2012 IL App (2d) 110329-U
No. 2-11-0329
Order filed June 29, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Jo Daviess County.
Plaintiff-Appellee,	)	
v.	)	No. 06-CF-116
DAVID A. DAMM,	)	Honorable William A. Kelly,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

Held: (1) The trial court did not err in denying defendant the opportunity to call live witnesses during evidentiary hearing on issue of forfeiture by wrongdoing;

(2) defendant's former wife's testimony regarding sexual practices did not violate the marital privilege, and even if it did, the admission of the testimony was harmless error where defendant admitted to same practices;

(3) trial counsel was not ineffective for failing to object to the admission of certain portions of defendant's statement to police where he was not prejudiced by the otherwise inadmissible evidence;

(4) any error in refusing defendant's tendered verdict form on felony murder was harmless where it could be determined by the jury's overall verdicts that he was guilty of intentional murder;

(5) defendant's conspiracy conviction must be vacated where defendant was convicted of the principal offense; and

(6) defendant was proven guilty beyond a reasonable doubt of the aggravated kidnaping offense.

¶ 1 Defendant, David A. Damm, was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 2006)), conspiracy to commit first degree murder (720 ILCS 5/8-2(a) (West 2006)), and aggravated kidnaping (720 ILCS 5/10-2(a)(3) (West 2006)), after a jury trial for the murder-for-hire plot that resulted in the bludgeoning death of 13-year-old D.H. On February 27, 2009, defendant was sentenced to death by the same jury for the murder conviction. The trial court then sentenced defendant to 15 years' imprisonment for the conspiracy conviction and 30 years' imprisonment on the aggravated kidnaping conviction. Defendant had timely appealed to the Illinois Supreme Court. On March 9, 2011, defendant's death sentence was commuted to natural life imprisonment by Illinois Governor Patrick Quinn. On March 24, 2011, our supreme court transferred defendant's appeal to this court.[1]

¶ 2 On appeal, defendant argues: (1) the trial court erred in refusing live testimony at the evidentiary hearing on the issue of forfeiture by wrongdoing; (2) the admission of Kathy Damm's testimony about sexual practices with him violated his statutory marital privilege; (3) he received

[1] We note that while this case was pending in the supreme court, defendant moved to withdraw one issue in his brief (relating to certain testimony of witness Bruce Burt and prior criminal dealings with defendant). The supreme court granted that motion on February 22, 2011. Additionally, defendant acknowledges that the commutation of his death sentence renders two other issues moot (claim that juror was improperly excused for opinions regarding death penalty and claim that death sentence was unconstitutional). Accordingly, we do not address those three issues raised in defendant's original brief.

ineffective assistance of counsel when trial counsel failed to have certain portions of his statement to police redacted to eliminate the otherwise inadmissible references to his refusal to take a polygraph examination, his prior "terrorism" charge, and that he was on probation for an unnamed offense; (4) the trial court's refusal to tender his verdict form on felony murder deprived him of the opportunity to obtain an acquittal on the intentional murder charge, which subjected to him to the natural life sentence; (5) his conviction on the conspiracy charge must be vacated because he cannot be guilty of both the inchoate and principal offense; and (6) he was not proven guilty beyond a reasonable doubt of the aggravated kidnaping offense. We affirm defendant's convictions for first degree murder and aggravated kidnaping and vacate his conviction and sentence for conspiracy to commit murder.

¶ 3 I. BACKGROUND

¶ 4 What began as a sexual abuse case turned into a disturbing murder case. In October 2006, events led to D.H. disclosing that defendant had sexually abused her on more than one occasion. As police were investigating the sexual abuse allegations in Waterloo, Iowa, where both parties resided, D.H. was found bludgeoned to death in Jo Daviess County. The murder investigation quickly turned to defendant, who had allegedly hired Bruce Burt for $5,000 to kill D.H. in order to prevent the sexual abuse case from continuing.

¶ 5 On December 1, 2006, defendant was charged by indictment for events that took place between October 24 and October 28, 2006. Count I alleged that he committed first degree murder (720 ILCS 5/9-1(a)(1) (West 2006)) for causing the death of D.H. with the intent to kill by causing her head to be struck with a blunt instrument. Count II alleged that he committed first degree murder (720 ILCS 5/9-1(a)(2) (West 2006)) for striking D.H.'s head with a blunt instrument, knowing such

an act created a strong probability of death or great bodily harm. Count III alleged that he committed first degree murder (720 ILCS 5/9-1(a)(3) (West 2006)) by causing D.H.'s death while committing a forcible felony (aggravated kidnaping). Count IV also alleged he committed felony murder, with the underlying felony being robbery. Count V alleged that he committed solicitation of murder for hire (720 ILCS 5/8-1.2(a) (West 2006)) in that defendant intentionally procured Bruce Burt to kill D.H. for a sum of money that defendant would pay. Count VI alleged that defendant committed the offense of solicitation of murder (720 ILCS 5/8-1.1(a) (West 2006)) in that defendant requested that Bruce Burt commit the offense of first degree murder. Count VII alleged that defendant committed the offense of aggravated kidnaping (720 ILCS 5/10-2(a)(3) (West 2006)) by knowingly inducing D.H., through enticement or deceit, to go from one place to another with intent to secretly confine her against her will and inflicted great bodily harm to her by cutting her throat. Count VIII alleged that defendant committed the offense of conspiracy (720 ILCS 5/8-2(a) (West 2006)) in that he, with the intent to commit first degree murder, committed and agreed with Bruce Burt to murder D.H., including the overt acts of Bruce Burt procuring a hammer and knife for the crime, defendant driving D.H. to meet Burt, and Burt striking D.H.'s head with a blunt instrument and causing her death. Count IX alleged that defendant committed the offense of robbery (720 ILCS 5/18-1 (West 2006)) in that he knowingly took property from D.H.'s person by use of force. Defendant was ultimately sentenced on count I (intentional murder), count VII (aggravated kidnaping), and count VIII (conspiracy to commit murder).

¶ 6 On June 13, 2007, the State moved *in limine* to admit evidence of defendant's prior acts of sexual abuse of D.H. The motion alleged that in the weeks leading up to D.H.'s murder, D.H. gave a taped statement to Iowa police that detailed her relationship with defendant. Waterloo police also

interviewed defendant and took DNA samples from him. The State sought to have admitted: (1) the DVD interview of D.H. wherein she detailed specific acts of sexual abuse by defendant; (2) the DVD interview of defendant wherein he denied allegations of sexual abuse; and (3) testimony from Kristan Evans of the Iowa State Forensic Lab regarding defendant's DNA matching a paper towel D.H. gave police that she stated contained defendant's semen after he ejaculated during an incident of abuse. The State also sought admission of testimony of D.H.'s father and various Waterloo police officers who were investigating the pending sexual abuse case involving D.H. and defendant prior to the murder. The State sought the admission of the evidence to show that defendant's motive for having D.H. murdered was to prevent her from pursuing the sexual abuse case against him. The State argued that defendant forfeited his rights of confrontation regarding D.H.'s statements by hiring Burt to kill D.H. Both the State and defendant submitted proffers on the issue. While the defense wanted an evidentiary hearing to be held so it could call witnesses in to testify, the trial court ruled that it would be appropriate in this case to rely on the proffers that the parties submitted.

¶ 7 On June 17, 2008, the court again considered the question of whether to conduct a full evidentiary hearing or to decide the forfeiture by wrongdoing issue based on the proffers of evidence. The defense argued it should have the opportunity to present live witnesses, and the State could choose to rest on its proffers. The State argued that the court was correct in ordering the proffers because the parties already took depositions and had the prior statements of the witnesses. The State argued the court did not need to conduct a mini-trial on the issue, and it had submitted sufficient information that met its burden of showing that defendant had hired Burt to kill D.H. to stop her from pursuing the sexual abuse charges. The State submitted Burt's statements to police and deposition transcripts, the DNA testing that showed defendant's sperm was on the paper towel that

D.H. gave to police after he ejaculated during one of the abuse incidents, and D.H.'s statements to police. The trial court again decided to rely on the proffers that had been introduced by the State and defendant. It continued the arguments on those proffers to June 25, allowing both parties to submit additional evidence if they decided.

¶ 8 On June 25, the parties argued their positions. The State argued it should be allowed to present the evidence of the ongoing sexual abuse case in order for the jury to understand the motive and timing of the murder. The defense argued the State did not need to get into the details of the abuse to show motive because it had Burt to testify to the murder-for-hire deal. The trial court stated that the State had to show by a preponderance of the evidence that defendant had the specific intent to prevent D.H. from testifying against him in court in order for the forfeiture by wrongdoing doctrine to apply. The court found that the State's proffer supported its contention that defendant was involved in the death of D.H. because he was angry about the sexual abuse allegations.

¶ 9 On September 15, 2008, defendant's jury trial commenced. Leneaka Johnson, D.H.'s mother, testified for the State. Johnson lived in Waterloo with her daughters, 13-year-old D.H. and 11-year-old V.H. Adonnis H., the girls' father, lived nearby. Defendant and his wife lived across the street from Johnson's home. Her children often played with defendant's 6-year-old grandson, Blake. She knew of defendant's business, East Side Motors on Independence Avenue in Waterloo because her fiancee, Lawrence Merchant, purchased a car from him.

¶ 10 Johnson testified that on October 11, 2006, D.H. went to school and returned home around the usual time, 4 p.m. D.H. told Johnson that she wanted to go to her friend's home to play. Johnson allowed her to go. Around 4:30 p.m., that friend, with whom Johnson thought D.H. was with, called Johnson and asked if she could come play with D.H. This alerted Johnson to the fact

that D.H. was not with that friend, and she did not know where she was. Johnson called Adonnis, her brother Charmus, and his fiancee Angela Wilson. Adonnis went out to look for D.H. Johnson also called police to report D.H. missing. Adonnis then returned with D.H. He saw D.H. leaving defendant's car by Beech Street near Ferguson Park, which was about two blocks away from their home. Johnson wanted to know why D.H. was with him and why he dropped her off so far away when he lived right across the street from their home. D.H. said that he was just giving her a ride, but Johnson told her that she did not believe that story. Then D.H. said that she was attacked by an older white man in the field down the street, but D.H.'s details kept changing. Johnson and Wilson did not believe the story, but Johnson decided to take her to the hospital to have D.H. examined. Before they left, the police came, and Johnson informed the officer that they were taking D.H. to the hospital based on her story. The officers followed them to the hospital. After the exam, D.H.'s clothes were taken into evidence but Johnson admitted that D.H. had been wearing a black jacket earlier and did not wear the jacket to the hospital. So the jacket was not taken into evidence. They went home that night and did not discuss what had happened.

¶ 11 The next day, October 12, Johnson kept D.H. home from school. Johnson told D.H. that she did not believe the story of the man attacking her in the field and that she wanted her to talk to her when she was ready. D.H. came out of her bedroom later and told Johnson that she was ready to talk. D.H. said, "It was [defendant]." Johnson asked what she meant, and D.H. said, "everything, the whole time, it's been [defendant]." Johnson began crying and asked D.H. if defendant had been touching her, and D.H. said yes. She asked D.H. if he had intercourse with her, but D.H. said, "no, just touching." Johnson called Adonnis, and he was furious. Johnson was waiting for Adonnis, Charmus, and Wilson to come to the house when D.H. said she had something to give her. D.H.

pulled something out of her black jacket that she was wearing the day before. It was a napkin or paper towel. D.H. said it came from defendant's shop. Johnson asked what was on it, and D.H. said "[defendant's] semen." Johnson grabbed it and put it in a plastic bag. She called the police to come pick it up, which they did.

¶ 12 Johnson did not question D.H. much because it was so difficult for her to hear. Wilson did speak to D.H., and D.H. stayed at Wilson's home for a night or so in Cedar Falls. She did ask D.H. why she did not say anything before, and D.H. stated she thought she would be mad at her. On October 17, D.H. left her home, and Adonnis found her rollerblading near defendant's business. Johnson called Detective Frana of the Waterloo Police Department and asked her to explain to D.H. that she needed to stay away from defendant. Detective Frana came out on the 17th to talk to D.H.

¶ 13 On October 19, Johnson, Wilson, and Johnson's aunt took D.H. to Cedar Rapids for an interview and physical exam arranged by Detective Frana.

¶ 14 Shortly after the 19th, Johnson contacted the school bus company to request that D.H.'s stop be changed so that she would not be dropped off near defendant and in a place where Johnson could see her get off and on the bus. The school accommodated the request given the circumstances. On October 27, D.H. left for school wearing jeans, tennis shoes, a shirt which Johnson could not recall the color, and a black leather jacket. D.H. likely had her black jean jacket on underneath her leather jacket. Her hair was in a ponytail style with a synthetic hair attached to her real ponytail. She left around 7 a.m. Around 3 p.m., Johnson received a call from Bessie Johnson, D.H.'s new bus driver. Bessie asked Johnson if she had picked up D.H. Johnson said no. She called Adonnis, Wilson, and Charmus and told them that D.H. was on the wrong bus and had gotten off near defendant's business. Johnson then called the police. D.H. never returned home. A massive search began,

including friends, family, neighbors, and police. On October 29, the police told Johnson a body was found matching D.H.'s description.

