Illinois Official Reports

Appellate Court

People v. Golden, 2021 IL App (2d) 200207

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RICKY GOLDEN, Defendant-Appellant.
District & No.	Second District No. 2-20-0207
Filed Rehearing denied	September 30, 2021 October 27, 2021
Decision Under Review	Appeal from the Circuit Court of De Kalb County, No. 18-CF-69; the Hon. William Brady and the Hon. Marcy L. Buick, Judges, presiding.
Judgment	Affirmed.
Counsel on Appeal	Rachael J. Leah, of Law Office of Rachael J. Leah, LLC, of Lisle, for appellant. Richard D. Amato, State's Attorney, of Sycamore (Patrick Delfino, Edward R. Psenicka, and Laura Bialon, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.
Panel	JUSTICE BIRKETT delivered the judgment of the court, with opinion. Justices Hudson and Brennan concurred in the judgment and opinion.

OPINION

¶ 1 Following a bench trial in the circuit court of De Kalb County, defendant, Ricky Golden, was convicted of one count of aggravated domestic battery (720 ILCS 5/12-3.3(a-5) (West 2018)) and two counts of domestic battery (*id.* § 12-3.2(a)), for which he received an eight-year term of imprisonment. On appeal, defendant contends that the trial court erred in granting the State's motion to admit certain hearsay statements as substantive evidence under the doctrine of forfeiture by wrongdoing (Ill. R. Evid. 804(b)(5) (eff. Jan. 1, 2011)). Defendant also contends that he was denied his right to a speedy trial, that the evidence of his guilt was insufficient, and that the trial court incorrectly imposed a Class X sentence. We affirm.

¶ 2 I. BACKGROUND

¶ 3 We summarize the relevant facts appearing in the record on appeal. On January 30, 2018, defendant engaged in an altercation with Tiera Atwood at Atwood's apartment on Ridge Drive in DeKalb. Police officers were dispatched to the apartment. When the officers arrived, defendant was not present, and the officers took a verbal and a handwritten statement from Atwood; they also took photographs of Atwood and the apartment. On that date, defendant was charged in a criminal complaint with one count of aggravated domestic battery and two counts of domestic battery. Also on that date, defendant was on bond in three pending 2017 misdemeanor domestic battery cases involving Atwood (2017 domestic battery cases).

¶ 4 On February 20, 2018, defendant was arrested on the charges in this case. At his arraignment, the trial court appointed the same attorney to represent defendant who was representing him in the 2017 domestic battery cases. In addition, the trial court ordered that defendant have no contact with Atwood.

¶ 5 On March 19, 2018, defendant was indicted in this case. Count I alleged that defendant committed aggravated domestic battery, a Class 2 felony, by grabbing Atwood by the neck and impeding her normal breathing or blood circulation. 720 ILCS 5/12-3.3(a-5), (b) (West 2018). Count II alleged that defendant committed domestic battery, a Class A misdemeanor, by knowingly causing bodily injury when he grabbed Atwood's neck and kicked her. *Id.* § 12-3.2(a)(1), (b). Count III alleged that defendant committed domestic battery, a Class A misdemeanor, by knowingly making insulting contact with Atwood by grabbing her around the neck. *Id.* § 12-3.2(a)(2), (b).

¶ 6 On March 22, 2018, defendant was presented for arraignment on the indictment and for a hearing on defendant's motion to reduce bond in the instant case and the State's motion to revoke bond in the 2017 domestic battery cases. During the discussions, it was noted that defendant had an upcoming May 3, 2018, trial on one of the 2017 domestic battery cases, and defense counsel stated that defendant had not filed a speedy-trial demand. The State indicated that it had tendered to counsel copies of calls from jail between defendant and Atwood. The State represented that, in the calls, defendant and Atwood were discussing the cases and "what she needs to be doing," including giving to defense counsel and the State "different statements as to what really happened." Defense counsel indicated that Atwood had contacted him and requested that the bond's no-contact conditions between her and defendant be lifted. The trial court did not address the no-contact conditions, which thus remained in place, and it denied defendant's motion to reduce bond.

¶ 7 On April 6, 2018, defendant filed a motion to modify the conditions of his bond, seeking permission to communicate with his two children, which would also entail incidental communication with Atwood. On April 12, 2018, the trial court held a hearing on the motion. During the discussion, the State indicated that Atwood had not been cooperative; defense counsel indicated that Atwood was "much more cooperative" when speaking to him. The court granted defendant's motion in part, allowing defendant to have telephone contact with his 12-year-old child and denying contact with either Atwood or defendant's 4-year-old child.

¶ 8 On May 3, 2018, the matter was before the trial court ostensibly for a bench trial in one of the 2017 domestic battery cases. The State asserted that it was not ready to proceed on the trial because Atwood "ha[d] not been able to be located or served." According to the State, at least two subpoenas to different possible addresses had been issued but had not been returned. In addition, the prosecutor in the 2017 domestic battery case set for trial represented that he had tried to serve Atwood personally when he anticipated that she might be appearing in court on another matter. Defendant objected to the continuance in the scheduled 2017 domestic battery case. Defendant observed that he was not taken by surprise by the continuance caused by Atwood's absence and opined that he believed obtaining Atwood's presence for trial in any of the pending matters would likely be problematic. Defendant informed the trial court that, on March 6, 2018, Atwood had provided him with an affidavit recanting her allegations regarding the January 30, 2018, incident. Defendant requested that the court review his bond, based on the State's anticipated difficulty in securing Atwood's presence for trial. The court granted the State's motion to continue over defendant's objection, but the order showed that the continuance to May 10, 2018, was by agreement of the parties, although there is also a note stating that defendant objected.

¶ 9 On May 4, 2018, defendant filed a motion to reduce his bond. On May 10, the trial court held a hearing on the bond reduction motion. At the outset, the parties discussed Atwood's recantation. Defendant read into the record the March 6, 2018, recantation affidavit in which Atwood averred that she made the 911 call and statements to the police because she discovered that defendant was carrying on an affair with another woman. Atwood further averred that, when she confronted the other woman, they fought and Atwood received her injuries in that altercation. The State responded that it had adopted a wait-and-see policy regarding Atwood, choosing not to reach out to Atwood but to wait for Atwood to reinitiate contact with the State. The State also noted that it believed that it would be able to serve Atwood with process at some unspecified time in the future.

¶ 10 The trial court granted the motion to reduce bond, anticipating that this would result in defendant's release from custody; in addition, the court expressly imposed a no-contact provision between defendant and Atwood. Defendant noted that he wished to file a speedy-trial demand but, because he was being released, he needed to revise the demand to reflect that he was out of custody. The State then changed its election from one of the 2017 domestic battery cases to the instant case. A jury trial was set for June 18, 2018, and defendant was released on unrestricted electronic home monitoring; the continuance was expressly attributed to the State. We note that, although defendant announced that he was planning to file a speedy-trial demand, no speedy-trial demand appears in the record.[1]

[1]At a June 28, 2018, hearing, defendant expressly represented that he had not filed a speedy-trial demand.

¶ 11 On May 21, 2018, the State issued a subpoena for Atwood to compel her presence at the scheduled June 2018 trial. The subpoena was addressed to defendant and Atwood's residence in DeKalb.

¶ 12 On May 30, 2018, the De Kalb County Sheriff's Department filed an electronic monitoring violation report, alleging that defendant had violated the no-contact provision of his bond. That same day, the State filed a motion to revoke or increase the amount of defendant's bond. At a hearing on May 30, 2018, the trial court set defendant's bond at $5000. Defendant successfully posted bond but remained in custody because he did not have suitable housing for the purpose of electronic home monitoring. Defendant remained in custody for about four weeks until he was finally released on electronic home monitoring.

¶ 13 On June 5, 2018, while still in physical custody, defendant filed a motion to modify his bond, seeking to eliminate the electronic home monitoring requirement so that he could finally be released from custody. The motion to modify was scheduled to be heard on June 14, 2018.

¶ 14 On June 12, 2018, the State filed a motion to continue the jury trial in this matter. The State averred that it needed a continuance because Atwood had not been served with a subpoena and it needed more time to file unspecified substantive motions. On June 14, 2018, the trial court granted the State's motion to continue, over defendant's objection. The order also directed the parties to file their motions by June 28, 2018. The time for the delay was attributed to the State, and the matter was set for a jury trial on September 10, 2018.

¶ 15 On June 15, 2018, the State filed a May 21, 2018, subpoena it had issued to compel Atwood's presence at the scheduled June 2018 trial. The subpoena was marked, "Recalled per ASA."

¶ 16 On June 28, 2018, the parties filed their motions *in limine* and notices. Relevantly, the State filed a motion *in limine* seeking to admit certain hearsay statements pursuant to the doctrine of forfeiture by wrongdoing and Rule 804(b)(5) of the Illinois Rules of Evidence (forfeiture motion) (Ill. R. Evid. 804(b)(5) (eff. Jan. 1, 2011)). The State alleged that defendant had induced Atwood to avoid service and refuse to appear in the proceedings in this matter, and it referenced numerous phone calls that defendant made to Atwood while he was incarcerated in the county jail. The State also filed motions *in limine* to admit statements from Atwood's 911 call as excited utterances and to admit hearsay statements made by Atwood in certain police reports, pursuant to section 115-10.2a of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10.2a (West 2018)).

