2015 IL App (1st) 131868-U

SIXTH DIVISION
Order filed: October 30, 2015

No. 1-13-1868

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 09 CR 5704
	)	
FREDRICK GOINGS,	)	Honorable
	)	Maura Slattery Boyle,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the trial court is affirmed, where the following arguments by the defendant were rejected: (1) crime scene photographic evidence and evidence as to the victims' surviving family member, along with the State's commentary referring to such evidence, was irrelevant and inflammatory and operated to deprive the defendant of a fair trial; (2) the victim's testimony in a prior hearing was improperly admitted; (3) cell phone evidence was admitted in violation of his constitutional rights; and (4) his trial judge was biased. The defendant's mittimus is ordered modified to reflect convictions for two counts of first-degree murder instead of four counts.

¶ 2 Following a jury trial, the defendant, Fredrick Goings, was convicted of two counts of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2008)) and sentenced to natural life imprisonment. On appeal, the defendant argues that he is entitled to a new trial, because (1) highly prejudicial crime scene evidence was improperly admitted, and the prosecution's comments about the evidence, along with its characterization of the decedent's surviving child as a "victim," were also highly prejudicial and improper; (2) one victim's testimony in a prior hearing was improperly admitted; (3) cell phone evidence was admitted in violation of his constitutional rights, and (4) the trial court demonstrated bias against him. The defendant further asserts that his mittimus should be corrected to reflect convictions for two, not four, counts of first-degree murder. For the reasons that follow, we affirm the defendant's conviction and sentence, but we order that his mittimus be modified to properly reflect, as conceded by the State, two convictions of first-degree murder rather than four.

¶ 3 The evidence adduced at trial may be summarized as follows. On January 24, 2009, the victims, Nova Henry (Henry) and her daughter Ava Curry, were found shot to death in their home. Henry's three-year-old son, Noah Curry, was also in the home, but was unharmed. According to the testimony of Henry's mother, Yolan Henry (Yolan), Henry gave birth to Noah in November of 2005, and had been seeking to obtain child support payments from the child's biological father. In the Fall of 2006, Henry retained the defendant, an attorney, to handle her child support case. Also around this time, Henry began a relationship with the defendant, and moved in with him at his home in Chicago. Yolan testified that Henry's relationship with the defendant was a tumultuous one, and that Henry suffered ongoing physical abuse at the hands of the defendant from the inception of the relationship until the shootings. The couple would frequently argue, break up, and then reconcile. Yolan stated that, in early 2007, Henry moved

out of the defendant's home and into her own apartment, but the defendant continued to visit her there.

¶ 4 As of April 2007, the defendant was no longer representing Henry in her child support case. On April 6, 2007, Henry obtained an order of protection against the defendant, but she terminated the order within 11 days of its entry. Yolan and Keith Henry (Keith), Henry's stepfather, testified to several instances throughout the years of 2007 and 2008, in which Henry would move in with the defendant, reside with him temporarily and then move out again. Yolan testified that, at one point during this period, Henry called her to her home and she observed red marks around Henry's neck.

¶ 5 In January 2009, Henry leased a two-story duplex apartment in Chicago (apartment), where she intended to reside with Ava and Noah. In the week before Henry moved in, she was at the apartment cleaning and painting with Keith and her father, Eric Grimmette, when the defendant came to the door unexpectedly. According to Grimmette, Henry appeared startled and then pushed the defendant out the door. Outside, the defendant had a confrontation with Grimmette and then drove away in a Range Rover.

¶ 6 The State introduced footage from a surveillance video camera outside of Henry's apartment complex for the days of January 23 through January 24, 2009. The footage depicted a silver BMW and a black Range Rover, both belonging to the defendant, going in and out of the parking area of Henry's apartment on numerous separate occasions during that two-day period. Sarah Lindquist, Aphrodite Angelakos, and Christopher Berry were Henry's neighbors, and provided testimony placing the defendant's car in the parking lot of the apartment complex at various times on January 23 and 24, 2009. Lindquist testified that, around 1 p.m. on January 24, 2009, she heard several "loud bangs" followed by footsteps coming from Henry's apartment.

Angelakos testified to having seen a black Range Rover parked in the parking lot of the complex from around 8:30 a.m. until sometime that afternoon. Berry, who resided in the apartment next door to Henry, testified that, around 1:15 p.m. on January 24, 2009, he heard shouting coming from Henry's apartment, followed by several "bangs," a pause, and then more "bangs," which he believed may have been gun fire. He then heard a male voice shout "fuck you."

