 ILCS 5/108A-8(c) (West 2014)) provides as follows:

> "The contents of any recorded conversation or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other judicial or administrative proceeding unless each party not less than 10 days before such a proceeding has been furnished with a copy of the court order and accompanying application under which the recording was authorized or approved and has had an opportunity to examine

> the portion of the tapes to be introduced or relied upon. Such 10-day period may be waived by the judge if he finds that it was not possible to furnish the party with such information within the stated period and that the party will not be materially prejudiced by the delay in receiving such information."

Defendant complains that the State used the recordings in a bond hearing on January 16, 2015 and before the grand jury on January 20, 2015, but did not formally disclose the that "electronic surveillance was used in this case" until January 21, 2015 (notice was given well before the trial). The State counters that the recordings were made only a few days before the bond hearing, so 10-day notice was not possible. Moreover, the State continues, since the statute allows waiver of this requirement if notice was not possible, a request for waiver would have been granted.

¶ 63 In his argument, defendant does not identify precisely what portion of the bond hearing he is relying on in support of this argument (needlessly complicating our review). However, our review of the transcript leads us to conclude that this is the pertinent material:

> "In addition, Judge, the evidence would establish that this friend traveled to the state of Illinois, agreed to a judicial overhear; that during the course of telephone conversations and text conversations with Mr. Keller, specifically during telephone conversations Mr. Keller made numerous admissions admitting that he had, in fact, killed Nate Fox, reiterated that he had he had put the gun back in its place and [it] would never be found again."

Defendant did not object based on lack of notice or for any other reason (it was not until over two years later that defendant raised the issue in the motion). Had defendant objected, the State could have sought a ruling on waiver, which likely would have been successful since the recordings were created less than ten days prior to the bond hearing (the recording was also created less than 10

days before the grand jury proceedings). Indeed, one could surmise that the reason that defendant did not object was that the waiver exception so clearly applied. By failing to interpose a contemporaneous objection, defendant has forfeited this issue. *People v. Gone*, 375 Ill. App. 3d 386, 393-94 (2007).

¶ 64 Moreover, defendant's claims of prejudice are highly speculative. Defendant first contends that members of the press were present at the bond hearing. By referencing the recording, according to defendant, the State poisoned the jury pool. Additionally, defendant asserts that "every witness that the defense talked to already knew about the overhear" and "[m]any of the defense's potential witnesses refused to talk to them after exposure to the overhear, having already concluded [d]efendant was guilty." As for the first point, nothing in the record indicates the amount and depth of press coverage to which this case was subjected. Without more, we certainly could not say that the trial court's finding that the publicity in this case was not as significant as many cases for which the trial court was able to pick a jury is against the manifest weight of the evidence. As for the second, nothing establishes why witnesses were refusing to speak with defense counsel. In fact, defendant cites nothing but the argument of defense counsel to substantiate this theory. Prejudice cannot be established by mere speculation. *People v. Torres*, 245 Ill. App. 3d 297, 301 (1993); *People v. Walker*, 24 Ill. App. 3d 421, 423 (1974) ("An assertion of prejudice does not establish such as a fact, but is speculative in the absence of a showing of actual prejudice."). Moreover, it is not even known whether any of the witnesses that purportedly refused to speak to defense counsel would have had anything to say that would have benefitted defendant at trial. See *People v. Meeks*, 27 Ill. App. 3d 144, 148 (1975) ("[T]he record before this court does not contain a whisper of a suggestion that no matter how extensively, how ingeniously or how vigorously the complaining witness might have been cross-examined, her testimony would

have given petitioner any comfort. It would be impossible for petitioner to establish or even allege that her testimony could have been helpful to him because whether it would have changed or shifted or whether how she would have behaved under cross-examination would have affected the decision to plead guilty is completely speculative.").

¶ 65 We find this argument unpersuasive as well. Further, to the extent defendant argues that the statements should have been suppressed as they were otherwise "obtained in violation of Illinois law," *People v. Nieves*, 92 Ill. 2d 452 (1982), as we explain below, would control on the question of admissibility.