¶ 17 On June 28, 2018, the trial court held a status hearing at which defendant appeared, out of custody. The court asked, "Is there a term running?" Defendant replied, "There's no speedy[-trial demand], no." The State queried defendant, suggesting that "he demanded [speedy trial] on the last [hearing]." Defendant expressly refuted the query, stating, "I didn't file [a speedy-trial demand]." The State maintained its position that defendant was demanding trial: "[H]e's demanding trial, I believe, on the continued date [of September 10, 2018,] because it got continued on my motion."

¶ 18 On August 24, 2018, defendant executed a jury waiver. Defendant stated that waiving a jury trial removed "the urgency of having a hearing before the September jury [date]." Defendant requested "to set another hearing date on the pending motions and then at that time" to set a trial date. The parties then agreed to hold a hearing on the pending motions on September 27, 2018.

¶ 19 On September 27, 2018, the matter was before the trial court on the pending motions. At that time, defendant agreed with the State's suggestion about "admitting [defendant's] phone calls [to Atwood] into evidence so the Court has an opportunity to listen to them" before the parties returned to argue the forfeiture motion. Defendant reminded the court that no trial date had been set because "we wanted to resolve these issues first." The State provided the court with the calls pertinent to its motion, and the court suggested that it needed two weeks to review the tendered materials.

¶ 20 On October 19, 2018, the trial court tried to ascertain the general contours of the forfeiture motion. Defendant asserted that Atwood "ha[d] been very uncooperative from the get-go on all of the charges, not just the felony charge." The court expressly declined to address the substance of the pending issue, assuring the parties that it was "[j]ust the theory" underlying the forfeiture by wrongdoing claim that it was "trying to figure out," such as what could constitute wrongdoing or whether the phone calls themselves could be admitted. The court noted that, in the phone calls it had reviewed, "there are things said there that could be considered to be threatening" and an "anger presented that might be corroborative of [Atwood's] testimony that he yelled at [her] and screamed at [her] and all those other things when all this happened." The parties scheduled the hearing on the forfeiture motion.

¶ 21 On November 2, 2018, the forfeiture motion advanced to a hearing. The State argued that, based on the phone calls defendant made to Atwood encouraging her to change her account of the January 30, 2018, incident and discouraging her from cooperating with the State or appearing to testify at trial, he had forfeited his right to cross-examine Atwood during the trial. Further, her statements to the police, memorialized in the police reports, should be admitted substantively. The State highlighted several statements made during several phone calls from defendant to Atwood. Specifically, in a February 22, 2018, call at 7:02 a.m., defendant told Atwood to let defense counsel "know about Shorty in the next building. [That] will save me. I need your help. Tell [my attorney] they got all them other ones, the ones I'm gonna beat. Write me a letter." Atwood replied, "I'm not doing this all for you. You do your crime. You do your time." The State characterized this as the first conversation in which defendant instructed Atwood what to do.

¶ 22 The State also highlighted a February 22, 2018, call at 7:40 a.m., in which defendant discussed what Atwood was supposed to tell defense counsel about what happened in the January 30, 2018, incident but did not provide any details. On February 23, 2018, at 12:24 p.m., defendant instructed Atwood to say, "you caught me with—you say you caught me with another chick. [Say] [y]ou got bipolar real bad, that I was in a whole different building when this had happened."

¶ 23 The State noted that, on February 26, 2018, at 7:34 a.m., defendant told Atwood that she needed to do what he was saying, "to stand your ground [(on the story they had developed)]," and to not "let them interrogate you." Thereafter, defendant told Atwood that she needed to appear in court for the bond reduction motion. The State noted that Atwood had, in fact, appeared in court for defendant's bond reduction motion and had also requested that the trial court change the conditions of defendant's bond to allow contact. Defendant also noted that, before this case (presumably in the 2017 domestic battery cases), Atwood had filed motions to allow contact with defendant.

¶ 24 The State then referred to a March 1, 2018, phone call in which defendant referenced the prosecutor as the "pregnant lady." The State related that defendant asked Atwood, "Did you

talk to the lady who is pregnant saying [*sic*] about the case? Did you stick to what we had planned that you said it wasn't me[?]" In addition, the State further related that defendant told Atwood, "As long as you did that[,] my lawyer will handle it. Once they have the statement[,] they can't do anything about it[,] just like they did the last time." The State explained that defendant was "referring to a prior affidavit that [Atwood] had submitted on his other pending domestic batteries."

¶ 25 The State also referenced some calls defendant made to Atwood in April 2018, "in which [defendant] tells [Atwood] to 'stay out of the way, don't come to court, you know what to do.' " The State interpreted these calls to mean that defendant was instructing Atwood "not to show up here [(at the circuit court)]."

¶ 26 Defendant countered that the State's argument failed to account for the fact that Atwood had unrelated pending criminal charges for which there was an outstanding warrant for her arrest, which also could have caused Atwood's refusal to cooperate or appear. In addition, defendant noted that Atwood had provided an affidavit to defense counsel (which counsel shared with the State) recanting her statements to police about the January 30, 2018, incident as well as recanting to the State directly her accounts in at least one of the 2017 domestic battery cases. Defendant argued that Atwood's personal legal issues and multiple recantations indicated that she had her own reasons not to cooperate. Defendant concluded that Atwood's personal reasons, not defendant's actions, were the cause of her unavailability.

¶ 27 The discussion turned to section 115-10.2a of the Code. During the discussion, the trial court wondered whether section 115-10.2a could be used instead of the doctrine of forfeiture by wrongdoing to admit Atwood's hearsay statements. In discussing unavailability under section 115-10.2a, the court commented, "I don't think it takes a whole lot of rocket science to figure out she's unavailable if she's not a—there's a warrant out for her arrest and she's not showing up in court, obviously process isn't available."

¶ 28 Finally, the trial court requested copies of the statements the State sought to admit. It announced that it would consider the statements under section 115-10.2a of the Code, and then, if that section were deemed unavailable or inappropriate, the court would proceed to analyze the statements under the doctrine of forfeiture by wrongdoing. The matter was continued by agreement to November 30, 2018, for the court's decision.

¶ 29 On November 30, 2018, the trial court requested a transcript of the various phone calls on which the State was relying in making its arguments under section 115-10.2a of the Code and the doctrine of forfeiture by wrongdoing. The court explained that the transcript would assist it in determining what defendant and Atwood had said and help it determine whether it agreed with the State's interpretation of the calls. The parties continued the case by agreement to January 11, 2019. Defendant stated that he did not "have a problem with coming out after the start of the new year."

¶ 30 On January 11, 2019, the State filed a "supplemental response" to its forfeiture motion. In the supplemental response, the State listed statements from the conversations between defendant and Atwood (without attribution to who was speaking), including the phone number, date, and time and the elapsed time during the conversation. The conversations occurred beginning February 22, 2018, and extended through April 27, 2018, involving two different phone numbers. According to the State, the statements established that defendant and Atwood "concocted a story to give" and induced Atwood to provide an affidavit recanting her

statements to the officers on the date of the offense. In addition, the statements reflected that defendant was urging Atwood to avoid attending court.

¶ 31 On January 11, 2019, the State's lead prosecutor was absent. The parties discussed the next convenient date:

> "[DEFENSE COUNSEL]: I think, [defendant], you want a little bit more time? Is [*sic*] you don't want to come back in two weeks; right? You want to come back—
>
> THE COURT: March the 8th.
>
> DEFENDANT: You say March?
>
> [DEFENSE COUNSEL]: March?
>
> DEFENDANT: That's a couple of months.
>
> [DEFENSE COUNSEL]: Is that what you want?
>
> DEFENDANT: I'll take it."

Defendant then expressly agreed to continue the case to March 8, 2019.

¶ 32 On March 5, 2019, defendant filed a motion to modify his bond conditions, requesting permission, as required in his bond, to travel to Nevada. On March 8, 2019, the trial court granted the request and continued the case, by agreement, to March 15, 2019, allowing defendant to complete his requested travel.

¶ 33 On March 15, 2019, the trial court requested and received the precise statements that the State would seek to introduce substantively if Atwood were deemed unavailable. They included Atwood's January 30, 2018, written statement and a police report authored by Chris Sullivan, a police officer with the City of DeKalb police department, "that describes the oral statements that were given" by Atwood to the officer. The trial court then proceeded to rule: "based on the information that has been provided to the Court[,] there is sufficient evidence under whatever that is, [Illinois Rule of Evidence] 803(b)(4) [*sic*], I think, to authorize the admissibility of testimony regarding these matters if [Atwood] is unavailable." Turning to other matters, defendant reiterated that Atwood had not been cooperative, and the court verified that Atwood had a May 2018 warrant for battery (unrelated to this case) still outstanding. Defendant also requested that he be removed from electronic home monitoring. The court allowed the request but ordered that defendant pay $100 per month toward his electronic home monitoring program fee arrearage. The matter was then set, by agreement, for a May 13, 2019, trial.

¶ 34 On May 13, 2019, the trial court cleared up pending motions *in limine* regarding whether and which of defendant's prior convictions could be used as impeachment if he testified. The court then turned to the issue of Atwood's testimony. Initially, the court corrected its order from the previous hearing, ruling that, if Atwood were unavailable, the State could seek to use the identified evidence (Atwood's written statement and Sullivan's report memorializing Atwood's statements to the police) under the doctrine of forfeiture by wrongdoing.