¶ 15 Johnson testified that during the summer of 2006, D.H. played with Blake a lot. She taught him how to rollerblade and had a sibling-like or motherly-like relationship with Blake. On a few occasions, D.H. and V.H. joined defendant, his wife, and Blake to get ice cream. Johnson was aware of "crushes" that D.H. had on boys and teachers at school but was unaware of D.H.'s crush on defendant.

¶ 16 On cross-examination, Johnson denied asking D.H. for any physical evidence from D.H. to prove that defendant harmed her; D.H. voluntarily brought her the paper towel. Johnson admitted that D.H. did not want defendant to go to jail. She had Detective Frana talk to D.H. to reinforce what she and other family members had been telling D.H. about the relationship with defendant being wrong. She admitted that D.H. still had affection for defendant even after disclosing the abuse.

¶ 17 Dr. Regina Butteris testified that she saw D.H. on October 19, 2006 at the Iowa Child Protection Center. D.H. denied having any redness, soreness, or bleeding following the alleged abuse. Dr. Butteris did not ask for specific details about the abuse because the children are always interviewed by a forensic interviewer after the physical exam. D.H. denied sexual activity. Dr. Butteris testified that D.H.'s physical exam was entirely normal. Her hymen was intact and there was no evidence of any injury to her genital area. Dr. Butteris explained that manual or oral touching would not normally lead to physical findings on an exam.

¶ 18 V.H., 11 years old at the time of trial, testified that she and her sister D.H. frequently played with Blake. Late in the summer of 2006, V.H. told D.H. that she was going to tell defendant that D.H. had a crush on him. D.H. told her to do it, and V.H. told defendant that her sister had a crush

on him. Defendant said "oh, really." V.H. said yes, and defendant said "oh, okay." V.H. then ran across the street to D.H.

¶ 19 Whitney Wise, a neighbor of D.H.'s, testified that she lived down the street from D.H. in 2006. In the morning of a late September or early October 2006 day, Wise was at the bus stop on the corner by defendant's home. Wise saw D.H. leave her house with her backpack. Wise saw defendant come out of his house and wave D.H. towards him. D.H. stopped to talk to defendant, and they both went inside the house. It was approximately 7:15 to 7:20 a.m. Later, Wise asked D.H. about what she saw, and D.H. asked Wise not to tell anyone because defendant would get into trouble. Wise asked D.H. why she went in the house, and D.H. said she was buying a car. On one occasion, D.H. told Wise that she liked older men.

¶ 20 Kianne Pettit, a friend of D.H.'s, testified that D.H. used her phone three or four times. She did not recall the date that D.H. placed calls from her phone. D.H. usually stated that she was calling her mom,but Pettit did not hear the conversations. The phone records showed that D.H. called defendant.

¶ 21 Adonnis H., D.H.'s father, testified that on October 11, Johnson called him to say that D.H. did not come home. Adonnis went looking for D.H. and found her exiting defendant's van on Beech Street. He got out of the car and asked D.H. where she had been and what was going on. D.H. said she was walking home from a friend's house when defendant picked her up to give her a ride. When they got back to Johnson's home, Johnson and Wilson were out front. The scene was a bit chaotic with everyone trying to figure out what had happened. Adonnis said then there was something said about a rape or abduction, but the fact that defendant dropped her off so far from home did not make any sense to anyone.

¶ 22 On October 17, Johnson called him again, informing him D.H. ran away. Adonnis found D.H. rollerblading with her music headphones on near East Side Motors in pants, rollerblades, a shirt and no underwear. Adonnis yelled at her to get her attention and grabbed her by her pants to pull her into the car, which is when he noticed she did not have underwear on. Adonnis called Johnson to tell her he found her and she would not believe how D.H. was dressed or where she was. On October 27, Adonnis again was told D.H. was missing. He looked for her but did not find her.

¶ 23 Leon Mosley, a neighborhood activist in Waterloo, testified that he saw defendant sitting in his white van near Ferguson Field on October 27. Mosley knew defendant for many years. He also saw a young, African-American lady walking across the park's basketball courts. She appeared to be 18 to 20 years old. Mosley acknowledged defendant as he passed by. In his rearview mirror, he saw the girl get into defendant's van. The evening of October 28, Mosley received a call from Johnson and D.H.'s grandmother about her disappearance. Mosley often got calls about issues in the neighborhood, and so he got up and went looking for D.H. at local drug houses and around Waterloo. He did not find out any information about a 13-year old girl. When he saw D.H.'s picture in the Waterloo Courier, Mosley recognized the girl as the one he saw get into defendant's van. He thought the girl walking was older because of her height and development. On cross-examination, he admitted that he did not know that the picture in the Courier was taken when D.H. was 11, not 13. He explained that even though he was assisting in the search for D.H. after having seen the girl enter defendant's van, he did not think that was D.H. because he thought that girl was older. It was not until he saw the newspaper picture after D.H.'s body was found did it trigger the connection. On redirect, Mosley explained that he had a great relationship with defendant; they were neighbors.

Mosley also knew Bruce Burt to be a drug dealing criminal. However, he never knew defendant to have any relationship with Burt. He never saw them together.

¶ 24 Joshua Wessels, a Waterloo police officer, testified that he responded to the October 11 call about a missing child. When he arrived at the house, Johnson was getting into the car with D.H. Johnson advised that she was taking D.H. to the hospital because she claimed to have been raped. He followed them to the hospital and spoke to Johnson, D.H., and the admitting nurse. D.H. advised him that she was walking home from her friend's house on Beech Street and noticed an older, white male following her. The man came up behind her near the intersection of Albany and Linden and sexually assaulted her. The conversation was short because the sexual abuse nurse arrived to perform the exam. Officer Wessels then left to investigate the area of Albany and Linden, where he did not find anything except footprints in the dirt. He then went to speak to defendant, who had been identified as the driver of the white van that D.H. exited from. Defendant was not a suspect at the time and agreed to give a statement at the police station. The written statement was admitted into evidence. Defendant stated that he saw D.H. near the intersection of Idaho and Madison, and she waved him down. Defendant stopped and asked if she needed a ride home. Defendant stated that D.H. was a shy girl and that she did not act any differently than any other time he saw or spoke with her. On cross-examination, Officer Wessels stated that Johnson was upset and did not tell him that she did not believe D.H.'s allegation. He admitted that D.H. told the other officer at the hospital that her panties were removed during the assault and left at the scene, but Officer Wessels did not find any panties.

¶ 25 Kerry Devine, a sergeant with the Waterloo Police Department, testified that she spoke to D.H. at the hospital on October 11. She recorded her interview, and the tape was played for the jury

and admitted into evidence. D.H. told Sergeant Devine that the man attacked her, then she saw defendant and flagged him down for a ride. D.H. said that she asked him to drop her off at Beech Street because she did not want her mom to think that he had done anything to her. D.H. said defendant picked her up near East Side Motors.

¶ 26 Bruce Burt testified for the State as follows. Burt was charged with first degree murder, aggravated kidnaping, and conspiracy to commit the murder of D.H. with defendant. He admitted he entered into an agreement with the State to plead guilty to first degree murder and conspiracy to commit murder with defendant and to testify against defendant in exchange for a life sentence and no federal charges. Burt met defendant in 1988, when Burt was on parole and looking for work. Defendant hired Burt to work on cars for him and to go with him to auctions. In the summer of 2006, Burt called defendant for help because he was in jail for failing to pay child support. Defendant bonded Burt out of jail. The next time Burt heard from defendant was on October 26, 2006. Burt was living at 218 Sumner Street, a known crack house, where Burt abused crack cocaine. Burt used crack and drank alcohol, but his use of drugs did not affect his ability to remember things or understand what was going on around him. He was able to function like a normal person despite his addiction. Defendant came to the house in the late morning or early afternoon hours and asked to see Burt. Burt went outside, got inside defendant's car, and defendant explained that they were going to look for a car to be repossessed. Defendant had asked Burt for assistance on repossessions in the past. While they drove around Waterloo, defendant talked about having some problems and thought Burt may have heard about them. Burt had heard through someone else about a "rape case or something." Defendant said they were life-changing problems and mentioned something about some DNA coming back in December. Burt testified that defendant mentioned the DNA two or

three times in the conversation, and one time he mentioned a napkin that it was on. Burt did not know why defendant was telling him about this problem. Defendant did not mention the girl involved but discussed the problem in general.

¶ 27 Defendant told Burt that the girl needed to disappear because if the problem persisted, he would not be able to be around his wife, kids, and grandson. Burt testified that when defendant said the girl needed to disappear, he understood that to mean she needed to die. Defendant discussed ways in which she could disappear. Burt testified that defendant suggested he drive on Interstate 80 to Nebraska, turn off into a cornfield, and no one would ever find them out there. He also suggested giving her a "hotshot," which is a drug overdose given intravenously. Burt testified that he just listened during this conversation, and that he did not know how to give someone a hotshot because he did not use intravenous drugs. Defendant asked Burt if he knew someone who could kill the girl, and that money was not an object because he would be broke anyway when the DNA came back. Burt said a $5,000 figure was mentioned. Burt told defendant that he probably knew some people from New Orleans, and he agreed to look for somebody to do it. Burt told defendant it would probably take two weeks because the person would have to watch the victim for a while. Defendant told Burt that it needed to be done before that but did not explain why. Defendant also said he would need a picture to confirm the murder took place. The conversation ended with Burt planning to meet defendant at East Side Motors at 9 a.m. the next day, and defendant dropped Burt off at home.

¶ 28 Burt testified that he made no effort to find someone else to commit the murder. The next morning he met defendant at East Side Motors. Another employee, Tim Hampton, was there, but defendant arrived five minutes later. Hampton spoke to defendant for a few minutes about work related things. Then Burt got into defendant's van, and defendant drove down Route 63 towards a

Hyvee store and a McDonald's. Defendant asked Burt about finding anybody, and Burt told defendant that he did not want a third person involved. Defendant agreed that not involving a third person was a good idea. Defendant parked at the Hyvee so Burt could buy a camera, but it did not have one. They eventually went to a Wal-Mart, and Burt purchased the camera and film. Defendant told Burt that none of his vehicles could be used because it could be traced back to him. Burt did not own a car, so he mentioned borrowing a car. Defendant then drove Burt home and gave him money for the camera and for gas. Burt then spent the rest of the day getting high.

¶ 29 Later that day, defendant called Burt around 4:30 p.m. Defendant told Burt he was not where he was supposed to be and that he was ready. Burt put his clothes on and went to the home of his friend, Mike Biggles, to borrow his vehicle. Biggles' home was three houses down from Burt's crack house. Biggles allowed Burt to borrow his white Cadillac. Burt offered him $300 to borrow the car; he never gave him money before to borrow the car and did not know why he offered him money this time. Burt put the camera in the backseat of the car. Biggles wanted to clean out some personal belongings from the car and did so. While Biggles was doing that, Burt called his house and asked Terri Cribbs for a "mall," which is a small sledgehammer. Cribbs did not know what that was and so Burt spoke to Herman Wise. Wise brought the hammer to Burt, and Burt put it underneath the seat of the car. Burt then called back Cribbs and asked for a knife. Cribbs brought him a knife wrapped in a newspaper. Burt placed the knife under the seat of the car as well.

¶ 30 Burt testified that he then drove towards the McDonald's on Route 63, which was where defendant said he was. Defendant's van was sitting on the access road next to the McDonald's. Defendant pulled away and headed north on Route 63. Burt called defendant and told him that he needed to get gas, and defendant told him to meet him by the Budget Motel. Burt stopped to get gas

at Casey's, about a mile and a half from the Budget Motel. Burt purchased gas, two Old Milwaukee beers, and a can of Pringles and proceeded to meet defendant at the Budget Motel. Defendant said "come here," and then the sliding door of the van opened; a female ran around the back of the van and towards the front of Burt's car. Burt unlocked his doors, and the girl got into the backseat on the passenger side. Burt had gotten out of his car, and defendant told the girl to sit in the front seat; she complied.

¶ 31 Defendant then told Burt that he told the girl that he was going to meet her in Chicago later on, and he handed Burt $40. Defendant told Burt that the girl had some money, but he did not say how much. Burt then drove off and headed north on Route 63 to avoid driving through Waterloo so no one would see D.H. in his car. Burt stopped in Independence, Iowa, to make a phone call. During that stop, D.H. did not try to get out or run. He eventually turned onto Route 20 and headed east. Defendant called him at that point and told him to turn off his cell phone because the cell phone towers can track him. Defendant also told Burt that he should "mess her face up." Burt shut off his phone.

¶ 32 Burt testified that he continued on Route 20 and passed through Galena. He started to get tired and decided to turn down a road to find a spot to kill D.H. He drove down the road quite a way and turned into a driveway. Burt testified that during the trip, he and D.H. did not really talk except when Burt asked her to get the camera out of the backseat. D.H. could not find a camera. D.H. also mentioned that she recognized Burt as the guy that delivered newspapers on Willow Street.

