No. 127946

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- CARL SMITH JR., Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 5-19-0066. There on appeal from the Circuit Court of the First Judicial Circuit, Jackson County, Illinois, No. 18-CF-303. Honorable Ralph R. Bloodworth, III, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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NATURE OF THE CASE

Carl Smith, Jr. was convicted of residential burglary, after a jury trial and was sentenced to six years and six months in the Department of Corrections and three years of mandatory supervised release.

This is a direct appeal from the judgment of the court below. No issue is raised challenging the charging instrument.

ISSUES PRESENTED FOR REVIEW

I. Whether a consistent reading of Illinois Rules of Evidence 1003, 1004, and the best evidence rule necessitates a finding that the surveillance "clips" from Smith's apartment complex are inadmissible under both the duplicate exception of Rule 1003 and the other evidence exception of Rule 1004 and are barred by the safeguards of the best evidence rule.

II. Whether, pursuant to Supreme Court Rule 341(j) Smith, waived arguing that the clips lacked an adequate foundation, where he thoroughly responded to the State's foundation argument on reply.

STATUTES AND RULES INVOLVED

Illinois Rule of Evidence 1003. Admissibility of duplicates.
A duplicate is admissible to the same extent as an original unless:

(1) a genuine question is raised as to the authenticity of the original or
(2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

IL.R.EVID Rule 1003

Illinois Rule of Evidence 1004. Admissibility of other evidence of contents.
The original is not required and other evidence of the contents of a writing, recording, or photograph is admissible if-

(1) Originals Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
(2) Original Not Obtainable. No original can be obtained by any available judicial process or procedure; or
(3) Original in Possession of Opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing; or
(4) Collateral Matters. The writing, recording, or photograph is not closely related to a controlling issue.

IL.R.EVID Rule 1004

STATEMENT OF FACTS

Carl Smith was convicted of residential burglary based on taking hydrocodone pills, change, and jewelry from Michael Whittington's apartment in Carbondale (C.106). Defense counsel moved *in limine* to bar the admission of surveillance video "clips" from the apartment complex where both Smith and Whittington lived, and where this incident occurred (C.67).

At a hearing on the motion, Pieter Schmidt, who owned the building, testified that his surveillance system saved footage for 48 hours (R.410-12). Schmidt viewed footage from July 29, 2018, between 1:53 and 2:14 pm, after Whittington told him he had been robbed (R.412-416). He attempted to copy the footage onto a flash drive, but stated he was "not competent enough apparently to do that" (R.415). He and his wife recorded two clips of the footage, by holding the wife's iPhone up to the screen of the surveillance camera (R.416-418). They decided only to record these periods, because, "We would have had to stand there for 20 some minutes, 25 minutes holding a cell phone recording. So we recorded just a couple of clips that we thought were important" (R.418).

The clips were approximately 20 seconds at 1:53 pm and approximately 20 seconds at 2:14 pm, but Schmidt stated that between these clips, Smith did not enter, and "the hallway was empty for quite a period of time" (R.417, 425-6). Schmidt also acknowledged that on the original surveillance footage there were "a lot of" other people in the hallway and, prior to the 1:53 recording, Smith and his wife could be seen near Whittington's apartment door (R.427). Schmidt's wife sent the iPhone footage to Schmidt's office email, and an IT professional from his office burned the clips onto the CD that was eventually presented at trial (R.421,

424).Schmidt stated that, between the 29th and the 31st, when the original video footage was still available, no State's Attorney or police officer attempted to retrieve the video (R.422). The court denied the motion and admitted the video clips (R.446).

At Smith's jury trial, Michael Whittington testified that he was "friendly" with Carl Smith and his girlfriend "Tina," who lived down the hall (R.464-68). On July 29, 2018, Smith and Tina cleaned Whittington's apartment from 10:00 am to around noon (R.468-69). At 12:30pm or 1:00pm, Whittington went to a bar, locking his door handle lock (R.468-71). He got home after 6pm and noticed that his key was not working and the striker plate on his door was bent (R.471). Once he got inside, a container of change and some of his prescribed pain pills were missing (R.472-73). He called the police and Pieter Schmidt, because he had told the police that there may be surveillance footage of the incident, and thought Schmidt could retrieve it (R.474-78). Whittington did not know who had been in his apartment, and did not yet want to press charges (R.474). In the next couple of days, Whittington called the police again, as he noticed turquoise jewelry missing, and that his window was "off the tracks" (R.474-7). He did not notice the window earlier, as he did not normally raise it (R.476).

On cross examination, Whittington stated that he had taken hydrocodone before going to the bar, and drank beer there until he was not "okay to drive" (R.485-88). He had a past conviction for aggravated DUI (R.481). He had accused Smith and Tina of stealing from him previously but they denied it, and he let them clean again (R.486).

Officer Michael McCrary testified that, around 7 pm on July 29, 2018, he met with Whittington, who told him that his hydrocodone pills and change were

missing and his door was damaged (R.500-501). Whittington was "a little confused" but wasn't really interested in pursuing charges (R.500-501). On July 30th, he met with Whittington again when Whittington noticed some jewelry missing, and also dusted for fingerprints, knocked on doors, and met with Schmidt (R.501). He determined Smith was a suspect, and arrested him for burglary (R.502-503). He found cash and 20 hydrocodone pills on Smith on arrest, but the pills were prescribed to Smith (R.503-505). Smith was charged with residential burglary on August 1, 2018 (C.12).

McCrary stated that he knew about the possibility of surveillance footage when he met with Whittington on the 29th, but did not attempt to view it. (R.510). He also did not retrieve or view it on the 30th (R.508-509). When he decided to retrieve the surveillance, he relied on Schmidt's assurances that he would copy the video (R.511). On the 31st, Schmidt provided the iPhone clips in lieu of the footage (R.528).

On Whittington's request, Officer Ashley Noto went to Whittington's apartment on July 31st, and saw the window was off of its hinges or tracks and the screen was "busted" (R.514-15).

Pieter Schmidt testified at trial that, after getting a message from Whittington, he viewed the footage from July 29, 2018 between 1:53 to 2:14 pm and "some before that" (R.526-27). To "record" the clips, he and his wife held his wife's iPhone up to the screen (R.528). He did not record the entire relevant time period: "we thought those [clips] were the most important or pertinent things that were observed on the videotape...we would have had to hold that cell phone up to the monitor for, you know, 20 some minutes just to record nothing happening

in the hallway" (R.529-30).

The first clip, about 20 seconds starting at 1:53 pm, shows Smith walking down the hallway, standing near Whittington's doorway for about 5 seconds, and walking away (People's Exhibit 1). The second clip, about 20 seconds starting at 2:14 pm, shows Smith exiting Whittington's apartment holding what looks like a white garbage bag (St.Exhib. 1). The clips do not show Smith entering the apartment.

Smith's wife Tina Chappell testified that she and Whittington were friends and she periodically cleaned his apartment for pay, including on the date in question (R.551-5). Normally, it took 3-4 hours, and sometimes she was in his home alone (R.554-58). Whittington took pain medication for health issues, and drank alcohol after taking the pills (R.555). A homeless woman had stayed with Whittington for a period, prior to this incident (R.555-7). The woman would knock on the window to come in, and may have come in through the window (R.555-8). Whittington had previously accused Chappell of stealing a ring, but later found it (R.557-58). Alek Rose, who lived in the complex, testified that Whittington had accused him of breaking into his apartment months prior, and that Whittington was drunk during this confrontation (R.561-3).

The State recalled Pieter Schmidt, who re-watched the clips, and confirmed that Smith stood in front of Whittington's door in the 1:53 clip, and exited in the 2:14 clip with something in his hand(R.570). The State recalled Whittington, who stated that he saw Rose "jiggling" his locks, but never found his lost property (R.577-78). The homeless person who stayed with him did not enter through the window (R.579).

In close, the State's theory was that Smith entered through the window, and, as was shown on the 2:14 clip, exited through the front door (R.593). Smith was found guilty of residential burglary (R.633).The defense moved for a new trial, arguing, *inter alia*, that the video clips were unfairly prejudicial and violated the best evidence rule (R.645-6, C.102). The court denied the motion (R.650). Smith was sentenced to six years and six months in prison (R.695).

Smith's conviction was affirmed on direct appeal. *People v. Smith*, 2021 IL App (5th) 190066. Smith argued, *inter alia*, that the trial court abused its discretion by admitting the iPhone clips. The lead opinion found that the clips were admissible either as duplicates under Illinois Rule of Evidence 1003, or as other evidence under Illinois Rule of Evidence 1004. *Id*. at ¶¶54-55. The lead opinion also found that Smith's reliance on *Electric Supply Corp v. Osher* and its best evidence rule principles was "mistaken," as the decision in *Osher* came down prior to the adoption of the Illinois Rules of Evidence, and found that Smith forfeited any claim that the foundation for the clips was improperly laid. *Id*. at ¶¶52, 53. The special concurrence found that Smith did not forfeit the claim that there did not exist a proper foundation for the clips, but found that the State laid a proper foundation. *Id*. at ¶ 81. The dissent found that Smith did not forfeit the foundation argument, and found that the trial court abused its discretion in admitting the clips, as they lacked a proper foundation and because other circumstances made the admission of the clips unfair to Smith. *Id*. at ¶103.

This Court granted leave to appeal on January 26, 2022.

ARGUMENT

I. A consistent reading of Illinois Rules of Evidence 1003, 1004, and the best evidence rule necessitates a finding that the surveillance "clips" from Smith's apartment complex are inadmissible under both the duplicate exception of Rule 1003 and the other evidence exception of Rule 1004 and are barred by the safeguards of the best evidence rule.

Carl Smith's trial was unfair. The iPhone clips admitted in lieu of the original surveillance footage were unduly prejudicial and their admission was necessitated by an officer's willful inaction. The appellate court's decision upholding the admission of the clips devalues the Illinois Rules of Evidence and violates the best evidence rule. Contrary to the appellate court's finding, these clips are not duplicates under Rule 1003, because they are not an "accurate reproduction of the original" surveillance footage, and, even if this Court finds that they constitute duplicates, they are still inadmissible, as Rule 1003(2) states that duplicates are not admissible if their admission would be unfair under the circumstances. IL R EVID Rule 1003(2).

If not admissible under Rule 1003, these clips should not be reviewed under Rule 1004, where the case law indicates that Rule 1004 is not meant to allow incomplete evidence or to serve as a back door entry to admission of duplicates that had been previously found inadmissible under Rule 1003's fairness requirements. Even if analyzed under Rule 1004, the clips are inadmissible under the rule, where it provides that, to admit other evidence, the original must have been lost absent bad faith. IL R EVID Rule 1004.

The clips were also inadmissible due to their violation of the best evidence rule's requirement that the proponent must have been diligent in attempting to procure original evidence before substitute evidence is let in. This Court should thus reverse the appellate court's decision in *Smith* and find that the clips were

inadmissible under Illinois Rules of Evidence 1003 or 1004, and that they violate the still-relevant best evidence rule, entitling Smith to a new trial. Such a holding will preserve the value and purpose of the Illinois Rules of Evidence preventing the admission of unreliable, unfair evidence.

"The best evidence rule states a preference for the production of original documentary evidence when the contents of the documentary evidence are sought to be proved." *People v. Vasser*, 331 Ill.App.3d 675, 685 (2002). Under *Electric Supply Corp v. Oscher*, "the best evidence rule requires that the original writing be introduced into evidence unless the original is shown to be lost, destroyed or unavailable. In such a case, the proponent must prove the prior existence of the original, its unavailability, the authenticity of the substitute, and the proponent's own diligence in attempting to procure the original" 105 Ill.App.3d 45, 48-49 (1982).

"The current trend of the law of evidence [is] away from strict adherence to 'best evidence' foundation requirements where photocopies and other duplicates of original written instruments are involved." *People v. Bowman*, 95 Ill.App.3d 1137, 1142 (1981). "[A] duplicate of a document should be admissible in Illinois to the same extent as an original unless a genuine issue is raised as to the authenticity of the original or unless it would be unfair to admit the duplicate as an original under the circumstances present in the case where the document was offered into evidence." *Bowman*, 95 Ill.App.3d at 1143.

The rules set forth in the Federal Rules of Evidence and in *Bowman* are codified in the Illinois Rules of Evidence. To prove the contents of a recording, the original recording is required except as otherwise provided. IL R EVID Rule 1002. Although a duplicate is admissible to the same extent as an original, a duplicate is defined as "a counterpart produced by the same impression as the

original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original." IL R EVID Rule1001 (4), 1003. An otherwise admissible duplicate is inadmissible under Rule 1003 if, "in the circumstances it would be unfair to admit the duplicate in lieu of the original." IL R EVID Rule 1003. An original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if all originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or, no original can be obtained by any available judicial process or procedure; or, at a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing; or, the writing, recording, or photograph is not closely related to a controlling issue. IL R EVID Rule 1004. Admissibility of evidence is within the sound discretion of the trial judge and will not be overturned absent an abuse of discretion. *People v. Aguilar*, 265 Ill.App.3d 105, 109 (3d.Dist.1994).

A. The clips are not duplicates under Rule 1003.

The lead opinion, special concurrence, and dissent in *Smith* analyzed the clips first under Rule 1003, as potential "duplicates" of the original surveillance footage. *People v. Smith*, 2021 IL App (5th)190066 ¶ 54. The "duplicate" exception of 1003 should not apply, however, because the clips did not "accurately reproduce the original" footage, a requirement under the rule. IL R EVID Rule 1001(4).

The surveillance camera was running and creating original footage for the entire day of this incident, and, most importantly, depicted a 21-minute time period between 1:53 and 2:14 pm. At 1:53 pm, Smith walks past the exterior door of the

apartment, and at 2:14 he exits the apartment through the same door (St.Exhib.1). The time period between 1:53 and 2:14 was essential to the State's case, where the State alleged that, at some time between 1:53 and 2:14, outside of the view of the surveillance camera, Smith burglarized Michael Whittington's apartment by entering through a back window.

Had the State presented the original video, and had, as it claimed, Smith not appeared between 1:53 and 2:14, the State could have proven the burglary through the inference that, because he did not appear entering the apartment, he must have entered through the window. Further, footage from before and after the clips was essential to prove whether Whittington's account of his comings and goings on the day of the incident was accurate and whether Smith committed this offense. Had footage from the entire day been recovered, Smith could have established the time of his **authorized** entry into the apartment (remember: it is undisputed that Smith was in Whittington's apartment with authority at some point in the day) and may have been able to demonstrate an unauthorized entry by someone else entirely. But the State did not present the original video. It presented a seconds-long clip at 1:53 and another seconds-long clip at 2:14. The jury saw Smith walk past the outside of the apartment and saw him exit, and was forced to rely on the landlord's unsubstantiated claim that Smith did not enter between the two clips, and that no one else entered either between or before and after the clips (R.526-7).

Where the clips omitted possibly the most relevant time period to the commission of this offense, as well as any other potentially relevant time period throughout the day, during which any of Whittington's, Smith's or anyone else's entry could have been established, the appellate court was wrong to find that,

under the rule, the short clips "reproduced" the original, much less that they constituted an "accurate" reproduction. IL R EVID Rule 1003.

The appellate court's finding that these clips met the requirements of being a duplicate under Rule 1003, or, in other words, that they constituted an accurate reproduction of the original surveillance footage, is in conflict with the purpose of the rules of evidence. As there is no Illinois Supreme Court precedent interpreting Illinois Rule of Evidence 1003, and minimal precedent in the appellate courts, interpretations of Federal Rule 1003 are instructive here, where Illinois Rule 1003 and Federal Rule 1003 are functionally identical. *See generally Diamond Mortgage Corp of Illinois v. Armstrong*, 176 Ill.App.3d 64 (where Illinois Rules of Civil Procedure match the federal rules, and there is a lack of controlling precedent in Illinois, federal rules provide guidance); *L. Offs. of Colleen M. McLaughlin v. First Star Fin. Corp.*, 2011 IL App (1st) 101849, ¶ 30 (Illinois "adopted" Federal Rule of Evidence 1003).

The advisory committee's note on Federal Rule 1003 is illuminating as to what type of evidence adheres to the spirit of the rule: "When the only concern is with getting the words or other contents before the court with accuracy and precision, then a counterpart serves equally as well as the original if the counterpart is a product of a method which insures accuracy and genuineness" Fed. R. Evid. 1003(Advisory Committee Note). The purpose of the rule is to allow for duplicates when the duplicates serve "equally as well as the original." Indeed, the advisory committee cites a number of cases where duplicates are admitted, and in all of these cases it is clear that the duplicates are exact, complete copies and would not have shown the fact finder more or less than the original would have. *Myrick v. United States*, 332 F.2d 279 (5th Cir.1964)(no error in admitting copies of checks

instead of original in absence of "the slightest suggestion" to trial judge that the copies were incorrect); *Johns v. United States*, 323 F.2d 421 (5th Cir.1963)(trial court did not err in admitting a copy of a tape over an original where counsel for appellant conceded openly that the tape was an accurate re-recording); *Sauget v. Johnston*, 315 F.2d 816 (9th Cir.1963)(harmless error to admit of copy of agreement when opponent had original and did not on appeal claim any discrepancy).

United States v. Condry, 2021 WL 5756385 (N.D. Okla. 2021) provides guidance. In *Condry*, a federal district court found that a "video of a video" was admissible in lieu of the surveillance video itself under Federal Rule 1003. *Id*. at *2. The circumstances of *Condry* show the correct utilization of the 1003 exception. In *Condry*, the defendant consented to investigating officers downloading incriminating videos from his phone. *Condry*, 2021 WL 5756385, at *1.When the officers were unable to complete the download due to technological issues, the officers used a police-issued cell phone to record the relevant videos as they played on the defendant's phone. *Id*. The *Condry* court held that the government met its burden of showing that the duplicate recording "accurately reproduced the original" under Federal Rule 1003, where, in the recording, one can clearly see defendant's entire phone, **the entirety of the videos**, and clearly hear the audio…" and where the rerecording could be authenticated by the officers who made it as well as the complainant, who was pictured in the video. *Id*. at *2 (emphasis added).