¶ 66 2. Other Statutory Requirements

¶ 67 As defendant's remaining arguments pertain to the same statutory subsection, we will address them together. Defendant also contends that the State failed to comply with section 108A-7(b) of the Act (725 ILCS 5/108A-7(b) (West 2014)). That section provides, in pertinent part, as follows:

> "Immediately after the expiration of the period of the order or extension or, where the recording was made in an emergency situation as defined in Section 108A-6, at the time of the request for approval subsequent to the emergency, all such recordings shall be made available to the judge issuing the order or hearing the application for approval of an emergency application."

Defendant points out that the recordings were returned to a judge other than the one who issued the overhear order. Further, defendant asserts that the only indicia of when the recordings were returned to the judge is the file stamp date on the judge's order sealing them, which is April 30, 2015, 77 days after the overhear order expired. In his motion raising these issues, defendant does not allege that the recordings were altered in any way.

¶ 68 Section 108A-9 (725 ILCS 5/108A-9 (West 2014)) allows an "aggrieved person" to move to suppress recorded conversations on multiple grounds, specifically: (1) that the conversation was unlawfully overheard; (2) that the order authorizing the overhear was improperly granted; or (3) that the State failed to comply with the authorizing order.

¶ 69 The State does not seriously dispute that it did not comply with the literal terms of the statute; instead, it argues that the violations that occurred were technical in nature and not a basis to suppress the recordings. To this end, it relies on *Nieves*, 92 Ill. 2d 452, in which our supreme court considered whether the State's failure to comply with section 108A-7(b) of the Code (Ill. Rev. Stat. 1977, ch. 38, par 108A-7(b) (now codified as amended at (725 ILCS 5/108A-7 (West 2014))) warranted suppression of telephone conversations recorded through the use of an eavesdropping device. The defendant moved to suppress as the recordings were not returned to the issuing judge until 16 days after the order expired, allegedly violating the immediacy requirement of section 108A-7(b). *Id.* at 455. The State countered that its failure to return the recordings for 16 days was a mere technical violation that did not warrant suppression. *Id.* at 456.

¶ 70 The supreme court noted that this was an issue of first impression in Illinois; however, federal courts had construed similar language in federal statutes, which included an immediacy requirement. *Id.* at 457. It added that "the wording in the Federal and Illinois statute is virtually identical in all pertinent respects." *Id.* at 458. The *Nieves* court observed that the United States Supreme Court, in *United States v. Chavez*, 416 U.S. 562, 574-75 (1974), held that not every failure to comply with the federal statute required suppression. In *United States v. Giordano*, 416 U.S. 505, 527 (1974), the Court explained, "[W]e think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations

clearly calling for the employment of this extraordinary investigative device." Subsequently, in *United States v. Chun*, 503 F.2d 533, 541-42 (9th Cir. 1974), the Ninth Circuit Court of Appeals distilled the following test from *Chavez* and *Giordano* to ascertain when failure to comply with the federal statute mandated suppression: "(1) [whether] the particular safeguard is a central or functional safeguard in the congressional scheme to prevent abuses, (2) [whether] the purpose that the particular procedure was designed to accomplish has been satisfied in spite of the error, and (3) [whether] the statutory requirement was deliberately ignored and, if so, whether there was any tactical advantage to be gained by the government." *Nieves*, 92 Ill. 2d at 458-59.

¶ 71 The *Nieves* court further observed, "With respect to the above criteria, it has been consistently held that the immediate-sealing requirement is a primary safeguard in the legislative scheme (factor 1) and that the function of the post-interception procedural requirement is to preserve the integrity of the intercepted conversations and to prevent any tampering or editing of the tapes (factor 2)." *Id.* at 459. It added, "The inquiry under factor (2) of the test thus becomes whether that purpose has been fulfilled despite failure to adhere to the immediacy requirement." *Id*. The *Nieves* court also noted the Seventh Circuit Court of Appeal's holding in *United States v. Angelini*, 565 F.2d 469, 473 (7th Cir. 1977), that "the congressional purpose underlying the sealing requirement was satisfied inasmuch as there was no substantial question raised about the integrity of the tapes." *Nieves*, 92 Ill. 2d at 460.