¶ 33 Burt testified that he shut the lights off on the car while parked in the driveway. He then eased the hammer out from underneath the car seat. D.H. was looking at the weeds and the trees. Burt opened D.H.'s car door and reached in for her hand to help her out of the car. Burt then hit her

in the head with the hammer. D.H. turned and looked at Burt and asked where defendant was. Burt testified that he got scared, backed up, put the hammer in his right hand and hit her in the head again. D.H. was still wobbling after the second hit, so Burt struck her in the head a third time. D.H. fell to her knees and said that she had $1,500 in her pocket. Burt asked her where the money was, and D.H. said in her right jacket pocket. Burt took the money; it amounted to $150. D.H. was still on her knees but slumping. He then struck her in the head a fourth time. Burt testified that he set the hammer down, slid through the passenger side door, and retrieved the knife because he was not sure D.H. was dead. He tried to slit her throat with the serrated knife. He thought the knife got caught on her collar. Burt testified that he panicked, threw the knife down, and started to drag D.H. into the weeds. He stated that he dragged her about four or five feet by the collar on her jean jacket and her pants, with her face down. Burt testified that he could not find the knife, so he backed the car up to put the headlights down to look for the knife but he still could not find it. He saw his Marshall Field's logo cap on the ground as it fell out of the car during the events. Burt testified that he was panicked and wanted to get out of there, so he just got in the car and left. He got back on Route 20. He thought he left his cell phone at the crime scene and drove back a mile until he remembered it was on the backseat. He made a U-turn and headed back towards Waterloo. Burt testified that he stopped at the Wal-Mart in Independence and used a restroom. Burt did not notice any blood on himself. He continued on Route 20 and stopped at a McDonald's drive-through in Elk Run Heights; it was about 10:30 p.m. He arrived home around 15-20 minutes later, parked Biggles' car under his carport, took the hammer out, and placed it in the backyard under a seat. Burt testified that he went inside, asked if anyone had any drugs, and then showered. He left his clothes in the middle of the floor of the bedroom. The clothes were gone when he got out of the shower. Someone took them

to wash them although Burt testified that he did not ask anyone to do that. Biggles was in Burt's bed asleep. Burt gave Biggles his key back. Burt testified that he spent the night getting high and then slept.

¶ 34 The next day, Burt testified that he woke up around 11 a.m. Derek Robinson told Burt that defendant stopped by around 9 a.m., but Robinson could not wake Burt. Defendant told Robinson he would come back around 2 p.m. Burt testified that defendant arrived in his van around 2 p.m., and he got into the van. Defendant drove and asked Burt if it had been done. Burt told him yes and defendant did not want the details. He gave Burt $2,000 and told him that was all he could get without being noticed for now. Burt told defendant that the camera had been removed from the car, but defendant said that he believed Burt that it was done. Burt told defendant that the body would be found. Defendant dropped Burt off at Biggles' house. Burt testified that he paid Biggles the $300 for letting him borrow his car, and he gave him an extra $20 for cleaning up around the driver's seat. Burt thought the car needed to be cleaned to hide fingerprints. Burt also asked Biggles about the camera, and Biggles said he accidentally took it out and that he brought it down later that day. Burt testified that he spent the remainder of the day getting high, buying more crack than usual that weekend with the extra money he had. He told Wise to retrieve the hammer and throw it into the river. Burt also told Blair Jones to return the camera to Wal-Mart. This all took place on that Saturday, October 28.

¶ 35 Burt testified that he was arrested on October 30. Burt testified that he at first denied involvement in the murder and denied that defendant was involved because he did not know what the police knew at that point. Eventually, Burt was transferred to Illinois, where he found out some information that the police knew. He was then offered a deal in exchange for his testimony. Burt

testified that prior to the murder of D.H., he performed other criminal acts for defendant but never murder. The trial court admonished the jury that evidence of defendant's other crimes was only to be considered to show a pattern of transactions between Burt and defendant.

¶ 36 On cross-examination, Burt admitted that during the day of October 27, he smoked several pipes of crack. When he met defendant at 4:30, he stopped smoking crack. He was starting to come down from the crack, which is why he purchased some beer for the road trip. He admitted during the entire trip, D.H. never tried to get away and never screamed or questioned Burt about what he was doing. He admitted that had she tried to run, she would have outrun him because he had bad knees. Burt testified that the interrogating officer, Mark Meyers, told him some of the evidence that they had against him. Meyers told Burt that the police knew that he borrowed Biggles's car, that he paid Biggles for borrowing the car, the car had blood in it, that a knife was found at the scene, that they knew about the hammer and that the hammer had blood on it, and that a can of Pringles taken from the car had D.H.'s fingerprints on it. Burt testified that based on the police questioning, the police thought he killed D.H. and that they had a fair amount of evidence. Burt was aware Illinois had the death penalty, and police informed him that perhaps he could save himself if he implicated defendant. Burt was extradited, and he discussed the deal with his appointed attorney. In exchange for Burt's testimony against defendant, the State agreed not to seek the death penalty and the federal government agreed not to pursue federal charges.

¶ 37 Jalisa Young testified that she was a friend of D.H. On October 26, 2006, D.H. was at Young's house. D.H. asked to use Young's cell phone. Young could not hear D.H.'s conversation and did not know who she called. When she got off, D.H. said she called defendant and that he

wanted her to meet him that day, but she told him she would meet him the next day. Cell phone records introduced in evidence later confirmed the phone calls.

¶ 38 Teresa Zuke, a supervisor at Casey's General Store on Route 63 in Waterloo, confirmed that video surveillance showed Burt purchasing gas, beer, and Pringles on October 27. The video was admitted into evidence.

¶ 39 Waterloo police officer, Joseph Zubak, testified that he saw Burt at Casey's in a white Cadillac. He knew Burt from previous encounters and thought it was unusual to see him away from the crack house. He also thought it odd that Burt was in a car.

¶ 40 David Winger, an Independence, Iowa, police officer, testified that he saw Burt come into the Wal-Mart store to use the restroom. Office Winger followed him out and saw him walk through the parking lot, but he did not see what car he got into. He identified the video surveillance from Wal-Mart and confirmed that it accurately depicted what he saw. The video was admitted into evidence. The video showed Burt enter and leave the Wal-Mart around 9:45 p.m. on October 27, and enter a white Cadillac. Bryan Johnson, the store manager of the Waterloo Wal-Mart, identified the transaction history showing Burt's purchase of the camera and film. He also identified the return transaction for the same camera. Video surveillance showing Burt purchasing the camera and film and another person returning the camera, and the transaction histories were entered into evidence.

¶ 41 Kentavia Williams, a classmate of D.H.'s, testified that she sat with D.H. on the bus on the way home from school on October 27. D.H. told Williams that she was going to be going out of town with her father that weekend. Rosemary Stuart, a bus driver, testified that another driver, using the cb radio system, asked her if D.H. was on her bus. Stuart was stopped at Glenwood and Linden Streets. The other driver stated that D.H. was not supposed to be on Stuart's bus. Stuart asked if

D.H. was on the bus, and D.H. identified herself. D.H. started to walk towards the door. Stuart was told that if D.H. got off the bus, she would be suspended, but D.H. did not care and got off the bus. Stuart saw that D.H. went west on Glenwood, towards the railroad tracks.

¶ 42 Rhonda Weber, a Waterloo police officer, testified that she took into evidence the following items: defendant's buccal swabs, photographs of defendant's van, items from defendant's van, a Pringles can and two Old Milwaukee beer cans from Biggles's car, two $100 bills from Biggles's house, the bloody hammer found near West Lewis and Ackerman Street, and blood samples taken from the steering wheel and passenger side doors of Biggles's car. The items were entered into evidence.

¶ 43 Timothy Hampton testified for the State. Hampton worked for East Side Motors as a mechanic and salesperson. He knew Burt from going to car auctions on a few occasions and knew Burt went with defendant on some repossessions. In summer 2006, Hampton went to bail Burt out of jail at defendant's request. Hampton also knew D.H. through defendant. During September and October 2006, D.H. came to East Side Motors frequently. She also called frequently. On October 26, Hampton saw Burt at the shop and saw him leave with defendant in the white van. Hampton saw them leave in the morning.

¶ 44 On October 27, 2006, Hampton went to Menards to pick up supplies. He received six calls from East Side while shopping, and he called back and spoke to defendant. Defendant stated that Hampton needed to return to the shop because his "company's here." Hampton did not know what that meant but returned to the shop within 10 to 15 minutes. D.H. was at the shop, standing by the refrigerator in the larger office. Defendant was sitting in the smaller office, which they called the "cage." When Hampton came in, D.H. walked over to him, put her hand on his shoulder and said

"hi." She then walked out of the office area. Hampton heard a car door shut shortly thereafter. Defendant then told Hampton that "you have not seen me or her other[wise], or watch yourself." Defendant then walked out of the shop, using the same door as D.H., and Hampton heard a car door shut. Hampton then walked out and saw defendant driving away in his white van. The tinted windows prevented him from seeing whether D.H. was with him. Hampton stated this occurred around 3:45 p.m. Around 5 p.m., defendant called and told Hampton to call defendant's wife and tell her that defendant would be late for supper because he was out looking for a Suburban.

¶ 45 Around 5:15 p.m., Hampton received a phone call from Detective Rogers, who asked him where defendant was. Hampton told him that he was not at the shop. Hampton then called defendant on his cell phone and told him that the detective was at the shop and wanted to speak to him. Defendant came back to the shop and spoke to the detective. Hampton did not hear their conversation. Hampton then locked up and left the shop. Around 6:30 p.m., Hampton received a call from defendant. Defendant asked whether Hampton wanted to come along to look for a Suburban but Hampton declined because he had dinner plans.

¶ 46 The next day at the shop, defendant asked Hampton to get the money pouch out of the ceiling tile. Hampton testified that the pouch had a sticky note that said "1600," but that he never actually counted the money. There was money in the pouch when he put the pouch back into the ceiling. The shop closed at noon, and Hampton left and went home after that. He did not know where defendant went. He did not see or hear from defendant for the rest of the day on October 28 or the next day.

¶ 47 On October 29, Hampton was interviewed by Waterloo police. Although Hampton did not see defendant, he could hear his voice coming from the next room over. Hampton testified that he

told police that he did not see D.H. at the shop on October 27 because he was afraid of defendant. On October 30, Hampton received a call from defendant. Defendant stated he was at a motel and asked Hampton if he could meet him at the shop because he wanted to get the checkbook and the car payment pouch. Defendant also apologized to Hampton for getting him involved in the middle of the situation.

¶ 48 Hampton testified that police interviewed him again on November 3. On that date, Hampton initially denied seeing D.H. on October 27, but at some point during the interview, he told the truth. Hampton testified that he gave police false information during his initial interview on October 29. Hampton identified the paper towel that D.H. gave to her mother as a pattern that looked familiar to him because defendant's wife purchased towels for the shop with the pattern. Hampton also saw the same towels in defendant's van.

¶ 49 On cross-examination, Hampton testified that he saw Johnson at the shop making payments and that later he and defendant had to repossess her car. He also admitted that on one occasion, D.H. came to the shop, walked up behind him, put her breast up against his back and asked if he would be interested in sex. Hampton testified that he told D.H. "no." D.H. left Hampton alone after that.

¶ 50 Keith Carlbom, an Illinois State Police crime scene investigator, testified that he reported to the scene where D.H.'s body was found. At the scene, he found a Waterloo newspaper (the Courier), blood-stained area of grass, and some bone fragments within that area. The newspaper contained some brain-like matter on it. Carlbom testified that there was a jacket laying next to D.H.'s left hand, partially covering her legs. Inside the jacket pocket, Carlbom found a torn paper that appeared to be a parent-teacher conference notice for D.H. from Logan Middle School in Waterloo. There was a wig, or hairpiece, hanging off a little tree nearby. Carlbom testified that he found a knife laying

in the grass and a blue knit cap with the words "Marshall Field's" embroidered on the cap. He also identified the clothing found on D.H.'s body. Several photographs were admitted during Carlbom's testimony, each depicting the scene and evidence found at the scene.

¶ 51 Derek Robinson testified that he lived in Burt's crack house in October 2006. He knew Burt for most of his life, and they delivered Waterloo Courier newspapers together. Robinson testified that on October 28, defendant drove up the driveway of the house in a white minivan around 11:30 a.m. or noon. Robinson went outside, and defendant asked to see Burt. Robinson told him Burt was not there, and defendant told him to tell him that he came by and would be back around 2 p.m. Robinson found out later that Burt was in the house. He spoke to Burt later in the kitchen and told him that defendant came by and said he would be back around 2 p.m. Defendant returned, and Robinson saw Burt get into the van and leave with defendant. About 15 minutes later, Robinson saw defendant's van near the corner of Sumner and Vinton Streets and Burt on the corner. Robinson testified that he saw Burt at the house later on Saturday, that he had a lot of money and a lot of dope, and that there were more people around than normal. Robinson testified that the amount of money and the amount of dope that Burt had that weekend was more than normal. On cross-examination, Robinson admitted that he could not remember everyone that was at the crack house that weekend.

¶ 52 Michael Biggles testified that he knew Burt for over 20 years. Burt lived three or four houses away from Biggles. Biggles also knew defendant for probably 20 years. On October 27, 2006, Biggles saw defendant parked in front of Burt's house, and they were talking. Biggles went to talk to defendant about his car payment; defendant was sitting in his van. Later that day, Burt asked to borrow Biggles's car. Biggles told Burt that he was going to be late on his payment, but defendant said it would be okay. Burt told Biggles that he might be able to help with his payment after a real

estate deal went through. Biggles allowed Burt to borrow his 1998 white Cadillac, which had vanity plates "Biggles." He testified that he first removed his belongings out of the car, including a camera and film that he thought belonged to his daughter. Later, Biggles learned the camera actually belonged to Burt. Burt was on his phone while Biggles cleaned out the car. Biggles testified that he heard Burt say "tell Terri to give me the bag that's beside the chair." Burt then left with the car.