This is greatly at variance with the clips admitted here. It is clear that the government in *Condry* was utilizing the Rule 1003 exception to admit evidence that would recreate the original evidence that it had tried and failed to obtain. The clips in Smith's case were not created in an attempt to duplicate the original. Rather, the clips only depicted tiny portions of the original pieces of evidence

that would be helpful solely to the State's case. Though the State could have attempted to recreate the surveillance by recording a complete, accurate copy and authenticating it, it did not do so. As noted by Justice Cates' dissent in *Smith*, the process by which the clips made their way from Schmidt's wife's iPhone to a CD was not explained by Schmidt and was performed by an unknown, non-testifying IT person, which "eviscerates any reliability pertaining to the creation of the video clips and chain of custody." *Smith*, 5190066, ¶128. And, unlike the officer in *Condry*, "Schmidt was not a trained investigator, and his decisions regarding what content to record and what to omit from the original surveillance video footage raise questions about the reliability and trustworthiness of these clips and whether they accurately portray the entirety of what occurred..." *Id*. at ¶ 129.

Here, where the original surveillance footage would have shown the jury all that it needed to decide on Smith's conviction, the clips were incomplete and unfair. If Smith was shown entering through the door of the apartment between 1:53pm and 2:14pm, the State could not secure a conviction based on the theory that he entered through the window. Footage from before and after the clips would have told the jury whether Whittington exited his apartment when he testified to having done so, whether and how Smith's **undisputed authorized** entry occurred, and whether anyone else entered the apartment with or without authority throughout the day.

The purported "duplicate" here omitted the entire relevant time period where the crime was alleged to have been committed, and omitted time periods wherein Whittington's testimony could have been corroborated or disproved or another perpetrator could have been revealed. It is in no way similar to a copy of a check

instead of an original check, a conceded accurate copy of an original tape, or a copy of an agreement with no discrepancy between it and the original agreement. *See Myrick,* 332 F.2d at 282; *Johns*, 323 F.2d at 421; *Sauget*, 315 F.2d at 818. And it is certainly not similar to the duplicate in *Condry*, where the court emphasized that the entirety of the video was recorded, and also, the video was made by law enforcement officers on police issued cell phones with the defendant's consent and in the defendant's presence. *Condry*, 2021 WL 5756385, at *2. The clips in Smith's case certainly do not serve "equally as well" as the original, where they did not tell the jury what it needed to know in terms of Smith's entry, and the original video unquestionably would have.

The lower court's ruling that these clips are duplicates encourages the admission of unreliable evidence. Under the appellate court's understanding of "duplicate," the State would be allowed to admit two non-consecutive pages of a lengthy police report, or medical record, or one square centimeter of a crime scene photo, under the reasoning that these pieces of evidence duplicated the original. Such a result directly conflicts with the purpose of the Rules of Evidence and invites the admission of "duplicate" evidence that is cut, altered, and edited in ways that have unfairly suggestive value for the party seeking to admit it. This Court should reverse the finding in *Smith* that the clips are Rule 1003 duplicates, thereby instructing the lower courts that, where proposed evidence is incomplete, non consecutive, and prejudicial, it is not admissible as a duplicate under the Rule.

B. *Even if this court finds that the clips are duplicates, they are inadmissible under Rule 1003, because their admission would be unfair in the circumstances.*

The dissent in this case found that the admitted clips were duplicates, but correctly found that, because the circumstances of their admission were unfair,

they should not have been admitted. *Smith*, 2021 IL App (5th) 190066 at ¶ 54(Cates, J., dissenting). ¶ 131; *See* IL R EVID Rule 1003(2) (duplicate is inadmissible if, in the circumstances, it would be unfair to admit the duplicate in lieu of the original). Consistent with the dissenting opinion, even if this Court finds that the clips are duplicates, this Court should still find that they are inadmissible under Rule 1003 because in these circumstances, admission of the clips would be unfair. IL R. EVID. Rule 1003(2).

The text of Rule 1003(2) by itself, is illuminating as to the spirit of the rules of evidence. By preventing admission of evidence if "in the circumstances it would be unfair," it is clear that rules want evidence to be reliable, fair, and complete. The clips admitted against Smith do not meet these criteria. As discussed, the clips omitted the most important information about the case, they were recorded by a non-affiliated admittedly incompetent person, and their existence was necessitated by the willful inaction of law enforcement. In these circumstances, it would be unfair to admit the clips as duplicates.

The only evidence of Smith's comings and goings from Whittington's apartment shown in the clips are 20 seconds at 1:53 pm where Smith stands near Whittington's door, and 20 seconds at 2:14 pm where Smith exits it. As explained (See Arg. I(a)), if the full footage was shown, it would have depicted all of the entries and exits by Smith and Whittington (and anyone else) on the day of the incident. Without the full footage, however, circumstantial evidence simply shows that Smith was at one time in the apartment, and left out the front door. But the exclusions invited the jury to draw negative inferences that the entire video could have foreclosed. This is unfair.

In finding that the clips were duplicates but "under the circumstances

presented in this case, the admission of the video clips was unfair to the defendant," the dissent in *Smith* identified factors contributing to the unfairness. *People v. Smith*, 2021 IL App (5th) 190066 ¶ 131 (Cates, J., dissenting). Namely, the landlord did not know how to utilize his surveillance system to download footage, and neither he nor the investigating officer took the time to create a complete copy. *Id*. The resultant clips were "snippets in time and were selected by a person who had no apparent training in criminal investigation." *Id*.

The dissent also considered the factors relevant to whether there was an adequate foundation laid for the clips in conjunction with best evidence principles and the Illinois Rules of Evidence, finding, essentially, that the inadequate foundation for the clips contributed to its ultimate finding that the clips were unfair in the circumstances under Rule 1003. *Id*. at ¶126-129. Specifically, the dissent found that the foundation was lacking where the landlord, Schmidt, had recently purchased the surveillance system and testified that he was not competent to operate it, Schmidt's wife recorded the clips instead of the police or an IT professional, there was no evidence that the date and time stamp was correct, the facts were "muddled" regarding the chain of custody, and surrounding transfer of the clips to a CD by an unidentified IT person who worked for Schmidt and did not testify at trial, and, importantly, "there was also inconsistent testimony indicating that footage in the original surveillance video revealed the presence of another woman, along with several people up and down the hallway. None of these people were captured in the two clips..." *Id*. The dissent's final comments here are apt:

> Ultimately, I would further note that the two video clips were not derived from simply "editing" a lengthy video to exclude unimportant and irrelevant material. Rather, because Schmidt was not trained or experienced in

> operating his system, he was unable to export and preserve the complete surveillance footage. The two video clips were made using an iPhone camera and there was no evidence as to the capability of that camera. In the absence of a reliable foundation, I find that this evidence was irreparably tainted and inadmissible, and that the trial court erred in admitting it. *Id*. at ¶130.

Indeed, the circumstances surrounding the gathering of the clips combined with, most importantly, the fact that the "editing" process resulted in the exclusion of relevant, important material, rendered the clips fundamentally unfair and should have barred their admission.

Relevant Illinois case law interpreting Rule 1003, while sparse, confirms that this rule is not meant to allow admission of evidence as a "duplicate" under questionable circumstances like what occurred here. Rather, in cases interpreting the rule, evidence is admitted as a duplicate where the opposing party does not claim that the copy was altered or inaccurate. *See Parkway Bank & Tr. Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 34 (Rule 1003 supports admissibility of copy of note where defendants "provide no explanation as to why the original note was so necessary when they had a copy of it. They do not contend that they even suspect that the note is a forgery, that its existence is a mystery to them, or that the copy was altered from the original in some way"); *L. Offs. of Colleen M. McLaughlin v. First Star Fin. Corp.*, 2011 IL App (1st) 101849, ¶ 31 (evidence admissible under Rule 1003 where defendants raised no issue as to the authenticity of the original settlement agreement and where they do not claim that the photocopy was not an accurate duplicate of the original agreement). Based on these cases, it is clear that the purpose of Rule 1003 is to admit copies of evidence in cases where there is no detriment to either party in doing so. Indeed, it would not prejudice a party to have an accurate, complete photocopy of a settlement agreement or promissory

note. Thus, there would be no reason for Rule 1003 to prohibit it. And indeed, in this case, had the investigating officer simply recorded the complete footage from the surveillance camera on to a DVD (which he was indisputably capable of doing), or even had Schmidt record the entire video on his iPhone and provided a foundation for his process, Rule 1003 would not have been violated. But this is not what happened. And here, where Smith contests the accuracy of the original and has, throughout the proceedings, explained why it is unfair to admit the clips in lieu of the duplicate (both procedurally because the State should not be allowed to benefit from it's agent's destruction of evidence and substantively because the clips prejudiced Smith more than the original would have) Rule 1003 should not allow for admission of the evidence.

C. If this Court finds that the clips are inadmissible under Rule 1003, they should not move on to a Rule 1004 analysis.

The evidence in this case was considered, first and foremost, as a potential duplicate. Thus, the rule determining its admissibility is Rule 1003. Both the special concurrence and the dissent in *Smith* recognized this, with the special concurrence finding that the clips were admissible duplicates under 1003(2) and the dissent finding that they were inadmissible due to their violation of 1003(2)'s fairness requirement. *People v. Smith* 2021 IL 190066, ¶ ¶ 100, 131. The lead opinion, however, found that the clips were duplicates under Rule 1003 or, if not, they were admissible as other evidence under Rule 1004. *Id.* at ¶ 55.This finding devalues the Rules of Evidence and the best evidence rule to the point of superfluity. Essentially, the lead opinion renders Rule 1004 as a back-door means of admitting questionable evidence: if evidence is inadmissible for being an inaccurate reproduction under 1003(1) or too unfair under Rule 1003(2), it can be let in as

"other evidence" under Rule 1004.

Following the lead opinion's method of analysis allowing unfair duplicates to be considered as possible "other evidence" under 1004--would invalidate Rule 1003 entirely. For virtually any evidence, a party could bypass the safeguards the rules are meant to provide, and rely on Rule 1004 to admit any inaccurate, unfair evidence that it tried, and failed, to admit as a duplicate. Contrary to the lead opinion's holding, the Rule 1004 other evidence exception should not be utilized to admit unreliable copies, but should be utilized to admit just that other evidence. Indeed, other courts have held that parties can utilize the Rule 1004 exception to admit other forms of evidence testimony, transcripts, reconstructions when original footage or audio has been destroyed. This is a correct, fair application of Rule 1004. Because the evidence was not an accurate reproduction of the original or because its admission was unfair under the circumstances, Rule 1003 should have barred it. And the analysis should have ended there. A finding that evidence should not be admitted because it is not an accurate reproduction of the original under Rule 1003(1) or too unfair under Rule 1003(2), but can still be admitted under Rule 1004, allows parties to use Rule 1004 as a method of introducing unfair evidence.

Many federal courts have provided interpretations of Rule 1004 that differ from that in *Smith* and preserve the integrity of the rule. As discussed, there is a dearth of Illinois case law interpreting 1004, meaning "it is reasonable to look to federal cases," where the Illinois and Federal Rules are "practically identical." *People v. Smith*, 2021 IL App (5th) 190066 ¶ 55, *citing Diamond Mortgage Corp of Illinois,* 176 Ill.App.3d at 71. Such a review confirms that the purpose of Rule 1004 is not to admit inaccurate or incomplete copies. Instead, Rule 1004 normally

applies when a party attempts to admit testimony regarding the contents of documentary evidence that has been destroyed . In this context, courts have found that the evidence is admissible if the original was destroyed through no fault of the proponent and if the substitute evidence is reliable. *See* FED R EVID Rule 403("although relevant, evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice…"); IL R EVID Rule 403 (same). Analyzing Smith's case in keeping with this federal precedent reveals that Rule1004 is not the proper context for the analysis of the admissibility of the clips. Indeed, if evidence that is deemed an unfair or inaccurate copy under 1003 can simply be let in as other evidence under Rule 1004, there would be no reason for the requirements under Rule 1003 that a duplicate must be an accurate reproduction and must be fair.

In the typical Federal Rule 1004 case, the proponent is arguing that, under Rule 1004, testimony regarding the contents of a writing or recording is admissible in lieu of the destroyed writing or recording itself. *See Hale v. Mayor and City Council of Baltimore City*, 2022 WL 374512 (N.D. Md. 2022) (plaintiff allowed to testify about the contents of text messages under 1004 where she provided an innocent motivation for their destruction). At the very least, the rule normally

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Federal district courts routinely prejudge the admissibility of law enforcement testimony regarding missing surveillance footage. While the holdings in these cases lack precedential value, they are nonetheless useful to illustrate the common, appropriate context in which Rule 1004 analyses typically appear. *See US v. Ortiz,* 2013 WL 101727 (footage of a drug deal destroyed, officer allowed to testify about what he observed on the footage under Rule 1004); *Stocchi v Kmart,* 1997 WL 611619 (officer allowed to testify about the contents of a destroyed tape); *US v. Brown,* 2009 WL 2338112 (Government seeks to have DEA agents testify about a destroyed surveillance tape. Court finds that testimony would be admissible under Rule 1004, but bars evidence under Rule 403 due to unreliability of the testimony in the circumstances).

deals with the loss of an original, and the proponent attempting to admit another type of evidence aside from the original itself to prove the original's contents. *US Fidelity and Guaranty Company v. Ulbricht,* 2022 WL 110457 (where insurance policies are "lost or destroyed, and not by the proponent acting in bad faith" under 1004, defendants were allowed to attempt reconstruction of the missing policies); *United States v. Nugent*, 300 F. Supp. 3d 932 (E.D. Ky. 2018)("account transcripts" are admissible as evidence of an installment agreement under Rule 1004 where the original agreement was destroyed and the transcripts constituted "reliable" secondary evidence").

These Federal Rule 1004 cases present the scenario for which the Rule exists: the evidence is not an original under Rule 1002, and there exists no duplicate under Rule 1003, so the State is allowed, under Rule 1004, to introduce other evidence of the contents of the prior-existing evidence to attempt to re-create the evidence that was destroyed. Here, 1004 does not apply, where the State willfully missed its known opportunity to duplicate the entire surveillance footage, and did not attempt to recreate the original, but rather provided a more prejudicial, unfair purported duplicate.

Hale v. Mayor and City Council of Baltimore City, 2022 WL 374512 demonstrates the appropriate context for a Rule 1004 analysis. In this case, the plaintiff alleged harassment by a coworker, and some of the harassment occurred via text message. *Id.* *2. Because the texts had been destroyed, however, the plaintiff sought to **testify** regarding the contents of the text conversations. *Id*. The court denied the defense's motion for summary judgment on the matter, finding that, under Federal Rule1004, "Testimonial evidence may be admitted to prove the contents of a writing where the originals are lost or destroyed by a proponent not

acting in bad faith" and further finding that, where the plaintiff gave non-culpable motivations for her destruction of the texts and the defendants did not refute the motives, the plaintiff made a *prima facie* case for admissibility of testimony on the contents of the texts. *Id*. at *8.

This situation differs from the lead opinion's use of Rule 1004 here. In *Hale*, the defendant attempted to testify to the contents of the entire text conversation, thereby recreating the original messages. Here, by contrast, the State only produced clips of portions of the original footage, and these portions happened to assist the State's case. The clips do not represent the State's attempt to fairly recreate the original evidence, but represent a cherry-picking of only inculpatory evidence. Had the *Hale* plaintiff sought to admit a screenshot of text messages with pivotal messages blacked out and picturing only the messages helpful to her own case, and had the messages that were advanced been cherry-picked by an unaffiliated individual who was capable of, but decided not to, provide the complete text conversation, this would be synonymous with what happened here. Clearly, such evidence would fail under the federal case law's conception of Rule 1004, where it is consistently held that secondary evidence must be trustworthy. *See e.g. People v. Maxwell*, 383 F.2d 437, 442 (2d Cir.1967)(best evidence rule allows secondary evidence that "does not…appear to be untrustworthy); *U.S. v. Ross*, 33 F.3d 1507, 1514 (transcript admissible in lieu of recording under Rule 1004 where drafter of transcript testified to its accuracy).

Here, the State provided a purported duplicate, and the lead opinion found that, even though it was incomplete and unfair, it was admissible under Rule 1003, but even if it was not admissible under Rule 1003, the State could advance it under Rule 1004. *People v. Smith*, 2021 IL App (5th) 190066 ¶ 55. This is unfair

and represents a departure from sound precedent. *See e.g. Maxwell*, 383 F.2d at 442 (secondary evidence allowed where it "does not…appear to be untrustworthy").

Consider the lead opinion's reasoning in *Smith*: for a duplicate to be admissible it must accurately reproduce the original, and the circumstances must be fair. But if the purported duplicate does **not** accurately reproduce the original, or if the circumstances are **unfair**, this inaccurate or unfair reproduction can still come in under 1004. *People v. Smith*, 2021 IL App (5th) 190066 ¶ 55. This cannot be how the rules function together. Rule 1003 is rendered impotent by a holding that any evidence that fails its tests is still admissible under Rule 1004.

In many of the above cited cases, witnesses are allowed to testify regarding the contents of evidence that has been destroyed. As a threshold matter, testimony from the officer or Schmidt regarding the contents of the lost surveillance would certainly have carried less evidentiary strength in front of the jury than the clips did. *See Hale*, 2022 WL 374512 *8 (Noting that plaintiff testifying as to the content of destroyed text messages "may face an uphill battle to convince a jury as to the existence of the text messages, their content, and the effect they had on her psychological well-being."). Even so, the above cases beg the question: In the absence of the original surveillance footage, should the officer or landlord in Smith have even been allowed to testify about its contents? The answer to this question is no, because of Rule 403. IL R EVID Rule 403 ("although relevant, evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice…").

*State v. Miranda,*147 Hawai'i 171 (2020) is instructive. In *Miranda*, a surveillance video was destroyed, and, though officers attempted to get a copy of the video, they were unsuccessful, and there was no evidence that the original

was destroyed in bad faith. *Id.* at 184. The Supreme Court of Hawaii held that, under Hawaii Rule of Evidence 1004 (which matches Illinois rule 1004), the officers' testimony as to what he viewed on the recording "satisfied the criteria of admission..." *Id*.

The inquiry did not end there, however. While admissible under Rule 1004, the court held that the testimony might still be barred by Hawaii Rule of Evidence 403 (also functionally identical to Illinois' Rule of Evidence 403). Haw. Rev. Stat. Ann. § 626-1, Rule 403 ("although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice…").The *Miranda* court found that, under Rule 403, because the officer would be testifying about the contents of a video he viewed once, two years prior, was "rushed" when watching the video, and did not have pausing, fast forwarding, rewinding, or stopping abilities, any probative value of the officer's testimony may have been outweighed by the prejudicial effect. *Id.* at 185. Accordingly, because the lower court did not weigh the evidence under Rule 403, remand was necessary. *Id*.