¶ 35 Turning to Atwood's availability, the State indicated that Atwood was not present. The State had attempted to serve her with a subpoena for the previous trial dates but not for the May 13, 2019, trial date, in part because she had an original and outstanding warrant. The State explained that the warrant had been issued at least 10 months ago (and it appears that Atwood's warrant was originally issued in May 2018). The trial court questioned the State's effort to procure service, noting that nothing in the court file indicated that service had been attempted and failed. The State was able to point the court to an April 11, 2018, subpoena that was issued

in one of the 2017 domestic battery cases and was returned as unserved because Atwood could not be found. The State further related conversations with police officers who attempted to procure service. The court declined to take the State's verbal statements as evidence of efforts to achieve service on Atwood, and the State requested a continuance so it could provide proper and acceptable evidence of its efforts at serving Atwood. The court granted the continuance.

¶ 36 We note that the record on appeal contains a May 17, 2019, subpoena issued to Atwood, at two Chicago addresses, commanding her presence on June 20, 2019, but the subpoena is not file stamped. Additionally, the subpoena does not appear to have been served.

¶ 37 On June 20, 2019, the matter was before the trial court for a bench trial. Preliminarily, the court addressed the State's good-faith efforts to procure service on Atwood. The State noted that it used the defendant's and Atwood's address in DeKalb and that the police had contacted the landlord and learned that Atwood had vacated the premises without leaving a forwarding address, even though her lease had not expired. The State issued a subpoena for an address in Chicago, which appears in the record, and the State asserted that one had been issued for another address in Chicago, but service had not been achieved at either of the Chicago addresses.[2] Defendant questioned the basis for the Chicago addresses. The court ruled:

> "I don't think you can look at this in a vacuum. The State has done something to try and procure [Atwood's] presence. Is it sufficient? It's arguable that it's not sufficient, but for me to look at it as only that portion of it and not look at the portion where there is a suggestion by the defendant to [Atwood] not to appear along with [Atwood's] statements to the State saying she is not going to show up, even [defense counsel's own observations], that she doesn't want any part of this.
>
> Now, she may not want any part of this for a reason other than she was directed by [defendant] to lay low, but there is certainly evidence that that was a reason for her non-cooperation in the prosecution.
>
> You know, all evidence is not the same and certainly if I had somebody in here testifying in court[,] that gets me a greater ability to make a credibility assessment. When that person is not here, I don't have that ability. I think that affects her non-appearance and the use of evidence that she would testify if she was here goes to the credibility of that testimony. I don't think it goes to the admissibility of that testimony, so I'll allow it, and as I said, it will mean what it will mean."

The matter proceeded to the bench trial.

¶ 38 Kaitlin Armstrong, a dispatcher with the City of DeKalb police department, testified that, on January 30, 2018, at approximately 11:30 a.m., she was on duty when Atwood called. Atwood stated that she was at the Ridge Drive apartment in DeKalb and, when prompted by Armstrong, answered that her boyfriend "jumped on" her and identified defendant by name as her boyfriend. The trial court admitted a portion of the recording of the 911 call, up to Atwood's identification of defendant, as an excited utterance. The record, however, is unclear as to what precisely was admitted into evidence; Atwood identified defendant about 13 seconds into the call, and then, at 37 seconds into the call, she again identified defendant by name in

[2]On July 2, 2019, the State filed the returns of service for Atwood's subpoenas, issued on May 17, 2019. The returns of service indicated that Atwood had not been served because her address was not listed and the officers attempting to serve the subpoenas had been unable to contact Atwood.

response to Armstrong's question, "what's his name." Armstrong testified that, in response to Atwood's 911 call, police were dispatched to the Ridge Drive residence.

¶ 39 Sullivan, a City of DeKalb police officer, testified that, on January 30, 2018, at approximately 11:30 a.m., he was dispatched to Atwood's Ridge Drive residence. When he arrived, Officer Boldt was already present. Sullivan observed that a garbage can and a light had been knocked over and a dish rack had been pushed into the sink.

¶ 40 Sullivan testified that he observed Atwood's physical appearance, noting bloody scratches on her neck and red marks on her stomach. When he arrived, Atwood was crying. Sullivan testified that he asked her what had happened. Atwood told Sullivan that defendant got upset after she told him not to put their son's blanket over a dirty window and that caused an argument. Atwood told defendant to leave, but then she asked him to fix the television before he left. Defendant grabbed his backpack to leave, and she grabbed the strap of the backpack. Defendant turned, "grabbed [Atwood] by the neck with both of his hands and strangled her [until] she lost consciousness." Sullivan testified that Atwood told him that she fell to the floor and defendant dragged her across the floor, knocking over the garbage can and the light in the process. Atwood curled into a ball, and defendant "kicked her multiple times in the stomach." Sullivan testified that Atwood told him that, once defendant stopped, she got up and grabbed her phone and, at that point, defendant ran out of the residence. Atwood ran after defendant and called 911. Atwood told Sullivan that the last time she saw defendant was when he jumped over a fence to an adjacent building.

¶ 41 Sullivan also laid a foundation for photographs of Atwood and the apartment as they both appeared on January 30, 2018. The photos showed scratches on the right side of Atwood's neck that appeared fresh and unscabbed and marks on Atwood's stomach. Photos of the apartment showed the dish rack knocked into the sink and a garbage can overturned next to a floor lamp that had been knocked down. Garbage was also strewn on the floor, near the garbage can. Some of the photos depicted blood on the floor; Atwood is shown to have a bloody toe (but she related that she injured her toe while chasing defendant).

¶ 42 Sullivan also identified and provided a foundation for Atwood's written statement, which the trial court admitted into evidence. The statement, dated January 30, 2018, signed by Atwood, and witnessed by Sullivan, provides:

> "It started when he came home and he was trying to put my son blanket on the window I said no he got mad I told him to get out I grab his bookbag I guess I broke the strap He got very upset Choked me out When I came back to light I was on the floor all I know He kicked me a couple of times and ran out the door [Transcribed and punctuated as it appears in the record.]"

Atwood inscribed her initials, "T.A." next to an addendum indicated by a line extending downwards from the word "out" in the phrase "Choked me out," which provides "with both of his hand [*sic*] My neck bleeding."

¶ 43 Sullivan testified that Atwood told him that the marks on her neck were caused when defendant grabbed her around the neck and strangled her. Clarifying somewhat, Atwood told Sullivan that she was standing against the counter when defendant first grabbed her, and, when he pushed her backwards, the drying rack was knocked into the sink.

¶ 44 On cross-examination, Sullivan testified that he did not know whether Boldt prepared a police report; he reviewed only his own report before he testified. Sullivan explained that he

was able to provide an in-court identification of defendant based on his presence during defendant's arrest. Sullivan testified that he did not know how long Atwood was unconscious; moreover, he did not observe any petechiae, which he described as "red dots," in Atwood's eyes, even though he agreed that persons who have been strangled often exhibit them. Sullivan also conceded that he did not conduct interviews with the neighbors and was unaware if other officers questioned the neighbors.

¶ 45 On redirect examination, Sullivan testified that an ambulance had been dispatched to the Ridge Drive address. However, Atwood refused to go to the hospital, and she signed a refusal form.

¶ 46 The State rested following Sullivan's testimony, and defendant moved for a directed finding, which the trial court denied. Following argument, the court found defendant guilty of all counts. The court reasoned that the fact that Atwood was not present to testify was problematic. The evidence of her statements to the police and her written statement, alone, were insufficient to determine defendant's guilt beyond a reasonable doubt. However, the photographic evidence corroborated those statements, so the court was able to find defendant guilty of the charges. The court stated that the aggravated domestic battery charge was somewhat more difficult to resolve because Atwood, in her statements, claimed that defendant had used both hands to strangle her, and the photographic evidence included only pictures of the right side of Atwood's neck. The court surmised that, had injuries been observed on the left side of Atwood's neck, the police would have photographed those injuries as well. However, even if Atwood's account of two-handed strangling were disbelieved, this would not mean that strangulation was not proved because the statute simply required pressure on the throat or neck impeding normal breathing or circulation and did not specify the means. The court concluded that, under this definition, an accused need use only one hand to strangle another, and the photographic evidence sufficiently corroborated that defendant used at least one hand to impede Atwood's normal breathing or circulation. Accordingly, the court also found defendant guilty of the aggravated domestic battery charge.

¶ 47 Judge Brady, who had presided over the bench trial, retired after its completion. Thereafter, Judge Buick presided over the posttrial motions and sentencing.

¶ 48 On July 3, 2019, defendant, via counsel, filed a motion for a new trial. In that motion, defendant argued, relevantly to this appeal, that the forfeiture motion was improperly granted and the evidence was insufficient to prove him guilty beyond a reasonable doubt. On August 12, 2019, defendant, again via counsel, filed a motion to continue the hearing on his posttrial motion and sentencing because defendant had alleged that counsel was ineffective for failing to advise defendant on the possibility that truth-in-sentencing provisions might apply to any possible sentence and defendant would be liable to serve 85% of any imposed sentence. On August 16, 2019, defendant filed a *pro se* motion, alleging that counsel had been ineffective because he had failed to advise defendant on the truth-in-sentencing issue and had not presented "beneficial evidence" consisting of a recording and affidavit of Atwood. We note that neither the posttrial motion filed by counsel nor defendant's *pro se* allegations of ineffective assistance raised any speedy-trial issue.