¶ 7 Yolan testified that, on January 24, 2009, Henry and the children were supposed to accompany her to a family funeral. Yolan conversed with Henry by telephone around noon that day, and then attempted to call her again around 1:44 p.m., but received no answer. About 5:45 p.m., Yolan and her boyfriend, Keith "Reginald" Corner, drove to Henry's apartment. When they arrived, Yolan opened the door and found Henry lying on the floor near the front door in a pool of blood. Yolan testified that she began screaming, and Corner pushed her outside, shut the door and went into the apartment.

¶ 8 According to Corner's testimony, when he and Yolan first opened the door to the apartment, he observed Henry lying on the floor in a pool of blood, and Ava was lying at Henry's feet. After Corner entered, he checked Henry for a pulse but was unable to detect one. He proceeded to look around the apartment for Noah, and discovered him asleep in a chair, wrapped in a blanket. Corner also observed that the child had dried blood on his hands and feet. He carried Noah outside, gave him to Yolan and instructed her to get into his truck. He then called the police. Yolan testified that, when they were inside the truck, she asked the boy "who hurt mama?" Noah looked at Yolan and said, "Fredrick, Fredrick did it," and put his finger up and said, "shh." The police arrived shortly after that time.

¶ 9 Officer Charles Redman testified that, about 6:30 p.m. on January 24, 2009, the night of the shooting, he and two other officers arrived at Henry's apartment and investigated the crime

scene. Officer Redman initially observed that there was no damage to the front door and no sign of a forced entry. Inside of the apartment, he saw the bodies of Henry and Ava on the floor about three feet away from the front door, lying in large pools of blood. Officer Redman testified that there was a spent cartridge under Henry's body and toys in the area of both victims' bodies. He also noticed "blood smears" on the interior of the front door and on the east and west walls of the front room of the apartment. He discovered bullet holes and .380-calibur cartridge casings in a chair in the same room, along with bullet holes in the walls and window blinds. Officer Redman testified that, as he proceeded down the hallway to the kitchen area, he saw a cartridge casing on the kitchen floor and more blood smears on the side of the kitchen island. On the staircase to an upper floor, he found blood droplets on the bottom steps, continuing in a trail towards the front room where the victims were found. According to the officer, the presence of the blood droplets was consistent with the victims having moved around as they were bleeding. Officer Redman stated that there was blood on the banister of the stairway and blood smears on the railing and on the wall of the upper floor landing. There were also blood smears on the wall of Noah's second floor bedroom. Officer Redman recalled that all of the blood smears were low to the ground, with none of them higher than four feet above floor level.

¶ 10 On cross-examination, Officer Redman admitted that, although there were numerous items of value in the apartment, the officers never conducted an investigation to determine whether the crime could have been incidental to a robbery. He acknowledged that, as there was a very large amount of blood at the scene, there could possibly have been blood on the perpetrator as well. On re-direct examination, and over a defense objection, Officer Redman testified that the smears of blood could have been made by Noah during the period he remained

in the home with the bodies—*i.e.*, from the time of the shooting until he was taken out of the apartment hours later by Corner.

¶ 11 Officer Dennis Walsh testified that he was called to the scene on the night of the shootings, and that, in the course of questioning witnesses, learned that the defendant had threatened to kill Henry and members of her family several weeks prior to the shootings. Investigating officers determined that the defendant owned two cars, a black Range Rover with vanity license plate number FDG ESQ 1, and a silver BMW with license plate number G99 4077. By late in the evening of January 24, 2009, the officers had viewed footage from a surveillance camera located outside of Henry's apartment building. The footage depicted the defendant's Range Rover arriving in the guest parking lot prior to the time of the shootings, and parking in a space in front of Henry's apartment. The vehicle remained in the space and was driven out of the parking lot at approximately 1:30 p.m. that same day. Investigating officers attempted to locate the defendant's cars at his home and his parent's home. Although the officers found the defendant's BMW at his house, they did not locate the defendant.

¶ 12 After the police were unable to locate the defendant, Officer Scott Berry spoke with one of the defendant's neighbors, Carlos Whiteman. Over a defense objection, Officer Berry testified that Whiteman provided him with the defendant's cell phone number. According to the testimony of investigating officer, Edward Wodnicki, he and other officers contacted Sprint Corporation and, with Sprint's assistance, were able to pinpoint the location of the defendant's cell phone, which was in Michigan City, Indiana. The officers notified the Michigan City police department and, relying upon the defendant's license plate number and a description of his vehicle, officers there conducted a search for the car. Around 3:30 a.m. on January 25, 2009, the

Michigan City police found the defendant's Range Rover in the parking lot of a Comfort Inn in Michigan City.