Here, following other courts' guidance about evaluating Rule 1004 problems, the Rule would come into play in a hypothetical situation where the State lost the original surveillance and sought to instead introduce testimony about the contents of the clips as Rule 1004 "other evidence." In such a situation, it is clear that Rule 403 would bar the evidence, where testimony surrounding the surveillance footage would be far more prejudicial than probative. IL R EVID Rule 403 (Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice). Here, either the landlord or the investigating officer being allowed to testify would be severely unfair. Preliminarily, whereas in *Miranda*, the officer had at least viewed the footage (albeit a year before the

trial), there is absolutely no evidence in this case that officer McCrary **ever** viewed the original footage. Obviously, he could not have testified about footage he had not seen. Meanwhile Schmidt, as previously noted, was an admittedly incompetent operator of his surveillance equipment, meaning his testimony regarding the contents of the video would have to be viewed in the context of his not knowing how to use it whatsoever, decreasing the probative value. Moreover, as the dissent noted, Schmidt provided inconsistent testimony regarding whether there were other people present in the original footage, meaning that any evidentiary value of Schmidt's testimony would have been undercut by the fact that he was apparently not able to clearly discuss the contents of the footage. *Smith*, 2020 IL 190066 at ¶ 129 (Cates, J., dissenting). Thus, even were this Court to find that the clips could not be admitted, but "other evidence" of the surveillance footage could be possibly offered by way of testimony, Rule 403 should bar testimony about the footage in this case, due to the fact that McCrary never saw the original, and the prejudicial effect of Schmidt's testimony would have outweighed any probative value.

In sum, as found by the dissent and special concurrence, the clips do not warrant review under Rule 1004. Moreover, were testimony regarding contents of the surveillance advanced under Rule 1004 and analyzed under Rule 403, such testimony would be inadmissible as unduly prejudicial.

D. The best evidence rule still is applicable in Illinois and its principles favor inadmissibility of the clips.

Further supporting the inadmissibility of the clips is the best evidence rule. This rule, like Illinois Rules of Evidence 1001-1004, is focused on fairness and is premised on the notion that original evidence should be introduced where possible. The best evidence rule states that a substitute is admissible if the original is lost,

destroyed or unavailable, but if so, the proponent is responsible for showing its diligence in attempting to procure the original. *Electric Supply Co. v. Oscher*, 105 Ill.App.3d 45, 48-49 (1982). Here the State's unexcused failure to retrieve available evidence, combined with the unreliability and unfairness of the resulting clips, created a best evidence rule violation, and the consequence should have been that the prejudicial clips were not admitted.

Here, the appellate court's lead opinion found that the best evidence rule was inapplicable after the passage of the Illinois Rules of Evidence and further found that the best evidence rule's emphasis on whether the proponent was diligent in attempting to procure the original conflicts with Rule 1004's bad faith requirement. *Smith*, 2020 IL 190066 at ¶ 53. Contrary to these findings, however, the best evidence rule is still cited and its principles are still important to answering evidence admissibility questions. The best evidence rule helps to explain why, under the Illinois Rules of Evidence, these clips are inadmissible.

A commonly cited case setting out the best evidence rule is *Electric Supply Corp. v. Oscher*, 105 Ill.App.3d 45, 48-49 (1982). Under *Oscher*, "The best evidence rule requires that the original writing be introduced into evidence unless the original is shown to be lost, destroyed or unavailable. In such a case, the proponent must prove the prior existence of the original, its unavailability, the authenticity of the substitute, and the proponent's own diligence in attempting to procure the original." 105 Ill.App.3d 45, 48-49 (1982). In *Oscher*, the court analyzed a best evidence question stemming from a plaintiff's attempt to present copies of documents in lieu of the originals. The court in *Oscher* held that this secondary evidence was inadmissible because the original documents were in the hands of a third party and the plaintiff made no attempt to retrieve them from that party. *Id.* at 49-50.

Thus, "diligence in attempting to procure the original" under the best evidence rule was not satisfied and the substitute evidence was not admitted. *Id.* at 49. Clearly, under *Oscher*, where Officer McCrary made no attempt to collect the original surveillance footage even though he knew it was available, he was not diligent in attempting to procure the original evidence and a best evidence rule violation occurred.

Smith made this best-evidence-rule-violation argument below and the lead opinion in *Smith* found that reliance upon the principles announced in *Oscher* was "mistaken," because, after the 2010 enactment of the Illinois Rules of Evidence, the Rules, rather than *Oscher,* "comprise the proper guiding principles for this issue." *People v. Smith*, 2021 IL 5190066 ¶ 53. This view is demonstrably incorrect. The best evidence rule is still prevalent in Illinois case law. *See e.g. In Re Marriage of Greenberg*, 2021 IL App (1st) 210325-U, ¶ 16, 27 (proponent most prove his own diligence in attempting to procure the original before introducing substitute evidence under Rule 1004); *People v. Grafton*, 2017 IL App (1st) 14-2566-U, ¶ 78-80[2] (citing *Oscher* for the rule that the State must prove diligence in attempting to procure the original, and upholding the admission of substitute video evidence where the officer diligently attempted to make a full copy immediately on finding that the original video was malfunctioning). Both *Greenberg* and *Grafton* were decided after the enactment of the Illinois Rules of Evidence, yet they cited *Oscher,* and relied upon its rules. These cases undercut the lead opinion's assertion that the best evidence rule is no longer relevant post-Illinois Rules of Evidence. It is

[2] While *Grafton* is an unpublished case, it is not being cited for the precedential value of its holding. Rather, the case simply demonstrates that *Oscher* was being cited and its principles were being used to analyze evidentiary admissibility questions in Illinois in 2017, far past the enactment of the IRE.

clear that Illinois courts continue to look at whether the proponent was diligent in attempting to procure the original in determining evidence's admissibility.

Federal cases that were decided after the enactment of the equivalent Federal Rules of Evidence also cite the best evidence rule and rely upon its principles. In enacting its rules of evidence in 2010, Illinois adopted the Federal Rules of Evidence, and each rule at issue in this case matches the corresponding Federal Rule. *See generally, L. Offs. of Colleen M. McLaughlin v. First Star Fin. Corp.*, 2011 IL App (1st) 101849, ¶ 30 ("this court long ago adopted" Federal Rule of Evidence 1003). The lead opinion said that Smith was wrong to rely on *Oscher* because *Oscher* did not take into account the evidence Rules, but federal best evidence cases that take into account the Federal Evidence Rules still say the same thing that *Oscher* says: to admit substitute evidence, that evidence must be trustworthy and the original must have been lost through no fault of the proponent. Indeed, federal cases do not identify a conflict between the best evidence rule and the Federal Rules of Evidence: Rules 1001-1004 are a codification of the best evidence rule itself. *See United States v. Chavez*, 975 F.3d 1178, 1200 (10th Cir. 2020).

In *United States v. Chavez*, 975 F.3d 1178 (10th Cir. 2020), the government sought to admit English-language transcripts of Spanish-language audio recordings of a drug deal, in lieu of the recordings. The court in *Chavez* found that while Rule 1003 and 1004 do provide exceptions to the common law best evidence rule, the exceptions did not apply in the case, because the government had the ability to, but failed to, admit the original recordings. *Id* at 1200. This conceptualization of the best evidence rule is apt. Rule 1002 codified the best evidence rule, with its mandate that an original writing, recording, or photograph is required in order

to prove its content unless the rules or a federal statute provide otherwise. *Id*. Rules 1003 and 1004 provide exceptions to Rule 1002, but the purpose and safeguards of the common law best evidence rule still apply. The *Chavez* court extensively discussed the best evidence rule, noting that "the animating purpose of this rule is to 'promote accurate fact-finding" and explaining:

> The best-evidence rule guards against fraud. In the absence of the original of a given source, witnesses may be tempted to "lie with impunity about the original's contents because the risk of detection is small" a temptation that the best-evidence rule removes by requiring the originals to be produced. 31 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 7162, Westlaw (database updated Apr. 2020). § 7182; see *United States v. Howard*, 953 F.2d 610, 613 (11th Cir. 1992) (per curiam) ("The best evidence rule presupposes the existence at one time of a decipherable original, and is intended to prevent fraud in proving the contents of documents and/or recordings."). Finally, **even when there is no human error or outright fraud, secondary evidence "may leave out crucial details the omission of which may be difficult to discern"; that is, it raises the risk of "incomplete[ness]**." 31 WRIGHT ET AL., supra, § 7182.
> *Id*. at 1194-95. (Emphasis added).

Contrary to the appellate court's assertion in *Smith*, the best evidence rule and its safeguards are still very important after the enactment of the Rules of Evidence. *See also United States v. Maxwell*, 383 F.2d 437, 442 (2d Cir. 1967)(analyzing the admissibility of substitute evidence and finding, "as far as the best evidence rule is concerned, a well recognized exception is that secondary evidence may be admitted in lieu of the original provided the original has not been lost, destroyed or become unavailable through the fault of the proponent and provided the copy does not otherwise appear to be untrustworthy"). While Rule 1003 and 1004 allow for limited admissibility of non-originals, federal courts still comply with best evidence principles: for secondary evidence to be admitted, it should be accurate, lacking in fraud, trustworthy, and the original should not have been destroyed through the fault of the proponent. As explained in *Chavez*, these principles prevent

fraud and the omission of crucial details.

The lead opinion's mistake here was that, unlike the courts in *Maxwell* and *Chavez*, it upheld the admission of the clips in this case without analyzing their fairness or keeping best evidence principles in mind. Rather than determining whether the evidence it sought to allow under Rule 1003 or 1004 would also be admissible under the best evidence rule, the opinion mistakenly found that Rules 1003 and 1004 somehow invalidate the best evidence rule. This mistake lead to a ruling that the clips were admissible under 1003 or 1004, overlooking the fact that they were severely unfair to Smith, and that the circumstances necessitating their admission over the original was decidedly the fault of the State. The lead opinion's mistake here demonstrates the need for the best evidence rule. Without utilizing its principles in conjunction with the Rules of Evidence, there is a danger that unfair evidence will be admitted. Smith suffered from the actualization of this danger. The lead opinion was wrong to find that the clips were admissible under Rules 1003 or 1004. And even if 1003 or 1004 could have allowed them--though they could not have (*See* Arg. I a,b,e)--the unfairness of the clips and the State's culpability in failing to procure the original surveillance footage bars them under the best evidence rule.

E. The diligence factor under the best evidence rule does not conflict with Rule 1004's bad faith requirement.

To support its finding that the best evidence rule is no longer applicable in Illinois, the lead opinion points to a committee comment on Rule 1004 which states, "It is no longer necessary to show that reasonable efforts were employed beyond available judicial process or procedure to obtain an original possessed by a third party" and asserts that this comment means that "proponents need

not prove their diligence in obtaining the original before destruction to admit a duplicate or other evidence of the contents of the recording." *Smith,* 2021 IL (5th) 190066 ¶ 54, *citing* Ill.R.Evid. 1004(1), Committee Comment. In fully reviewing the Illinois Rules of Evidence, the best evidence rule, and the applicable case law, it is clear that this view represents a misunderstanding or misapplication of the committee comment.

First of all, it is not at all clear that the comment is applicable to Smith's case. The "possessed by a third party" and "judicial process or procedure" aspects of the comment indicate a situation wherein a party is attempting to subpoena or otherwise obtain documents from a party unwilling to provide them. *See e.g. Elliot v. Cartagena,* 2022 WL 44749 *4-6 (S.D.N.Y. 2022) (Proponent's efforts to contact the party who possessed relevant document via subpoenas and several service attempts indicated that the document was "lost" and "beyond the reach of the court" under 1004(a) and (b)). Here, the original surveillance, while in the possession of Schmidt, was available to the officer from the commencement of the investigation. There is no indication whatsoever that the evidence not being captured was due to anything other than the officer simply choosing not to capture it. Indeed, it would not seem that an officer simply asking a willing, cooperating landlord if he could obtain an available surveillance tape from him, would constitute means "beyond available judicial process or procedure."

Next, it is clear under Rule 1004 that whether the government was at fault for the destruction of original evidence is relevant to the admissibility of the substitute. *United States v. Ross*, 33 F.3d 1597, 1513-14 (11th Cir. 1994)("All of Rule 1004s' requirements are met because the transcript constituted 'other evidence' of 'the contents of…recording[s]' that had been 'lost or destroyed' through no fault

of the government); *United States v. Maxwell*, 383 F.2d 437, 442 (2d Cir. 1967) ("[A]s far as the best evidence rule is concerned, a well recognized exception is that secondary evidence may be admitted in lieu of the original provided the original has not been lost, destroyed or become unavailable through the fault of the proponent and provided the copy does not otherwise appear to be untrustworthy")(internal citations omitted). Relatedly, whether the offering party made a diligent search for the original is still relevant to whether the substitute is unfair. *See Elliot* 2022 WL 44749 at *4-6 (plaintiffs challenged admissibility of duplicate evidence, but court found it admissible where the defendant made an exhaustive, months-long search for the original). These cases show that one indicia of whether the proponent was at fault for the destruction of the original is whether they attempted to find it. A showing that a party was diligent in attempting to procure a lost original undercuts the notion that the party manufactured its destruction. Conversely, a party who did nothing upon realizing a document was lost is more subject to scrutiny as to whether they wanted the loss to occur or even created the circumstances leading to the loss.

Further, federal cases have specifically held that whether an attempt to procure the original document was made is relevant to bad faith. *See Eckman v. Encompass Home & Auto Ins. Co.* 2021 WL 3271051, at *6-7(E.D.Pa.2021) (the burden of proving that the originals were not lost or destroyed in bad faith can be met by presenting evidence of a diligent but unsuccessful search for the document). These cases focus on the fault of the government in the original's destruction and whether there was a subsequent attempt to recover it. This inquiry is reflective of the best evidence rule's inquiry as to whether the government attempted to procure the original.

In undergoing a Rule 1004 bad faith analysis, the *Smith* court should have considered whether the State attempted to obtain the original surveillance (it did not) and whether it was the State's fault that the original was destroyed (it was). The sequence of events leading to the production and introduction of the clips in this case begs the question: When an officer's willful failure to preserve original evidence results in substitute evidence that is less accurate but also potentially better for the State than the original evidence would have been, should the State be allowed to use this evidence to secure a serious conviction? The answer to this question, for policy reasons, is no. This is why the best evidence rule exists to ensure that the most reliable evidence possible is admitted. The evidence in *Smith* does not pass this test. Upholding the admission of the clips in this case would encourage these type of "accidents" by investigating officers, due to the promise that they might result in favorable evidence being utilizable by the State. *See Chavez*, 976 F.3d 1178, 1194-5(The best evidence rule guards against "witnesses [who] may be tempted to lie with impunity about the original's contents" and prevents the omission of crucial details). Affirming the appellate court in *Smith* would erase the safeguards that the Rules of Evidence and the best evidence rule are together meant to provide. Contrary to the appellate court's holding in *Smith*, the best evidence rule and the Illinois Rules of Evidence share a consistent goal.

F. Even if this Court chooses to analyze the admissibility of the clips under Rule 1004, their admission should be barred because the destruction of the original was in bad faith.

To summarize the arguments above, the clips violate the best evidence rule and their inadmissibility under the Rule 1003 duplicate exception must necessarily preclude them from Rule 1004 analysis. This understanding of the rules allows

them to work in conjunction to provide necessary safeguards for the admission of only reliable evidence. However, even finding, as the appellate court's lead opinion did here, that if evidence fails the tests for admissibility as a duplicate, it is allowed to move on and be analyzed as "other evidence," does not mean that the clips were admissible in this case. And even finding, as the appellate court's lead opinion here did, that Rule 1004's bad faith requirement invalidates the diligence requirement of the best evidence rule, does not mean the clips were admissible in this case. Rather, if this Court finds that this evidence can be analyzed under Rule 1004, and that only bad faith, not diligence in attempting to procure the original, can bar substitute evidence, the clips are still inadmissible under Rule1004 because the circumstances evidence bad faith. IL R EVID Rule 1004.

The court below acknowledged that the proper interpretation of Rule 1004 was an issue of first impression, stating: "We note that there is no controlling precedent to guide us in determining whether the police's actions in this case amount to bad faith under 1004(1)" *Smith*, 2020 IL (5th) 190066 at ¶ 55. The appellate court accordingly proceeded to analyze the evidence's admissibility utilizing federal case law, noting that Illinois Rule of Evidence 1004 mirrors Federal Rule of Evidence 1004. The appellate court is correct that federal case law is instructive. However, a review of cases interpreting Federal Rule of Evidence 1004 demonstrates that Rule 1004 does not allow the clips. Federal cases focus on the fault of the government in the original evidence's destruction, whether the government knew about the exculpatory value of the evidence, and whether the government made an attempt to locate the missing evidence on the destruction of the original. None of these factors favor admission in Smith's case. And above all else, Rule 1004 cases

demonstrate that, even in undergoing a bad faith analysis, relevant to whether evidence can be admitted under Rule 1004 is the character of the evidence itself only when the substitute evidence is reliable should it be admitted.

i. The State was at fault for the destruction of the original.

The original footage was available from July 29th, when this offense allegedly occurred, through the 31st, and even though investigating Officer McCrary knew about the surveillance on the 29th, and even though he visited the complex again on the 30th where the footage was still available, McCrary made the conscious decision not to record the footage, and there is no evidence that he even watched it (R.508-511).Once the State let the footage the only conclusive evidence of Smith's alleged commission of the Class X felony of residential burglary record over itself, the State charged Smith with residential burglary just a day later (R.500-511, C.12). Because the officer consciously chose not to collect available evidence, the State should not have been able to use a poor, incomplete substitute to secure its conviction, especially where it made incriminatory suggestions that the original video would not have.