¶ 49 On September 13, 2019, the trial court denied defendant's *pro se* motion alleging ineffective assistance of counsel. The court found that the allegations involved matters of trial strategy and, in the case of the truth-in-sentencing issue, was a collateral consequence of the sentence and a collateral issue because it involved the award of good-conduct credits and was

therefore tied to defendant's own behavior while incarcerated. On October 10, 2019, the court denied defendant's motion for a new trial.

¶ 50 The matter turned to sentencing. The parties first discussed whether defendant was eligible for Class X sentencing. Defendant objected, asserting that, because his previous Class 2 felony weapons offenses had Class 3 elements, they should not be considered to make him eligible for Class X sentencing.

¶ 51 The State introduced a copy of the police report from this case and police reports from two of the 2017 domestic battery cases. Additionally, the State requested that the trial court consider the recorded calls from the jail between defendant and Atwood, both the transcripts prepared by the State and the actual recordings themselves. Finally, the State introduced certified copies of defendant's convictions, including a 2003 Cook County conviction of manufacturing or delivering cocaine and 2005 and 2009 Cook County convictions of unlawful use or possession of a firearm by a felon.

¶ 52 The trial court determined that defendant was eligible for Class X sentencing. The court sentenced defendant to an eight-year term of imprisonment on the aggravated domestic violence count, and it merged the domestic battery convictions into that count. The court further determined that the truth-in-sentencing provision applied and defendant would be required to serve 85% of his eight-year term.

¶ 53 On November 21, 2019, defendant filed a motion to reconsider and reduce his sentence. Among other things, defendant challenged the determination that he was eligible for Class X sentencing. On March 6, 2020, the trial court denied defendant's motion to reconsider and reduce his sentence. Defendant timely appeals.

¶ 54 II. ANALYSIS

¶ 55 On appeal, defendant argues that the trial court erred in granting the State's forfeiture motion because the court did not make specific findings regarding the elements or, alternatively, because its findings were against the manifest weight of the evidence. Defendant also contends that he was denied his constitutional and statutory speedy-trial rights, that the evidence was insufficient to prove him guilty beyond a reasonable doubt of all counts, and that the court erred in imposing a Class X sentence. We consider these contentions in turn.

¶ 56 A. Forfeiture by Wrongdoing

¶ 57 Defendant first argues that the trial court erred by admitting testimonial hearsay evidence under the doctrine of forfeiture by wrongdoing. Ill. R. Evid. 804(b)(5) (eff. Jan. 1, 2011). Defendant contends that the court did not make specific findings regarding the elements of forfeiture by wrongdoing. Alternatively, defendant contends that the court's factual determinations were against the manifest weight of the evidence. Before addressing defendant's contentions, we briefly review the contours of the doctrine of forfeiture by wrongdoing.

¶ 58 1. Elements and Standard of Review

¶ 59 The common law doctrine of forfeiture by wrongdoing is codified by Illinois Rule of Evidence 804(b)(5) (eff. Jan. 1, 2011). Rule 804(b)(5) provides that "[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" is "not excluded by the hearsay rule."Ill. R. Evid. 804(b)(5) (eff. Jan. 1, 2011). The doctrine is not only an exception to the rule against hearsay but also extinguishes confrontation clause claims. *People v. Hanson*, 238 Ill. 2d 74, 97 (2010). The doctrine is rooted in the idea that no person is permitted to profit by his own wrongdoing. *People v. Peterson*, 2017 IL 120331, ¶ 18.

¶ 60 In employing the doctrine as codified by Rule 804(b)(5), Illinois courts have recognized that there are but two factors that must be satisfied for the admission of hearsay statements pursuant to the rule: (1) that the party against whom the statement is offered has engaged or acquiesced in wrongdoing and (2) that such wrongdoing was intended to, and did, procure the unavailability of the declarant as a witness. *Id.* ¶ 32; *People v. Zimmerman*, 2018 IL App (4th) 170695, ¶ 98. Our supreme court has consistently held that "a defendant forfeits his ability to challenge the reliability of the declarant's statements by the very act of preventing the declarant from testifying," so that "requiring additional indicia of reliability would undermine the equitable considerations at the very center of the forfeiture by wrongdoing doctrine." *Peterson*, 2017 IL 120331, ¶ 33 (citing *Hanson*, 238 Ill. 2d at 98). Thus, so long as the declarant's statements are relevant and otherwise admissible, such statements admitted pursuant to the doctrine of forfeiture by wrongdoing need not be shown to reflect additional indicia of reliability. *Id.* (citing *Hanson*, 238 Ill. 2d at 99).

¶ 61 For the hearsay statements to be admitted under the doctrine, the trial court must find, by a preponderance of the evidence, that the defendant engaged or acquiesced in wrongdoing and that the wrongdoing was intended to and did procure the unavailability of the declarant as a witness. *Id.* ¶ 37. A preponderance of the evidence is the least stringent standard among the commonly used standards of proof (proof beyond a reasonable doubt being the most stringent, and clear and convincing evidence being the intermediate standard). *Id.* In other words, the State must present evidence that demonstrates the existence of the fact to be more likely true than not. *Id.*

¶ 62 Generally, a trial court's evidentiary decisions are reviewed for an abuse of discretion because such a decision usually requires the court to exercise its discretion by making a judgment call. *Id.* ¶ 39. The admission of a hearsay statement pursuant to the doctrine of forfeiture by wrongdoing does not involve the court's exercise of discretion; instead, admission of the statement is dependent on the court determining, by a preponderance of the evidence, that the defendant engaged or acquiesced in wrongdoing that intended to, and did, procure the witness's unavailability. *Id.* A court's evidentiary determination is reviewed to determine whether it is against the manifest weight of the evidence. *Id.* A court's evidentiary determination is against the manifest weight of the evidence where the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented. *Id.* We therefore apply the manifest-weight standard to a trial court's decision to admit hearsay evidence pursuant to the doctrine of forfeiture by wrongdoing. *Id.*

¶ 63 2. Specific Findings

¶ 64 Defendant argues that the trial court erred in applying the doctrine of forfeiture by wrongdoing because it did not make specific findings regarding the elements the State needed to prove. Specifically, defendant contends that the court failed to make three necessary specific findings. First, defendant argues that the court did not make a specific finding that Atwood was unavailable under Illinois Rule of Evidence 804(a)(5) (eff. Jan. 1, 2011). Second, defendant

argues that the court failed to make specific findings that (a) defendant engaged in wrongdoing and (b) the wrongdoing was intended to procure Atwood's unavailability. Third and last, defendant argues that the court failed to make a specific finding that the wrongdoing caused Atwood's unavailability.

¶ 65 Defendant's "specific-findings" argument is without merit. Indeed, in response to the State's challenge that a trial court is not required to make any specific findings on the record, defendant conceded the point and claimed that he was arguing only that the trial court's findings were against the manifest weight of the evidence. While defendant's concession is proper, he nevertheless clearly and unequivocally argues that the trial court erred by omitting "specific finding[s] of 'wrongdoing' or 'causation,' both of which are necessary elements under the forfeiture by wrongdoing doctrine." This argument is erroneous because there is no requirement that a trial court recite specific findings into the record, as it is presumed to know and properly apply the law, and because the trial court's judgment may be affirmed on any basis supported by the record. *People v. Phillips*, 392 Ill. App. 3d 243, 265 (2009). In any event, we accept defendant's concession. If the trial court erred, it was not because it omitted specific findings.

¶ 66 Moreover, even without defendant's concession, we note that the trial court stated on the record that "there is sufficient evidence under whatever that is, 803(b)(4) [*sic*], I think to authorize the admissibility of testimony regarding these matters if Ms. Atwood is unavailable." Additionally, immediately before the commencement of the bench trial, the trial court revisited its ruling on the State's forfeiture motion. After the parties briefly argued their positions, the court reiterated why it was granting the State's motion:

> "I don't think you can look at this in a vacuum. The State has done something to try and procure [Atwood's] presence. Is it sufficient? It's arguable that it's not sufficient, but for me to look at it as only that portion of it and not look at the portion where there is a suggestion by the defendant to [Atwood] not to appear along with the witness' statements to the State saying she is not going to show up, even [defense counsel's own observations], that she doesn't want any part of this.
>
> Now, she may not want a part of this for a reason other than she was directed by [defendant] to lay low, but there is certainly evidence that that was a reason for her non-cooperation in the prosecution."

¶ 67 The trial court stated, on the record, that the State had taken measures, which were arguably insufficient, to procure Atwood's presence at the proceedings in this matter. It also stated, on the record, that there was evidence that Atwood's failure to appear was due to defendant's efforts to convince Atwood to not attend any of the proceedings. While it is true that the court did not direct comments to whether defendant's statements to Atwood constituted wrongdoing under the doctrine and Rule 804(b)(5), the original grant of the State's forfeiture motion and the June 20, 2019, reiteration of that grant immediately before the commencement of the bench trial indicate that the court believed the conduct to be wrongdoing under the doctrine and the rule and that defendant intended and did procure Atwood's unavailability. Accordingly, even though not required, the record sufficiently demonstrates the court's specific findings regarding the required elements to admit hearsay under the doctrine of forfeiture by wrongdoing and Rule 804(b)(5).