¶ 13 Shortly after the discovery of the defendant's Range Rover, the Chicago police were notified and drove to Michigan City, Indiana. Lieutenant Patrick Walsh testified that he obtained a search warrant for the defendant's hotel room and Range Rover. Forensic testing disclosed the existence of gunshot residue on the driver's side door handle, steering wheel, gear shifter and center console of the Range Rover. The evidence collected from the Range Rover and the defendant's motel room was tested for the presence of blood or DNA, but none was found. The defendant's apartment and laptop computer were also searched pursuant to a search warrant. An arrest warrant was subsequently issued for the defendant, who was arrested on February 20, 2009.

¶ 14 The State introduced a receipt from the Comfort Inn into evidence disclosing that the defendant had checked into the hotel at approximately 5:57 p.m. on January 24, 2009, and paid for the room in cash. Michael Frey, who was working at the hotel's front desk on the night of January 24, 2009, testified that the defendant came to the front desk around midnight and inquired whether the hotel had a laundry room and detergent. Frey stated that he gave the defendant directions to the laundry room, and that on two occasions during that night, he saw the defendant coming down to check on his laundry.

¶ 15 Autopsy evidence demonstrated that both Henry and Ava died of multiple gunshot wounds, but it was not possible to pinpoint the exact time of their deaths. None of the wounds suggested that the victims were shot at close range. According to Dr. Michel Humilier, who performed the autopsies on the victims, it was possible that Nova was holding Ava at the time of the shootings.

¶ 16 At the close of the State's case, the defendant moved for a directed verdict, which the trial court denied.

¶ 17 In his own defense, the defendant offered the testimony of Officers Mickey Pontarelli and Tony Villardita, both of whom had conducted separate interviews of Yolan on the night of the shootings. According to Officer Pontarelli, Yolan told him that, when she asked Noah, "who hurt mama," she had also inquired whether the defendant's four-year-old daughter Destiny "was there," to which Noah had responded, "yes." According to Officer Villardita, however, Noah said nothing to Yolan about Destiny having been present. Officer Villardita also testified that, on the night of the shootings, he watched through a mirrored window as Noah was questioned about the occurrence by a child advocacy specialist. The officer acknowledged that, although Noah had told Yolan that the shootings were committed by the defendant, he provided no information about the crime in response to the specialist's questions.

¶ 18 Salvatore Chapata, an employee of a roadside assistance company, also testified for the defense. Chapata testified that, at 6:32 p.m. on the night of the shootings, the defendant called the company reporting that his Range Rover had broken down at the Comfort Inn in Michigan City, Indiana, and requesting that his vehicle be towed to his home in Chicago.

¶ 19 Following closing arguments, the jury found the defendant guilty of four counts of first degree murder. In April 2013, the trial court sentenced the defendant to natural life in prison. In May 2013, the trial court denied the defendant's post-trial motions for a new trial, and this appeal followed.

¶ 20 The defendant raises several challenges to the admission of graphic photographs depicting the crime scene. He argues that the photographs placed undue emphasis upon the fact that Henry had small children and that Noah was left alone as a result of her death.

¶ 21 On the night of the shootings, police officers took numerous photographs and video footage depicting the interior and exterior of the crime scene and detailing the evidence contained therein. The video and photographs were admitted into evidence, and Officer Redman testified about some of the images. The images show, in relevant part, the bodies of Henry and Ava lying next to one another in large pools of blood; a spent cartridge casing on the floor near Henry's head, a toy sword near the victims' bodies; blood droplets on the walls, the stairs, the banisters, and the floors, all leading in a trail to the victims' bodies in the front room. The photographs also depict isolated "smears" of blood on the front door, the walls of the front room, the kitchen island, Noah's bedroom, and some of the upstairs walls. The video similarly shows bullet holes and cartridge casings at various points around the house, children's clothes and shoes, and the children's bedrooms. In addition, a family portrait and a video depicting the home as it was on the day of the crime, which included scenes of toys, children's clothing, and the children's bedrooms, were admitted into evidence.

¶ 22 The defendant first asserts that the photographs were graphic and repetitive, and contained unnecessary references to Ava and Noah. In particular, he objects to the depiction of the children's clothing, toys and bedrooms, and the photos showing Henry and Ava lying side-by-side, "splayed out" in pools of their own blood.