Even in the cases that the *Smith* court cites, the evidence is only deemed admissible under Rule 1004 where the government was not at fault for its destruction. For example, in *United States v. Ross*, cited by the *Smith* Court, a transcript of a telephone conversation was admitted over the conversation itself. The federal court in *Ross* affirmed the admission of the transcript, finding: "All of Rule 1004's requirements are met because the transcripts constituted 'other evidence' of 'the contents of ... recording[s]' that had been 'lost or destroyed' through no fault of the government." 33 F.3d 1507, 1513-14 (11th Cir. 1994). Here, by

contrast, the State was directly at fault for neglecting to capture the original footage. The officer could not have been more clear. He knew about the footage and did "nothing" about that knowledge (R.508-09). Similarly, in *People v. Maxwell*, 383 F.2d 437 (2d Cir. 1967), also cited by the *Smith* court, the government was allowed to introduce a transcript in lieu of an original recording, but in that case, the government destroyed the evidence a year after the conclusion of the first trial in that case, reasonably satisfied that there would not be a retrial. *Id.* at 441. This is a far more understandable course of action than in this case where the State's agent knew that there existed surveillance footage, knew or should have known that surveillance footage records over itself, and instead of capturing the surveillance at the time he found out about it or in the two days subsequent, simply chose to use an unaffiliated lay person's incomplete iPhone clips as its main source of evidence to charge this serious crime. Accordingly, the State should have been penalized accordingly and been disallowed from admitting the fragmentary, unfairly suggestive clips. Where the loss of the original was the fault of the State's willful inaction, this weighs in favor of a finding of bad faith under Rule 1004.

ii. The State did not make an effort to recover the original.

Another focus of cases analyzing bad faith is the diligence of the government in attempting to recover the original evidence prior to entering the substitute. The State in Smith's case woefully fails this test. Under Rule 1004, the government "bears the burden of proving that the originals were not lost or destroyed in bad faith, and this burden can be met by presenting circumstantial evidence such as evidence of a diligent but unsuccessful search for the document." *Eckman v. Encompass Home & Auto Ins. Co.* 2021 WL 3271051, at *6 7 (E.D. Pa. 2021)(internal

quotations omitted); *See also In Re Marriage of Greenberg*, 2021 IL App (1st) 210325-U, ¶ 16, 27 (proponent must prove his own diligence in attempting to procure the original before introducing substitute evidence under Rule 1004).

Here, there is no evidence that the State did anything to attempt to recover the footage once it was discovered that it was recorded over. *See Eckman*, 2021 WL 3271051, at *6 7 (E.D. Pa. 2021)(diligent search for a document evidences lack of bad faith). Indeed, once the State realized that it would only have the clips to rely on, it immediately charged Smith with burglary the very next day after presumably reviewing the clips. This charging decision evidences bad faith, where there was no evidence that the State attempted to recover the full surveillance footage and where the clips were more prejudicial to Smith than the full surveillance footage would have been. The use of clips instead of the full footage allowed the State to tell the jury that, between the two clips, Smith must have committed the crime. The fact that the clips were immediately relied upon, with no evidence that the State did anything to attempt to recover the original footage or even to fully reconstruct the original footage, especially where the clips were extraordinarily helpful to the State's case, potentially more helpful than the original, is another factor weighing in favor of a finding of bad faith.

iii. The State knew of the exculpatory value of the clips.

Another relevant factor to determining bad faith is whether the exculpatory value of the evidence was known to the government prior to its destruction. Here, the State relied on the theory that Smith committed this burglary by entry through the window, outside of the reach of the surveillance camera. The officer was aware that Whittington's allegation was an unauthorized window entry, meaning he

was aware that, had Smith been shown on the surveillance footage entering through the front door, Whittington's claim would be invalidated, and the State's theory destroyed. In other words, the potential exculpatory value of these clips was obvious.

When it comes to the loss or destruction of evidence generally, "[t]he presence or absence of bad faith turns on the government's knowledge of the apparent exculpatory value of the evidence at the time it was lost or destroyed, because without knowledge of the potential usefulness of the evidence, the evidence could not have been destroyed in bad faith." *United States v. Beal*, 2021 WL 2517837, at *1 (D. Haw. June 17, 2021), *citing United States v. Zaragoza-Moreira*, 780 F.3d 971, 977 (9th Cir. 2015).

In *United States. v. Cooper*, the defendants were accused of utilizing their lab to manufacture illegal substances, and certain lab equipment that would have evidenced a legitimate, legal use of the lab was destroyed. 983 F.2d 928, 930 (9th Cir. 1993). The court found that the government's actions amounted to bad faith where "the equipment's value as potentially exculpatory evidence was repeatedly suggested to the government's agents" *Id*. at 931. Similarly, in *United States v. Zaragoza-Moreira*, the defendant was accused of transporting contraband through a port-of-entry, and there existed video footage at the port-of-entry. 780 F.3d 971 (9th Cir.2015). The defendant claimed she was being forced to transport contraband, and in an interview with the investigating agent, explained that the port-of-entry footage would exculpate her, as it pictured her attempting to alert law enforcement to the contraband, supportive of her duress defense. *Id*. At 978. Nevertheless, the agent "made no attempt to view or preserve" the video because it was "just something [she] didn't think about doing."*Id*. at 980. Despite this willful inaction

by the officer, the State argued that this was merely negligent or reckless, and not evidence of bad faith. *Id.* The appellate court disagreed, finding that knowledge of the potentially exculpatory value of the evidence combined with willful inaction constituted bad faith, and remanding for dismissal of the indictment. *Id.* at 982.

The situation in *Smith* is comparable to that in *Cooper* and *Zaragoza*, where investigating officer McCrary knew that the surveillance footage could definitively prove or disprove the State's theory. In *Smith*, complaining witness Whittington testified that the first time Officer McCrary arrived at his apartment, he told the officer that there was surveillance footage recording his front door (R.477-78). Soon after, Whittington called officers back on noticing that his back window was "off its hinges or off its tracks," making it apparent to law enforcement (agents of the State) that Whittington's allegation was that the offender entered through the back window (R.474-6). In other words, like in *Zaragoza*, where bad faith was evident because the government had knowledge that the original could be helpful to the defense, the officer in this case knew that the surveillance footage would show whether Smith or anyone else entered through the door on camera, proving or disproving the window theory. Moreover, the officer in Smith's case was in the building where the surveillance existed on several occasions and apparently had permission from the cooperating landlord to view or copy the video (R.508-511). But the officer did nothing, allowing the video footage to lapse, even though the evidence could have completely exonerated Smith. Where the State knew of the exculpatory value of the evidence but still failed to recover it, this, too, suggests bad faith. The knowledge of exculpatory value, combined with lack of effort to recover the original once it was lost, and the State being at fault for its destruction

in the first place, all indicate that the State's actions constitute bad faith under Rule 1004.

iv. Even in analyzing bad faith, courts have found that the character of the substitute evidence is relevant, and, here, the substitute evidence is unreliable.

While Rule 1004 allows for the admission of substitute evidence absent bad faith, in analyzing bad faith, the federal courts also consistently find relevant whether the substitute evidence is reliable generally. In fact, in the federal cases cited by the *Smith* court, the federal appellate courts make findings that no bad faith exists, but also emphasize that there is no unfairness or inaccuracy alleged regarding the substitute evidence. This concern by the courts for the fairness of the evidence demonstrates that a proper reading of Rules of Evidence 1003 and 1004 necessitates a continued consideration for fairness. Evidence that is unfair to a party should not be admitted under Rule 1004, or any of the rules.

For example, in the above discussed case *United States v. Maxwell*, 383 F.2d 437 (2d Cir. 1967), the court upheld the admissibility of evidence under Rule 1004, discussing lack of fault by the government but also noting that the portions of the original omitted from the substitute were "inaudible, irrelevant, and repetitive." *Id.* at. 442. Unlike in *Maxwell*, where the differences between the original and the substitute were inconsequential, in this case the omitted evidence was essential. In analyzing the admissibility of the evidence under Rule 1004, the *Maxwell* court considered not only literal bad faith (i.e. was it the government's fault that the evidence was destroyed?) but also fairness or unfairness of the substitute evidence generally. Following the reasoning of *Maxwell*, where the evidence admitted in Smith's case was of such a character that the deletions present

in the substitute had the ability to completely alter the outcome of the case, it was too unfair to be admitted under Rule 1004, or any of the other evidence rules. Here, the indicia of bad faith including the State's culpability in the evidence destruction, its lack of search for the original, and its knowledge of the footage's evidentiary value, combined with the evidence being severely unfair means it should be found inadmissible under Rule 1004, and otherwise.

G. Conclusion

As demonstrated, in order to preserve the value of the Illinois Rules of Evidence and the best evidence rule, each potential avenue for the admission of the clips must fail. Under the best evidence rule, this Court should find that the substitute clips were not admissible where the State was not diligent in attempting to procure the original surveillance footage and where the substitute was unreliable, inaccurate, incomplete, and unfair. Under Rule 1003, the Court should find that the clips are not duplicates because they do not accurately reproduce the original. But even if this Court finds that they are duplicates, it should find that they are inadmissible under Rule 1003(2) because their admission would be unfair in the circumstances.

The analysis should end there. Where a purported duplicate fails the safeguarding tests provided by Rule 1003, the evidence should not go on for analysis under Rule 1004, where it is clear that Rule 1004 is not meant to constitute a mode of admission for unreliable, incomplete Rule 1003 evidence. But even if this Court finds that, where the clips are inadmissible under Rule 1003, they can still be analyzed under 1004, 1004 should bar them because the officer's actions here constitute bad faith, and because of unfairness of the evidence generally. Likewise,

even if this Court finds that 1004's bad faith requirement invalidates the best evidence rule, the bad faith evident in this case should bar the admission of the clips. Under the best evidence rule and under either Illinois Rules of Evidence 1003 or 1004, these clips are inadmissible.

II. Pursuant to Supreme Court Rule 341(j) Smith did not waive arguing that the clips lacked an adequate foundation, where he thoroughly responded to the State's foundation argument on reply.

Smith argued in his opening brief in the appellate court that the admission of two iPhone clips was unfair, where the arresting officer willfully neglected to obtain the original footage. In response, the State argued that the proper foundation was laid for the clips. Based on this argument, and in compliance with Supreme Court Rule 341 (j), Smith argued on reply that the case the State relied on to support its foundation argument--*People v. Taylor*, 2011 IL 110067--is distinguishable from the case at bar. Smith's *Taylor* analysis, explaining how the circumstances supporting the foundation of the *Taylor* evidence were not present in Smith's case, comprised the majority of Smith's argument on reply. Nevertheless, the lead opinion of the appellate court held that Smith waived the foundation argument. This Court should instruct the lower court that Smith did not waive the argument that a proper foundation was not laid for the admission of the clips, and remand, instructing the full court, including the lead opinion, to consider the foundation issue. This is necessary because, as argued on reply, the foundational inadequacies of the clips contributed to the general unfairness of their admission, and present another reason, along with their inadmissibility under the Rules of Evidence and their violation of best evidence principles, that the clips should not have been admitted. Where Smith did not waive arguing that there was insufficient foundation for the clips, the foundational issues' contribution to the unfairness of the evidence's admission warrants consideration.

The question of the proper interpretation of a Supreme Court Rule is reviewed

de novo. *People v. Suarez*, 224 Ill.2d 37, 42 (2007).

The three justices in this case had three differing opinions regarding foundation. The lead opinion found that Smith waived the foundational issue in the case, and declined to address it. *Smith*, 2021 IL App (5th) 190066 ¶52. The special concurrence found "that the defendant did not forfeit his right to argue the applicability of *Taylor*" but found that the *Taylor* factors supported the admission of the clips. *Id*. ¶ 81. 85 (Wharton, J., specially concurring). Finally, the dissent found that the evidence was inadmissible, and found that the *Taylor* factors were neither waived nor forfeited, explaining:

> In the defendant's brief, the defendant claimed that the trial court erred in admitting the video clips because the clips violated the best evidence rule and were highly prejudicial. In response to the defendant's claims, the State argued that the video clips were properly admitted because the prosecutor laid a proper foundation under *Taylor*. The State then engaged in a lengthy discussion of the *Taylor* factors. In the reply brief, the defendant addressed the State's argument, and initially asserted that *Taylor* was distinguishable. The defendant next asserted that the best evidence doctrine concerned an entirely different set of factors than those discussed in *Taylor*. *Smith*, 2021 IL App (5th) 190066 ¶ 121 (Cates, J., dissenting).

Indeed, consistent with the directive of Illinois Supreme Court Rule 341(j), Smith's brief discussed *Taylor*, explaining how, in *Taylor*, the video admitted was far more reliable than that in Smith's case, as it was more complete and there was a legitimate reason to account for the missing portion (Reply.Br. 5-7). There would be no purpose for Supreme Court Rule 341 (j)'s directing the appellant to respond to each of the appellee's arguments, if, on doing so, the court can then consider the responsive arguments waived.

Supreme Court Rule 341(j) states, "The reply brief, if any, shall be confined strictly to replying to arguments presented in the brief of the appellee and need contain only argument." Ill. S. Ct. R. 341(j). This Court has repeatedly held that,

under Supreme Court Rule 341(j), a defendant's lack of inclusion of an issue in the opening brief does not mean that is waived or forfeited, so long as the issue is addressed on reply when raised by the opponent in a response brief. For example, in *People v. Whitfield*, 228 Ill. 2d 502, 514 (2007), this Court applied Rule 341(j) and found that an issue was not precluded from appellate review because it was not in the defendant's opening brief when it was raised in the State's response brief:

> We take judicial notice of the arguments raised in the parties' respective briefs below, and acknowledge that defendant did not raise a double jeopardy claim in his opening brief. **However, defendant's initial failure to raise this argument does not automatically preclude its consideration. Supreme Court Rule 341(j) permits appellants to reply to arguments presented in the brief of the appellee**. A review of the briefs filed below demonstrates that defendant's double jeopardy argument was presented in reply to the State's assertion that defendant would not be entitled to any credit for the time he spent on probation toward his prison sentence under any circumstances, even if defendant served his entire two-year probation sentence. It would be unfair for us to require an appellant, when writing his or her opening brief, to anticipate every argument that may be raised by an appellee. *Id*. (Emphasis added).

Similarly, in *Chamberlain v. Civil Serv. Comm'n of Vill. of Gurnee*, 2014 IL App (2d) 121251, ¶ 31, the Illinois Appellate Court considered a plaintiff's due process claims when they were made in the reply brief in response to the issue being raised by the defendants in their response brief. The *Chamberlain* court noted, "Plaintiff spends no time in his initial brief establishing how he had a property interest that entitled him to due process" *Id.* Nevertheless, just as in *Whitfield,* the court held the issue was not forfeited under Supreme Court Rule 341(j). *Id.*

This court should come to the same conclusion as the courts in *Whitfield* and *Chamberlain*. While Smith did not make the argument in opening that the clips lacked an adequate foundation, the State argued in response that the

foundation was proper, and Smith replied, explaining how the substitute evidence in *Taylor* was reliable, but in Smith's case it was not, meaning that the clips should not be found admissible under *Taylor,* 2011 IL 110067.

Notably, as Smith argued on reply in the appellate court, the facts of *Taylor* are distinguishable from the facts here, which only further supports Smith's claim that the clips were inadmissible. In *Taylor*, the State produced surveillance footage from a motion-sensing camera, picturing the defendant stealing cash. *Id.* at ¶11,15. While there was a gap in the *Taylor* video, the gap was satisfactorily explained by the fact that the camera only ran when someone was moving in its view. *Id.* at ¶16. Further, the gap in *Taylor* was not alleged to have contained pivotal or even important information. *Id.* This is, of course, at variance with this case, where there was no explanation for the omissions from the full surveillance footage excluding the landlord's admitted laziness and incompetence, and where the gaps were alleged to have contained the only concrete evidence, or lack thereof, establishing this offense.

While the pivotal question in this case is whether the clips were acceptable forms of secondary evidence after the original recording was lost, *Taylor* does not concern secondary evidence whatsoever. Rather, the evidence offered in *Taylor* was a VHS recording produced directly from the surveillance footage, or, in other words, "the recording shown in court **was the original** as it was taken from the DVR." *Taylor,* at ¶45 (emphasis added). Thus, there was no Rule 1003 or 1004 analysis performed or necessary in *Taylor*, where the case does not concern any form of secondary evidence. As explained in Smith's reply brief in the appellate court, this difference is precisely the reason why the factors considered in *Taylor*

are not outcome determinative here.

Nevertheless, even excluding, *arguendo,* Rule 1003 and 1004's roadblocks to admissibility of the clips, the factors announced in *Taylor* regarding general admissibility of surveillance footage indicate that the clips are inadmissible. In *Taylor*, the operator was instructed on how to use the equipment as well as read the instructions himself, the copying process was explained, there was an appropriate chain of custody, and the resulting VHS tape produced by the surveillance footage was not "the result of tampering or fabrication" *Id*. At 39-44. None of this is true of the clips admitted in this case. Justice Cates' analysis of *Taylor* in her dissent is apt. Justice Cates noted that in this case, "Schmidt's level of understanding and skill was well below that of the detective in *Taylor*." *Smith,* 2021 IL App (5th) 190066 at ¶127. Further, the process by which the clips made their way from Schmidt's wife's iPhone to a CD was not explained by Schmidt and was performed by an unknown, non-testifying IT person, which "eviscerates any reliability pertaining to the creation of the video clips and chain of custody." *Id*. at ¶128. Finally, "Schmidt was not a trained investigator, and his decisions regarding what content to record and what to omit from the original surveillance video footage raise questions about the reliability and trustworthiness of these clips and whether they accurately portray the entirety of what occurred..." *Id*. at ¶ 129.

As noted by both the dissent and the special concurrence, under *Taylor*, the "ultimate issue is the accuracy and reliability of the process that produced the recording" *Smith*, 2021 IL 5190066 at ¶ 130 (Cates, J., dissenting); *Smith,* 2021 IL 5190066 at ¶ 99 (Wharton, J., specially concurring). And as explained in *Taylor*, the question is not whether edits were made whatsoever. Rather, "the

more important criteria is that the edits cannot affect the reliability or trustworthiness of the recording." *Taylor,* 2011 IL 110067 at 45. Indeed, Smith argued in his briefs extensively and vehemently that the processes that lead to the admission of the unfair clips was unreliable, and the clips were inaccurate, incomplete, and untrustworthy. As argued, the evidence produced here by an incompetent lay person's cherry-picking of surveillance, the lack of legitimate reason for the gaps in the video, the "murky" evidence regarding copying, chain of custody, editing, and the other people omitted from the clips, all demonstrates that "this evidence was irreparably tainted and inadmissible." *See Smith*, 2021 IL 190066 ¶130 (Cates, J., dissenting).