¶ 68 3. Factual Determinations

¶ 69 Defendant alternatively challenges the trial court's factual determinations regarding the elements necessary to demonstrate the admissibility of evidence pursuant to the doctrine of forfeiture by wrongdoing and Rule 804(b)(5). First, defendant contends that the trial court's determination that Atwood was unavailable was against the manifest weight of the evidence. Next, defendant contends that the trial court's determination that defendant's actions constituted "wrongdoing" for purposes of the doctrine or the rule was against the manifest weight of the evidence. Finally, defendant challenges the sufficiency of the evidence that his communications with Atwood more likely than not caused her unavailability. Unlike regarding the specific findings, defendant makes no concessions regarding these contentions, so we address each contention.

¶ 70 Defendant initially argues that the trial court's determination that Atwood was unavailable was against the manifest weight of the evidence. Defendant's position is entirely based on the belief that engrafted upon Rule 804(b)(5) is the requirement, under Illinois Rule of Evidence 804(a)(5) (eff. Jan. 1, 2011), that the proponent of the hearsay statement demonstrate an inability to procure the declarant's attendance by process or other reasonable means. A brief consideration of the text of Rule 804(a)(5) belies defendant's contention.

¶ 71 Rule 804 governs exceptions to the rule against hearsay where the declarant is unavailable. Ill. R. Evid. 804 (eff. Jan. 1, 2011). Rule 804(a)(5) expressly encompasses situations in which the declarant "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means." Ill. R. Evid. 804(a)(5) (eff. Jan. 1, 2011). By its very terms, then, Rule 804(a)(5) does not apply to the doctrine of forfeiture by wrongdoing as codified in Rule 804(b)(5).

¶ 72 This is also easily understood by viewing how Illinois authority has consistently treated the doctrine. For example, our supreme court, in *Peterson*, 2017 IL 120331, ¶ 32, explained that Rule 804(b)(5) "identifies only two criteria or factors that must be satisfied for the admission of hearsay statements under the rule:" wrongdoing on the part of the defendant and evidence that the wrongdoing was committed with the intent to, and did, render the witness unavailable to testify. Subsequent cases have recognized that Rule 804(b)(5) "has two, and 'only two' " factors that need be satisfied. *Zimmerman*, 2018 IL App (4th) 170695, ¶ 98 (quoting *Peterson*, 2017 IL 120331, ¶ 32). Thus, the interpretation given Rule 804(b)(5) by Illinois courts does not require the State to demonstrate in any particular manner that the witness was unavailable despite its best efforts to procure the witness's attendance.

¶ 73 Instead, the two factors contemplated by Rule 804(b)(5) subsume within them the witness's unavailability. Rule 804(b)(5) provides, pertinently, that the defendant's wrongdoing "was intended to, *and did*, procure the unavailability of the declarant as a witness." (Emphasis added.) Ill. R. Evid. 804(b)(5) (eff. Jan. 1, 2011). In other words, the focus of the doctrine of forfeiture by wrongdoing is not the declarant, but the defendant and the defendant's conduct that has caused the declarant to become unavailable. The other hearsay exceptions, like statement against interest (Ill. R. Evid. 804(b)(3) (eff. Jan. 1, 2011)), place the focus on the declarant and require the proponent to undertake reasonable efforts to procure the declarant's presence and live testimony (see Ill. R. Evid. 804(a)(5) (eff. Jan. 1, 2011)) before the declarant will be deemed unavailable.

¶ 74 The authority relied upon by defendant is also flatly distinguishable. Defendant relies on *People v. Kent*, 2020 IL App (2d) 180887, ¶ 97, for the proposition that Rule 804(a)(5) applies to the doctrine of forfeiture by wrongdoing and requires the State to prove the steps it took to secure the presence of a missing witness at trial. However, *Kent* involved the State's attempt to admit a witness's testimony from a previous trial. *Id.* ¶ 95. Moreover, there, the court was expressly concerned with the defendant's right to confront witnesses (*id.* ¶ 93), something that is extinguished once the doctrine of forfeiture by wrongdoing is found to apply (*Hanson*, 238 Ill. 2d at 97 (doctrine of forfeiture by wrongdoing extinguishes confrontation clause claims)). Thus, the same considerations at play in *Kent* are simply not present here, and *Kent* provides no guidance.

¶ 75 Relying on *People v. Busch*, 2020 IL App (2d) 180229, ¶ 49, defendant also contends that the State failed to prove that it was unable to procure Atwood's attendance at trial by process or reasonable means because it provided no evidence before trial that attempts had been made to serve or locate her. *Busch*, however, is also flatly distinguishable because it is based on "an issue of statutory interpretation" (*id.* ¶ 48) of section 115-10.2a(c)(5) of the Code (725 ILCS 5/115-10.2a(c)(5) (West 2016)). Section 115-10.2a(c)(5) required the State to show that it was unable to procure the witness's attendance by process or other reasonable means. *Busch*, 2020 IL App (2d) 180229, ¶ 49. While this statutory requirement appears to parallel the requirement in Rule 804(a)(5), as we discussed above, the doctrine of forfeiture by wrongdoing as codified by Rule 804(b)(5) both subsumes the witness's unavailability and does not require a particular showing of the efforts undertaken to procure the witness's attendance. Accordingly, *Busch*, and the argument derived from it, are inapposite.

¶ 76 We therefore reject defendant's contention regarding the State's evidence of its efforts to procure Atwood's presence. Rule 804(a)(5) expressly does not apply to the doctrine of forfeiture by wrongdoing as codified by Rule 804(b)(5), and, in any event, confrontation clause issues are extinguished by the application of the doctrine and the rule.

¶ 77 Moreover, we cannot say that the trial court's determination that Atwood was unavailable was against the manifest weight of the evidence. As the trial court itself noted, there was ample evidence in the record to suggest, wholly apart from Atwood's own legal difficulties, that defendant had influenced her and ultimately convinced her not to attend any of the proceedings in this matter. In addition, Atwood had made representations to defense counsel and the State that she would not attend, and these representations were made following the phone calls between defendant and Atwood. Therefore, we cannot say that the determination that Atwood was unavailable for purposes of the doctrine of forfeiture by wrongdoing was against the manifest weight of the evidence.

¶ 78 Defendant next contends that the trial court's determination that defendant's conduct constituted wrongdoing for purposes of the doctrine of forfeiture by wrongdoing was against the manifest weight of the evidence. Defendant contends that, because the State did not allege that defendant threatened Atwood, bribed her, or coerced her, his conduct could not constitute wrongdoing as contemplated by the doctrine of forfeiture by wrongdoing. We disagree.

¶ 79 Rule 804(b)(5) does not specify what manner of conduct constitutes wrongdoing beyond that it be intended to, and does, cause the witness's unavailability. Ill. R. Evid. 804(b)(5) (eff. Jan. 1, 2011). Our supreme court has recognized that the rule, as well as case law, "makes no distinction based on the nature of the 'wrongdoing.' Thus, *** the rule applies whether the declarant is rendered unavailable through murder or some other wrongdoing." *Peterson*, 2017

IL 120331, ¶ 32. Defendant's attempt to limit the types of wrongdoing to threats, bribery, or coercion is unavailing, especially as it is directly rebutted by pertinent authority.

¶ 80 *People v. Hampton*, 406 Ill. App. 3d 925, 939-40 (2010), is instructive. There, the court recognized that any conduct performed by a defendant that is intended to render a witness against him or her unavailable to testify is wrongful. *Id.* In that case, the defendant attempted to procure the witness's absence at trial by writing a letter, which the witness never received, urging the witness to "plead the fifth" because doing so would frustrate the State's prosecution of the defendant. *Id.* at 940. In addition, the defendant urged the witness to call the defendant's mother, and there was evidence that the defendant and his mother had engaged in a scheme to pressure the witness into invoking the fifth amendment to avoid testifying against the defendant. *Id.* at 940-41. The court concluded that the State "proved what it needed to: that [the] defendant engaged in conduct intended to render [the witness] unavailable to testify at defendant's trial." *Id.* at 942.

¶ 81 Here, the State alleged that defendant called Atwood from jail, in violation of a no-contact order, and urged Atwood to change her account of the incident to one in which defendant did not batter her but instead defendant's paramour caused Atwood's injuries. Further, defendant urged Atwood to say that she blamed defendant because she was angry about his infidelity. After enduring a number of phone calls from defendant, Atwood did indeed recant and allege that she was beaten by defendant's paramour, and she told police defendant was responsible only for revenge. In addition, in a number of calls, defendant told Atwood to stay away and not attend the proceedings. At the time of the phone calls, Atwood had not been charged, and the State's attempt to procure her attendance at a pending 2017 domestic battery case trial was unsuccessful. We cannot say that, when the trial court determined that defendant's conduct—urging and succeeding in getting Atwood to recant and change her story to the one he devised as well as urging Atwood not to attend any of the proceedings in this matter—constituted wrongdoing, the determination was against the manifest weight of the evidence. The conduct defendant engaged in was intended to render the witness unavailable to testify at his trial. *Id.*

¶ 82 Defendant attempts to distinguish *Hampton* by emphasizing that it involved collusion between the defendant and a third party to procure the witness's unavailability. See *id.* (citing with approval *Commonwealth v. Edwards*, 830 N.E.2d 158, 171 (Mass. 2005), which held in a collusion case that a defendant's joint effort with a witness to secure the witness's unavailability, regardless of whether the witness had independently decided not to testify, may be sufficient to support a finding of forfeiture by wrongdoing). This, however, reads *Hampton* too narrowly. *Hampton* expressly stated that conduct intended to render a witness unavailable to testify at the defendant's trial constituted wrongful conduct. *Id.* That statement is broad enough to encompass any conduct intended to interfere with a witness's availability to testify at the defendant's trial. We reject defendant's attempt to distinguish *Hampton*.