¶ 72 Our supreme court adopted the federal test articulated in *Chun* to determine when suppression is warranted for violations of section 108A-7(b) and related provisions. *Id.* at 462. It further explained, "Where the issue is immediacy, we believe that if a defendant challenges the integrity and presents some evidence to support the challenge, the burden should shift to the State, similarly to when suppression of a confession is sought, and the State must show that the tapes

have not been altered." *Id*. Further, "the absence of any challenge to the integrity of the tapes, combined with the lack of any indication that tampering has occurred, goes a long way toward fulfilling the legislative objective." *Id*. The court then applied the test and determined that the recordings at issue in *Nieves* were admissible. *Id.* at 462-63.

¶ 73 Applying the test in this case, the trial court first observed that the purpose of our statute was to "allow for, in this case, a consensual overhear"—that is, consensual "at least by one of the parties." The "immediate sealing" requirement serves to "prevent any attempt or any alteration or modification of what is actually on the overhear," and the "timeframes" serve the same purpose. The trial court then noted that the recordings had been turned over to the defense for at least a year prior to the hearing on the motion to suppress the recordings and that there was "no allegation in any of the pleadings that they [had] been altered or modified in any way." Defendant was making no claim "that they are not what occurred." The trial court found that the fact that a different judge issued the order than the judge it was returned to was not of "any great consequence"; therefore, this was not a basis for suppression (we note that the trial court's analysis on this point implicates the first factor set forth in *Chun*--whether the safeguard is central to the legislative scheme to prevent abuses). The trial court concluded that since the recordings authenticity was not at issue, the defendant's motion was denied.

¶ 74 Issues of statutory construction are subject to *de novo* review, of course (*People v. Legoo*, 2019 IL App (3d) 160667, ¶ 9); however, we find the trial court's analysis persuasive. Applying the three-factor test adopted by our supreme court in *Nieves*, 92 Ill. 2d at 459, we initially note that the provision stating the recording should be returned to the issuing judge does not appear central to the legislative scheme, while the immediacy and sealing requirements do (see *People v. Cunningham*, 2012 IL App (3d) 100013, ¶ 24). Moreover, as defendant does not allege that the

recording has been altered, the purpose the statute is designed to serve (factor 2) has been satisfied. See *Nieves*, 92 Ill. 2d at 462-63. Indeed, Schweigert testified that the recordings of the conversations that took place during the overhear were accurate. Finally, regarding the third factor, we are unable to discern any tactical advantage the State gained by returning the recordings to a different judge than the one that issued the order or by delaying in doing so. Moreover, defendant identifies nothing along these lines. Thus, we hold that, under *Nieves*, the trial court did not err in refusing to suppress the recordings at issue in this case.

¶ 75 Defendant asserts that *Nieves* has been preempted by federal law, specifically, by the United States Supreme Court's decision in *United States v. Ojeda Rios*, 495 U.S. 257 (1990). It is true that Congress has "preempted the regulatory field of electronic surveillance, and therefore Illinois may not enact standards that are less stringent than the requirements set by the federal statute." *People v. Allard*, 2018 IL App (2d) 160927, ¶ 25.

¶ 76 In *Ojeda Rios*, the defendant sought suppression of surveillance recordings based on the police's failure to have them sealed in a timely manner. Section 2518(8)(a) of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Act) (18 U.S.C.A. § 2518(8)(a) (2000)) provides, in pertinent part: "The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection(3) of section 2517." Based on this language, the Supreme Court held that before a delay in sealing a recording could be excused, the government was required to proffer a satisfactory explanation as to why the delay occurred and why it is excusable. *Ojeda Rios*, 495 U.S. at 265. Defendant notes that section 108A-7(b) contains language that is substantially similar to the language construed in *Ojeda Rios*. See 725 ILCS 5/108A-7(b) (West 2014) ("The presence of the

seal provided for in this Section or a satisfactory explanation for the absence thereof shall be a prerequisite for the use or disclosure of the contents of the recordings or any evidence derived therefrom."). Defendant reasons that since the language of both statutes is so similar, and because federal law preempts state law generally in the field, the *Nieves* test for admissibility is no longer good law and Illinois is required to adopt and apply the more stringent satisfactory-explanation test.

¶ 77 The State counters that the federal law upon which defendant relies concerns nonconsensual wiretaps and does not apply to overhears where one party has consented. It points to section 2511 of the Act, which states: "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." 18 U.S.C.A. § 2511(2)(c) (2000). Indeed, our supreme court noted in *Coleman* that Title III of the Act "prohibits recording conversations when neither party consents," but provides an exception where one party has consented to the overhear. *Coleman*, 227 Ill. 2d at 434.