¶ 23 It is well-established that, where photographic evidence is relevant to establish any fact at issue, it is admissible and may be shown to the jury despite the fact that the images are gruesome or disgusting in nature. *People v. Rissley*, 165 Ill. 2d 364, 405 (1995); *People v. Lucas*, 132 Ill. 2d 399, 439 (1989); *People v. Foster*, 76 Ill. 2d 365, 377 (1979). An exception exists only where the nature of the photographs is so prejudicial and so likely to inflame the jurors' passions that it outweighs the probative value of the evidence they depict. *People v. Heard*, 187 Ill. 2d 36, 77

(1999). Photographs of a crime scene are properly admitted to prove the nature and extent of the victims' injuries and the force needed to inflict those injuries; the position, condition, and location of the body; and the manner and cause of death. *Id.* Photographs of the scene are appropriate to aid in understanding the testimony of a pathologist or other witness. *Id.* Further, when a defendant in a murder trial pleads not guilty, the prosecution is allowed to prove every fact relevant to the crime charged, even if the defendant does not contest those facts or offers to stipulate to them. *Id.* Although photos may be cumulative of witness testimony, they may nonetheless aid jurors in understanding the testimony. *Id.*

¶ 24 The responsibility of weighing the probative value and potentially prejudicial effect of the photographs rests within the sound discretion of the trial court, and its decision as to which evidentiary items should be taken into the jury room will not be disturbed absent a clear showing of an abuse of discretion. *People v. Taylor*, 2011 IL 110067, ¶ 27. "[A]n abuse of discretion occurs when the trial court's ruling is fanciful, unreasonable or when no reasonable person would adopt the trial court's view." *Id.*

¶ 25 While we agree that many of the images admitted in evidence in this case are disturbing, we disagree that they were erroneously admitted. The State sought to prove that Henry and Ava were killed while Henry, holding Ava, was moving through her home in an effort to escape from the shots being fired at her, ultimately falling to the ground with the child. The photographs of the victims, the bullets and cartridges, and the drops of blood forming a trail to the victims' bodies, were all clearly relevant to prove the victims' injuries, as well as the location and position of the victims throughout the shooting. Further, the depiction of toys and other children's belongings was, in many instances, inevitable due to the proximity of these items to blood, ballistics evidence and to the victims themselves.

¶ 26 The defendant also maintains that, during its re-direct examination of Officer Redman, the State was improperly permitted to elicit testimony that the blood smears on the walls were "consistent *** [w]ith a three-year-old boy touching blood *** during the four hours he was alone with his mother and sister."

¶ 27 We find nothing improper about the State's inquiry. There is no dispute that Noah was, in fact, alone in Henry's apartment for hours after the victims were shot. A review of the photographs shows that the blood smears on the wall of the apartment could have been made with hands or fingers, and, according to Officer Redman's testimony, none of the smears was higher than four feet from the floor, about the height of a small child. The elicited testimony was, therefore, properly supported by the evidence. In addition, it was necessary to explain why Noah had blood on his hands and feet when he was taken from the scene following the shooting.

¶ 28 The defendant next asserts that the State's closing argument was improper and inflammatory where it referenced the impact the shootings had upon the victims' surviving family member, Noah, and referred to Noah as a "victim." The disputed argument was as follows:

> "What happened to this little family was an absolute abomination. It is enough to make you lose faith in the human race. I'm not just talking about the murders itself [*sic*], don't forget about that 3-year-old little child in there. *** Don't forget about Noah, who hurt mama? Shh. That child was left with this, for over four hours to play and wonder when mommy is going to get up and look at that blood. Do you think that child wasn't terribly traumatized?"

The defendant objected, and the trial court overruled his objection.

¶ 29 In closing argument for the defense, counsel attempted to cast doubt upon the credibility of Noah's statement to Yolan that the defendant committed the shootings. In particular, defense counsel pointed out that Noah had not responded to the child advocacy experts when they questioned him about the occurrence. In rebuttal argument, the assistant State's Attorney responded by arguing:

> "Are you surprised, is anybody *** surprised when this three-year-old child, who has to play in mommy and sister's blood for over four hours, are you surprised that when he is in another building, talking to other adults he's never met under circumstances he's never been under, he clams up? Of course he clammed up. That kid was an eyewitness, but *make no mistake about it, he is a victim, too*." (Emphasis added.)

At the end of his rebuttal argument, the assistant State's Attorney displayed a photograph of Henry, Ava and Noah, urging the jury to "do justice for what's left now of this beautiful family of three."