¶ 83 It is also notable that defendant does not cite any case that interprets wrongdoing to be limited to threats, bribery, coercion, or other physical or psychological violence. To be sure, the cases cited by the parties involve violence, threats, and even murder. However, none of those cases remotely suggest that wrongdoing encompasses only violence or threats. Instead, as in *Hampton*, they do not limit the conduct but, instead, address the conduct at issue in the case in assessing whether it was intended to interfere with a witness's availability to testify against the defendant. Taking that tack in this case, we see that defendant's persistent wheedling and cajoling, suggesting that Atwood change her account of the incident despite her

initial vigorous refusals to lie for defendant, coupled with his urging that she lie low and avoid anything to do with appearing in this matter (and impliedly avoid service of process), when considered as a whole, constitute wrongdoing under any reasonable conception of the term.

¶ 84 Accordingly, there is evidence that defendant urged Atwood both to change her account of the incident and to avoid appearing in any proceedings in this matter. We cannot say that the trial court's determination that this conduct constituted wrongdoing was against the manifest weight of the evidence.

¶ 85 Defendant's final contention in this portion of his appeal is that the State "failed to prove that communications between [defendant] and [Atwood] more likely than not caused [Atwood's] subsequent [un]availability." In other words, defendant contends that the trial court must find that his conduct, standing alone, was the cause of Atwood's unavailability. We disagree.

¶ 86 Rather than proving that a defendant's actions were the sole proximate cause of a witness's absence, as defendant contends, all the State need prove is "that the defendant intended by his actions to procure the witness' absence." *People v. Stechly*, 225 Ill. 2d 246, 277 (2007). Indeed, our supreme court in *Peterson* expressly held that the wrongful conduct "was motivated 'at least in part' by an intent to prevent [the witness] from testifying." *Peterson*, 2017 IL 120331, ¶ 50 (quoting *Stechly*, 225 Ill. 2d at 272). Thus, the focus is not on the defendant's conduct but is on the defendant's intent that his or her actions cause the witness's unavailability, and as noted, the actual unavailability is subsumed into the doctrine as codified by Rule 804(b)(5). Thus, the question is whether the trial court's determination that defendant's conduct was at least partly motivated by an intent to prevent Atwood's testimony was against the manifest weight of the evidence.

¶ 87 As discussed above, defendant made numerous calls to Atwood from jail. The first calls were urging Atwood to change her account from that defendant choked her to that defendant's paramour beat her and she blamed defendant in revenge for his infidelity. Several times, Atwood vigorously declined to lie for defendant. Eventually, though, Atwood recanted and provided an account to defense counsel consistent with the version defendant proposed. Additionally, before Atwood was charged with her own unrelated offense, defendant began urging her to avoid attending court for any of the proceedings. After these urgings, Atwood expressed her intent and desire not to participate to both defense counsel and the State. We cannot say, therefore, that the trial court's conclusion that defendant's conduct was at least partly motivated by an intent to forestall and prevent Atwood's testimony was against the manifest weight of the evidence.

¶ 88 Defendant criticizes the trial court's conclusion, asserting that the State offered no evidence that Atwood had ever expressed fear of consequences should she testify. Defendant's contention, however, assumes that the only sort of conduct that is countenanced under the doctrine of forfeiture by wrongdoing is violent and threatening conduct. Here, defendant's conduct was cajoling and attempting to play on Atwood's feelings for defendant both as a romantic partner and as the father of her children. As discussed above, wrongful conduct under the doctrine of forfeiture by wrongdoing is any conduct performed with the intent to prevent the witness from testifying. See *id.* (wrongful conduct is motivated at least in part by the intent to prevent the witness from testifying); *Hampton*, 406 Ill. App. 3d at 942 (wrongful conduct is any conduct intended to render a witness unavailable to testify at the defendant's trial). Accordingly, defendant's contention is unavailing.

¶ 89 Defendant also attributes Atwood's unavailability to her own pending criminal charges. While it is true that Atwood was charged in May 2018, the bulk of defendant's phone calls with Atwood occurred before she was charged. Moreover, the focus is on the defendant and whether his or her conduct was motivated at least partly by the intent to prevent the witness from testifying. We have determined that the trial court's conclusion is not against the manifest weight of the evidence. Accordingly, whether Atwood herself was also motivated by her own legal issues does not change the fact that defendant's own conduct was intended to render Atwood unavailable to testify at his trial (*Hampton*, 406 Ill. App. 3d at 942) and was motivated at least in part by the intent to prevent Atwood from testifying (*Peterson*, 2017 IL 120331, ¶ 50), and the trial court's determination on these points was not against the manifest weight of the evidence.

¶ 90 Accordingly, for the foregoing reasons, the trial court's determinations regarding the doctrine of forfeiture by wrongdoing as codified by Rule 804(b)(5) are not against the manifest weight of the evidence.

¶ 91 B. Speedy Trial

¶ 92 Defendant next contends on appeal that he was denied both his constitutional and statutory rights to a speedy trial. Defendant, however, has unequivocally waived any statutory speedy-trial claim.

¶ 93 Section 103-5(a) of the Code (725 ILCS 5/103-5(a) (West 2018)) provides that a defendant in custody must be tried within 120 days of being taken into custody and that a defendant must make a written or oral demand for trial on the record; otherwise "[d]elay shall be considered to be agreed to by the defendant." Similarly, section 103-5(b) of the Code (*id.* § 103-5(b)) provides that, if a defendant is not in custody, he or she "shall be tried *** within 160 days from the date defendant demands trial" and the demand "shall be in writing." Defendant made no written demand for trial on the record. On May 10, 2018, defendant was released from custody and given a recognizance bond. Defense counsel stated that he had a written demand for trial that he wished to file on defendant's behalf but, because of the release from custody, counsel needed to revise the written demand. On June 28, 2018, the trial court inquired whether defendant had demanded trial. The State indicated that it believed that defendant had demanded trial on the previous date. Defense counsel stated, "There's no speedy, no," and expressly stated that, "I didn't file [a speedy trial demand]." Subsequent to June 28, 2018, there are no indications that defendant wished to demand trial. Accordingly, defendant never made a competent demand for trial that would trigger his statutory speedy-trial term.

¶ 94 In addition to never demanding trial for purposes of his statutory rights, defendant did not raise the speedy-trial issue at any time before his trial or in any of his posttrial motions. Generally, an issue is forfeited or waived if a defendant fails to contemporaneously object at trial and to include the issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 187 (1988). Defendant neither raised any potential speedy-trial violation in the trial court nor included the issue in any of the posttrial motions filed. The issue is thus forfeited under *Enoch*.

¶ 95 To the extent that defendant objected to certain of the State's requests for continuance (*e.g.*, May 3, 2018, June 14, 2018, May 13, 2019), any objections were insufficient to preserve the issue for appeal. To preserve the issue, a defendant is required to file a motion seeking dismissal based on a speedy-trial violation and to include the issue in the posttrial motion. *People v. Alcazar*, 173 Ill. App. 3d 344, 354 (1988). Defendant did not file a motion to dismiss

based on a speedy-trial violation, precisely because he never made a proper demand for trial that would have triggered the speedy-trial term.

¶ 96 Alternatively, defendant contends that trial counsel was ineffective for failing to pursue a speedy-trial claim. An ineffective-assistance claim is evaluated under the familiar standard in *Strickland v. Washington*, 466 U.S. 668 (1984). Under that standard, a defendant must show that his attorney's representation fell below an objective standard of reasonableness and prejudice resulting from the deficient performance. *Peterson*, 2017 IL 120331, ¶ 79. Prejudice in the *Strickland* sense means there exists a reasonable probability that, but for counsel's errors, the outcome of the proceeding would have been different. *Id.* If the defendant fails to satisfy either prong of the *Strickland* standard, the ineffective-assistance claim fails. *Id.*

¶ 97 Even if trial counsel's representation were deemed deficient for failing to file a motion to dismiss based on a speedy-trial violation, no prejudice accrues. On February 20, 2018, defendant was arrested and taken into custody. The record further reveals that, on May 10, 2018, defendant was released on a recognizance bond. The period from February 20, 2018, to May 10, 2018, comprises 79 days. The record shows that at each hearing, beginning on February 21, 2018, and ending May 10, 2018, the cause was continued by agreement or on defendant's motion. Thus, only one day of delay during the 79-day period from February 20, 2018, to May 10, 2018, is attributable to the State. Moreover, even if all the delay from February 20, 2018, to May 10, 2018, were attributed to the State, that would be 79 days, which is well under the 120-day period for a defendant in custody.