¶ 78 We agree with the State. It is difficult to see how federal law that is not applicable to the conduct at issue before a court could preempt state law that pertains to such conduct. Defendant attempts to establish such a link by pointing to the fact that state and federal statutes at issue here (18 U.S.C.A. § 2518(8)(a) (2000); 725 ILCS 5/108A-7(b) (West 2014)) contain substantially similar language. If defendant were simply asking us to construe section 108A-7(b) and pointed to section 2518(8)(a) as persuasive authority, we could certainly consider it in this manner. However, defendant is asking us to hold that *Nieves*, a case issued by our supreme court (a court we lack the authority to overrule (*Blumenthal v. Brewer*, 2016 IL 118781, ¶ 28)), is no longer good

law in light of subsequent developments in federal law. We could only do so on the clearest, dispositive authority indicating federal action has abrogated *Nieves*—not, as defendant suggests, a case and statute that do not even address the conduct at issue here.

¶ 79 In a related context, our supreme court has held:

> We are bound to follow the United States Supreme Court's interpretation of the Constitution of the United States. [Citations.] But we are not bound to extend the decisions of the Court to arenas which it did not purport to address, which indeed it specifically disavowed addressing, in order to find unconstitutional a law of this state. This is especially true where, as here, to do so would require us to overrule settled law in this state."

This logic is pertinent here. Defendant asks that we extend *Ojeda Rios* beyond its facts and find that *Nieves* has been abrogated. We are compelled to decline defendant's request.

¶ 80 C. HARMLESS ERROR

¶ 81 Finally, the State contends that both alleged errors were harmless because the evidence against defendant was overwhelming. The erroneous admission of evidence can amount to harmless error where the other evidence against a defendant is overwhelming. *People v. Sandifer*, 2017 IL App (1st) 142740, ¶ 71. Such is the case here. At trial, the following evidence was adduced.

¶ 82 Carlie Fraley, the victim's paramour, testified that she heard two gunshots about 30 seconds after the victim arrived home and opened the garage door. She ran to the garage and discovered he had been shot. On the day of the shooting, a neighbor who lived in a townhome adjacent to the victim noted an outdoor light on his garage was not working. He discovered it was not screwed in all the way, so he tightened the bulb. Later, he heard two loud noises and a car drive off. A number

of police cars arrived, and he went outside. He then noted that the light was not working and discovered that it was not screwed in all the way again. He never had a problem with the light not working after this date. Another neighbor testified that he heard the gunshots but did not hear any arguing preceding them. He observed a dark colored car leaving the scene.

¶ 83 Dr. McElligott testified that she performed an autopsy on the victim. She observed two gunshot wounds. One entered on the front of the left shoulder and traveled downward. The second entered the right forearm and traveled upward. She found no evidence of close-range firing, meaning within 24 inches.

¶ 84 Schweigert testified that he had been friends with defendant since college. On January 9, 2015, he and defendant had dinner at Schweigert's house. At one point, defendant asked Schweigert if he had ever been so mad at someone that he wanted to kill him. Schweigert answered no, and defendant said, "I was so mad at somebody that I killed him." Defendant explained that "the woman that he was seeing he felt was seeing someone behind his back." He said the woman's name was "Katie." Defendant stated that he and Katie had not been intimate. Defendant agreed with Schweigert's characterization of the relationship as an "emotional affair." Defendant indicated that she had feelings for him too. Defendant told Schweigert that "he felt strongly that she had actually gone behind his back and had sexual intercourse with another man." Defendant identified the man as Nate Fox, a former basketball player.

¶ 85 Defendant told Schweigert to use Google to get more information about the killing. Defendant did not want to use his own phone to perform the search. An article appeared, and defendant pointed to it and said, "I did that." Defendant was not emotional when he did so. Schweigert asked defendant why he shot Fox, and defendant "said that Nate was messing with something, or someone, that he shouldn't have been messing with." Schweigert inquired as to

whether defendant had confronted Katie. Defendant stated that he had, and she always denied it. However, defendant "suggested that his gut feeling has always been historically 100 percent accurate, and he still had the gut feeling that she was having sex behind his back and with Nate." Defendant said, "he wanted to get rid of the problem" and the problem was Nate Fox.