¶ 30 A "defendant faces a substantial burden in attempting to achieve reversal based upon improper remarks made during closing argument." *People v. Byron*, 164 Ill. 2d 279, 295 (1995). The State is generally allowed wide latitude in closing argument to discuss the evidence and the strength of its case, and also, to urge the fearless administration of justice and comment on the detrimental effects of crime. *People v. Cloutier*, 156 Ill. 2d 483, 507 (1993). Additionally, comments in closing argument are not to be considered in a vacuum, but must be evaluated in context of the entire closing argument of both the State and the defendant. *Id.* "The trial court has discretion to determine the proper character and scope of argument, and every reasonable presumption is indulged that such discretion was properly exercised." *Id.*

¶ 31 Nonetheless, proof that the victim of a crime is survived by a family, in and of itself, is irrelevant to the defendant's guilt or innocence and will "only serve to prejudice [the] defendant in the eyes of the jury." *People v. Blue*, 189 Ill. 2d 99, 129 (2000); *People v. Bernette*, 30 Ill. 2d 359, 371 (1964). Evidence or argument "dwelling" upon the victim's family can constitute reversible error where it is "not elicited incidentally, but is presented in such a manner as to cause the jury to believe it is material" to the defendant's guilt or punishment. *Bernette*, 30 Ill. 2d at 371; *Blue*, 189 Ill. 2d at 129. However, "incidental evidence of the victim's family is not only permissible, but in most trials, unavoidable," as most murder victims leave behind some family members. *Blue*, 189 Ill. 2d at 131.

¶ 32 In this case, the majority of the disputed arguments were either appropriate comments based upon properly-admitted evidence or invited responses based upon the defendant's account of events. Initially, as discussed above, the State's references to the fact that Noah was found alone with the blood-ridden bodies of his mother and sister were based upon the evidence presented at trial. See *id*. at 131. The evidence was necessary to explain the presence of blood on Noah's hands and feet and the existence of unusually-shaped blood "smears" on the walls of the apartment. This case is distinguishable from *Bernette*, upon which the defendant relies, because there, the State elicited testimony and made arguments about family members who were neither present at the scene nor relevant in any manner to the crime itself. See *Bernette*, 30 Ill. 2d at 372 (gratuitous evidence and argument regarding decedent's child and step-children held irrelevant and inflammatory).

¶ 33 Furthermore, the description of Noah "playing" in his mother's blood, while perhaps flippant, was justified in response to the defendant's theory of the case. In its cross-examination of Officer Redman and closing arguments, the defense advanced the notion that the shootings

were committed by an unknown, violent intruder, rather than by the defendant. The defense suggested that, in light of the large amount of blood found at the scene, the shooter would necessarily have had to be covered in blood as well, whereas there was no blood found on the defendant. In order to respond to this account, the State could properly introduce evidence about the large amount of blood and explain that the blood smears were caused by Noah.

¶ 34 The State's characterization of Noah as a "victim," taken in context, refers to the reason for his not having responded to the questions of the child advocacy expert. More troubling, however, is the State urging the jury not to "forget about Noah" and to "do justice for what's left" of the victims' family. Such statements bore no relevance to the issue of the defendant's culpability for the crimes charged, and risked conveying to the jury that the effect of the shootings on Noah was probative of the question of the defendant's guilt. As such, the trial court should have sustained the defendant's objection to these statements and instructed the jury to disregard them. See *Blue*, 189 Ill. 2d at 132.

¶ 35 Nonetheless, we are unable to conclude that these comments alone warrant reversal in this case. Not all references to a victim's family members warrant a new trial. *People v. Hope*, 116 Ill. 2d 265, 276 (1986). "In certain circumstances, *depending upon how this evidence is introduced*, such a statement can be harmless ***." (Emphasis in original.) *Id.*; *People v. Adams*, 109 Ill. 2d 102, 125 (1985); *People v. Kliner*, 185 Ill. 2d 81, 157 (1998) (error resulting from the State's closing argument does not require reversal if the reviewing court is able to conclude, based upon the record as a whole, that the error was harmless beyond a reasonable doubt). In determining if reversal is warranted, this court asks whether the comments "engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them." *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). If it appears that the

jury could have reached a contrary verdict in the absence of the disputed comments, the defendant is entitled to a new trial. *Id.*

¶ 36 Here, the State's and the defendant's closing arguments were extensive and thoroughly explored the facts of the crime based upon the evidence. Viewed in the context of the State's entire argument, the disputed comments, in which the State asked the jury not to forget about Noah and referred to him as a "victim too," and requested that the jury do justice for "what's left" of the victims' family, amounted to little more than isolated references. We are unable to conclude that these comments "dwelt upon the deceased's family to the point that the jury would have related that evidence to the defendant's guilt." *People v. Kitchen*, 159 Ill. 2d 1, 33 (1994); *cf. Bernette*, 30 Ill. 2d at 372 (extensive testimony elicited by the State permitted jury to believe that existence of children was a matter to be proved); *Blue*, 189 Ill. 2d at 139 (finding "pervasive pattern of unfair prejudice" purposefully caused by State); *Hope*, 116 Ill. 2d at 278-79. Additionally, in its statements immediately preceding the disputed remarks, the State articulated the correct standard of proof required to sustain the charges against the defendant.