¶ 98 Upon defendant's release from custody on May 10, 2018, any 120-day, in-custody speedy-trial demand would cease to be effective. After his May 10, 2018, release from custody, a new, written speedy-trial demand was necessary to effectuate the 160-day speedy-trial term for an out-of-custody defendant. Defendant, however, did not demand trial upon his release, and no written demand appears in the record. Even if defendant's May 10 indication that he intended to file a written speedy-trial demand were countenanced, on June 28, 2018, it was repudiated, and the period from May 10 to June 28 comprises only 49 days. Thus, the delay potentially attributable to the State is 50 days, which is well shy of the 160-day speedy-trial term for an out-of-custody defendant. 725 ILCS 5/103-5(b) (West 2018) (160-day term in which a defendant released on bail or recognizance must be brought to trial).

¶ 99 We therefore conclude that a motion to dismiss based on a speedy-trial violation would have been futile because only 50 days of the 160-day term are attributable to the State. Further, because defendant did not demand trial after the June 28, 2018, repudiation of any speedy-trial demand, the speedy-trial term was never thereafter triggered and thus never elapsed. Accordingly, because there was no speedy-trial violation, there can be no prejudice arising from counsel's failure to file a motion to dismiss based on a speedy-trial violation, and defendant's claim of ineffective assistance of counsel cannot stand in the absence of prejudice.

¶ 100 Finally, defendant contends that his constitutional speedy-trial right was presumptively violated because he was not brought to trial within a year of his arrest. For purposes of this contention, we will ignore defendant's forfeiture of the constitutional speedy-trial claim by failing to file a motion to dismiss based on a constitutional speedy-trial violation. *People v. Stevens*, 185 Ill. App. 3d 261, 265 (1989) (a constitutional speedy-trial claim is forfeited on appeal where it is not raised in the trial court).

¶ 101 In *Barker v. Wingo*, 407 U.S. 514 (1972), the United States Supreme Court explored the contours of the constitutional speedy-trial right. Our supreme court discussed the application

of *Barker* in *People v. Crane*, 195 Ill. 2d 42, 46 (2001). The constitutional speedy-trial right balances the societal interest in providing a speedy trial against the rights of the accused. *Id.* This balancing recognizes that sometimes, abridging the right to a speedy trial may work to the advantage of the accused and against the State, and sometimes the other way around. *Id.* at 47. A constitutional speedy-trial claim requires examining the totality of the record to determine whether the defendant's right has been violated. *Id.* at 48. Finally, we employ a bifurcated standard of review: we defer to the trial court's factual determinations by employing the manifest-weight-of-the-evidence standard but do not defer to its determination on the ultimate question—of whether the defendant's constitutional speedy-trial right has been violated—by employing the *de novo* standard of review. *Id.* at 51.

¶ 102 Under the *Barker*/*Crane* rubric, a court is to balance the following factors: the length of the delay; the reasons for the delay; the prejudice, if any, to the defendant; and the defendant's assertion of his speedy-trial right. *Id.* at 52. Under *Barker*, a year of delay is presumptively prejudicial. *Id.* at 52-53. Here, on February 20, 2018, defendant was arrested, and on June 20, 2019, the bench trial in this matter was held. Thus, approximately 16 months elapsed, which is at least presumptively prejudicial.

¶ 103 In our estimation, the most significant factor is defendant's failure to assert his right to a speedy trial. On May 10, 2018, defendant indicated that he wished to demand trial. However, on June 28, 2018, defendant completely repudiated any demand and denied that he had ever demanded trial. Thereafter, defendant did not attempt to request or enforce his right to a speedy trial. As noted above, if all the time up to the date of the repudiation were attributed to the State, it would have constituted 128 days, or somewhat more than 4 months. Because defendant never thereafter demanded trial, defendant did not assert his right to a speedy trial. This factor weighs strongly against finding a violation.

¶ 104 The reasons given for the delay were, in part, to procure Atwood's presence but also to litigate important issues before the trial, including the main issue here—whether Atwood's hearsay account of the offense would be admissible in her absence. Defendant argues that the State did not satisfactorily demonstrate that it was undertaking reasonable efforts to procure Atwood's presence. The record is not exactly replete with the State's particular strategies to locate Atwood and compel her attendance. Defendant correctly points out that the subpoena return on Atwood was not filed until after the completion of the bench trial. On the other hand, Atwood had indicated to the defense and the State that she was unwilling to participate in these proceedings. In addition, as discussed above, defendant's conduct was intended to discourage Atwood's attendance, so the State's failure to procure her presence is unsurprising. Even though the State could have provided much better documentation of its efforts, given the realities of defendant's cajolery and efforts to render Atwood unavailable, we cannot say that this factor is any more than slightly in favor of finding a violation.

¶ 105 Finally, we turn to actual prejudice to defendant. The record suggests that no prejudice accrued from the delay (most of which defendant at least acquiesced in). Likewise, defendant suggests no specific prejudice accruing from the 16-month period between arrest and trial. During most of that time, defendant was released on bail, and several times during that period, defendant was allowed to travel out of state to attend to personal matters. This factor is also strongly against a finding of a violation.

¶ 106 Accordingly, balancing the *Barker* factors, we must conclude that, while the lapse of time was presumptively prejudicial, no actual prejudice accrued because of the lapse of time.

Accordingly, defendant's constitutional right to a speedy trial was not violated.

¶ 107 C. Sufficiency of the Evidence

¶ 108 Defendant next challenges the sufficiency of the evidence. When a defendant challenges the sufficiency of the evidence, the reviewing court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements beyond a reasonable doubt. *People v. Jackson*, 2020 IL 124112, ¶ 64. This standard of review allocates to the trier of fact the responsibility to resolve the conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from the facts presented to determine the ultimate facts. *Id.* Thus, it is not the reviewing court's function to retry the defendant; moreover, the reviewing court will not substitute its judgment for that of the trier of fact on issues involving the weight of the evidence or the credibility of the witnesses. *Id.* A criminal conviction will be overturned on a challenge to the sufficiency of the evidence only where the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *Id.*

¶ 109 For the charge of aggravated domestic battery, the State alleged that defendant had strangled Atwood. "Strangle" is defined as "intentionally impeding the normal breathing or circulation of the blood of an individual by applying pressure on the throat or neck of that individual or by blocking the nose or mouth of that individual." 720 ILCS 5/12-3.3(a-5) (West 2018). For the charge of domestic battery, the State alleged that defendant knowingly caused bodily harm to Atwood (count I) (*id.* § 12-3.2(a)(1)) and knowingly made contact of an insulting nature with Atwood (count III) (*id.* § 12-3.2(a)(2)) when he grabbed her neck and kicked her.

¶ 110 At trial, Sullivan testified that Atwood told him that defendant had choked and kicked her. In Atwood's written statement, she related that defendant choked and kicked her. Finally, in the 911 call, Atwood related that defendant had choked her. All of Atwood's admitted substantive statements are consistent. Moreover, Sullivan testified that he observed injuries on Atwood's neck and marks on her abdomen, and these observations are consistent with Atwood's verbal statements to Sullivan and her written statement. Finally, the photographic evidence corroborates Atwood's statements, both verbal and written, revealing the injuries and marks on her body and the disarray in her apartment that she described in her statements.

¶ 111 Based on Atwood's statements, Sullivan's corroborative testimony, and the corroborative photographic evidence, any rational trier of fact could have found the necessary elements of each offense. Regarding the evidence of strangulation (count I), Atwood's statements all indicated that defendant had choked her until she was unconscious or nearly so, and Sullivan's observations of the injuries to her neck and the photographs of the injuries to her neck support those statements. Regarding the evidence of bodily harm (count II), Atwood's statements again indicated that defendant had placed his hand or hands on her neck and choked her and had kicked her in the stomach; Sullivan's observations and the photographs support those statements. Regarding the insulting contact (count III), the charge is supported by the same evidence provided by Atwood of choking and kicking, and Sullivan's observations and the photographs serve to corroborate Atwood and support the charge. There is, therefore, ample evidence in the record to support defendant's convictions, and his challenge to the sufficiency of the evidence is unavailing.

¶ 112 Defendant specifically argues that Atwood's hearsay statements (her verbal statement to Sullivan and her written statement) should not have been admitted into evidence. However, we disposed of this contention above: the hearsay statements were admitted into evidence under Rule 804(b)(5), and the doctrine of forfeiture by wrongdoing both serves as an exception to the rule against hearsay and extinguishes any issues regarding the right to confront witnesses. *Peterson*, 2017 IL 120331, ¶ 33.

¶ 113 Defendant also challenges individual aspects of the trial court's explanation of its judgment and finding of guilt. In general, defendant highlights that Atwood's statements are not altogether internally consistent and some aspects appear implausible. Defendant juxtaposes these difficulties with Atwood's statements with the trial court's reluctance to base its judgment and finding of guilt solely on those statements, such as when the court noted that the statements alone would not support finding defendant's guilt. Defendant characterizes this as the trial court's repudiation of Atwood's credibility and urges us to find the trial court's judgment and finding of guilt so unsatisfactory and implausible that there exists a reasonable doubt.