¶ 53 Biggles testified that he went to Burt's house later that night because Burt said he would be back that evening. Biggles sat and drank with some people that were at the house. Biggles testified that he was drunk and others were smoking crack. He did not recall what time he got to Burt's house and did not know when Burt came home. Biggles testified that a girl came in and handed him his keys. Biggles then left the house, walked home, and went to bed. He saw that his car was parked on the side of his house. The next morning, Biggles woke up and went to Burt's house, had some coffee, and then went home. Later that day, Biggles saw defendant in front of Burt's house. After defendant drove off, Burt came to Biggles's house. Burt gave him three $100 bills, telling Biggles to take care of his business. Burt walked away, then came back, and gave Biggles a $20 bill. Burt said to get the car cleaned up. Burt also asked Biggles about a camera, which Biggles returned to him later. When he gave the camera to Burt, Biggles testified that he heard Burt ask Blair Jones to return the camera and get the money back.

¶ 54 Biggles testified that Burt had borrowed his car in the past but never paid him before. Biggles testified that he took out two beer cans and a Pringles can from the front seat of the car and threw them in the garbage. He put the $300 in a drawer in his upstairs bedroom. Biggles testified that he spent $100, which he used to pay a roofer doing work on his home. Biggles identified the

two $100 bills, the Pringles can, and the two Old Milwaukee cans that were entered into evidence as the items taken from his home.

¶ 55 Biggles testified that he drove the Cadillac on Sunday to go to the store and that Burt borrowed the car for about 20 minutes to go to his girlfriend's house. Eventually, Biggles asked his daughter to move the car because he was suspicious and had called the police. Police questioned Biggles twice. On cross-examination, Biggles admitted when he spoke to police, he was intoxicated and did not recall some of the things he told them.

¶ 56 Keith Rogers, a sergeant with the Waterloo Police Department, testified that on October 27, he received a phone call from defendant, who knew that police were looking for him in regards to the disappearance of D.H. Sergeant Rogers went to East Side Motors and met with defendant around 5:30 p.m. Defendant told Sergeant Rogers that D.H. was at the shop around 2 p.m. for about 30 seconds. He told D.H. to leave because police had told him to not have contact with her. Defendant told Sergeant Rogers that D.H. told him she was kicked out of school and that she was going to get on a bus and leave town that day.

¶ 57 Anthony Heindel, a sergeant with the Illinois State Police, testified regarding the various bloodstain and patterns on the car. He could only opine that there were more than two blows to the victim to cause the patterns.

¶ 58 Blake Aper, a forensic scientist with the Illinois State Police, testified regarding the DNA testing in this case. D.H.'s DNA profile matched the interior car door bloodstain. D.H.'s and Burt's DNA were found in the steering wheel bloodstain. D.H.'s DNA was found in the blood on the hammer. No one's DNA (D.H., Burt, or defendant) matched the stains from the sweatpants that

were found. D.H.'s DNA also matched the bloodstains taken from the front passenger door of the car, the exterior rear passenger door, the knife, and the bone fragments.

¶ 59 Andrea Frana, a detective with the Waterloo Police Department, testified that she took on the sexual assault case involving D.H. in October 2006. On October 16, Detective Frana questioned defendant at East Side Motors. When told that there was an allegation of sexual abuse made against him, defendant stated that he could not believe that. He agreed to provide DNA samples, and he stated that there was no way that he could perform. He told Detective Frana that there had been no part of him inside of D.H. Detective Frana did not tell him any details of the alleged abuse.

¶ 60 Detective Frana set up an interview at the Child Protection Center in St. Luke's for D.H. to take place on October 19. Detective Frana watched and listened to the interview through a two-way mirror. D.H. said that the relationship with defendant began when her sister told him that D.H. had a "crush" on him. After that, D.H. said that she went for a ride in defendant's van sometime in September and he stopped, began kissing her, and felt her breasts. Later that evening, D.H. was home, and defendant stopped by her house to get things out of a car. He asked D.H. what she would be doing that night. D.H. told him that she was going to study, take a shower, and read. Defendant asked D.H. if she was mad at him, and D.H. said "no." Then defendant asked if he could come in and wash her back. D.H. told him "no." D.H. described another incident in defendant's van at Ferguson Park. She said that they started French kissing, and he felt her breast both over and under her clothing.

¶ 61 Detective Frana testified that D.H. described another incident in which defendant told her to come over as D.H. walked to the bus stop in the morning. He told her that his wife left to take Blake to school. He took D.H. inside and felt her breasts under her shirt. D.H. said that he had her feel his

penis. She said it felt hard but it was over his clothing. Defendant took her into the bedroom, took off her pants, and he kissed her vagina. D.H. said she got up, and defendant kissed her breasts. Then they left, kissed a little in a field, and then defendant took her to school. D.H. said that they talked about having sex, but defendant thought she was too young. D.H. admitted that she wanted to but he refused.

¶ 62 Detective Frana testified that D.H. then discussed the details of the October 11 incident. D.H. said that she had been at defendant's shop after school. The shop was closing, and defendant had to bring dinner home for his wife and grandson. D.H. walked to the home of her friend, Kianne Pettit. Around 5:30 p.m., D.H. said that she called defendant from Pettit's house. She then left Pettit's house, and defendant picked her up at Madison and Idaho Streets. It was about 5:45 p.m. They went to East Side Motors, and no one was there. D.H. said that defendant locked the doors, and she became scared. Defendant told D.H. to take off her clothes. D.H. told him "no," and sort of laughed because she thought defendant was joking. Defendant told her that he was serious, and D.H. said she was scared so she did. Defendant then sat in a chair, pulled his pants down to his ankles, and told D.H. to sit on his lap. D.H. said she had to sit on his lap with her legs spread apart, facing defendant. D.H. told the interviewer that he used his fingers and touched her vagina. Defendant then told D.H. to get on her knees, which she did. D.H. said he then put his penis in her mouth and moved her head down. D.H. said it was disgusting. She said at first his penis was soft and then became hard. D.H. asked defendant if she could stop, and defendant let her stop. She got up, and defendant made her put her hand on his penis and moved her hand up and down. D.H. said semen came out of his penis and on the side of her hand. She wiped her hand on a napkin. D.H. got

dressed and put the napkin in her pocket because she could not find a garbage can. Defendant dropped her off on Beach Street, which was where her father saw her.

¶ 63 Detective Frana testified that D.H. discussed with the interviewer that she next saw defendant on October 17. D.H. went down to the shop, and defendant told her that if he went to prison, he was never going to see her again. Defendant told her to lie and say there was never a relationship between the two of them.

¶ 64 Regarding D.H.'s original story, Detective Frana testified that D.H. said it was not true and that she made it up because she was scared and thought what happened was her fault and no one would believe her. D.H. said that her mom trusted defendant and thought he was a good person. D.H. did not want defendant to go to prison. She was concerned about defendant because he took care of his wife and Blake. Detective Frana said that the interviewer asked her how she knew that, and D.H. said that defendant told her.

¶ 65 On October 24, Detective Frana interviewed defendant, and the interview was videotaped. The interview was played for the jury. Detective Frana admitted that during the interview, she told defendant that D.H. indicated that only oral and manual acts occurred. She also told defendant that it would take approximately two months for the DNA testing to be done. Detective Frana identified an Adventureland charm that defendant's wife gave to her, which she found in defendant's pocket and was an item that V.H. had described that belonged to D.H.

¶ 66 Detective Frana testified that the DNA testing from the napkin came back after D.H. was found dead. Detective Frana had no information to suggest that D.H. was *not* going to pursue the sexual assault case against defendant. Detective Frana admitted that she never told defendant during

any of her interviews with him about the napkin/paper towel that D.H. turned over to police. She interviewed defendant on October 16, 17, and 24.

¶ 67 At the conclusion of Detective Frana's testimony, the court admonished the jury that the statements D.H. made during the forensic interview were being admitted only for the limited purpose of showing motive on the part of defendant. The court advised that the evidence regarding the sexual abuse was not to be considered as evidence of the charges against defendant and that he was not charged with sexual abuse.

¶ 68 Kristen Evans, a forensic scientist with the Iowa Division of Criminal Investigation Criminalistics Laboratory, testified that she tested the napkin that D.H. claimed had defendant's semen on it. The napkin matched defendant's DNA sample. Again, the trial court admonished the jury that the evidence of sexual abuse was admitted for the limited purpose of showing motive.

¶ 69 Additional witnesses from phone companies testified for the State and provided the foundation for the phone records that supported the State's witnesses testimony regarding calls made between Burt and defendant, defendant's calls, and calls made between defendant and D.H. Additionally, videotape evidence showing Blair Jones returning the camera to Wal-Mart, and other photographs were admitted into evidence.

¶ 70 Kathy Damm, defendant's former wife, testified for the State. At the time of the murder, Kathy was married to defendant, and they had one son and one grandson. She and defendant owned East Side Motors, which was now owned by their son, Justin. Kathy lived across the street from Johnson. She testified that D.H. used to play with her grandson, Blake, teaching him how to rollerblade. On October 11, 2006, Kathy testified that defendant came home with food from a

restaurant. The order was incorrect, and defendant left and returned with the correct order. Kathy testified that she did not know how long defendant was gone.

¶ 71 On October 27, Kathy received a call from Hampton around 5:05 p.m. Hampton told her that defendant was going to be late for dinner. Hampton told Kathy that defendant was out looking for a Suburban to repossess. Kathy did not know why defendant could not call her himself. Between 3 p.m. and 5:30 p.m. that day, Kathy did not see defendant. Kathy testified that defendant returned home between 5:30 and 5:45 p.m. She recalled that he left at some point that evening and returned home. Kathy testified that she had no plans to go away for the weekend with defendant. The only plans that they had were for the next night, October 28, to attend their grandson's concert. Kathy testified that she was unaware of any reason that defendant would need any large amounts of money in the house. She denied seeing any large amounts of cash in the home. She denied that defendant had any plans to go to the casino that weekend. She also denied that defendant ever brought more than $300 to the casino.

¶ 72 Kathy testified that defendant worked on October 28 from 9 a.m. until noon. They went to breakfast in Cedar Falls with Justin, his girlfriend, and Blake. They returned home around 1:30 p.m. Defendant dropped them off and said he was going to look for that Suburban with Burt. Defendant returned around 2:30 or 3 p.m.

¶ 73 Kathy identified an Adventureland gold charm that she found in defendant's jacket pocket. She gave that charm to police. She recalled that on September 27, 2006, she had an early meeting at Blake's school and left the house around 7 a.m. She did not return until 8 a.m. or shortly thereafter.

¶ 74 Regarding defendant's health, Kathy testified that defendant could dress himself and walk. He typically wore sweat suits, but Kathy denied that he did so because he had difficulty dressing. When asked whether defendant's condition interfered with his ability to have sexual relations with her, Kathy testified "to some extent." She testified that defendant had had a vasectomy, which was confirmed by the DNA testing. Kathy testified, over objection, that in the three months prior to October 27, 2006, she had sex with defendant "maybe once." Over objection, she testified regarding defendant's ability to get an erection. Kathy testified that "to some point, yes" he could get an erection but "not like he use[d] to." She testified "yeah" when asked if defendant's penis would grow and to some extent get hard. When asked whether she had other forms of sexual relations with defendant involving his penis, Kathy testified that she used lotion and manually caused defendant to ejaculate. She confirmed that defendant's penis would get hard with manipulation.

¶ 75 Kathy identified the paper towel that D.H. turned over to police as the type of paper towels Kathy bought for her home. She testified that she would also have defendant take those towels to the shop. The towels were Bounty Basic.

¶ 76 On cross-examination, Kathy acknowledged that defendant had lost weight since 2006 and was suffering from ankylosing spondylitis, a type of arthritis that caused him to walk stooped over and prevented him from turning his neck. She admitted the disease was painful, but infusion treatments had helped him. Kathy admitted she used to help defendant dress, but after his knee surgery in 2002/2003, he was self-sufficient. She described her relationship with D.H. as a friendly one and thought she was about 16 years old based upon her appearance. Kathy thought it was odd that D.H. had such a strong interest in Blake because of the age difference. However, Kathy did not do anything about it because D.H. was teaching Blake things and Blake liked D.H. Kathy admitted

that she saw D.H. playing with other neighborhood children. Kathy testified that the weekend of October 28 and 29, many cars and people were around their home, and the police told defendant that they should leave. Kathy and Blake did not return to the home until Thanksgiving.

¶ 77 The State rested its case. Defendant moved for a directed verdict and particularly argued that the State failed to prove its case on the aggravated kidnaping charge. The court denied defendant's motion on all counts.

¶ 78 Defendant called Mark Meyer, a sergeant with the Waterloo Police Department. Sergeant Meyer testified that he knew Burt from his work in the narcotics unit. From time to time, Burt worked as an informant for the police. Sergeant Meyer questioned Burt after D.H.'s body was found and police had some evidence. He admitted that he questioned Burt about defendant's involvement. He admitted that he told Burt that police had the car, which had blood on it, the hammer, fingerprints from D.H. inside the car, and the Pringles can. Sergeant Meyer denied telling Burt about the paper towel because he had no knowledge of any pending DNA evidence in the sexual abuse case. Sergeant Meyer admitted that about three weeks prior to the murder, Burt complained to him about another drug dealer who was threatening Burt because Burt owed money. However, Sergeant Meyer knew the debt had been paid off before October 27.