In analyzing the *Taylor* factors in combination with the best evidence rule and the Illinois Rules of Evidence, the dissent found "considering all of the circumstances, including the lack of foundation for the video clips discussed earlier, I conclude that the admission of the duplicate video clips was unfair to the defendant" *Id*. ¶131. Just like the dissent, Smith argued in his briefs that this evidence was too unfair to be admissible, and that this situation differed from that in *Taylor*, wherein the factors supported admission of the evidence in question. Smith complied with Supreme Court 341 (j), extensively distinguished *Taylor*, and explained why the utter unreliability of the process that produced the clips here rendered them inadmissible.

The foundational issue was not forfeited, and ultimately, remand is necessary because the foundational problems with the clips contributed to the general unfairness of the evidence and represent an additional reason the clips should not have been admitted. The lead opinion should consider the foundational issue

in conjunction with the best evidence rule concerns, violations of the Illinois Rules of Evidence, and general unfairness to Smith caused by the admission of the clips.

CONCLUSION

For the foregoing reasons, Carl Smith, Jr., defendant-appellant, respectfully requests that this Court remand for a new trial barring the admission of the surveillance clips, or remand for the appellate court to consider Smith's reply brief's argument that there lacked an adequate foundation for the clips, contributing to their inadmissibility.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 50 pages.

/s/Adrienne E. Sloan
ADRIENNE E. SLOAN
Assistant Appellate Defender

APPENDIX TO THE BRIEF

Carl Smith, Jr. No. 127946

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IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
JACKSON COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	Case No. 2018CF303
vs.	)	Date of Sentence: 1/18/19
	)	Date of Birth: 11/24/1954
CARL D. SMITH	)	
Defendant.	)	

JUDGMENT-SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

WHEREAS the above-named defendant has been adjudged guilty of the offenses enumerated below, **IT IS THEREFORE ORDERED** that the defendant be and hereby is sentenced to confinement in the Illinois Department of Corrections for the term of years and months specified for each offense.

COUNT	OFFENSE	DATE OF OFFENSE	STATUTORY CITATION	CLASS	SENTENCE	MSR
One	Residential Burglary	7/29/2018	720 ILCS 5/19-3(a)	1 Felony	78 months	3 years

Count One is to be served at 50% pursuant to 730 ILCS 5/3-6-3.

The Court finds that the defendant is:

☒ Convicted of a class 1 offense but sentenced as a class X offender pursuant to 730 ILCS 5/5-4.5-95(b).

The Court further finds that the defendant is entitled to receive credit for time actually served in custody of 172 days as of the date of this order. The defendant is also entitled to receive credit for the additional time served in custody from the date of this order until defendant is received at the Illinois Department of Corrections.

☒ The defendant remained in continuous custody from the date of this order.
☐ The defendant did not remain in continuous custody from the date of this order (less days from a release date of _____ to surrender date of _____).

☐ The Court further finds that the conduct leading to conviction for the offenses enumerated in counts _____ resulted in great bodily harm to the victim. (730 ILCS 5/3-6-3(a)(2)(iii)).

☐ The Court further finds that the defendant meets the eligibility requirements for possible placement in the impact incarceration program. (730 ILCS 5/5-4-1(a)).

☒ The Court further finds that the offense was committed as a result of the use of, abuse of, or addiction to alcohol or a controlled substance and recommends the defendant for placement in a substance abuse program. (730 ILCS 5/5-4-1(a)).

☐ The defendant successfully completed a full-time (60-day or longer) Pre-Trial Program.
☐ Educational/Vocational ☐ Substance Abuse ☐ Behavior Modification ☐ Life Skills ☐ Re-Entry Planning-provided by the county jail while held in pre-trial detention prior to this commitment and is eligible and shall be awarded additional sentence credit in accordance with 730 ILCS 5/3-6-3(a)(4) for ____ total number of days of program participation, if not previously awarded.

☐ The defendant passed the high school level test for General Education and Development (GED) on _____ while held in pre-trial detention prior to this commitment and is eligible to receive Pre-Trial GED Program Credit in accordance with 730 ILCS 5/3-6-3(a)(4.1). THEREFORE IT IS ORDERED that the defendant shall be awarded 60 days of additional sentence credit, if not previously awarded.

☐ IT IS FURTHER ORDERED the sentence imposed on _____ be (concurrent with, consecutive to) the sentence imposed in case number _____ in the Circuit Court of _____ County.

☐ IT IS FURTHER ORDERED that _____

The Clerk of the Court shall deliver a certified copy of this order to the Sheriff. The Sheriff shall take the defendant into custody and deliver the defendant to the Department of Corrections which shall confine said defendant until expiration of this sentence or until otherwise released by operation of law.

This order is: ☒ effective immediately ☐ stayed until _____

DATE: 1/18/19

ENTER: _____

Ralph R. Bloodworth III

2021 IL App (5th) 190066

NO. 5-19-0066

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CARL SMITH JR., Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Jackson County. No. 18-CF-303 Honorable Ralph R. Bloodworth III, Judge, presiding.

JUSTICE VAUGHAN delivered the judgment of the court.
Justice Wharton specially concurred, with opinion.
Justice Cates dissented, with opinion.

OPINION

¶ 1 I. BACKGROUND

¶ 2 This case arises from allegations that coins, pain medication, and jewelry were stolen from Michael Whittington's apartment on July 29, 2018. After an officer viewed surveillance footage of the apartment building, defendant was suspected as the offender. On August 1, 2018, defendant was charged with residential burglary in knowingly and without authority entering into the dwelling of Whittington, with the intent to commit therein a theft (720 ILCS 5/19-3(a) (West 2018)).

¶ 3 On October 29, 2018, defense counsel filed a motion ***in limine*** to preclude the introduction of the two nonconsecutive iPhone clips, which depicted defendant walking away from

Whittington's apartment after touching the doorknob and then exiting Whittington's apartment about 20 minutes later. He argued that the clips were unduly prejudicial without admitting the full original surveillance video, as the jury would likely speculate as to what may or may not be on the rest of the original surveillance video. The motion also argued that the clips violated the best evidence rule pursuant to Illinois Rules of Evidence 1001-1003 (eff. Jan. 1, 2011) because they were not duplicates where the 20- to 30-second clips did not "accurately reproduce the original" as required in Illinois Rule of Evidence 1001(4) (eff. Jan. 1, 2011).

¶ 4 Before trial, the court heard argument on defendant's motion ***in limine*** regarding the iPhone clips. Defense counsel noted that the State did not provide the original surveillance video to the defense in discovery, and from talking with the State that morning, it was due to the State not being provided the original video by law enforcement. Counsel argued the two 20- to 30-second clips are prejudicial to defendant because there is no video of what happened in between the two clips, what happened before that time, or what happened after that time. Counsel acknowledged that edited clips of long videos are often admitted into evidence but asserted that the other side always has the original to use if necessary. Without the original, the jury is left to speculate as to what might be on the full surveillance video. Counsel further argued that the clips violated the best evidence rule because they are not the original nor are they duplicates under Illinois Rule of Evidence 1001(4) (eff. Jan. 1, 2011).

¶ 5 At that time, the State had no response but requested the court to reserve its ruling until it could have the witness who was to authenticate the video come testify the next morning, so the court could be fully informed of the foundation of the clips. Defense counsel and the court agreed.

¶ 6 The following morning immediately before trial the State called Pieter Schmidt to testify. Schmidt owned the apartment building in which Whittington and defendant lived. Schmidt

stated that the apartment complex had a video surveillance system. He testified to his familiarity with the system, noting that he had previously reviewed surveillance video footage by pulling up the surveillance screen then selecting the appropriate icon to go forward, backwards, or to pick a specific date. He explained that there are four cameras that automatically record and save to a DVR for 48 hours. The cameras are positioned to look through the office windows into the hallway, to look down the hallway, and to look at the parking lot. Schmidt testified that the recordings are time-stamped and cannot be altered. Schmidt averred that this matter was the first time he had to retrieve surveillance video footage since installing the system the previous spring. He stated that he knew the video surveillance was functioning properly on July 29, 2018, because the footage for that date was available for review.

¶ 7 Schmidt testified that, after Whittington left him a message that someone broke into his apartment and "robbed" him, he viewed the surveillance footage for July 29, 2018, for some time earlier than 1:53 p.m. until 2:24 p.m. Once Schmidt arrived at the apartment building, Whittington gave him a police officer's card and informed him that the officer was interested in knowing if the video surveillance system worked. Schmidt verified that, based on his knowledge of how the system worked, the video displayed a fair and accurate depiction of what occurred in front of the cameras at that time. When asked if he was able to copy the footage, Schmidt stated, "I'm not competent enough apparently to do that. And we tried and we could not get it to download on a flash drive. So we recorded it on a cellphone. Basically I think they call that a screenshot."

¶ 8 Schmidt testified that he and his wife recorded a couple of clips that they thought were important on his wife's iPhone that were subsequently e-mailed to his iPhone. He then took his iPhone to an IT person at his law firm who put the clips onto a compact disc (CD), which he delivered to the Carbondale Police Department.

¶ 9 Schmidt averred that Whittington's apartment was right outside the office where one camera is located. Schmidt testified that, in the footage, defendant went down the hallway and touched the doorknob of Whittington's apartment. However, defendant just touched the doorknob and continued to walk further down the hallway. He then disappeared until roughly 20 minutes later when he walked out of Whittington's apartment. Schmidt verified that before he had his wife record the video footage on her iPhone, Schmidt viewed the entire footage and did not observe anything but an empty hallway during the period between the two recorded clips. Defendant never walked into Whittington's apartment during that time. Schmidt also testified that he did not alter the recording at all. Schmidt clarified that the two clips showed the time to be about 1:53 p.m. and 2:14 p.m., respectively. He testified that the CD admitted to the court fairly and accurately depicted what occurred on the cameras near Whittington's apartment.

¶ 10 On cross-examination, defense counsel asked if Schmidt could be considered a competent operator of the security system where he did not know how to export the footage. Schmidt responded that he could not download the footage to a flash drive but could operate the other functions of the system. He acknowledged that he had no formal training on the system. He read the instruction manual to try to see how to export a video but could not figure it out. Schmidt stated that he did not ask anyone from the police department or an IT person from his office to help him export the video. Schmidt also testified that no one from the police department attempted to retrieve and export the footage themselves. The footage would have been available from July 29, 2018, to July 31, 2018. Schmidt averred that while he observed the 20-minute period between the iPhone clips, he did not have any personal knowledge of what the cameras were recording.

¶ 11 Schmidt conceded that he could have recorded the entire original footage but did not because it would take too long. When asked if there were other people in the hallway, he averred

that when defendant came out of Whittington's apartment, a woman appeared from the stairwell around the corner. Schmidt clarified that no one else was around or in front of Whittington's apartment that day, except defendant and his wife, who were in front of the apartment earlier in the day.

¶ 12 Defense counsel argued that the iPhone clips violated the completeness doctrine and the best evidence rules (Ill. R. Evid. 1001-1004 (eff. Jan. 1, 2011)) and were unduly prejudicial. Counsel contended that the State was allowed to cherry-pick two parts of the full video and precluded the defense's fair shot to look at the whole original to decide if any portion would be beneficial to defendant. Counsel further argued that the police knew that the original would be deleted after 48 hours and had plenty of time and the authority to try to obtain the original. With respect to the best evidence rules, counsel claimed the iPhone clips were not originals or duplicates under the Illinois Rules of Evidence because they did not accurately reflect or reproduce the original's data. A comparable situation would be admitting "two or three words of a multiple page contract," which would also be objectionable. Counsel noted that while Illinois Rule of Evidence 1004 (eff. Jan. 1, 2011) allows other evidence of the contents of a recording if the original is lost or destroyed, the original here was destroyed with the knowledge of the State's witness and the failure of law enforcement to obtain the original in time. By allowing the State to pick two nonconsecutive clips, defendant was denied the chance to obtain any exculpatory evidence.

¶ 13 Defense counsel also objected to the iPhone clips for insufficient foundation under silent witness theory. He argued that Schmidt conceded he was incompetent to export the surveillance footage. Counsel also contended that there was insufficient chain of custody where Schmidt's wife was not present to testify to her part in transferring the recordings to Schmidt, and the IT person did not testify to how he burned the recordings from Schmidt's e-mail to a CD.

¶ 14 In response, the State relied on ***People v. Taylor***, 2011 IL 110067, to argue that the iPhone clips were originals and therefore not subject to the best evidence rule. It contended that the clips which copied the exact data from the surveillance hard drive as it played is essentially that same as digital images transferred to a CD from a hard drive. See ***id.*** ¶ 43 (tape made by copying data stored on a hard drive of a DVR satisfies the definition of original). The State also argued that it did not cherry-pick evidence; rather, a neutral third party was in control of the copying process and determined what was relevant. As such, "[t]his really isn't a case of, you know, law enforcement attempting to frame something or attempting to alter evidence." As to the competency of the operator, the State claimed ***Taylor*** focuses on the competency to operate the recording device itself. Here, Schmidt provided sufficient testimony to how the surveillance system worked, that the system was operating properly, and what the cameras depicted. Schmidt also explained the entire copying process. The State argued that it need not present every link in the chain of custody when a witness testifies that its exhibit accurately displays what was originally recorded. Under such circumstances, any missing links go to the weight of the evidence, not the admissibility.

¶ 15 Based upon the arguments and Schmidt's testimony, the court determined that the iPhone clips were admissible. It stated, "in a perfect world, we would have clear and complete videos of every situation, clear and complete and clean chain of custody. Unfortunately, we do not work in a perfect world and cases do not arise and are not handled in a vacuum or in a perfect world." It further noted that defense counsel would have wide discretion on cross-examination.

¶ 16 At trial, Schmidt's testimony regarding the surveillance cameras and video was substantially the same as his testimony during direct examination and cross-examination at the pretrial hearing on defendant's motion ***in limine***. Additionally, Schmidt testified that Whittington

informed him that his window had been damaged. Schmidt averred that no cameras faced Whittington's window from the exterior.

¶ 17 During the direct examination of Schmidt, the State played the two iPhone clips. The first clip depicted the man that Schmidt identified as defendant going up to the door that Schmidt identified as Whittington's apartment for a brief moment and then continuing down the hallway. The second clip, time-stamped roughly 20 minutes later, showed the same man exiting the door that he approached in the first clip while carrying a white bag.

¶ 18 The State next called Whittington to testify. Whittington testified that he had asked defendant and defendant's wife to clean his apartment for payment, about three times over the past two years, when he did not feel well enough to clean it himself. He averred that defendant, however, was not allowed in his apartment when he was not home. On the day of the incident, Whittington asked defendant to clean his apartment. Defendant started cleaning the apartment around 10 a.m. and left about 12:30 p.m. Afterwards, Whittington met a couple of friends at a local bar. He testified that he locked his door when he left, as he always has. The door was able to be locked from the inside or outside. Whittington averred that he was at the bar from about 1 p.m. to 6 p.m. and drank four to six beers.

¶ 19 Upon returning home, Whittington noticed that the doorknob was kind of bent, which made it difficult for him to unlock and open his door, which he found suspicious. Based on this suspicion, he checked his cup full of quarters that he kept on the stand for laundry and noticed all the quarters were missing. He also noticed that all the nickels and dimes were gone from a canister, in which he kept the rest of his coins. Whittington testified that he knew the coins were missing because he checked to see how many quarters he had before he left to go to the bar. He looked around further and realized that 40 or 50 tablets of his prescribed hydrocodone pain medication were also missing.

Whittington then called his landlord and left a message that he believed someone broke into his apartment. He also called the police to make a report. Whittington testified that, at the time, he had no idea whom to pursue criminal charges against, so he just wanted to make a police report. He, however, informed the police that surveillance videotapes may be available because there were cameras in the building. Whittington admitted that he was "a little buzz[ed]" but was not drunk.

¶ 20 Over the next day or so, Whittington called the police again to inform that jewelry was also missing out of the top drawer of his chest and his window was broken. He testified that the missing jewelry was several pieces of turquoise jewelry, two of which were from his late mother. He knew the jewelry was in the drawer the day before the break-in because he saw it when he needed to check paperwork located in the same place. Whittington testified that he did not notice his window located on the wall across from his front door was pushed off the tracks at the bottom until his health care worker came over and raised the window to air the apartment out.

¶ 21 Whittington testified that he did not give people permission to come and go into his apartment as they pleased and did not allow anyone to come inside his apartment that afternoon. He also averred that he never found his missing jewelry.

¶ 22 On cross-examination, counsel impeached Whittington with a previous aggravated DUI conviction. Whittington agreed that he was not supposed to drink beer while taking hydrocodone, but occasionally did so. He testified that he took one hydrocodone pill before leaving for the bar that day. When asked if he believed drinking beer while taking hydrocodone affects his ability to recall details, he responded, "I don't take that many pills." Whittington also did not believe that the beer and hydrocodone combination affected his ability to unlock his apartment.

¶ 23 Whittington acknowledged that he had known defendant for a couple of years, visited at defendant's apartment a couple times, and considered them to be on friendly terms. He conceded

that he had previously accused defendant and defendant's wife of stealing from him but continued to let them clean his apartment after they denied doing so. Whittington also averred that, about a year prior, he allowed a homeless female friend to stay over for about a week. He stated that she took all her belongings when she left.

¶ 24 Whittington admitted that he had never opened his window before and always had his blinds shut, but that he did not believe it was broken because he "would have felt a breeze last winter." When asked about the police's actions on July 29, 2018, Whittington testified that the police did not take fingerprints, swabs for DNA, or foot impressions. He averred that the police told him they would contact the landlord and try to get the surveillance video.

¶ 25 The officer who was dispatched to Whittington's apartment around 7 p.m. on July 29, 2018, Michael McCrary, also testified. Officer McCrary stated that Whittington seemed "kind of confused" because somebody had been in his apartment and took his stuff. He did not believe Whittington was intoxicated. After speaking with Whittington, Officer McCrary inspected the door handle, which was bent such that it was causing a problem to open the door. Officer McCrary stated that, at that time, Whittington did not suspect anyone in particular and was not really interested in pursuing charges. So, Officer McCrary left his card and asked Whittington to contact him if Whittington found anything else.