¶ 37 We are mindful of the fact that, while the State's comments were inflammatory, the jury had already been confronted with the disturbing facts surrounding Noah's presence at the scene, circumstances relevant to the crime in this case. Further, there is no dispute that the evidence against the defendant was overwhelming. Among other evidence, the State presented substantial proof of the defendant's motive, ongoing physical abuse of Henry, and threats to kill her and her family. Surveillance footage shows the defendant's vehicle in the parking lot of Henry's apartment complex at the time of the shootings and there is no dispute that the defendant traveled out of state that night. The next day, officers located his vehicle and found gunshot residue inside the vehicle. In light of this evidence, and the fact that the disputed comments were

relatively isolated in the context of the State's entire closing argument, we are unable to find that the comments alone so compromised the integrity of the proceedings that the defendant was denied a fair trial. Accordingly, we conclude that the remarks of the State amounted to harmless error beyond a reasonable doubt.

¶ 38 The defendant next contends the trial court erred when it allowed the State to introduce Henry's prior testimony from a 2007 order-of-protection hearing. Specifically, he argues that he was denied an adequate opportunity to cross-examine Henry in violation of his right to confrontation.

¶ 39 A trial court's ruling on the admission of prior testimony is to be reviewed for an abuse of discretion. *People v. Torres*, 2012 IL 111302, ¶ 46.

¶ 40 Here, the trial court admitted Henry's prior testimony pursuant to section 115-7.4 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-7.4 (West 2012)).[1] Under section 115-7.4(a), evidence that the defendant committed other crimes of domestic violence is admissible "and may be considered for its bearing on any matter to which it is relevant." 725 ILCS 5/115-7.4(a) (West 2012); see also *People v. Null*, 2013 IL App (2d) 110189, ¶¶ 43-47 (testimony regarding the defendant's prior acts of domestic violence was admissible to show intent, motive, and lack of mistake in prosecution for first-degree murder of wife). To be admissible, however, testimony regarding the defendant's prior acts of domestic violence must not only comply with the requirements under section 115-7.4 but must also satisfy the confrontation clause of the United States Constitution. See U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8; *People v. Leonard*, 391 Ill. App. 3d 926, 934 (2009).

[1] Henry's testimony was also admissible under section 115-10.4 of the Code, which contains an exception to the hearsay rule for the admission of a prior statement of a deceased witness. 725 ILCS 5/115-10.4 (West 2012).

¶ 41 The confrontation clause requires that a criminal defendant have the right "to be confronted with the witnesses against him." U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8. Thus, in order to admit Henry's prior testimony, the confrontation clause requires that the witness be unavailable at trial and that the defendant "had an adequate opportunity to effectively cross-examine the witness at the prior hearing." *Torres*, 2012 IL 111302, ¶ 53. Since Henry was not available at trial, the defendant's argument focuses solely on whether he had an adequate opportunity to cross-examine her at the order-of-protection hearing.

¶ 42 The Illinois Supreme Court has stated that prior opportunity to cross-examine an unavailable witness must have been "meaningful," "effective," and "ample." *People v. Sutherland*, 223 Ill. 2d 187, 273 (2006). The court explained:

> " 'For an opportunity to cross-examine to be considered meaningful, and therefore adequate and effective, the motive and focus of the cross-examination at the time of the initial proceeding must be the same or similar to that which guides the cross-examination during the subsequent proceeding.' " *Id.* (quoting *People v. Rice*, 166 Ill. 2d 35, 41 (1995)).

However, the "motive-and-focus test" should not be the "sole guide to a resolution" in every case. *Torres*, 2012 IL 111302, ¶ 60. The court identified two other factors for consideration: unlimited cross-examination at the prior proceeding allowing for a full questioning of the witness "regarding critical areas of observation and recall, to test him for any bias and prejudice, and to otherwise probe for matters affecting his credibility"; and "what counsel knows while conducting the cross-examination." *Id.*

¶ 43 At the 2007 order-of-protection hearing, Henry testified to various episodes of abusive behavior, including specific details and time frames of physical and emotional attacks. Henry's

testimony revealed that the defendant subjected her to numerous forms of psychological abuse over extended periods of time. He accused Henry of incest and yelled insulting and demeaning epithets at her. Henry also testified that the defendant attempted to isolate her from her family and friends. She stated that the defendant repeatedly threatened to kill her and her family. Henry testified to instances where the defendant prevented her from leaving the house to escape the abuse. On one occasion, the defendant grabbed Henry as she attempted to leave her house, put his arm around her neck, and pushed her against a banister. On another occasion, the defendant prevented Henry from leaving the bedroom by putting his arms around her, backing her onto the bed, and laying on top of her. Henry testified that the defendant also engaged in stalking behavior which prompted her to call the police.