¶ 79 Rob Camarata, a sergeant with the Waterloo Police Department, testified that he interviewed Biggles after his daughter had called in. Biggles volunteered information about the potato chips being left all over the front seat and that Burt specifically told him to clean up the driver's side of the car.

¶ 80 Karmin Caldwell testified that she was at Burt's house on Friday, October 27 into Saturday morning of the 28th. Caldwell testified that she got to Burt's house on that Friday around 10 p.m.

and thought that Burt came home sometime around 1 or 2 a.m. that morning. She had her cousin, Leon Mosely, contact police because she thought Burt may have had something to do with D.H.'s disappearance. Caldwell testified that she was at Burt's home, along with her cousin, Sonja Harmon. Caldwell was in Burt's bedroom with Harmon, Biggles, and Terri Cribbs. Harmon was sorting her mom's clothes and Burt's clothes to wash. Burt came in and asked where the body wash was, which struck Harmon as unusual because Burt usually wore the same clothes over and over. Burt went to take a shower. After the shower, Burt dropped his clothes on the floor of the bedroom. Caldwell testified that the clothes he dropped were a gray-looking pair of Docker pants, a blue and gray sweat jacket, and tennis shoes. Caldwell thought there was something splattered all over the bottom of the pants. She testified that it appeared to be a whitish splatter. His sneakers appeared to have blood smeared on them. Harmon picked up the clothes, and they walked to the kitchen. Caldwell testified that another woman, Brenda Fisher, asked Burt what was all over his pants and shoes. Burt said he planned to get rid of those. Harmon put the clothes in the washing machine.

¶ 81 Patricia Harris testified that she and Burt had a child together and had a seven-year long relationship. Harris testified that Burt was a crack addict and at times was violent with her. She testified the crack made him violent, but he was not always violent.

¶ 82 Herman Wise testified that on October 27, around 4:30 p.m., someone at the crack house gave him the phone to talk to Burt. Burt asked him about a hammer. Wise found the sledgehammer and brought it to Burt, who was in Biggles's white Cadillac. Wise did not ask Burt what he needed the hammer for. Burt called the house again and spoke to Cribbs, asking for a knife with jagged edges. Wise testified that Cribbs brought him a knife in a brown paper sack. Wise thought he told Cribbs the knife was to clean some fish. Later, Burt called and told someone to clear out the house.

Wise testified that everyone thought that Burt had gone out on a drug run. Wise cleared the house, and he left as well.

¶ 83 Wise testified that the next day Burt asked him to get rid of the hammer. Wise left and came back, and Burt asked him whether he got rid of the hammer. Wise told him no. Burt told him where the hammer was and told Wise he wanted him to throw the hammer in the river. Wise asked Burt why he should throw it in the river, and Burt said he did not want to know. Wise drove near his mother's home and ended up throwing the hammer out somewhere around there. Wise eventually went to the police and told them about the hammer. Wise showed police where to find the hammer, which they did.

¶ 84 Sonja Harmon testified that she was in jail for theft. She knew Burt in 2006 because her grandmother bought Burt's mother's home. She also knew D.H.'s father's family very well. On October 26, Harmon was at Burt's house and smoked crack. Harmon testified that she fell asleep and woke up and it was dark. Biggles was angry about his car so Harmon called Burt's phone several times. Harmon testified that each time she called Burt's phone, it went straight to voicemail. Burt returned a few hours later but Harmon did not know what time. Later, police spoke to her. Harmon did not recall telling police that Burt came back sometime around 2 a.m. Harmon testified that Burt went and took a shower when he got home, which was unusual for him to take a shower. Burt threw his clothes in a pile. Harmon testified that she and Caldwell were sorting out some laundry. Harmon testified that it looked like drops of blood dripped on Burt's pants, as if someone cut their finger and it dripped. Harmon testified that she later heard people talking about the girl's disappearance and Burt's possible connection to it. She left the house and called Detective Meyer.

She did not recall telling police that Burt's leg had a scrape on it. She also did not recall any blood on Burt's shoes.

¶ 85 Defendant testified in his defense. He denied knowingly soliciting Burt to kill D.H. He denied aiding and abetting Burt in the commission of an offense. He denied agreeing that Burt kill D.H. He never intended on Burt killing D.H. He denied any involvement in a plan to kidnap D.H. Defendant admitted that he lied to police when he spoke to them on October 30 because he feared retaliation from D.H.'s family. Defendant testified that he was prepared to tell the truth.

¶ 86 Defendant testified that on October 25, 2006, he left East Side Motors to look for a Suburban. While out looking, he stopped by Burt's house and asked Burt if he knew the owner. Defendant and Burt drove by a couple of places that Burt thought the car might be, and then defendant drove him home. During the drive, defendant told Burt about the sexual abuse allegations against him, and Burt asked him what he wanted to do. Defendant testified that he mentioned to Burt that there would be DNA test results coming back in December, but he never mentioned anything about a napkin or towel. Defendant had no knowledge of the napkin at that time. Defendant told Burt that he needed the same kind of influence as D.H.'s father because he believed Adonnis H. was preventing D.H. from telling the truth. Defendant told Burt that he did not want D.H. afraid of him and did not want to hit or beat her. Defendant told Burt that D.H. wanted to run away for a few weeks, and he was inclined to help her do that. Burt said that the girl would want to come home and the problem would still be there. Burt asked defendant if he wanted D.H. dead, and defendant said "no." Burt said that was good because he would have to get one of the crazy New Orleans guys to do it, which would cost $5,000 to $10,000. Defendant testified that the conversation ended with Burt telling defendant to let him know if he wanted his help getting D.H. out of town. Defendant returned to work.

¶ 87 On October 26, defendant received a call from D.H., who was using a friend's phone. D.H. wanted to know how he was and wanted to know if she could come by the next day. Defendant testified that he told her that it would not be a good idea. D.H. said she wanted to see defendant, and so he said it would be okay if she came by the next day. Defendant decided to help her get a ride out of town. He told D.H. he would help her run away. Defendant then called Burt; the time was around 4:30 p.m. to 5 p.m.

¶ 88 Defendant testified that the next day, October 27, Burt was at the shop when he pulled in. Burt said he needed a ride so they got back into defendant's van. Defendant drove around and stopped at Logan Plaza and then at the Wal-Mart. Burt said he needed to buy a camera, and defendant gave him $60. Defendant testified that he did not know why Burt needed the camera. Burt returned with the camera and some chicken, which he ate in defendant's car. Burt said he had an idea to take some "embarrassing, compromising" pictures of D.H. involving nudity that might influence her if she returned home after her runaway. Defendant testified that Burt was not supposed to assault or kill D.H. in any way to get the pictures taken. Defendant was supposed to hold the pictures. Defendant testified that he then drove Burt home with the plan being that they would meet at 4 p.m. at the Gates Park Swimming Pool parking lot with D.H. Defendant returned to East Side Motors. He testified that at some point, Hampton left to go to Menards. While Hampton was gone, D.H. came to the shop; it was close to 3:30 p.m. Defendant testified that D.H. was in a hurry to leave because she did not want to be seen. She told defendant that she was in trouble for taking the wrong bus. Defendant testified that he began calling Hampton repeatedly. Hampton called him back, and defendant told him that he needed Hampton to return to the shop because he had company. Hampton returned, and defendant left with D.H. in his van. Defendant testified that he drove to the

Gates Park parking lot and waited for Burt, but he never showed up. Defendant testified that he drove out and called Burt and asked him why he was not where he was supposed to be. He told Burt to get moving. Defendant testified that it was getting closer to 5 p.m., he wanted to get back to the shop, and D.H. was getting nervous that she would be seen with him. He called Burt again, and he said he was getting gas. Defendant testified that he dropped D.H. off near a payphone by an abandoned Hyvee store. Defendant testified that that was the last time he saw D.H.

¶ 89 Defendant testified that Burt called him and asked where he was. Defendant told him that he could not wait any longer and told him to pick up D.H. at the location where he left her. Defendant testified that he also got a call from Hampton, who told him that a police officer came by looking for him. Defendant arrived at the shop and called the police officer, Officer Rogers. Defendant then said he was leaving, and Hampton gave him a letter to mail. Defendant drove to the post office. When he returned to the shop, Hampton was speaking to Officer Rogers. The officer then told defendant that D.H. was missing and her family was going crazy. Officer Rogers warned defendant that he might not want to go to his home. He also asked defendant if he had seen D.H. that day. Defendant told the officer that she was at the shop a couple of hours ago. She left, heading towards Independence Avenue. Defendant admitted that he did not tell the officer that he dropped D.H. off at a location for Burt to pick her up. Defendant then went home and told his wife he was going for a drive. He headed towards Cedar Falls.

¶ 90 While driving to Cedar Falls, defendant pulled over and called Burt. Defendant testified that Burt was mad with all the phone calls he was getting and was turning his phone off because his location could be tracked by the phone. Defendant told him he never thought about that and did not think the situation was "serious enough to be concerned." Defendant called Hampton to see if he

wanted to drive around and look for the Suburban, but Hampton said he had plans that night. At one point, he called his wife and told her he was coming home. He eventually returned home.

¶ 91 Defendant testified that on Saturday, October 28, he worked at the shop until noon and then went to Burt's house to retrieve the pictures and pay him. Defendant testified that he took $1600 from the ceiling tile of the shop. Defendant testified that he owed Burt $200 plus any expenses he might have incurred. Defendant testified that Burt was still sleeping so he told the man outside of the house to tell Burt he would return around 2 p.m. Defendant returned, and Burt was outside. Burt told defendant to drive down the alley and that he would meet him behind the church. Defendant did so, and Burt got into his van. As they drove, defendant asked if he got the pictures. Burt said that he did not because he left the camera in Waterloo. Burt told him the guy he borrowed the car from took the camera out of the car, which he did not realize until after they left. Defendant asked what he had done, and Burt said he killed her. Defendant testified that he was "confused, scared, bewildered," and did not know what to think. Burt told defendant that he owed him more than what they had talked about. Defendant told Burt there was money in his vest pocket, and Burt took it. Burt started to explain what he did but defendant told him he did not want any details. Defendant testified that he heard Burt say that he threw her in a ditch. He then drove Burt home. Burt got out and told defendant that he did not need to tell him that neither needed to talk to anybody about this. Defendant testified that he did not know Burt to be a violent person.

¶ 92 Defendant testified that later that afternoon, the doorbell ran and his wife said that there was a carload of people outside who wanted to talk to him. Defendant went to the door and D.H.'s grandmother and mother were screaming at him, asking where D.H. was. That night, defendant went to the police station and asked for some protection.

¶ 93 Regarding his relationship with D.H., defendant testified that he knew Johnson and her former boyfriend, Larry Merchant, because he sold Merchant a car. About three months after that, they moved in across the street from defendant. After Merchant went to jail, Johnson paid on the car for awhile, sometimes sending D.H. into the shop with the payment. D.H. also played with Blake. Defendant testified that he often took Blake and the other neighborhood kids for ice cream. He explained that there were not many homes on their block so not many children. Sometime at the end of August or early September 2006, V.H. told defendant that D.H. had a crush on him. Defendant testified that he thought it was "cute and flattering" at the time; everyone treated it as a joke. Gradually, defendant realized it was something more to D.H. She began to call him frequently and then showed up at the shop.

¶ 94 Defendant testified that he was not always faithful to his wife. He testified that he had been unfaithful with some acquaintances, customers, and neighbors. He said that 90% of the sex occurred in the office of East Side Motors. Defendant testified that the women used their hands on his penis until he ejaculated. Defendant said that he had a habit of using a paper towel to wipe himself clean after these incidents. He would throw those towels in the garbage or on the floor of the van. He denied that his sexual relationships were a secret in the town or from Hampton.

¶ 95 Defendant denied that he sexually abused D.H. He learned of the allegations on October 16 when Detective Frana came to his home and told him. He knew of her earlier claim about an old white man in a field. He cooperated with Detective Frana, allowing a buccal swab to be taken. He was never told about a napkin or paper towel during his discussions with police. Defendant testified that he did not learn about the towel until a year prior to trial.

¶ 96 Defendant admitted that D.H. would still be alive had he not dropped her off for Burt. He testified that D.H. was gone, her family has suffered, and "it didn't have to happen."

¶ 97 On cross-examination, defendant identified the charm that his wife found in his jacket pocket. He explained that D.H. gave him the charm sometime in October after getting ice cream. Defendant admitted that on October 11, he gave D.H. a ride to the park and that he lied to police when they asked him about how he came to have dropped off D.H. He admitted that he never told the police that D.H. called him that day for a ride. He admitted that there were times when he was alone with D.H. in the car and in the shop. Defendant denied that when he told Detective Frana that no part of him was inside D.H., he was choosing his words carefully. He admitted that he never denied having her masturbate him. Defendant denied telling D.H. to lie for him or that he would go to prison and be unable to support his family.

¶ 98 When asked if he was attracted to D.H., defendant did not answer, then said he could not answer. Defendant asked what kind of attraction. He then denied having any physical attraction or sexual attraction to her. He admitted that he was not told the details of the alleged abuse–that it was oral and manual–until his October 24 conversation with Detective Frana. He admitted he met with Burt the next day. He admitted that his relationship with Burt involved other criminal purposes. He denied threatening Hampton to lie about D.H. being in the shop. Defendant said he lied many times, but he did so to protect D.H., despite the fact he left her with a "crack head." The State brought up defendant's prior statements to police and pointed out the various lies, and defendant admitted that he, too, could not keep track of all the lies he told.