¶ 26 The next day, Whittington called Officer McCrary to say that he noticed some jewelry was missing. At that time, because Whittington seemed interested in pursuing charges, Officer McCrary dusted for fingerprints on the drawer from which the jewelry was missing and surveyed Whittington's neighbors.

¶ 27 Officer McCrary testified that he contacted Schmidt on July 30, 2018, to inquire about the surveillance video, and Schmidt said he would make a copy of the video. The next day, on July

31, 2018, Schmidt informed Officer McCrary the copy was ready. After collecting and reviewing the surveillance video, Officer McCrary suspected defendant. He averred that he located defendant at his apartment and placed him under arrest for burglary. After a search incident to arrest, Officer McCrary discovered $3000 and approximately 20 hydrocodone pills in a prescription bottle in defendant's pockets.

¶ 28 On cross-examination, Officer McCrary acknowledged that the bottle of hydrocodone pills was prescribed to defendant. He also stated that if Whittington indicated an interest to press charges on July 29, 2018, he would have dusted for fingerprints on the doorknob and jars of coins at that time. For the same reason, Officer McCrary did not speak with the apartment's owner until July 30, 2018, despite knowing the apartment had cameras on July 29, 2018.

¶ 29 Officer Ashley Noto, who inspected Whittington's window, testified that Whittington's window "was off of its hinges or off its tracks" towards the bottom. Officer Noto stated that it had been tampered with and pushed in, and the screen was busted. She noted the window was about five feet from the ground with an air conditioner unit "sort of almost under, a little bit to the side of the window."

¶ 30 On cross-examination, Officer Noto testified that Whittington said he opens the window to let smoke out, and when he went to do so, he noticed the window was off its track. Officer Noto conceded that, at that point, she was not sure whether the window had anything to do with the burglary. She stated that she did not take any fingerprints, DNA swabs, or shoe print impressions.

¶ 31 For the defense, Tina Chappell, defendant's wife, testified. She averred that Whittington was friends with her and defendant, and that they would hang out about five or six times a month. Chappell testified that she had cleaned Whittington's apartment a total of six or seven times, but defendant helped the last three times because her health made it more difficult. On more than one

occasion, Whittington would let her into his apartment to clean while he went to the bar. Chappell stated that Whittington gave defendant permission to be in his apartment while she cleaned.

¶ 32 Chappell testified that a homeless woman lived with Whittington about three months prior to the date of the alleged burglary. This lasted for a couple of months. Chappell stated the homeless woman would knock on his window for him to let her in, "or she may have come through the window," because you had to have a key to get in the apartment building. She also averred that about a month and half before defendant was arrested, Whittington had accused her of stealing a ring, but she informed him that she did not. About a month later, Whittington apologized to defendant and said he would apologize to Chappell for accusing her of stealing the ring because he later found the ring. When asked where he found it, Chappell replied, "It was in his apartment. Just probably like everything else is [***sic***] he's accusing [defendant] of stealing right now." She acknowledged she had a 2013 prior felony conviction for possession of controlled substance.

¶ 33 The defense last called Alek Rose to testify. Rose stated that Whittington while under the influence of alcohol falsely accused him of breaking into Whittington's apartment a couple weeks before defendant was arrested. Rose testified that Whittington threatened if it happened again Whittington would kill him. Rose also averred that there was an empty apartment located a few inches away from Whittington's apartment door, which the owner of the apartment building allowed Rose to use as temporary storage.

¶ 34 The State then recalled Schmidt as a rebuttal witness. He stated that he was certain the video depicted defendant standing in front of Whittington's apartment and not the empty apartment next door. He also was certain that the second video depicted defendant exiting Whittington's apartment, not the empty apartment. Schmidt stated that you could see defendant carrying

something in his right hand as he exited Whittington's apartment. Schmidt averred that the empty apartment was always kept locked, and no tenant had permission to use it nor a key to open it.

¶ 35 The State also recalled Whittington. He testified that after questioning defendant about a missing necklace, defendant and Chappell directed him to Rose, whom they saw jiggling his locks. Whittington admitted that, when he confronted Rose, he said "some things [he] probably shouldn't have." Whittington testified that he has not found any of the property that has been missing since July 29, 2018. He also clarified that the homeless woman, who had lived with him the year prior, never had a key to his apartment nor used his window to access his apartment. She would tap on his window so he knew she was there and then would let her in. The State played the second video, stopping it at the point where Schmidt testified you could see defendant exit the building and a woman coming from the stairwell. Whittington testified that the woman was not the homeless woman who lived with him. On cross-examination, Whittington acknowledged that, on July 29, 2018, he watched TV as defendant and Chappell cleaned his apartment and did not pay much attention to what they were doing.

¶ 36 The jury found defendant guilty of residential burglary. On November 28, 2018, defendant filed a motion for a new trial and judgment notwithstanding the verdict, challenging, ***inter alia***, the sufficiency of the evidence and the admission of the iPhone video clips. The court denied both motions, and the matter proceeded to a sentencing hearing.

¶ 37 At the sentencing hearing, the court first noted that it received and reviewed the presentence investigation (PSI) report. The PSI report revealed that defendant reported he suffered from kidney and bladder disease, arthritis, and bipolar disorder. However, no documentary evidence was obtained to verify these diagnoses. The report indicated that defendant has used illegal substances

from the age of 13. He graduated high school. While defendant did not have stable full-time employment, he worked odd jobs for people at his church.

¶ 38 The PSI report also revealed that defendant had several previous convictions, including convictions in different states. Spanning over 1975 to 2013, defendant accumulated two larceny convictions, one petty larceny conviction, two possession of stolen property convictions, two retail theft convictions, two theft convictions, a burglary conviction, one unlawful possession of vehicle conviction, a breaking and entering conviction, one unauthorized use of a vehicle conviction, two escape from the department of correction convictions, an assault of an officer conviction, and one unlawful possession of cannabis conviction. Based on his criminal history, the court noted that while defendant was convicted of a Class 1 felony, he must be sentenced as a Class X sentencing offender pursuant section 5-4.5-95(b) of the Unified Code of Corrections (730 ILCS 5/5-4.5-95(b) (West 2018)).

¶ 39 Defendant counsel called Eileen Troutt-Ervin to testify. Troutt-Ervin and defendant were members at the same church. She averred that she hired defendant to help around her house and that he was a hard worker. Although she was a little leery at first because defendant was an ex-convict she trusted him. She never felt something would be missing and never knew anyone at the church that felt like defendant would take something. She recently gave defendant a key to her shed, and defendant had access to her house without supervision. Troutt-Ervin also stated that defendant volunteered at the church.

¶ 40 The defense further admitted several character witnesses' letters from other members of defendant's church that shared the same sentiments as Troutt-Ervin's testimony. Collectively, they spoke to defendant's eagerness to work and willingness to volunteer for whatever needed done at the church. The letters also revealed that defendant worked for several members of the church, and

no one felt anxious or suspicious letting him into their homes. Some letters stated that defendant had the freedom to enter the house as necessary to complete his work and that the church members trusted him. All the letters expressed great satisfaction for defendant's work. One letter also claimed that defendant suffered from the crime of being poor and the crime of being homeless.

¶ 41 The State argued that, before this incident, Whittington thought defendant was his friend and trusted him enough to invite him into his house, but defendant seized the opportunity to score from an easy target. While the medication and coins could be replaced, Whittington testified to the sentimental value of his jewelry that is irreplaceable. The State contended that this was a cold and calculated act perpetrated against a friend and neighbor. Defendant knew Whittington would be gone and took advantage, which reflects his true character. The State also noted defendant's criminal history, including multiple theft offenses, as an aggravating factor (***id.*** § 5-5-3.2(a)(3)). It also stated that defendant had shown no remorse or offered any type of apology to Whittington. Defendant had demonstrated that he is a deceitful and dishonest individual, and "enough has to be enough." As such, the State contended that the sentence would be necessary to deter others from committing the same offense (***id.*** § 5-5-3.2(a)(7)) and requested a 10-year sentence.

¶ 42 Defense counsel argued that while it respected the jury's verdict, the State's argument relating to remorse would ring truer if defendant was actually guilty of this crime. Defendant should not be required to admit guilt for something that did not happen and has a right to maintain his innocence. Defense counsel highlighted that defendant pled guilty in his prior cases and this was the first case to go to trial because defendant admits when he is actually guilty. Defense counsel also noted the mitigating factor that imprisonment would endanger defendant's health conditions of kidney and bladder disease (***id.*** § 5-5-3.1(a)(12)). He argued that this factor should mitigate any consideration of a sentence that is longer than the minimum of six years because the

Illinois Department of Corrections does not have a robust medical care system. Defense counsel also asserted the mitigation factors that defendant did not threaten or cause serious physical harm to another (*id.* § 5-5-3.1(1), (2)). Accordingly, defense counsel requested the minimum of six years' imprisonment.

¶ 43 Defendant also made a statement. In addition to raising his health concerns and the fact that no one from his church distrusted him, defendant spoke of his rough life, with his mother being murdered and his father committing suicide by the time defendant was 14 years old. While he was in and out of prison all of his life, defendant averred that he always admitted when he was guilty. He stated, "But I cannot stay up here and take seven years or anything that the state is trying to offer me for something I did not do." After he married his wife, he did everything he could to keep them off the streets.

¶ 44 Defendant also questioned the State's evidence, claiming he could not climb up a building at 65 years old. He also posed the question, "If I went into the window, why didn't I come out of the window?" Defendant contended the trash bag that he carried out of Whittington's apartment was filled with beer cans and toilet paper rolls because Whittington was a slob. Defendant further questioned Whittington's credibility, claiming he was a drunk and pill head. Defendant noted Whittington's previous criminal activity and asserted that Whittington falsely reported this incident so that he had an appropriate reason to get his pain medication refilled. He expressed his frustration with the criminal justice system, stating that he had no reason to steal Whittington's jewelry because people at his church gave him watches, rings, and necklaces as gifts.

¶ 45 The trial court stated that it considered all the evidence before it, including the character letters, Troutt-Ervin's testimony, and the PSI report. It also considered all the factors in mitigation and aggravation. In addition to those factors argued by the parties, the court further noted to an

extent the character and attitude of defendant, indicating he is unlikely to commit another crime, and asked whether imprisonment would entail excessive hardship on his wife (***id.*** § 5-5-3.1(a)(9), (11)). The court understood defendant's position in maintaining his innocence, stating, "You've made a lot of progress during your time period since you were last incarcerated." It, however, also averred that it was bound to some mandatory duties. Considering all the above, the court sentenced defendant to 6½ years' imprisonment.

¶ 46 II. ANALYSIS

¶ 47 On appeal, defendant challenges the admission of the iPhone clips, the sufficiency of the evidence, and his sentence. We address each in turn.

¶ 48 A. Admission of iPhone Clips

¶ 49 Defendant argues that the iPhone clips violate the best evidence rule, which requires production of the original to prove the content of a recording. ***Electric Supply Corp. v. Osher***, 105 Ill. App. 3d 46, 48 (1982).[2] Although defendant concedes that Illinois Rule of Evidence 1003 (eff. Jan. 1, 2011) allows duplicates to be admitted to the same extent as originals, he contends that the iPhone clips are not duplicates because they are not accurate reproductions of the original surveillance footage. According to defendant, the original was therefore required. Citing ***Osher***, 105 Ill. App. 3d at 49, defendant explains that if the original is not being introduced, the offering party can introduce evidence to prove the contents of an original where it is able to prove (1) the prior existence of the original, (2) the original is currently unavailable, (3) the authenticity of the

[1]Defendant's opening brief on appeal also argued that the trial court erred in allowing the jury, during their deliberations, to view the iPhone clips in the court room with the parties present. However, in his reply brief, defendant concedes the court did not err in this respect based on the Illinois Supreme Court decision in ***People v. Hollahan***, 2020 IL 125091—which was published after defendant filed his opening brief. Accordingly, we do not address this issue.

[2]We note that although defendant also argued the iPhone clips violated the completeness doctrine and lacked a proper foundation at trial, he fails to assert those arguments on appeal. We therefore address only whether the iPhone clips violated the best evidence rule.

substitute, and (4) the proponent's diligence in attempting to procure the original. Defendant asserts that the State failed to prove the fourth requirement where the police knew that the surveillance footage existed from the commencement of the investigation but failed to practice due diligence in obtaining it. Instead, it relied on a lay person who was incompetent to accurately copy the footage.

¶ 50 The State contends that the iPhone clips were properly admitted because it laid a proper foundation under ***Taylor***, 2011 IL 110067. It argues that there is nothing to cast doubt on the capability of the system for recording or reliability. Schmidt testified that he was familiar with the system and explained how the system worked. Schmidt further testified that the video surveillance system was functioning properly and that the iPhone clips were a fair and accurate depiction of what occurred in front of the cameras. While Schmidt was not capable of exporting the videos directly from the system, he explained the copying process and that he a noninterested third party copied what he believed to be relevant. Schmidt assured that nothing occurred in the video during the elapsed time between the two iPhone clips. The State notes that ***Taylor*** held "given the particular circumstances of any case, alterations, deletions, or editing may be necessary." ***Id.*** ¶ 44. It thus argues that, given the totality of the circumstances presented in this case, the admission of the video was not an abuse of discretion.

¶ 51 The parties misapprehend the relevant principles here. In ***Taylor***, the supreme court clearly addressed the issue of whether the State laid a proper foundation under the "silent witness theory" for the admission of a surveillance videotape. ***Id.*** ¶ 1. In doing so, the court noted that the videotape in ***Taylor*** was an original as defined by Rule 1001(3). ***Id.*** ¶¶ 42-43. The best evidence rule and a potential duplicate copy was not at issue.

¶ 52 If defendant had challenged the foundation of the iPhone clips on appeal, I agree with my colleagues that ***Taylor*** would be instructive. However, as apparent from his appellate briefs, defendant declined to present any argument regarding the foundational requirements in ***Taylor*** or that the clips should have been excluded based on a lack of foundation. Admittedly, the State argued that the iPhone clips were admissible under ***Taylor***'s foundation requirements and that Illinois Supreme Court Rule 341(j) (eff. Oct. 1, 2020) confines an appellant's reply brief to the arguments presented in the appellee's brief. Yet, instead of disagreeing with the State's application of ***Taylor*** to the facts here, defendant's reply brief specially noted that "the foundation for the video is entirely beside the point" of his argument. The only issue on appeal concerning the iPhone clips is whether their admission violated the best evidence rule. ***Taylor*** therefore does not guide our analysis. ***People v. Johnson***, 2021 IL App (5th) 190515, ¶ 29 (if a party fails to raise an argument on appeal, it is forfeited). Nonetheless, I note that I agree with the special concurrence's analysis of ***Taylor*** to the facts of this case.

¶ 53 Defendant also mistakenly relies on ***Osher***. In that case, the First District addressed whether the admission of unexecuted copies of the trust receipt and wavier of lien violated the best evidence rule. ***Osher***, 105 Ill. App. 3d at 49. The court stated that where the original is shown to be unavailable, "the proponent must prove the prior existence of the original, its unavailability, the authenticity of the substitute and the proponent's own diligence in attempting to procure the original." ***Id.*** at 48-49. Because the plaintiff failed to show the original was unavailable and made no attempt to recover the original from the third party, the trial court erred in admitting the unexecuted copies. ***Id.*** at 49. While ***Osher*** analyzed a best evidence issue under the proper legal principles for that time, in 2010, Illinois adopted several rules concerning the use of an original, duplicate, and other means to prove documentary evidence. Ill. R. Evid. 1001 (eff. Jan. 1, 2011)

(defining what constitutes an original and duplicate); Ill. R. Evid. 1002 (eff. Jan. 1, 2011) (explaining the requirement of an original to prove the content of a writing, recording, or photograph); Ill. R. Evid. 1003 (eff. Jan. 1, 2011) (explaining the admissibility of duplicates); Ill. R. Evid. 1004 (eff. Jan. 1, 2011) (explaining when other evidence of the contents of a writing, recording, or photograph may be admissible). Accordingly, Illinois Rules of Evidence comprise the proper guiding principles for this issue.

¶ 54 The decision to admit evidence lies within the sound discretion of the trial court and will not be reversed unless that discretion was clearly abused. ***People v. Jaynes***, 2014 IL App (5th) 120048, ¶ 51. Although our evidentiary rules still require an original to prove the content of a writing, recording, or photograph, there are now exceptions. Ill. R. Evid. 1002 (eff. Jan. 1, 2011). Since 2011, "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Ill. R. Evid. 1003 (eff. Jan. 1, 2011). A duplicate is defined as "a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography *** by mechanical or electronic re-recording, or *** by other equivalent techniques which accurately reproduces the original." Ill. R. Evid. 1001(4) (eff. Jan. 1, 2011). Our rules also now provide that other evidence may be admissible to prove the contents of a writing, recording, or photograph if "[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith." Ill. R. Evid. 1004(1) (eff. Jan. 1, 2011). Notably, these rules differ from defendant's authority in that proponents need not prove their diligence in obtaining the original before destruction to admit a duplicate or other evidence of the contents of a recording. Ill. R. Evid. 1004(1), Committee Comments (adopted Sept. 27, 2010) (it is "no longer necessary to show that reasonable efforts were employed beyond available judicial process or

procedure to obtain an original possessed by a third party"); see ***United States v. McGaughey***, 977 F.2d 1067, 1071 (7th Cir. 1992) (diligent search for original is only relevant as "an avenue by which the larger issue of the document's destruction may be proved").

¶ 55 Even taking as true defendant's argument that the iPhone clips are not duplicates under Rule 1001(4), the clips along with Schmidt's testimony were admissible as other evidence to prove the contents of the recording unless the State lost or destroyed the original surveillance video in bad faith. Ill. R. Evid. 1004(1) (eff. Jan. 1, 2011). We note that there is no controlling precedent to guide us in determining whether the police's actions in this case amount to bad faith under Rule 1004(1). In such circumstances, it is reasonable to look to federal cases interpreting and applying the practically identical Rule 1004 of the Federal Rules of Evidence (Fed. R. Evid. 1004). ***Diamond Mortgage Corp. of Illinois v. Armstrong***, 176 Ill. App. 3d 64, 71 (1988); see ***Leow v. A&B Freight Line, Inc.***, 175 Ill. 2d 176, 185 (1997).