¶ 86 Defendant described to Schweigert how he committed the crime, including that he rented a car and followed Fox on several occasions and that he believed Fox was most vulnerable when he was exiting his car. On the night of the killing, defendant hid in some shrubbery. When Fox pulled into his driveway, defendant ran to where Fox would get out of his car and shot him three times. Defendant told Schweigert that he regretted not going back for a kill shot. Defendant was concerned that the car he rented had a GPS unit and would document his travels that evening. Defendant was also concerned that a red-light camera may have taken a picture of him. Defendant stated that he still had the gun he had used, but that "it would be put back where it belonged, or back in its place."

¶ 87 The next day, Schweigert drove defendant to the airport. On the way to the airport, defendant asked Schweigert if he had a gun. He also asked how far Schweigert would be able to drive if defendant needed his help. Defendant also stated he would not kill himself or go to prison and that "he was going to stay on the road on business and just not go back to Chicago for quite a while."

¶ 88 Defendant's nephew, Scott Schoenherr, testified that he and his ex-wife were staying at his parent's home in December 2014. They stayed in the basement. Defendant frequently visited and spent the night. Scott owned three guns, including a Smith & Wesson 9 mm. The 9 mm was stored in a quick-release safe under his bed. Scott was away on a business trip from December 7 to December 16, 2014 (defendant visited on December 13, 2014). On December 26, 2014, Scott

discovered that the 9 mm was missing. On January 10, 2015, defendant stayed at the house. Scott was out that night and his room was unlocked. On January 15, Bloomingdale police came to the house and asked Scott about his guns. Scott told them his 9 mm was missing. The officers and Scott went to look at the safe. When he opened it, the 9 mm was inside.

¶ 89 Debra Schoenherr testified that defendant stayed at their house on December 13, 2014, while Scott was away on business. Defendant slept in the basement. Debra next saw defendant when he stayed at her house on January 10, 2015.

¶ 90 Jack Feinstein, the director of product management for BrickHouse Security, testified that defendant purchased a GPS with a magnetic mounting case on November 10, 2014.

¶ 91 Kathryn Cole ("Katie") testified that she met defendant in 2010. Their daughters played soccer together. Defendant called her "Katie." By 2013, they were texting or emailing daily. In May 2013, Nate Fox began working at her office. She told defendant that he was a former basketball player. After about a month, he was terminated. Cole never saw Fox again. She told defendant that Fox had been fired.

¶ 92 In the summer of 2013, Cole felt that her communications with defendant were "getting a little out of control." She told defendant that they "needed to let it die down" and that she "needed some space." In October 2013, in a text message, defendant accused Cole of having a relationship with Fox. She denied this via text message. She was angry, and she called defendant as well. She was angry because "it was completely false, and I thought he was a friend of mine, and I didn't understand why he was doing this." Defendant then threatened to come to Cole's house if she refused to come and speak with him. She met defendant in a nearby church parking lot.

¶ 93 Also in the fall of 2013, defendant accused Cole of going to Fox's house. He claimed he saw her there. She had never been to Fox's house. She "vehemently denied it" to defendant. She

asked defendant to take her to where he saw her. Cole drove and defendant directed her, without using a GPS or other sort of device to locate it. Defendant was able to find it by memory. They arrived at a building that defendant pointed out, and Cole told him she had never been there. The subject of Cole having an affair with Fox came up on multiple occasions. Defendant accused her of going home with Fox after a party and of going to a hotel with him. Cole testified that none of the allegations were true. She was angry about the accusations and "cut off the relationship and communication" with defendant in November 2013 through January 2014. Despite the fact that Cole asked defendant to stop communicating with her, he continued to send messages on a near daily basis.

¶ 94 In 2014, she noted defendant following her on three occasions. She described their relationship in winter and spring as "tumultuous." They would start speaking, he would make an accusation, and she would cut off contact. In February 2014, Cole went to a company party. She drank a lot and became very intoxicated. She texted with defendant and flirted. Defendant asked if he could pick her up, and she agreed. He took her to his office, which was nearby. Cole felt sick and was "sick for hours." However, there was some "very minimal" physical contact. She testified that she never had sexual intercourse with defendant. Cole's husband found out that something was going on, and she explained it to him. Defendant met with Cole's husband (Dan), and they talked.