¶ 44 On cross-examination, Henry testified that she lived in a separate residence and had opportunities to leave the defendant, but she chose to stay at his house. Henry also admitted that she told the defendant she wanted to marry him, and she even allowed him to stay at her residence. Henry acknowledged that the defendant provided legal representation in a child-support dispute with another man, and he loaned her money to pay for parking tickets. During cross-examination, defense counsel challenged Henry's claims regarding physical abuse. Henry admitted that she bit the defendant and slapped him in the face. The defendant's attorney also asked questions designed to discredit Henry's testimony and show she was lying or exaggerating. Defense counsel's questioning at the 2007 order-of-protection hearing tested Henry's credibility, and her powers of observation and recall, just as counsel would have done in the instant case. Therefore, we believe that the cross-examination at the 2007 hearing involved the same "motive and focus" as a similar cross-examination would have had at trial.

¶ 45 Additionally, we find that the defendant had the benefit of "unlimited cross-examination" and a "fair opportunity" to inquire into Henry's observations, interest, bias, prejudice, and motive. *Torres*, 2012 IL 111302, ¶ 66; *Sutherland*, 223 Ill. 2d at 273. The defendant does not argue that defense counsel's ability to cross-examine Henry was hampered due to a lack of discovery or information. We also note that Henry's testimony was cumulative of the testimony of other witnesses, and the defendant has not suggested how additional cross-examination would have benefited him. See *People v. Horton*, 65 Ill. 2d 413, 417 (1976).

¶ 46 Viewed in its totality, we find that defense counsel's cross-examination of Henry at the 2007 order-of-protection hearing was adequate and effective under the confrontation clause, and the trial court did not abuse its discretion in admitting her prior testimony.

¶ 47 The defendant next contends his fourth amendment right against unreasonable searches and seizures was violated when police officers tracked his cell phone location without a search warrant "or any other court order." The State responds by arguing that the defendant forfeited this issue on appeal because no hearing was held on his motion to suppress, and the record on appeal is insufficient to support the defendant's claims of error. We agree with the State.

¶ 48 Ordinarily, to preserve an issue for review, a party must raise it at trial and in a written post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 190 (1988); *People v. Herron*, 215 Ill. 2d 167, 175 (2005) (a defendant who fails to both make a timely trial objection and include the issue in a post-trial motion forfeits the review of the issue). Our supreme court has explained two reasons for requiring objections to be made at trial to preserve an issue for appeal. "One is that this allows the trial court an opportunity to review a defendant's claim of *** error and save the delay and expense inherent in appeal if the claim is meritorious. [Citation]. A second reason for

this requirement is to prevent a litigant from asserting on appeal an objection different from the one he advanced below." *People v. Heider*, 231 Ill. 2d 1, 18 (2008).

¶ 49 In this case, the defendant never obtained a ruling on his motion to suppress evidence of his cell phone's location. We note, although the case had been pending for nearly three years and continued numerous times, the defendant waited until a month before trial to file his motion to suppress evidence and subpoena eight witnesses in support thereof, including three from Michigan City, Indiana. When some of the defendant's witnesses failed to appear at the January 15, 2013, hearing, the trial court granted a continuance and offered to continue the matter from day to day as each witness became available. The following day, four of the eight witnesses appeared, but defense counsel persisted in her refusal to put on any evidence or call witnesses out of order. The court, in managing its docket, *sua sponte* struck the defendant's motion to suppress stating, "[t]hese issues can be litigated at trial." Since the defendant refused to move forward on his motion, he never obtained a ruling. *People v. Urdiales*, 225 Ill. 2d 354, 425 (2007) (a movant has the responsibility to obtain a ruling on his motion if he is to avoid forfeiture on appeal).