¶ 114 We believe that Atwood's statements sufficiently line up with the corroborating evidence to support any rational fact finder in finding defendant guilty beyond a reasonable doubt. Instead, defendant is actually urging us to reweigh the evidence and to substitute our judgment for that of the trial court. This we decline to do. *Jackson*, 2020 IL 124112, ¶ 64. Accordingly, we hold that the evidence was sufficient to prove defendant's guilt of each of the offenses charged.

¶ 115 D. Sentencing as Class X Offense

¶ 116 Defendant argues that the trial court erred in sentencing him as a Class X offender under section 5-4.5-95 of the Unified Code of Corrections (Code of Corrections) (730 ILCS 5/5-4.5-95 (West 2018)) because his prior convictions of unlawful use of a weapon by a felon do not qualify under the Code of Corrections for Class X sentencing. Because we are called upon to interpret section 5-4.5-95 of the Code of Corrections, we review *de novo* the court's determination that defendant was subject to Class X sentencing. *People v. Foreman*, 2019 IL App (3d) 160334, ¶ 43.

¶ 117 Section 5-4.5-95(b) requires mandatory Class X sentencing for defendants who satisfy certain requirements. 730 ILCS 5/5-4.5-95(b) (West 2018). Section 5-4.5-95(b) provides, pertinently:

> "When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, *** after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now (the date the Class 1 or Class 2 felony was committed) classified in Illinois as a Class 2 or greater Class felony, *** and those charges are separately brought and tried and arise out of different series of acts, that defendant shall be sentenced as a Class X offender. This subsection does not apply unless:
>
> (1) the first felony was committed after February 1, 1978 (the effective date of Public Act 80-1099);
>
> (2) the second felony was committed after conviction on the first; and
>
> (3) the third felony was committed after conviction on the second." *Id.*

¶ 118 In this case, defendant was convicted of aggravated domestic battery, a Class 2 felony. 720 ILCS 5/12-3.3(b) (West 2018). As he was convicted of a Class 2 felony, defendant is potentially subject to the mandatory Class X sentencing of section 5-4.5-95(b) of the Code of Corrections if defendant has qualifying felony convictions.

¶ 119 At the sentencing, the State introduced certified copies of three prior convictions. In case No. 03-CR-209501 (Cook County) (the 2003 felony case), defendant was convicted of manufacturing or delivering more than 1 but less than 15 grams of cocaine (720 ILCS 570/401(c)(2) (West 2002)), a Class 1 felony. Defendant's date of conviction for this offense was March 4, 2003. On September 22, 2004, defendant was charged with unlawful use or possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2004)) in case No. 04-CR-2315001 (Cook County) (the 2004 felony case). Defendant's date of conviction for the 2004 felony case was June 21, 2005, and the conviction was represented as a Class 2 felony. On October 21, 2009, defendant was charged with unlawful use or possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)) in case No. 09-CR-1897701 (Cook County) (the 2009 felony case). Defendant's date of conviction for the 2009 felony case was February 1, 2010, and the conviction was represented as a Class 2 felony.

¶ 120 On appeal, defendant challenges the classification of the 2004 and 2009 felony cases as involving Class 2 felonies. Defendant contends that they have the elements of Class 3 felonies but were enhanced to Class 2 based on prior underlying convictions. Defendant concludes that, as a result, he was not eligible for Class X sentencing pursuant to section 5-4.5-95(b).

¶ 121 In support of his argument, defendant contends that *Foreman* is particularly instructive. In that case, the defendant was sentenced as a Class X offender based on prior convictions of delivery of a controlled substance and driving while license revoked, both of which were deemed Class 2 felonies. *Foreman*, 2019 IL App (3d) 160334, ¶ 25. The *Foreman* court reasoned that the focus of the inquiry under section 5-4.5-95(b) of the Code of Corrections is on the elements of the prior offense. *Id.* ¶ 46. A qualifying offense under section 5-4.5-95(b) must contain the same elements as an offense now classified as a Class 2 or greater class felony. *Id.* The court concluded that the defendant's driving-while-license-revoked conviction was enhanced from a misdemeanor offense to a Class 2 felony offense based upon defendant's prior driving-while-license-revoked convictions but that the prior convictions were only sentencing enhancements and not elements of the offense. *Id.* (citing *People v. Lucas*, 231 Ill. 2d 169, 180-81 (2008) (specifically dealing with the offense of driving while license revoked)). Thus, the elements of the offense were only those of a misdemeanor, and the driving-while-license-revoked conviction could not serve as a qualifying offense to make the defendant eligible for Class X sentencing. *Id.*

¶ 122 Defendant crafts his argument similarly. The 2003 felony case is a sentencing enhancement because the base unlawful use or possession of a weapon by a felon offense is classified as a Class 3 felony. Thus, according to defendant, just as the defendant in *Foreman*, he was ineligible for Class X sentencing. We disagree.

¶ 123 Section 24-1.1(a) of the Criminal Code of 2012 (Criminal Code) (720 ILCS 5/24-1.1(a) (West 2018)) provides:

> "It is unlawful for a person to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any weapon prohibited under Section 24-1 of this Act or any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State ***."

Section 24-1.1(e) provides:

> "Violation of this Section by a person not confined in a penal institution shall be a Class 3 felony for which the person shall be sentenced to no less than 2 years and no more than 10 years. A second or subsequent violation of this Section shall be a Class 2 felony for which the person shall be sentenced to a term of imprisonment of not less than 3 years and not more than 14 years, except as provided for in Section 5-4.5-110 of the Unified Code of Corrections. Violation of this Section by a person not confined in a penal institution who has been convicted of a forcible felony, a felony violation of Article 24 of this Code or of the Firearm Owners Identification Card Act, stalking or aggravated stalking, or a *Class 2 or greater felony under the Illinois Controlled Substances Act [(720 ILCS 570/100 et seq. (West 2018))]*, the Cannabis Control Act, or the Methamphetamine Control and Community Protection Act *is a Class 2 felony* for which the person shall be sentenced to not less than 3 years and not more than 14 years, except as provided for in Section 5-4.5-110 of the Unified Code of Corrections." (Emphases added.) *Id.* § 24-1.1(e).

¶ 124 The State used the 2003 felony case as the first case to begin to establish Class X sentencing eligibility. That first conviction was a violation of the Illinois Controlled Substances Act. The relevant question thus becomes whether the convictions in the 2004 and 2009 felony cases are sentencing enhancements as in *Foremen* or elements of the Class 2 offense of unlawful use or possession of a weapon by a felon.

¶ 125 We believe that the 2003 felony case is properly deemed an element of the Class 2 offense of unlawful use or possession of a weapon by a felon and is not simply an enhancing factor. The sentencing provision in section 24-1.1(e) deals with prior convictions as both enhancing factors to elevate the offense to Class 2 in certain circumstances and as elements necessary to commit a Class 2 offense. The passage that states "[a] second or subsequent violation of this Section shall be a Class 2 felony" (*id.*) is akin to the situation in *Foreman*. Clearly, the "second or subsequent violation" passage in section 24-1.1(e) is used to enhance a Class 3 felony to a Class 2 felony, just like the multiple driving-while-license-revoked convictions in *Foreman* were used to enhance the underlying offense from a misdemeanor to a Class 2 felony. *Foreman*, 2019 IL App (3d) 160334, ¶ 46. However, the next sentence in section 24-1.1(e) states that "[v]iolation of this Section by a person *** who has been convicted of *** a Class 2 or greater felony under the Illinois Controlled Substances Act *** is a Class 2 felony." 720 ILCS 5/24-1.1(e) (West 2018). This different predicate offense serves to differentiate this passage from the *Foreman* enhancement situation and suggests that the passage should be understood in a different sense. In other words, this passage uses the predicate drug offense as an element of a stand-alone Class 2 offense and not as an enhancing factor from the base Class 3 offense to an enhanced Class 2 offense. Thus, section 24-1.1(e) sets forth an enhanced Class 2 offense as well as a stand-alone Class 2 offense. Defendant's reliance on *Foreman* is therefore unavailing under the circumstances of this case.

¶ 126 Our conclusion is bolstered by *People v. Gonzalez*, 151 Ill. 2d 79 (1992). There, our supreme court determined that, for the offense of unlawful use or possession of a weapon by a felon, "[t]he fact that the offender must be a convicted felon is merely an element of the crime, it is not an 'enhancement' provision." *Id.* at 88. Similarly, in *People v. Powell*, 2012 IL App (1st) 102363, ¶ 17, the court noted that section 24-1.1 "differentiates only between a Class 3 conviction and a Class 2 conviction based on the nature of the accused's prior felony." As these

cases illustrate, it is the underlying felony that serves as an element describing the stand-alone Class 2 felony offense. Here, as a predicate, defendant committed a Class 1 felony drug offense and that qualified each of the later 2004 and 2009 felony cases to be prosecuted and sentenced as Class 2 felony offenses. Accordingly, the trial court did not err in sentencing defendant as a Class X offender under section 5-4.5-95(b) of the Code of Corrections.

¶ 127 III. CONCLUSION

¶ 128 For the foregoing reasons, the judgment of the circuit court of De Kalb County is affirmed.

¶ 129 Affirmed.