¶ 95 Cole testified that Facebook Messenger has a function that allows you to see where the person you are speaking with is located. Defendant would get "very upset" if Cole turned that function off. In May 2014, defendant again accused Cole of having an affair with Fox and sent her a text, which stated: "Total shit storm. You win. Congrats. Who did you think you were deceiving? No pride. No integrity. These walls will fall." About 9 days later, she sent defendant

a text stating, "Please do not ever contact me or my husband again." Defendant replied that maybe they should talk at the bowling alley, referring to a party she was having at a bowling alley for her daughter later that day. Defendant also texted: "You need to talk to me before this spins out of control. Tick tock. Time not an ally here." Nevertheless, they continued to communicate in June, including messages that were sexually provocative in nature, which continued. Defendant would send Cole links to pornography and explicit pictures of himself. On November 10, 2014, Cole declined to meet defendant for lunch because she had other things to do. Defendant sent her a message stating:

> "You have a standing offer. Other plans maybe? You encouraging me to doubt you? You encouraging me to doubt you question mark. [s*ic*] *** Let's talk here, Kate. Care to share why you can't? What's cooking today."

Subsequently, he stated:

> "I am going to look deeply into your day. I am going to look for your untrustworthy ways. Does not feel right. This should be the most trust you have seen. No problem. We get you straightened out. You poor thing. I feel sorry for you, but I prefer to do the right thing, so I will.

¶ 96 Detective David Spradling, a detective with the Bloomingdale police department, testified that he obtained the records from the GPS device that defendant had purchased. They showed that the device had been near, among other places, defendant's home and office, Cole's home, and the victim's home at various points. It pinged in Indianapolis and Columbus at times when charges were made on one of defendant's credit cards in those areas. Data further indicated that it was attached to Cole's vehicle when she left the state during the Thanksgiving holiday. On the day of the killing, it first transmitted from defendant's home and then his office. At about 11 a.m., it

pinged from near the victim's home. At about noon that day, the device was near the Weber Grill in Lombard, where defendant's credit card showed a purchase. Detective Thomas Brown testified that a forensic examination of defendant's computer revealed Google searches for "Nate Fox," "Du Page Major Crimes Task Force," and "Nate Fox reward." Other evidence indicated that defendant had a contact in his telephone for Nate Fox and that there was a Google Map entry for the victim's home. There was also evidence that defendant purchased handgun ammunition.

¶ 97 Clearly, the evidence of defendant's guilt was overwhelming. Given the strength of this evidence, the errors defendant complains of—even if his complaints were well founded—are harmless. *People v. Sandifer*, 2017 IL App (1st) 142740, ¶ 71. Moreover, as for the overhear recordings, Schweigert could have testified to the contents of those conversations had the recordings themselves been excluded. *People v. Walker*, 291 Ill. App. 3d 597, 604 (1997). Hence, even if defendant's claims of error had merit, we would nevertheless be compelled to affirm his conviction.

¶ 98 IV. CONCLUSION

¶ 99 In light of the foregoing, the judgment of the circuit court of Du Page County is affirmed.

¶ 100 Affirmed.

¶ 101 PRESIDING JUSTICE BIRKETT, specially concurring:

¶ 102 I agree with my colleagues in upholding the trial court's order denying defendant's motion to suppress the eavesdropping recordings. I write separately to note that the Illinois legislature amended the eavesdropping statute to allow one party consent eavesdropping during the investigation of a qualified offense, without a court order, so long as the State's Attorney has given his or her "written approval" and the recordings will be made within "a reasonable period of time

but in no event longer than 24 consecutive hours." 720 ILCS 5/14-3(q) (eff. Jan. 1, 2015). First degree murder is a "qualified offense." 725 ILCS 5/14-3(q)(7)(B).

¶ 103 In this case, DuPage County State's Attorney Berlin authorized the use of an eavesdropping device on January 13, 2015. The recordings were made on January 14, 2015. The newly enacted exemptions in section 14-3 were in effect when the recordings were made and at the time of trial. A court order under Article 108A may not have even been necessary given the speed with which the police completed their investigation after receiving the State's Attorney's authorization.