¶ 50 Moreover, the defendant failed to specifically object at trial to the introduction of his cell phone's location. Evidence regarding the location of the defendant's cell phone came from Detective Wodnicki, who testified that he obtained the defendant's cell phone number and, with the assistance of Sprint, learned the cell phone's location. The defendant objected on foundation and hearsay grounds only. The defendant now asserts that his cell phone location was obtained as a result of an unlawful search. The claim raised on appeal is significantly different from the objection he raised at trial. See *People v. Lovejoy*, 235 Ill. 2d 97, 148 (2009) ("A specific objection at trial forfeits all grounds not specified.").

¶ 51 Because the defendant failed to obtain a ruling on his pre-trial motion to suppress evidence and failed to object at trial to testimony regarding the location of his cell phone on grounds it violated his Fourth Amendment rights, we find the defendant has forfeited the issue. As the State correctly argues, no evidence was presented regarding how the Chicago police department obtained the defendant's location—*i.e.*, via Sprint's business records or real-time global positioning system tracking. As such, the trial court was deprived of an opportunity to review the defendant's Fourth Amendment claim. Not to mention, the defendant is asserting in this court a completely different objection from the one he raised at trial. See *Herron*, 215 Ill. 2d at 175 (" 'An accused may not sit idly by and allow irregular proceedings to occur without objection and afterwards seek to reverse his conviction by reason of those same irregularities' "). In circumstances such as these, where the trial court lacked an opportunity to review the same essential claim raised on appeal, the claim is forfeited.

¶ 52 Finally, the defendant's reply brief does not respond to the State's forfeiture argument and does not request plain-error review. To obtain plain-error review, a defendant must demonstrate a clear or obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Where, as here, the defendant declines to put forth an argument articulating how either of the two prongs of plain-error review is satisfied, he forfeits plain-error review. *People v. Nieves*, 192 Ill. 2d 487, 503 (2000). Thus, plain-error review is inappropriate.

¶ 53 The defendant next argues that he was denied his right to trial before a fair and impartial arbiter, because the trial judge made a "series of rulings" and comments which exhibited her bias against him and revealed that she had prejudged his guilt. Specifically, he maintains that the judge exhibited bias by: denying him an extension of time to present witnesses in support of his motion to suppress evidence, and then striking that motion; admitting highly inflammatory

photographic images from the crime scene without any meaningful consideration of the prejudicial impact of such evidence; and failing to grant the defense a continuance to obtain missing portions of trial transcripts before proceeding with the hearing on its post-trial motion. We find no merit in the argument.

¶ 54 Allegations of judicial bias or prejudice must be viewed in context and should be evaluated in terms of the trial judge's specific reaction to the events taking place. *Urdiales*, 225 Ill. 2d at 426. "The fact that a judge displays displeasure or irritation with an attorney's behavior is not necessarily evidence of judicial bias against the defendant or his counsel." *Id.*

¶ 55 We have reviewed the record in its entirety and find absolutely no basis for the defendant's assertions against the trial judge in this case. Initially we have already determined that the photographic and video evidence was properly admitted in order to prove the details of the shooting.

¶ 56 With regard to the trial court's decision to strike the motion to suppress, the record demonstrates that the trial judge, who for several years, was trying to set this case for trial, continually sought to accommodate the defendant, allowing him several weeks to personally review the State's discovery responses along with his attorney. On a date that was originally scheduled for trial, the trial judge granted the defendant leave to file his motion to suppress, and set a date of the defendant's own choosing for an evidentiary hearing on the motion. When the set date arrived and the defendant was still unprepared, the judge granted him numerous additional continuances to assemble and produce his witnesses to testify. In an effort to manage her docket, and frustrated with the defendant's refusal to put on his witnesses and ongoing requests for continuances, the court struck the defendant's motion to suppress. The defendant

does not challenge this decision as error in and of itself, and we are unable to find that it evidences any bias towards him by the trial judge.

¶ 57 We similarly reject the claim that the trial judge's bias was apparent from her "impatience" with defense counsel's request for a continuance, on the day of the hearing on the post-trial motion, to obtain additional portions of trial transcript. The defendant concedes that the refusal to grant the continuance alone was not error. He does not assert that the missing sections of transcript were essential to his argument on the motion, which consisted of 142 allegations. We also note that he had already been granted one continuance on that motion. We therefore see no indication of bias based upon this claim.

¶ 58 Finally, the defendant requests that his mittimus be corrected to reflect convictions of two counts of first-degree murder rather than four counts as is currently stated. The State concedes error on this point, and we therefore order that the mittimus be so corrected.

¶ 59 Accordingly, we affirm the defendant's convictions of first-degree murder and his sentence as determined by the circuit court of Cook County, and order that his mittimus be modified to reflect convictions for two counts of first-degree murder rather than four.

¶ 60 Affirmed as modified.