¶ 56 We find ***United States v. Maxwell***, 383 F.2d 437 (2d Cir. 1967), is factually similar to this case. In ***Maxwell***, a customs agent dictated roughly 10 minutes of a 45-minute conversation between the defendants to a shorthand stenographer, whose notes were then typed. ***Id.*** at 442. The deleted portions "were either irrelevant, inaudible or repetitive." ***Id.*** The agent subsequently determined that the transcript was accurate, based on his comparison of the transcript with the recording. ***Id.*** at 441-42. After a mistrial, the agent believed defendant would not be retried, so he returned the recordings to circulation where they were erased. ***Id.*** at 443. During retrial, the transcript was admitted into evidence. ***Id.*** at 442.

¶ 57 On appeal, defendants claimed that the admission of the transcript violated their rights under the due process clause of the fifth amendment because the accuracy of the transcript and whether it honestly reflects the whole conversation could not be ascertained. ***Id.*** at 441-42. The

Second Circuit found the defendants' argument presented a best evidence question. ***Id.*** at 442. It then found the transcript was admissible as secondary evidence where the agent testified that it accurately represented the recordings. ***Id.*** The court explained that while it did not approve of the government's conduct in not handling the recordings more carefully while the charges against defendant were outstanding, there was evidence to show that the recordings were not erased to prevent their production for trial. ***Id.*** It was therefore within the trial court's discretion to admit the transcript. ***Id.*** at 443.

¶ 58 In ***United States v. Ross***, 33 F.3d 1507, 1513-14, 1513 n.5 (11th Cir. 1994), the admission of transcripts made by the Spanish National Police of tape-recorded conversations involving defendant was affirmed because the recordings were lost or destroyed through no fault of the United States government, even where the transcripts included only the important or interesting portions of the conversations. The Eleventh Circuit reasoned that the prosecution never had control of the tapes, the Spanish officers who initially transcribed the recordings were cross-examined by defense counsel, and defense counsel "had ample opportunity to attack the transcripts' credibility before the jury." ***Id.*** at 1514. Similarly, in ***United States v. Workinger***, 90 F.3d 1409, 1415 (9th Cir. 1996), the Ninth Circuit found that a transcript of a videotaped deposition was admissible under Federal Rule of Evidence 1004(1) where the destruction of the videotape was "done in the ordinary course of business and not at the behest of the government."

¶ 59 Indeed, the federal case law finds that other evidence to prove the contents of a writing, recording, or photograph is admissible "except where the unavailability [of the original] is caused by the proponent's purposeful design to prevent production of the [original] evidence." ***Maxwell***, 383 F.2d at 443 n.3. The cases also demonstrate that other evidence is not unfair or inadmissible simply because there are deletions from the original and that the accuracy of the other evidence

may be established by the testimony of witnesses who reviewed the original. ***Id.*** at 442; ***Ross***, 33 F.3d at 1514.

¶ 60 Here, no evidence suggests that the police purposefully designed the prevention of the original surveillance video or delayed sending its own IT people to download the surveillance footage to avoid the original surveillance from being admitted at trial. Schmidt informed police that he would transfer the surveillance video onto a CD and a day later stated that it was ready. Nothing in the record indicates that the police directed Schmidt to transfer the video or that police knew Schmidt would be incapable of transferring the video in its entirety. Defendant concedes that it is not clear from the record whether police had time to download the surveillance footage in its entirety after it knew that Schmidt rerecorded only the portions he found relevant. The police therefore did not lose or destroy the original footage in bad faith and met the conditions of Rule 1004(1).

¶ 61 We further reject the contention that the admission of the iPhone clips was an error based on inaccuracy or unfairness. At trial, the State verified the accuracy of the iPhone clips through the testimony of Schmidt, who explained that he could not transfer the original footage from the surveillance system to a CD. He testified that he did not copy the entirety of the original footage on his wife's iPhone because it would take too long and certain portions of the footage were irrelevant. He also clarified that there were no other people near Whittington's door at any time nor anyone in the hallway during the missing period between the iPhone clips. Defense counsel cross-examined Schmidt regarding the iPhone clips and original footage twice and declined a third opportunity.

¶ 62 Defendant implies that this court should not take as true Schmidt's testimony or Whittington's testimony that defendant completed his authorized cleaning duties earlier that day

as true, but these credibility determinations are better suited for the trier of fact. ***People v. Jackson***, 2020 IL 124112, ¶ 69. While we would have preferred the State to ensure the original footage was memorialized in its entirety, we cannot find the trial court abused its discretion in admitting the iPhone clips based on this record.

¶ 63 B. Sufficiency of the Evidence

¶ 64 Defendant also challenges the sufficiency of the State's evidence. To prove the offense of residential burglary, the State must prove that defendant knowingly and without authority entered or remained within the dwelling place of another with the intent to commit a felony or theft therein. 720 ILCS 5/19-3(a) (West 2018). Defendant argues that the State failed to prove that he entered Whittington's apartment without authority and with the intent to commit a theft.

¶ 65 Specifically, defendant highlights that no evidence demonstrated that he reentered the apartment, no stolen property was recovered, and no forensic evidence or eyewitness tied defendant to this offense. Defendant also claims that nothing at trial established that Whittington actually checked for the items that were allegedly stolen before he left that day nor when he last checked the window. As such, Whittington's broken window could have occurred at any time especially where the defense put on evidence that a homeless woman was living with Whittington, she may have entered routinely through the window, and the allegedly stolen items could have been missing before that day. Moreover, defendant asserts that Whittington's testimony is unreliable and circumstantial because he was admittedly intoxicated on that day and had a history of falsely accusing others of stealing. Therefore, according to defendant, Whittington's timeline of the events is called into question. He further contends that, even assuming defendant did steal from Whittington, defendant could have done so when he was permissively in Whittington's apartment earlier with the intent to clean.

¶ 66 It is the responsibility of the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts. ***People v. McLaurin***, 2020 IL 124563, ¶ 22. When reviewing the sufficiency of the evidence in a criminal case, it is not the reviewing court's function to retry the defendant, nor should it substitute its own judgment for that of the trier of fact. ***People v. Swenson***, 2020 IL 124688, ¶ 35. Instead, the reviewing court determines " '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 omitted.) ***McLaurin***, 2020 IL 124563, ¶ 22 (quoting ***Jackson v. Virginia***, 443 U.S. 307, 319 (1979)). Under this standard, circumstantial evidence can be sufficient to sustain a conviction. ***Jackson***, 2020 IL 124112, ¶ 64. The intent to commit a theft can be inferred from the surrounding circumstances, including "the time, place, and manner of entry into the premises; the defendant's activity within the premises; and any alternative explanations offered for his presence." ***People v. Maggette***, 195 Ill. 2d 336, 354 (2001). "A criminal conviction will not be set aside on a challenge to the sufficiency of the evidence unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." ***Jackson***, 2020 IL 124112, ¶ 64. We draw all reasonable inferences in favor of the State. ***People v. Vanhoose***, 2020 IL App (5th) 170247, ¶ 25.

¶ 67 At trial, the State presented iPhone clips that showed defendant touching the doorknob of Whittington's apartment soon before Whittington discovered it was bent. The iPhone clips, along with testimony at trial, showed defendant exited Whittington's apartment without defendant entering through the front door and during Whittington's absence. That same day, Whittington discovered that his coins and pain medication were missing. A day later, Whittington also discovered that several pieces of jewelry were missing and that his window was broken, as if someone had tampered with it.

¶ 68 While no direct evidence tied defendant to this crime, the circumstantial evidence that defendant inexplicably accessed Whittington's apartment while Whittington was absent and left Whittington's apartment with unknown items can be sufficient to prove residential burglary where Whittington testified that defendant did not have permission to enter his home without Whittington's presence. See ***People v. Toolate***, 101 Ill. 2d 301, 308 (1984) ("[P]roof of unlawful breaking and entering is sufficient to infer to commit theft."); ***People v. Fico***, 131 Ill. App. 3d 770, 772 (1985) (same). Even taking defendant's assertion that the window was broken prior to the day of the incident as true, a jury could reasonably infer that defendant used the window to access the apartment where the evidence demonstrated that defendant never entered through the front door.

¶ 69 Moreover, despite defendant's contentions, Whittington testified to his observation that the missing coins were present in his home before leaving around 1 p.m. that day and recently observed the presence of his jewelry a few days prior. It can also be reasonably inferred that Whittington knew roughly how many prescribed pills were in his medication bottle when he testified that he recently had the prescription for 120 pills refilled and took one pill before leaving that day. While defendant, on appeal, provided a possible explanation that he could have taken the items while in Whittington's apartment with authority to clean, the jury is not required to search for any possible innocent explanation and " 'elevate [it] to the status of *** reasonable doubt.' " ***People v. Castile***, 34 Ill. App. 3d 220, 225 (1975) (quoting ***People v. Goodwin***, 24 Ill. App. 3d 1090, 1094 (1975)).

¶ 70 Defendant also requests reversal on the basis that Whittington was not credible. Defense counsel presented the same contentions of incredibility at trial as defendant raises on appeal. Indeed, the contentions call Whittington's credibility into question. However, "[a] conviction will not be reversed simply because *** the defendant claims that a witness was not credible." ***People v. Gray***, 2017 IL 120958, ¶ 36. It is in the purview of the fact finder to resolve questions of

credibility. ***Jackson***, 2020 IL 124112, ¶ 69. Moreover, the fact that a witness was under the influence of alcohol goes to the weight, not the admissibility, of his or her testimony. ***Gray***, 2017 IL 120958, ¶¶ 40-41. Accordingly, we do not find that no reasonable juror could have found all the essential elements of residential burglary beyond a reasonable doubt.

¶ 71 C. Excessive Sentence

¶ 72 Lastly, defendant contends that his sentence is excessive based on several mitigating factors. He further relies on the facts that his conviction was based on very thin evidence and involved a theft of minimal items. While defendant concedes that he failed to file a postsentencing motion to preserve this issue, he urges this court to apply plain error, which may be invoked if "(1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." ***People v. Hillier***, 237 Ill. 2d 539, 545 (2010). Nevertheless, to obtain relief, defendant must first demonstrate that a clear error occurred. ***Id.*** We find defendant has not established that an error occurred in this case.

¶ 73 In determining the sentence, the trial judge must consider all relevant factors in mitigation and aggravation and "balance the retributive and rehabilitative purposes of the punishment." (Internal quotation marks omitted.) ***People v. Weiser***, 2013 IL App (5th) 120055, ¶¶ 31-32. The trial judge is afforded substantial deference in sentencing, because unlike a reviewing court it has an opportunity to weigh such factors as "defendant's credibility, demeanor, moral character, mentality, environment, habits, and age." ***People v. Snyder***, 2011 IL 111382, ¶ 36. The defendant's potential for rehabilitation, however, is not entitled to more weight than the aggravating factors. ***Weiser***, 2013 IL App (5th) 120055, ¶ 32. A reviewing court cannot reweigh the aggravating and mitigating factors in reviewing a sentence, nor can it "substitute its judgment for that of the trial court merely because it would have weighed these factors differently." ***People v. Stacey***, 193 Ill.

2d 203, 209 (2000). Absent an abuse of discretion, a trial court's sentence will not be altered on review. ***People v. Etherton***, 2017 IL App (5th) 140427, ¶ 26. A sentence that falls within the statutory limits is presumed proper. ***Id.*** ¶ 28. The presumption is rebutted only where a defendant demonstrates that the sentence imposed "greatly varies from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense." ***Id.***

¶ 74 From the outset, we note that defendant could have been sentenced to 30 years' imprisonment (730 ILCS 5/5-4.5-25(a) (West 2018)), but the court imposed a sentence that was six months over the minimum. Defendant contends it was an abuse of discretion to impose any more time than the statutory minimum of six years because the letters from his church members demonstrate that he had been restored to useful citizenship. While defendant's character letters presented mitigating evidence, the State also presented aggravating factors of a lengthy criminal history most of which involved theft and the necessity to deter others from this crime.

¶ 75 Defendant's arguments would require this court to reweigh the relevant factors, which we cannot do. It is the duty of the trial court to balance the mitigating and aggravating factors in imposing an appropriate sentence. ***Etherton***, 2017 IL App (5th) 140427, ¶ 34. The record makes clear that, in determining 6½ years' imprisonment was the appropriate sentence, the court considered all the factors in mitigation and aggravation. It was not required to attribute more weight to defendant's rehabilitative potential than to the aggravating factors. ***Weiser***, 2013 IL App (5th) 120055, ¶ 32.

¶ 76 We also cannot say that the imposition of six months over the minimum was a great variance from the purpose of the law or manifestly disproportionate to the offense merely because defendant perceived the stolen items as insignificant. Defendant has not provided any authority to

the contrary. Accordingly, we find the court did not abuse its discretion in imposing a term of 6½ years' imprisonment.

¶ 77 III. CONCLUSION

¶ 78 Because the destruction of the original surveillance video was not by the State's purposeful design, the trial court did not err in admitting two nonconsecutive iPhone clips of the surveillance footage where a witness testified to their accuracy compared to the original surveillance footage. Consequently, the State presented sufficient circumstantial evidence to prove that defendant committed residential burglary beyond a reasonable doubt. The trial court also did not abuse its discretion in sentencing defendant to 6½ years' imprisonment. Accordingly, we affirm defendant's conviction and sentence.

¶ 79 Affirmed.

¶ 80 JUSTICE WHARTON, specially concurring:

¶ 81 While I agree with the majority's opinion that the trial court did not err in admitting the iPhone clips of the surveillance video, I would reach this conclusion on different grounds. First, I find that the defendant did not forfeit his right to argue the applicability of ***Taylor***. I also conclude that ***Taylor*** is relevant and applicable to an analysis of the admission of the clips into evidence. Finally, I find that ***Taylor*** and other relevant factors support the admission of the video clips.

¶ 82 The dissent analyzes and concludes that the defendant did not forfeit a ***Taylor*** analysis simply because he did not include the issue in his initial brief on appeal. I agree. Illinois Supreme Court Rule 341(j) (eff. Oct. 1, 2020) provides that an appellant's reply brief must be responsive to arguments present in the appellee's brief. Therefore, I agree with the dissent that ***Taylor*** should be analyzed.

¶ 83 Initially I consider the applicable standard of review on this evidentiary issue. The trial court has substantial discretion in determining whether evidence is admissible. ***People v. Williqman***, 2021 IL App (2d) 200188, ¶ 43 (citing ***People v. Becker***, 239 Ill. 2d 215, 234 (2010)). On appeal, the reviewing court should not reverse a trial court's discretionary admission of evidence unless the court abused its discretion. ***Id.*** "An abuse of discretion occurs when the trial court's ruling is arbitrary, fanciful, or unreasonable or where no reasonable person would agree with the position adopted by the trial court." ***Id.***

¶ 84 Although the supreme court in ***Taylor*** relied upon six factors in its determination that videotapes could be introduced as substantive evidence under the "silent witness" theory, those six factors are not exclusive. ***Taylor***, 2011 IL 110067, ¶ 35. The six factors utilized by the court in ***Taylor***, argued by the State in this case, and analyzed by the dissent are as follows:

> "(1) the device's capability for recording and general reliability; (2) competency of the operator; (3) proper operation of the device; (4) showing the manner in which the recording was preserved (chain of custody); (5) identification of the persons, locale, or objects depicted; and (6) explanation of any copying or duplication process." ***Id.***

¶ 85 Based on the following analysis, I conclude that the totality of the evidence presented in this case supports the admissibility of the video clips as substantive evidence. I find persuasive the State's arguments regarding the relevancy in this case of the six factors utilized by the ***Taylor*** court. I also find that there are additional factors that merit consideration based upon the unique facts of the instant case. I will briefly examine the six ***Taylor*** and additional factors.

¶ 86 A. Capability of the Device for Recording and General Reliability

¶ 87 In this case, the recording system was clearly capable of recording. The owner of the building, Schmidt, testified to his purchase and installation of the system, as well as the ability to

review the recordings from a mobile phone. The system consisted of four cameras hardwired to a digital video recording device. The four cameras automatically recorded. The recordings were date and time stamped and incapable of being edited. The recordings were automatically saved for 48 hours and then deleted.

¶ 88 B. Competency of the Operator

¶ 89 I also find that considering the totality of Schmidt's testimony, he was a competent operator. Schmidt was successful in setting up the surveillance system. He was also successful in locating the precise date and time of the suspected crime. He testified that to the best of his knowledge, the clips reflected a fair and accurate depiction of what was in front of the cameras. Although Schmidt lacked expertise in exporting the video clips, his testimony adequately established his general competence with the system and in providing a copy of the clips to law enforcement.

¶ 90 C. Proper Operation of the Device

¶ 91 Based upon Schmidt's testimony, I find that there is no question that the system operated properly.

¶ 92 D. Chain of Custody

¶ 93 In this case, the chain of custody evidence presented was sufficient given this unique factual setting. Schmidt was an independent witness and not a member of law enforcement. He testified that he reviewed the recorded footage on the primary system and was present when his wife recorded the two clips on her iPhone. Schmidt testified to the process his wife used to record the clips and forward them to his business e-mail. Schmidt testified about how he retrieved the clips from his e-mail, how the clips were transferred onto a CD by an employee, and how he delivered the CD to law enforcement. To the extent that this chain of custody is lacking in some

capacity, "gaps in the chain of custody go to the weight of the evidence, not its admissibility." ***Taylor***, 2011 IL 110067, ¶ 41.

¶ 94 E. Explanation of the Process of Any Copying or Duplication

¶ 95 Turning to the explanation of the copying process, I note that Schmidt was a noninterested party. He was the owner of the building and had access to the recordings created from the surveillance cameras he installed. He reviewed the recordings, found only two relevant clips, copied the clips to the best of his ability, and then provided the clips to law enforcement. At trial, he acknowledged his technological limitations in copying the clips. However, while his technological limitations required him to copy the footage in an indirect manner, the process utilized did not result in an inaccurate copy. I find that this case differs from ***Taylor*** in that the copy of the video in ***Taylor*** was made by law enforcement and not by a private individual. Moreover, even though the State did not explain its copying process in ***Taylor***, the supreme court concluded that the police report summary stating that a copy of the relevant video surveillance was copied from the hard drive onto a VHS tape provided a proper explanation of the copying process because this "evidence" addressed the preliminary question of admissibility. ***Id.*** ¶ 40 (preliminary questions, such as the admissibility of evidence, are "not constrained by the usual rules of evidence" (citing Ralph Ruebner, Illinois Criminal Trial Evidence 3 (4th ed. 2001), and 11 Ill. Prac., Courtroom Handbook on Illinois Evidence § 104.1 (2001))).