¶ 99 Further, on cross-examination, defendant admitted that he had a vasectomy and could ejaculate. He admitted that the paper towel that D.H. turned over to police was the type of towels

he had in his shop. He admitted that D.H. was wearing the black jacket that she said she put the towel in on October 11. Defendant stated he did not know if his semen was on it although he heard the testimony of the DNA expert. He admitted that D.H. thought Burt was giving her a ride out of town and that she trusted defendant. Defendant denied that he made her go with Burt. According to defendant, D.H. wanted to run away and wanted to leave with Burt. Defendant admitted that he knew on October 28 that Burt killed D.H. but never informed police. He admitted that the first time he told anyone that the plan was for Burt to take compromising photographs of D.H. was on the witness stand. He admitted that he had ejaculated from manual stimulation on too many occasions to count.

¶ 100 After the defense rested, the State entered certified copies of convictions of defendant in Iowa--two separate felony counts of unlawful possession of a firearm from April 2006.

¶ 101 During the conference on jury instructions, the defense tendered jury instructions stating "We, the jury, find the defendant David Damm not guilty of first degree murder (felony murder)" and the opposite for a guilty felony murder verdict. Defense counsel argued it was necessary to have the jury verdict specify what type of first degree murder it found defendant guilty of for the purpose of determining whether defendant was eligible for the death penalty. The trial court refused these instructions, stating that the jury would be able to consider the evidence at trial in determining the eligibility factors for the death penalty during sentencing.

¶ 102 The jury found defendant guilty of first degree murder, aggravated kidnaping, and conspiracy to commit first degree murder. The matter proceeded to the eligibility phase, in which the jury determined that defendant was eligible to receive the death penalty. Defendant's age, which was uncontested, was the first proposition in the eligibility phase. The State argued three additional

aggravating factors: (1) that defendant procured another to commit the murder for money; (2) that defendant commissioned the murder with the intent on preventing D.H. from testifying in the sexual assault prosecution; and (3) that defendant commissioned the murder because D.H. provided material assistance to the State in an investigation or prosecution against him by turning over the paper towel with defendant's semen. On October 14, 2008, the jury unanimously found that defendant was eligible for the death penalty because he was 18 years old or older at the time of the murder and he procured another to commit the murder for money or anything of value. The next day, the jury agreed that defendant should be sentenced to death.

¶ 103 Defendant filed a motion for a new trial, which was denied on February 27, 2009. The trial court entered judgment on the death sentence for the murder conviction, 15 years' imprisonment on the conspiracy conviction, and 30 years' imprisonment on the kidnaping conviction. Defendant timely appealed to the Illinois Supreme Court. In the meantime, defendant's death sentence was commuted, and the supreme court transferred his appeal to this court.

¶ 104 II. ANALYSIS

¶ 105 A. Forfeiture by Wrongdoing

¶ 106 Defendant first argues that the trial court erred in denying him the opportunity to call live witnesses during the evidentiary hearing on the issue of forfeiture by wrongdoing. Prior to trial, the State sought to introduce D.H.'s out-of-court statements to police and others regarding the alleged sexual abuse, asserting the statements would not be offered for the truth of the matters asserted but only to establish defendant's motive. The State also asserted that even if the statements were hearsay, they were admissible under the doctrine of forfeiture by wrongdoing because defendant forfeited his right to confront D.H. by causing her death, making her unavailable to testify against

him. The trial court determined that D.H.'s statement regarding the paper towel evidence was relevant and admissible only if allowed in for the truth of the matter asserted. On this statement, the trial court agreed with the defense that an evidentiary hearing was necessary to determine whether the forfeiture by wrongdoing doctrine applied. The court, however, ruled that it would rely upon the depositions on file and other materials presented with the motions and that it was unnecessary to bring in live witnesses.

¶ 107 While a reviewing court will not reverse a trial court ruling on a motion *in limine* absent an abuse of discretion (*People v. Hanson*, 238 Ill. 2d 74, 96 (2010)), defendant argues that the trial court was required to allow him to present live witness testimony, and this raises an issue of law that we review *de novo* (*id.*). We agree that we review this issue *de novo.*

¶ 108 The doctrine of forfeiture by wrongdoing is a common law doctrine. *Id.* The Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004), acknowledged that the doctrine, in addition to serving as an exception to the hearsay rule, also extinguished confrontation claims on equitable grounds. *Hanson*, 238 Ill. 2d at 96. The doctrine was also codified at the federal level by Federal Rule of Evidence 804(b)(6) as an exception to the general hearsay rule. *Id.*; Fed. R. Evid. 804(b)(6). The Illinois Supreme Court has also recognized that the doctrine serves both as an exception to the hearsay rule and to extinguish confrontation claims. *Hanson*, 238 Ill. 2d at 97.[2] Reliability of the statements sought to be admitted is not required to be established as requiring additional indicia of

[2] After this appeal was filed, our supreme court adopted the Illinois Rules of Evidence, which became effective on January 1, 2011, and includes Rule 804(b)(5). Ill. R. Evid. 804(b)(5) (eff. Jan. 1, 2011). Rule 804(b)(5) adopted the common law doctrine of forfeiture by wrongdoing, creating an exception for:

> "*Forfeiture by Wrongdoing.* A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Ill. R. Evid. 804(b)(5).

reliability would undermine the equitable considerations at the center of the doctrine. *Id.* at 97-98. When the State raises the doctrine of forfeiture by wrongdoing, it must prove that the defendant intended by his actions to procure the witness's absence to invoke the doctrine. *People v. Stechly*, 225 Ill. 2d 246, 277 (2007). The burden of proof that the State must prove such intention is a preponderance of the evidence. *Id.* at 278. In *Davis v. Washington*, 547 U.S. 813, 833 (2006), the Supreme Court noted that a hearing on forfeiture may be required and if so, hearsay evidence, including the unavailable witness's out-of-court statements, may be considered. Defendant argues that the trial court was required to allow him to present live testimony at the evidentiary hearing on the forfeiture issue because the court could not determine a factual issue, such as the intention on procuring the witness's unavailability, based solely on affidavits.

¶ 109 Defendant cites *A.F.P. Enterprises, Inc. v. Crescent Pork, Inc.*, 243 Ill. App. 3d 905, 913 (1993), and several out-of-state cases for the proposition that an evidentiary hearing was required to determine forfeiture. Accepting defendant's argument that an evidentiary hearing was required, we find that the trial court did conduct an evidentiary hearing on the issue. Defendant's dispute rests only in the manner in which the trial court allowed evidence into the hearing. The trial court limited the evidence to the transcripts of deposition testimony, affidavits, and other statements that the parties submitted to the court rather than bringing in the same witnesses to testify in court during the hearing. The court allowed the parties to submit additional evidence in addition to the documents submitted with their respective motions before it made its decision. Defendant cites to no case that holds that the trial court must allow the parties an opportunity to present evidence in the manner of their choice. Further, even if there was such a requirement, defendant does not argue how the witnesses would have testified differently than their deposition testimony such that defendant was

prejudiced by the trial court's failure to allow live witness testimony. The trial court only had to determine whether the State satisfied its preponderance-of-the-evidence burden and did not necessarily have to hear witnesses testify to make its decision.

¶ 110 Defendant cites *Commonwealth v. Edwards*, 444 Mass. 526, 544-45 (2005), for the proposition that the parties should be given an opportunity to "present evidence, including live testimony, at an evidentiary hearing outside the jury's presence." However, in *Edwards*, the trial court failed to allow any evidence to be presented in any form and relied on the parties' representations of what the evidence showed when it decided the forfeiture issue. *Id.* at 546. With such contrasting facts, we cannot take the "including live testimony" language from *Edwards* and extend it to a *per se* rule that all evidentiary hearings conducted for forfeiture by wrongdoing claims must allow live testimony. Defendant cites *Crescent Pork* for the proposition that the trial court cannot determine disputed factual issues solely upon affidavits and counter-affidavits. *Crescent Pork*, 243 Ill. App. 3d at 913. However, the issue in *Crescent Pork* involved a motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2002)). The appellate court reversed and remanded the trial court's decision to grant the motion because there was a disputed fact that the affidavits and counter-affidavits did not conclusively resolve. *Id.* at 913. The appellate court stated that where the documents are too inconclusive to resolve the question, the court is obliged to deny the motion to dismiss. *Id.* The court then concluded that the trial court should have either proceeded to an evidentiary hearing or denied the motion. *Id.* at 914. Distinguishably, in this case, the court's decision on forfeiture is not dispositive as a court's decision to grant a section 2-619 motion. Further unlike *Crescent Pork*, the evidence supporting the State's position was practically uncontroverted. While defendant could continue to maintain his theory that

Burt decided to kill D.H. on his own at trial and possibly succeed, the State's burden on this motion was lesser than the burden required at trial. We cannot agree with defendant that having the witnesses testify at the hearing, with no proffer that any witness would testify differently from their depositions or other statements, would have changed the trial court's decision.

¶ 111 The State submitted Burt's statements to police and his deposition, the DNA testing that showed it was defendant's sperm on the towel, and D.H.'s statements to police. The trial court allowed defendant to submit additional evidence for the hearing on June 25. Defendant's only contention is that the trial court had to hear its witnesses so that it could make credibility determinations. However, it is unclear what witnesses the defense intended to call or what evidence it was unable to bring in because of the court's declination to allow live witnesses. Defendant only argues that the State's evidence was nebulous because it rested on Burt's testimony, a crack addict. The fact that Burt was a crack addict and felon who admitted that he testified against defendant to be spared the death penalty was brought out in his deposition, and the trial court was able to consider this. Therefore, even if the court erred in denying the defense the opportunity to present witnesses, the error was harmless in light of the overwhelming evidence that the State presented to support its argument that defendant forfeited his right to confrontation when he arranged for D.H.'s murder. Accordingly, we reject defendant's argument that the trial court erred in denying live witness testimony where the facts show the court conducted an evidentiary hearing and the State presented sufficient evidence to satisfy its burden of proof on the matter.

¶ 112 B. Spousal Testimony

¶ 113 Defendant next argues that the testimony of Kathy Damm about their sexual practices violated the marital privilege and deprived him of a fair trial. We disagree that defendant was deprived of a fair trial by the admission of Kathy's testimony.

¶ 114 Kathy testified over continuing objection by the defense: that defendant's physical condition interfered with their sexual relations; that they had intercourse maybe once in the three months prior to D.H.'s murder; that he was able to get an erection but not like he used to; and that she manually manipulated defendant's penis, using lotion, bringing about his erection, until he ejaculated. The purpose of the testimony was to corroborate D.H.'s statements that defendant had her manually bring him to ejaculate. The State argued this testimony did not violate the marital privilege because it did not involve communications between the spouses, only sexual contact.

¶ 115 We review the decision to admit or exclude evidence for an abuse of discretion and will not overturn that decision absent a showing of abuse of that discretion. *People v. Trzeciak*, 2012 IL App. (1st) 100259, ¶23. Section 115-16 of the Code of Civil Procedure of 1963 (Code) prohibits testimony as to "any communication or admission made by either of them to the other or as to any conversation between them during marriage," except situations involving offenses against each other, spousal abandonment, or offenses or issues involving their children. 725 ILCS 5/115-16 (West 2006). We need not address whether Kathy's testimony regarding the couple's sexual contact constituted communications or admissions as meant under the statute because defendant himself testified that other women used their hands on his penis until he ejaculated and that his nonmarital sexual encounters usually occurred in the office of East Side Motors. Defendant also told police that his wife would cause him to ejaculate by using her hands on his penis. Defendant's own admissions corroborated D.H.'s statements and thereby waived the marital privilege. Therefore, even if Kathy's

testimony violated the marital privilege, the error was harmless and does not warrant reversal because her testimony did not, in light of the overall evidence in the case, contribute to the finding of guilt. See *People v. Hall*, 194 Ill. 2d 305, 335 (2000) (holding any error in admitting wife's testimony in violation of the marital privilege statute was not so substantial as to deny defendant a fair trial); *Trzeciak*, 2012 IL App. (1st) 100259, ¶30 (the admission of evidence in violation of the marital privilege deprives the defendant of a fair trial where it contributes to a guilty verdict, which it did in that case).

¶ 116 C. Effectiveness of Trial Counsel

¶ 117 Defendant next argues that trial counsel was ineffective when counsel failed to redact from his videotaped statement to police the irrelevant and prejudicial references to his refusal to take a polygraph examination, his prior "terrorism" charge, and that he was on probation for an unnamed offense. Claims of ineffective assistance of counsel are judged under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Manning*, 241 Ill. 2d 319, 327 (2011). A defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* at 326-27. The prejudice prong of *Strickland* may be satisfied if the defendant can show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Id.* at 327. We review defendant's ineffective assistance of counsel claim *de novo* where the issue was not raised in the trial court and therefore the trial court did not make any factual findings on the issue. See *People v. Presley*, 2012 IL App. (2d) 100617, ¶24.

¶ 118 Defendant argues that the following statements from his interview with Detective Frana should have been redacted: (1) defendant stated "then you can call my probation officer and tell her I didn't have anything to do with it so I can get off probation"; (2) defendant stated that he would agree to a polygraph but for the fact that 40 years earlier he had been falsely accused of a "similar situation" and "flunked a lie detector test on that"; and (3) defendant mentioned having "been involved with everything from the terrorism charge 20 years ago to this business here" when discussing cooperating with police.

¶ 119 The general rule in Illinois is to preclude introduction of evidence regarding polygraph examinations and the results of such tests. *People v. Harris*, 231 Ill. 2d 582, 589 (2008). Similarly, evidence of other crimes is generally inadmissible to show a defendant's propensity to commit crimes. *People v. Childress*, 321 Ill. App. 3d 13, 22 (2001). Therefore, we agree with defendant that counsel's failure to object or request defendant's statements be redacted constituted deficient performance. However, admission of otherwise inadmissible evidence does not automatically establish prejudice under *Strickland*.

¶ 120 Defendant argues that his refusal to take a polygraph was likely interpreted by jurors as evincing a consciousness of guilt of the sexual abuse offense. The prejudice occurs then with the likelihood that jurors concluded that if he was guilty of the sexual abuse offense, he was also guilty of murder. Second, defendant argues that his reference to a prior "terrorism" charge and the fact he was on probation for another offense likely led jurors to convict because they believed he was a bad person or a habitual criminal. Defendant argues that this inadmissible evidence could have easily tipped the balance between a verdict of guilty and not guilty where the case rested on a "credibility

contest between [defendant] and [Burt]." We disagree with defendant that the admission of this evidence satisfies the prejudice prong of *Strickland.*

¶ 121 In *People v. Baynes*, 88 Ill. 2d 225, 240 (1981), the supreme court held that polygraph evidence was inadmissible, and the parties could not stipulate to admit the evidence. The court held that the admission of the polygraph evidence rose to the level of plain error, impinging upon the integrity of the judicial system. *Id.* at 244. Because the potential impact and substantial influence of the polygraph evidence, the court reversed and remanded the cause for a new trial.. *Id.* at 245. The polygraph evidence admitted in *Baynes* consisted of the examiner testifying to the defendant's answers, denying stealing the items at issue, and the examiner testifying that he believed the defendant's answers were truthful. *Id.* at 233.

¶ 122 In *People v. Gard*, 158 Ill. 2d 191, 204 (1994), the supreme court went further and held that polygraph evidence pertaining to a witness was also inadmissible. In *Gard*, two witnesses for the State mentioned that they took polygraph exams and were questioned on their various statements to police and the polygraph examiner. *Id.* at 195-99. Further, the State and the defense both extensively discussed the polygraph evidence during closing arguments. *Id.* at 200. The supreme court reversed and remanded the cause for a new trial despite the fact the defendant did not object to the evidence or raise the issue in a posttrial motion. *Id.* at 204. The court held that the admission of the evidence constituted plain error that caused a "miscarriage of justice upon a defendant or a tainting of the integrity and reputation of the judicial process." *Id.* at 204-05. Further, the court stated that the evidence in its case was not so closely balanced that the defendant may be said to have been prejudiced by the introduction of the polygraph evidence but held that reversal was necessary to protect the integrity of the justice system. *Id.* at 205; also see *People v. Daniels*, 272 Ill. App. 3d

325, 343 (1994) (similarly holding reversal was warranted for the State's introduction of polygraph evidence where plain error rule applied because integrity of justice system was involved in improper admission of such evidence). In addition to the results and content of a polygraph exam, the fact a defendant was offered and/or refused to take the exam is likewise inadmissible. *People v. Eickhoff*, 129 Ill. App. 3d 99,102 (1984). An exception exists where the polygraph evidence may be used to rebut a defendant's claim that an inculpatory statement was made because of coercion. See *People v. Jefferson*, 184 Ill. 2d 486, 495 (184).

¶ 123 In *People v. Finley*, 312 Ill. App. 3d 892, 896 (2000), the court questioned whether *Gard* created a *per se* rule requiring reversal in all cases where a polygraph examination had been mentioned. The court concluded that there was no *per se* rule, and the case had to be decided on its facts to determine whether the defendant was denied a fair trial. *Id.* Under its facts, a police detective mentioned that the defendant had refused to take a polygraph. *Id.* at 895. The appellate court found that it was not clear how the defendant was harmed by the evidence that he refused to take a polygraph where the trial court had instructed the jury that polygraph evidence of any kind was inadmissible and unreliable, the witness's statement was stricken, and the fact that the defendant refused to take one should not be considered. *Id.* at 895, 897. The appellate court held that because there was no showing of bad faith on the part of the witness in making the statement, because the testimony was stricken and an appropriate instruction was given, and because there was no showing of substantial prejudice to the defendant, the trial court did not abuse its discretion in denying the defense's motion for a mistrial. *Id.* at 897; *cf. People v. Jackson*, 202 Ill. 2d 361 (2002) (holding it was plain error to admit polygraph evidence in anticipation of the defendant's arguing his inculpatory statement was coerced as the State cannot use polygraph evidence in the offensive); *Gard*, 158 Ill.

2d at 203-04 (reversing and remanding for a new trial despite no objection by the defendant where polygraph evidence pervaded the trial in witness testimony and closing arguments); *People v. Eaton*, 307 Ill. App. 3d 397, 402 (1999) (reversing where prosecutor questioned why the defendant did not take a polygraph exam during closing arguments); *People v. Lewis*, 269 Ill. App. 3d 523, 527 (1995) (where detective testified that a victim agreed to take a polygraph, the court struck the comment and advised the jury to disregard it, the appellate court still reversed on denial of a mistrial because it held that the improper reference could have substantially enhanced the credibility of the State's key witness); but see *People v. Britt*, 265 Ill. App. 3d 129, 148 (1994) (affirming trial court's decision to deny mistrial where witness spontaneously mentioned "polygraph" in one answer after having been instructed not to and where the court did not know if jury heard the answer because witness was speaking softly).

¶ 124 We agree with the *Finley* court that the supreme court did not render a *per se* rule in *Gard* that would require us to reverse and remand this cause for a new trial because of the references made in defendant's videotaped statement. Rather, we must consider the facts and circumstances and decide whether defendant was prejudiced by counsel's error in failing to request the statement be redacted. We conclude that despite the references made to defendant's refusal to take a polygraph, defendant was not denied a fair trial and was not prejudiced by the erroneous admission of the evidence. Our conclusion is based on the narrow facts of this case. Specifically, we note that defendant's statement in which he refused to take the polygraph was made during the investigation of the sexual abuse case, *prior* to D.H.'s disappearance and murder. The fear that the jury may have believed defendant was guilty of the sexual abuse because of his denial to take a polygraph did not necessarily transfer to the jury's belief that defendant was lying about his involvement in D.H.'s

murder. We also note that the references to the polygraph constituted less than two minutes in a trial that went on for days and had numerous exhibits and witnesses. Further, neither the State nor the defense elicited the comments and neither mentioned the polygraph in opening or closing statements. The State did not use the fact to bolster any witness's testimony or any other piece of evidence nor did it use it to offensively attack defendant's credibility. Additionally, there was overwhelming evidence of defendant's guilt by way of Burt's direct testimony, which was corroborated by numerous other witnesses, phone records, and video surveillance tapes. Physical evidence also corroborated Burt's testimony, and physical evidence corroborated D.H.'s claim that defendant's semen was on the paper towel that she used to wipe her hand clean after an incident of abuse. The jury had plenty of evidence aside from the polygraph references to conclude that defendant had sexually abused D.H. or at least knew she was proceeding with the sexual abuse case against him. Therefore, despite the improper admission of the polygraph references, we cannot say that defendant satisfied the prejudice prong of *Strickland* that the outcome of his trial would have likely been different but for counsel's deficient performance.

¶ 125 We similarly conclude that the brief comments defendant made on the videotaped statement regarding his "probation" and his prior "terrorism" charge twenty years ago did not satisfy the prejudice prong under *Strickland*. We first note that the reference to probation was not necessarily an error where the State submitted into evidence certified copies of defendant's felony convictions for unlawful possession of a firearm prior. Defendant moved to cite additional authority on this issue, which we grant. Defendant cites *People v. Moore*, 2012 IL App. (1st) 100857, to support his argument that counsel was ineffective in preventing the admission of other crimes evidence. In *Moore*, the defendant argued that counsel was ineffective for failing to object to the trial court's *sua*

sponte decision to allow the jury to view the entire interrogation video, which contained references to the defendant's prior crimes and past wrongs. *Moore*, 2012 IL App. (1st) 100857, ¶43. The appellate court agreed that had counsel properly objected to the other crimes portion of the video, the trial court would have excluded the evidence. *Id.* ¶50. While there was no way to know whether the jury actually viewed the entire video during deliberations as it was not played in court, the appellate court stated that it could not speculate as to which evidence the jury considered and stated that the evidence against the defendant was not overwhelming though sufficient to convict. *Id.* ¶55-6. Further, the court noted that both parties highlighted the fact that the jury could watch the entire interrogation video during their closing arguments, and the trial court judge instructed the jury that it could watch any, all or none of the video before sending it back to the jury room. *Id.* ¶55. The appellate court concluded that the defendant had satisfied the prejudice prong of *Strickland* and reversed and remanded for a new trial. *Id.* ¶59.

¶ 126 Unlike in *Moore*, the evidence against defendant was overwhelming as Burt testified directly to defendant's involvement, and many aspects of Burt's testimony regarding details of the crime were corroborated by others. Telephone records also corroborated D.H.'s statements regarding phone calls between her and defendant and corroborated Burt's testimony regarding his calls with defendant. While we know the jury heard the references in defendant's video because the tape was played for the jury in court, the references in this case were minor and the inadmissible evidence was not mentioned during any other part of the trial. Given the overall evidence in this case, we do not find the *Strickland* prejudice prong was satisfied.[3]

[3] In defendant's reply brief, he states that he may raise an issue involving plain error in a reply brief, relying on *People v. Williams*, 193 Ill. 2d 306, 347-48 (2000). Defendant argues that we could address this evidentiary issue despite counsel's lack of objection under plain error. We, however, do not read *Williams* to suggest that defendant can raise an issue for the first time in a reply brief but

¶ 127 D. Jury Instructions

¶ 128 Defendant argues that his conviction for intentional murder must be vacated and replaced with a conviction for felony murder because the trial court refused to give his tendered verdict form on felony murder. Additionally, because of this error, defendant argues that his conviction for the predicate felony of aggravated kidnaping must be vacated and the cause should be remanded for a new sentencing hearing. Defendant argues that the separate verdict forms were necessary because the consequences at sentencing were definitely different based on the specific theory of murder proven. Specifically, defendant was eligible for the death penalty if found guilty of intentional murder. While defendant's death sentence has now been commuted, he argues the issue is not moot because the same statutory aggravating factor that made him eligible for the death penalty also made him eligible for a natural life sentence without parole. See 725 ILCS 5/9-1(b)(5) (West 2006); 730 ILCS 5/5-8-1(a)(2)(b) (West 2006). Defendant argues that had the jury found him guilty of only felony murder based on accountability for aggravated kidnaping, he would not have been eligible for the death penalty or the natural life sentence. However, defendant argues that because the trial court denied the separate verdict form, there was no way to determine what theory of murder the jury based its conviction.

¶ 129 Defendant raises an issue as to whether the trial court improperly denied his request to provide separate verdict forms where the facts and legal principles at play in his trial required the requested forms. This is a legal issue, which we review *de novo*. *People v. Smith*, 233 Ill. 2d 1, 15

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rather may argue in a reply brief that plain error allows review of an issue raised in his opening brief, especially where the State raises forfeiture of an issue in its appellee brief. Thus, we limit our review of this issue to the one presented in defendant's opening brief, which framed the issue as a *Strickland* claim.

(2009) (recognizing jury instruction issues usually are reviewed for an abuse of discretion but applying *de novo* review to this particular issue because it is a legal one).

¶ 130 The court in *Smith* considered the issue of whether a trial court must provide the jury with separate verdict forms when a defendant is charged with multiple counts of murder based on differing mental states when the defendant requests such forms. *Smith*, 233 Ill. 2d at 4. In its consolidated cases, the defendants were each charged with intentional murder, knowing murder, and felony murder, along with the underlying felony offenses predicating the felony murder charges. *Id.* Both defendants requested separate verdict forms for felony murder, which both trial courts denied. *Id.* In both cases, the juries returned general verdicts of guilty of first degree murder; the juries also found the defendant guilty of the underlying felony offenses. *Id.* The trial court in the first case sentenced the defendant to 60 years' imprisonment for the first degree murder conviction, a concurrent term of 20 years for armed robbery, and a consecutive term of 8 years for attempted armed robbery. *Id.* at 9. That defendant argued that he would not have been eligible to be sentenced to a consecutive sentence on the attempted armed robbery conviction. *Id.* The trial court modified the defendant's sentence, making the 8 year term concurrent. *Id.* The jury in the second case in *Smith* returned a general verdict form finding the defendant guilty of first degree murder and armed robbery. *Id.* at 13. The trial court sentenced that defendant to 38 years' imprisonment for the murder and 18 years' imprisonment for the armed robbery, to run consecutively. *Id.*

¶ 131 The *Smith* court acknowledged that there were different sentencing consequences based on the different theories of murder proven, such as a person convicted of felony murder could only be eligible for the death penalty if the jury found that section 9-1(b)(6) of the Criminal Code of 1961 (720 ILCS 5/-9-1(b)(6) (West 2006)) had been proven. *Smith*, 233 Ill. 2d at 17. The court also

recognized the longstanding legal construct known as the "one good count rule," which provides that if one count in an indictment is valid, although all the others were defective, it was sufficient to support a general verdict of guilty. *Id.* at 19. Courts have also consistently held that, in a case where an indictment contains several counts arising out of a single transaction, a general verdict will have the effect of the defendant being guilty of each charged count except in cases where the one-act, one-crime doctrine applied and a sentence is imposed only on the most serious offense. *Id.* at 20. In cases where a defendant is charged with murder in multiple counts alleging intentional, knowing and felony murder, and a general verdict is returned, the defendant is presumed to be guilty of the most serious offense, and a sentence is to be imposed on that offense. *Id.* at 21.

¶ 132 The defendants in *Smith* did not challenge these general, longstanding legal constructs but challenged the presumptions of these principles when to do so would prejudice the defendant by subjecting him to more severe punishment. *Id.* at 21. The supreme court agreed, stating that it was impossible to determine from a general verdict form on what basis the jury found the defendant guilty of first degree murder. *Id.* at 23. The court agreed with the defendants' contentions that it was a violation of due process to deny them the opportunity to have the juries decide their theory of defense, which was that at most, the defendants were guilty of the less culpable offense of felony murder, and then sentence them on the presumptions that they were convicted of the more serious offenses. *Id.* The supreme court held that where specific findings by the jury with regard to the "offenses charged could result in different sentencing consequences, favorable to the defendant, specific verdict forms must be provided upon request and the failure to provide them is an abuse of discretion." *Id.*

¶ 133 The *Smith* court went on to state that determining whether the trial courts' refusal to submit separate verdict forms could be deemed harmless error was not a question that could be resolved by looking at the strength of the evidence. *Id.* at 25. Rather, the refusal to submit separate verdict forms is harmless error only if the jury's findings may be ascertained from the general verdicts entered. *Id.* The court then reviewed its instructions and determined that the theories of murder were listed in the disjunctive. *Id.* at 27. The jury was instructed that it could find the defendants guilty if it found any one of the theories of murder alleged in the indictment. *Id.* Thus, the supreme court held that under these circumstances, it could not conclude that the general verdicts demonstrated that the juries found the defendants guilty of each of the theories of murder charged, and that it was error to sentence the defendants on the presumption that they were found guilty of intentional murder. *Id.* The supreme court then determined that the appropriate remedy was to remand for sentencing on felony murder convictions. *Id.* at 28; see also *People v. Davis*, 233 Ill. 2d 244 (2009) (limiting *Smith* to only situations where the defendant requests separate verdict forms; applying harmless error analysis where trial court refuses separate forms and objection is made, and applying plain error analysis where no objection is made).

¶ 134 While defendant relies on *Smith* on this issue and argues the error was not harmless, the State argues that defendant's argument fails for three reasons: (1) his capital sentence did not rest on the presumption that he was convicted of intentional murder but rather on the jury's express finding during sentencing; (2) even if a *Smith* error occurred, it was harmless because the jury also convicted him of conspiracy to commit murder, which showed that the jury believed defendant conspired with Burt to commit the murder; and (3) assuming the *Smith* error was harmful, the death sentence was still proper under the Eighth Amendment. We agree with the State's first contention.

¶ 135 The State argues that *Smith* is distinguishable from the present facts because defendant's sentence was not entered upon a *presumption* that he was found guilty of intentional murder. Rather, the State argues that the jury entered an express finding at the conclusion of the sentencing hearing that defendant was eligible for the death penalty on the basis that he had procured another to commit the murder for money or anything of value. The State argues that *Smith* is limited to its facts, which involved a non-capital case where the severity of the defendant's sentence was controlled by the jury's findings based on the evidence adduced during the guilt phase. Unlike the trial court in *Smith*, the trial court in this case did not have to sentence defendant on the basis of presumptions drawn from the general verdict forms. Rather, the trial court had the jury's specific finding that defendant had hired Burt to kill D.H. The State further argues that because it had sought the death penalty, the trial court did not need to provide separate verdict forms because it knew the jury would determine eligibility during the sentencing phase.

¶ 136 We agree with the State that under the unique facts and circumstances of this case, there was no *Smith* error. Had the jury only believed that defendant was guilty of felony murder, it would not have issued a unanimous finding that defendant was eligible for the death penalty because he had procured another to commit the murder for money or anything of value. Because the trial court knew the eligibility phase would provide specific findings, we agree with the State that a *Smith* error did not occur because defendant's sentence was not resting on any presumptions drawn from the general verdict forms used during the guilt phase.

¶ 137 Further, even if a *Smith* error occurred, we agree with the State that error was harmless because we are able to discern from the jury's findings in their general verdict forms that it convicted defendant of intentional murder. The jury in this case convicted defendant of the conspiracy to

commit murder, which establishes that the jury believed that defendant conspired with Burt to have D.H. murdered. Only a rational jury could have convicted defendant of intentional first degree murder while convicting him on the conspiracy to commit murder charge. Thus, we agree with the State that if a *Smith* error occurred, in this case, it was harmless error.

¶ 138 We reject defendant's contention that had the jury been given separate verdict forms and acquitted him of the intentional and knowing count, that acquittal would have precluded the jury from finding him eligible for the death penalty under the murder-for-hire aggravating factor because of double jeopardy protections. In *Schiro v. Farley*, 510 U.S. 222, 225 (1994), the defendant was charged with various forms of murder, including knowing and felony, and other crimes. The State sought the death penalty for the felony murder count. *Id.* The jury returned a verdict of guilty on the felony murder count, that the defendant killed the victim while committing the crime of rape. *Id.* at 226. At the sentencing hearing, the State was required to prove an aggravating factor, which included that the murder occurred with a rape, but the jury recommended against the death penalty. *Id.* The trial court judge, not bound by the jury's recommendation, sentenced the defendant to death. *Id.* at 227. On appeal, the defendant argued that the jury's failure to convict him on the intentional murder count operated as an acquittal and that double jeopardy principles prohibited the use of the intentional murder aggravating circumstance for sentencing purposes. *Id.* The state supreme court and the federal appellate court rejected the defendant's contention that the jury's conviction on the felony murder count operated as an acquittal on the intentional murder count and ruled that the double jeopardy clause was not violated by litigating the intent issue during sentencing. *Id.* at 228. The United States Supreme Court agreed, stating that the jury had received conflicting instructions on whether it could return multiple verdicts, and it was therefore impossible to determine whether

the jury had actually decided the intentional murder issue. *Id.* at 233-34. Further, the court noted that the jury instructions on the intentional and felony murder counts were ambiguous and could lead the jury to believe that intention to kill was an element of both types of murder. *Id.* Thus, the court held that the issue of intent had not been litigated at the trial phase and could be revisited during sentencing. *Id.* at 236.

¶ 139 We find *Schiro* distinguishable from the facts of our case, but it provides guidance. In this case, we are able to discern from the overall verdict that the jury convicted defendant of intentional murder because it returned guilty verdicts for murder and conspiracy to commit murder, indicating that it believed the State's theory that defendant hired Burt to have D.H. murdered. Accordingly, the issue of intent had been litigated during the guilt phase and decided against defendant's favor, unlike in *Schiro,* which allowed the trial court to decide that the defendant had intentionally murdered the victim during sentencing. The fact that the jury then found defendant eligible for the death penalty based upon the murder-for-hire aggravating factor was consistent with the jury's verdict in the guilt phase. Thus, we find *Schiro* and the issue of double jeopardy or collateral estoppel inapplicable to the facts of this case.

¶ 140 E. Conspiracy to Commit Murder

¶ 141 Defendant argues that because a defendant cannot be convicted of the principal offense and the inchoate offense, his conviction for conspiracy to commit murder must be vacated. The State agrees that the conviction for the inchoate offense must be vacated pursuant to section 8-5 of the Criminal Code (720 ILCS 5/8-5 (West 2006)), which prohibits a conviction for both the inchoate and principal offenses. The State argues that the factual findings of the jury, however, remain intact. Conspiracy to commit murder is the inchoate offense of murder and therefore defendant's conviction

and sentence for the conspiracy charge must be vacated. *People v. St. Pierre*, 146 Ill. 2d 494, 520 (1992). We agree with the State that we may consider the fact that the jury returned the guilty verdict on this count in light of our jury instruction analysis.

¶ 142 F. Sufficiency of the Evidence

¶ 143 Finally, defendant argues that the State failed to prove him guilty of aggravated kidnaping beyond a reasonable doubt. Specifically, defendant argues that the State failed to prove the essential element of intent to secretly confine D.H. against her will. In assessing the sufficiency of the evidence to sustain a verdict on appeal, our inquiry is " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. Phelps*, 211 Ill. 2d 1, 7 (2004), quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). We will not substitute our judgment for that of the trier of fact on issues of the weight of the evidence or the credibility of witnesses. *Id.* It is the responsibility of the trier of fact to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Id.*

¶ 144 Defendant was charged with aggravated kidnaping for knowingly and by deceit or enticement inducing D.H. to go from one place to another with the intent to secretly confine her against her will and inflicting great bodily harm during the course of the crime. Defendant concedes that the State met its burden of proof as to the first element–that defendant induced D.H. by deceit or enticement to go from one place to another. Defendant argues, however, that there was no evidence that defendant did so with the intent to secretly confine D.H. against her will either during the trip or when Burt stopped at the ultimate murder site. Defendant argues that the evidence showed that D.H. voluntarily entered Burt's car, never asked to get out of the car, and never attempted to leave the car.

Defendant argues that the drive to Illinois was merely a part of the intent to kill D.H. Defendant concedes that a secret confinement may occur in an automobile. However, defendant maintains that the transportation of the victim in the automobile does not constitute "secret confinement" unless the defendant intended to secretly confine the victim when they reached their destination. Here, defendant argues, he intended only to kill D.H., not confine her, at the destination.

¶ 145 The statute under which defendant was charged provides that kidnaping occurs when a person knowingly by deceit or enticement induces another to go from one place to another with intent secretly to confine him against his will. 720 ILCS 5/10-1(a)(3) (West 2006). A kidnaping offense becomes aggravated when the kidnaper inflicts great bodily harm, other than by the discharge of a firearm, or commits another felony upon his victim. 720 ILCS 5/10-2(a)(3) (West 2006). Within the meaning of the statute, "secret" may be defined as concealed, hidden, not made public, or kept from the knowledge or notice of persons who would be affected by the act. *People v. Turner*, 282 Ill. App. 3d 770, 780 (1996). "Confinement" is also not strictly limited to the confinement within a house or a car and may include a dark field where one was concealed from public view and not free to leave. *Id.*, citing *People v. Franzen*, 251 Ill. App. 3d 813, 824 (1993). To determine whether an asportation or detention rises to the level of kidnaping as a separate offense, Illinois courts must consider four factors: "(1) the duration of the asportation or detention; (2) whether the asportation or detention occurred during the commission of a separate offense; (3) whether the asportation or detention that occurred is inherent in the separate offense; and (4) whether the asportation or detention created a significant danger to the victim independent of that posed by the separate offense." *People v. Ware*, 323 Ill. App. 3d 47, 54 (2001). Whether an asportation is

sufficient to constitute a kidnaping depends on the particular facts and circumstances of each case. *Id.*

¶ 146 In *Ware*, the victim was pulled into and locked in a bathroom and then sexually assaulted. *Id.* at 55-56. The court acknowledged the attack was brief and the detainment was only a few minutes. *Id.* However, the court stated that other courts have found that kidnaping constitutes a separate offense when the victim is transferred from one location to another before a rape. *Id.* at 56. The court held that the victim's forced movement into the locked bathroom was sufficient to sustain a conviction for kidnaping under section 10-1(a)(2) of the Code (720 ILCS 5/10-1(a)(2) (West 1998)). The court noted that the victim was forced into the bathroom before the rape occurred, and the detainment posed a significant danger to the victim independent of the danger created by the sexual assault because of the potential for more serious criminal activity due to the privacy of the destination. *Id.* The court further stated that a significant and independent danger arises where the victim is forced out of a public area and into a locked bathroom as her signal for help is more difficult to detect and the likelihood that a passerby would observe her is greatly diminished. *Id.*

¶ 147 The only difference between *Ware* and this case is that in *Ware*, the defendant was charged with confinement using force, not deceit or enticement like defendant. Defendant used deceit to induce D.H. to be transported from Rockford to another place, which D.H. thought would be Chicago. Defendant admitted this much. Had D.H. known that Burt would drive her to a remote field outside of Galena where she faced further danger, it is unlikely she would have gone. Defendant admitted this as well. Burt admitted that he drove to avoid others seeing D.H. in his car. Like in *Ware*, where the victim's detainment in the bathroom took place prior to the actual rape, D.H.'s detainment in the car and in the remote field took place *prior* to Burt's fatal blows to D.H.'s

head. The State was not required to show that D.H. was detained by force or threat because defendant was not charged under section 10-1(a)(2). A rational jury, viewing the evidence in the light most favorable to the State, could infer that D.H. went with Burt by defendant's deceit and that defendant intended to secretly confine her until such time that Burt decided to further harm her. Therefore, we affirm the conviction of aggravated kidnaping.

¶ 148 III. CONCLUSION

¶ 149 For the reasons stated, we affirm defendant's murder and aggravated kidnaping convictions and vacate his conviction and sentence for conspiracy to commit murder.

¶ 150 Affirmed in part and vacated in part.