¶ 96 F. Additional Factors

¶ 97 I also find that Schmidt's familiarity with the location of the cameras and what the camera recordings depicted, as well as the location of the defendant's apartment, supports the admissibility of the iPhone video clips. See ***id.*** ¶ 35 (stating that "additional factors may need to be considered"). Schmidt was the owner of the building at issue. He was also familiar with the victim and the

defendant. Schmidt identified the defendant, the defendant's location in the building, the defendant's proximity to the victim's apartment based upon his past interactions with the defendant and the victim, the location of the cameras, and the footage obtained. I find that Schmidt's personal knowledge enhanced his testimony about the accuracy and reliability of the video recordation and review process.

¶ 98 In addition, I find that the lack of bad faith by the local police department relative to the video recording is an additional relevant factor supporting admission of the video clips. ***Id.*** As noted by the majority, Schmidt notified the police that he would transfer the video on to a CD. No evidence suggests that the police asked Schmidt to create a copy. Additionally, there is no indication that the police knew that Schmidt was only going to transfer clips and not the entirety of the surveillance video. The evidence also fails to support a conclusion that the police purposefully prevented the preservation of the entire surveillance video. Initially, the victim did not want to pursue a criminal case. With no victim to pursue the case, coupled with the building owner's offer to provide a copy of the original surveillance video, I believe those facts provide a context for the police department's decision not to collect the complete surveillance video.

¶ 99 In reviewing this issue, I am reminded that the ultimate issue, regardless of the number of relevant factors considered, "is the accuracy and reliability of the process that produced the recording." ***Id.*** The defendant does not dispute that he is depicted in these two clips. However, the defendant objected to the fact that the clips were excised from the much longer surveillance video. The supreme court addressed this concern in ***Taylor***, noting that editing would not necessarily result in the evidence being inadmissible. ***Id.*** ¶ 44. The editing would go to the weight accorded the evidence. ***Id.*** (citing Jordan S. Gruber, ***Foundation for Contemporaneous Videotape Evidence***, ***in*** 16 Am. Jur. Proof of Facts 3d 493, § 17, at 527 (1992), and Jordan S. Gruber, ***Videotape***

Evidence, ***in*** 44 Am. Jur. Trials 171, § 31, at 242 (1992)). The party offering the video as evidence should remove irrelevant or unimportant material from the video. ***Id.*** "The more important criteria is that the edits cannot affect the reliability or trustworthiness of the recording. In other words, the edits cannot show that the recording was tampered with or fabricated." ***Id.*** In this case, Schmidt "edited" the recordings by omitting the irrelevant portions and limiting the clips to the two appearances of the defendant. Schmidt's court testimony established that the recorded clips shown in court were part of the complete recording that he and his wife reviewed. Thus, I would find that there was no evidence that the video clips had been fabricated or otherwise altered in some manner that would render the clips inadmissible.

¶ 100 Additionally, I conclude that admission of the video clips was supported by Illinois Rule of Evidence 1003. As noted by the majority, Rule 1003 provides that a duplicate is admissible as an original unless there is a genuine question as to the authenticity of the original or if the admission of the duplicate under the circumstances would be unfair. Ill. R. Evid. 1003 (eff. Jan. 1, 2011). Here, testimony of the building owner established that there was no issue of the authenticity of the original recording. Moreover, I find that admission of the duplicate under this case's unique facts was not unfair. The video clips were captured by an uninterested party, and there was adequate testimony of the process followed by the owner of the building and its recording system. In addition, the defendant did not dispute that his image was captured by the recording system.

¶ 101 Overall, I find that the totality of the evidence presented in this case supports the admissibility of the video clips. I concur with the result reached in the majority's opinion and, if ***Taylor*** is inapplicable through the defendant forfeiting his foundational argument, I further concur with the majority's analysis of the best evidence rule. I also concur with the majority's conclusion

that the State proved the defendant's guilt of residential burglary beyond a reasonable doubt and that the defendant's 6½-year prison sentence was not excessive.

¶ 102 JUSTICE CATES, dissenting:

¶ 103 The State's case rises and falls on the admissibility of two short clips made from a surveillance video. Other than the lens of a camera, there were no eyewitnesses to this residential burglary. There were no fingerprints or other types of forensic evidence for the jury to consider. None of the items allegedly reported stolen were recovered or even connected to the defendant. Thus, the authenticity and reliability of the video clips at issue were key to the State's case. In fact, as demonstrated by the record, these videos clips were of such significance that the jury requested the opportunity to view them again during their deliberations. Inasmuch as the original surveillance video was not preserved, and the owner of that system did not appreciate how to operate his own equipment, such that the chain of custody for the creation of these video clips was not clear, it is my view that the trial court abused its discretion in allowing these clips to be viewed by the jury as substantive evidence. Therefore, I must respectfully dissent.

¶ 104 On August 1, 2018, the defendant was charged with a residential burglary that occurred on July 29, 2018, at the home of Michael Whittington. On October 29, 2018, the first day of trial, defense counsel filed a motion ***in limine*** to preclude the introduction at trial of two short iPhone video clips that were captured by the wife of Pieter Schmidt, the owner of the apartment complex where Whittington lived. In the written motion and in arguments before the trial court, the defendant claimed that the video clips were unduly prejudicial in that the complete surveillance video recording had not been preserved by law enforcement and made available to the defense. The defendant also claimed that the two video clips each 20 to 30 seconds long were segments from a longer, now nonexistent, video recording and that there was no way to determine how or

why these particular clips were extracted from the complete video surveillance footage. The defendant explained that the video clips were actually videos of a video, in that the clips were made using the iPhone camera of Schmidt's wife to capture the images as the surveillance video recording was played on a DVR, and that each video clip included a date and time stamp. Because the original video was not preserved, the defense had no way to determine what occurred before, after, and between those two clips, and whether the video clips were fair and accurate representations of the images recorded in the original video.

¶ 105 Relying upon Rules 1001-1003 of the Illinois Rules of Evidence, the defendant also argued that the video clips violated the best evidence rule as the original recording was not produced. He claimed that the video clips were not duplicates of the original, and that the 20- to 30-second clips did not "accurately reproduce the original" as defined in Rule 1001(4) (Ill. R. Evid. 1001(4) (eff. Jan. 1, 2011)), "because they are not the whole data on the original."

¶ 106 On the second day of trial, the State made an offer of proof in response to the defendant's motion ***in limine***. The State called Pieter Schmidt to authenticate the video clips. Schmidt owned the apartment complex where both the defendant and Whittington lived. The apartment complex was equipped with a video surveillance system. Schmidt and his wife had recently purchased the surveillance system, and they, with the assistance of their maintenance man, installed it at the apartment complex. Schmidt testified he was familiar with the surveillance system to the extent that he could access it through his cellphone. He had not been trained on the use of this system and described his familiarity as "learn as you go." Schmidt stated that he had never had the occasion to retrieve a video from the surveillance system prior to this occasion.

¶ 107 Schmidt testified that the system consisted of four cameras that were "hardwired to a DVR." Two of the cameras were located outside of the building. Another was located in the office,

directed through the office windows and into the hallway, and the fourth camera was pointed down the hallway. The cameras recorded "whatever passe[d] in front of them." Schmidt believed that the recorded activities were saved on the DVR for a period of 48 hours. He indicated that the video recordings contained a date and time stamp, and he explained that if he wanted to view a specific recording, he could input the date and time, and the video would play. The person viewing the video recording could not alter or edit it.

¶ 108 Schmidt testified that the video surveillance equipment was operating properly on July 29, 2018, the date of the burglary. He knew the equipment was functioning properly on that date because he was "able to review the videotape and see images on it and see the date and the time." Schmidt recalled that he and his wife viewed the video from that date after receiving a phone message from a tenant. The tenant reported that he had been "robbed" and that the police "were interested in knowing if the video surveillance system worked." The tenant indicated that a police officer had left his card for Schmidt.

¶ 109 Schmidt testified that he tried to download the video footage from the surveillance system but was unable to do so. "We, I attempted to put it onto a flash drive, but I'm not competent enough apparently to do that. And we tried and could not get it to download on a flash drive. So we recorded it on a cellphone. Basically, I think they call that a screenshot." Schmidt stated that his wife recorded the video on her iPhone. She then "transferred it to my iPhone, and then I took it to my office where I had put it on a compact disc, which I then delivered to the Carbondale Police Department." When asked if he recorded the complete video footage from 1:53 p.m. to 2:14 p.m. on that date, Schmidt replied, "No, we did not." Schmidt explained, "We would have had to stand there for 20 some minutes, 25 minutes holding a cellphone recording, so we recorded just a couple of clips that we thought were important." In response to further questioning about what was

occurring on the video from 1:53 p.m. to 2:14 p.m., Schmidt stated that "the hallway was empty for quite a period of time."

¶ 110 Schmidt testified that he reviewed the content of the compact disc prior to the day of trial. He stated that the disc contained the same two video clips that he and his wife copied from the video surveillance system and that the video clips fairly and accurately depicted what he saw on the surveillance video the day he viewed it. After presenting this testimony, the State offered a copy of the compact disc as People's Exhibit No. 1.

¶ 111 During cross-examination, Schmidt acknowledged that he had never been formally trained on the video surveillance system. He stated that that the system had an instruction manual and that he had read parts of it. When asked if he read the manual in an effort to export the entire video footage to a flash drive, Schmidt replied, "Yeah. We actually did on the, trying to figure out how to put it [video] on the flash drive, but we couldn't figure it out." Schmidt also acknowledged that he did not ask the Carbondale police for help in downloading the surveillance video from the afternoon of the burglary. Schmidt testified that he asked his "IT person" to burn the video clips onto a compact disc, but he did not ask the IT person to export the complete video from the surveillance system. Schmidt testified that the video surveillance recording would have been available for 48 hours, but no one from the police department or the prosecutor's office asked to retrieve it.

¶ 112 With regard to the clips that were made from the cellphone, Schmidt testified that there were two clips one at approximately 1:45 p.m. and one at about 2:10 p.m. Schmidt acknowledged that approximately 20 minutes of footage between the two clips was not preserved, but he indicated that he watched that footage as the video recording was played. Schmidt testified that his wife e-mailed the video clips from her iPhone to his business e-mail account and the IT person transferred

the e-mailed clips to the compact disc. This testimony regarding the duplication process was somewhat different than what Schmidt had said during his direct examination.

¶ 113 After some back and forth between the State and defense counsel regarding the 20-minute gap between the two video clips, and what was displayed on the original video footage, the following brief exchange occurred between defense counsel and Schmidt:

> "[DEFENSE COUNSEL]: But on the original that was on the camera system, are there other people captured on that recording for that day walking in the hallway?
>
> [SCHMIDT]: Yes. There's, there are a lot of people on that."

¶ 114 On redirect, Schmidt was asked whether the defendant was in front of Whittington's apartment. Schmidt stated that, prior to 1:53 p.m., the defendant and his wife were in front of Whittington's apartment door and that, between 1:53 p.m. and 2:14 p.m., no one, other than the defendant, was seen in front of Whittington's apartment.[3]

¶ 115 At the conclusion of Schmidt's testimony, defense counsel objected to the introduction of the two video clips. Defense counsel argued that the admission of two 20-second video clips, taken out of an entire day of surveillance footage, violated the completeness doctrine because the defense did not have access to the entire, original surveillance video. Counsel claimed that the defense was left with two videos that had been "cherry-pick[ed]" when the Carbondale Police Department could have obtained the entire video footage. Counsel also claimed that the admission of these two clips was prejudicial because the jury would not be afforded the opportunity to view the entire video.

[3]At one point, Schmidt testified that the video showed the defendant touching the doorknob, presumably of Whittington's apartment, and then showed the defendant walk down the hallway. Schmidt further testified that the defendant was not seen again on the clips until "the next thing you see is him [the defendant] walking out of the apartment, which was a little confusing because you never see him go in."

¶ 116 Defense counsel further argued that the two iPhone clips were not originals or duplicates under the Illinois Rules of Evidence because they did not accurately reflect or reproduce the original's data. Counsel relied upon Rules 1001 through 1004 of the Illinois Rules of Evidence (Ill. R. Evid. 1001-1004 (eff. Jan. 1, 2011)), all of which pertain to the admission of recordings and duplicates, in support of his argument. Counsel described the two, nonconsecutive clips as "a recording of a recording that got recorded on a DVR, then got recorded on his wife's iPhone, who's not here to testify, then it got recorded or e-mailed to Mr. Schmidt's iPhone, then that was transferred to a DVR." Counsel claimed that the Illinois Rules of Evidence required production of the original or an exact duplicate of the original and that, here, there was "less than 40 seconds out of a whole 24-hour video." Counsel further claimed that the entire video constituted the "original," and that the failure to produce the entire video denied the defense a chance to view exculpatory evidence.

¶ 117 Defense counsel next argued that the admission of the two video clips was barred under Illinois Rule of Evidence 1004 (eff. Jan. 1, 2011) because the original surveillance video was lost or destroyed as a result of inaction by the investigating officer. Counsel asserted that Detective Michael McCrary, a member of the Carbondale Police Department, was on the case as of July 29, investigating the circumstances of the alleged residential burglary, and yet never requested the entire original surveillance video. Counsel concluded that the police made no effort to preserve the original video recording during the time that recording was under the control of Schmidt.

¶ 118 Finally, defense counsel objected to admission of the video clips, arguing that the State failed to lay a sufficient foundation under the "silent witness" theory. Summarizing Schmidt's testimony, defense counsel pointed out that Schmidt admitted that he was not competent to export the entire video, that Schmidt tried to read the instruction manual but could not figure out how to

export the entire video from the DVR, and that Schmidt did not request help from his own IT person. Defense counsel claimed there was no real "chain of custody," as the entire process from copying the images to an iPhone, then sending the images by e-mail, and then getting the images from the e-mail or Schmidt's iPhone to the compact disc involved other persons who had not testified. Two of the witnesses the defendant's wife and the IT person were missing witnesses in the series of events that ultimately resulted in the creation of these two video clips.

¶ 119 At the conclusion of the arguments by counsel, the trial court admitted the two video clips, stating,

> "Based upon what the Court's considered, in a perfect world, we would have clear and complete videos of every situation, clear and complete and clean chain of custody. Unfortunately, we do not work in a perfect world and cases do not arise and are not handled in a vacuum or in a perfect world."

The court made no other findings as to defense counsel's arguments regarding the completeness doctrine, the Illinois Rules of Evidence, or the silent witness theory.

¶ 120 In my view, there are two critical issues before this court. The first is whether there was an adequate foundation for the admission of the two, 20-second video clips under the "silent witness" theory. The second is whether, under the Illinois Rules of Evidence, the admission of the video clips was unfairly prejudicial to the defendant. After reviewing the record, I find that an adequate foundation was lacking in that Schmidt was not competent to operate his video surveillance system, there was insufficient explanation regarding the copying and duplication of the video clips, and the chain of custody was not clearly established. In addition, under the circumstances presented in this case, the admission of the video clips was unfair to the defendant. As a result, I find that the trial court erred in admitting the video clips into evidence.

¶ 121 In considering the admissibility of the video clips, I believe that ***People v. Taylor***, 2011 IL 110067, is instructive in this analysis (***supra*** ¶ 52). ***Taylor*** is the seminal case on the admissibility of surveillance video recordings, and I do not agree that a discussion of the ***Taylor*** factors has been waived or forfeited. In the defendant's brief, the defendant claimed that the trial court erred in admitting the video clips because the clips violated the best evidence rule and were highly prejudicial. In response to the defendant's claims, the State argued that video clips were properly admitted because the prosecutor laid a proper foundation under ***Taylor***. The State then engaged in a lengthy discussion of the ***Taylor*** factors. In the reply brief, the defendant addressed the State's argument, and initially asserted that ***Taylor*** was distinguishable. The defendant next asserted that the best evidence doctrine concerned an entirely different set of factors than those discussed in ***Taylor***. On appeal, as in the trial court, the State invoked the foundational requirements in ***Taylor*** in support of its position that the video clips were admissible, and thereby invited our consideration of the ***Taylor*** factors. The defendant offered his responses to the State's arguments.[4] Therefore, I conclude that the admissibility of the video clips, including the foundational requirements, are before us and that the ***Taylor*** analysis offers guidance on those issues.

¶ 122 In ***Taylor***, a police detective was assigned to investigate a series of thefts from an office in a high school. ***Taylor***, 2011 IL 110067, ¶ 3. In the course of the investigation, the detective purchased a wireless, motion activated digital camera that was concealed within a clock radio, and a DVR. The employee who sold the equipment to the detective showed him how to set up and use the system. The detective also read the instructions that came with the system. He testified that the " 'camera sends a signal to the wireless transmitter which is connected to the DVR which is a digital video recorder, just like a computer drive and that records the images that the camera

[4]Rule 341(j) permits the appellant to reply to the arguments presented in the brief of the appellee. See Ill. S. Ct. R. 341(j) (eff. Oct. 1, 2020); ***People v. Whitfield***, 228 Ill. 2d 502, 514-15 (2007).

sees.' " *Id.* ¶ 4. The detective also testified that he tested the equipment and made sure that the camera recorded a good picture to the DVR.

¶ 123 The detective then explained that he periodically checked to see whether the surveillance system had recorded any activity. When he reviewed the first recording made by the camera, he discovered that the images on the recording were not visible due to insufficient light. To correct the problem, he placed a small lamp near the camera. When he checked the equipment a few days later, he found that the DVR had recorded a theft. The detective, along with two of the school's employees, viewed the video images and identified the defendant, Teryck Taylor, as the individual in the recording. Taylor worked at the school as a night watchman. Several days after viewing the original surveillance footage, the detective " 'made a copy of the video surveillance on the hard drive, specifically the segment where Taylor was in [the] office,' " and placed it onto a VHS tape, which was then secured in an evidence locker until the trial. *Id.* ¶ 9.

¶ 124 Prior to trial, Taylor filed a motion ***in limine*** to bar the State from using the tape at trial, but the motion was denied. At trial, the State sought to admit the video depicting Taylor in the office. Taylor objected, claiming that there was a 30-second "skip" in the video and there was an inadequate foundation for admitting the recording. The video at issue contained two segments. The first showed Taylor crouching behind a desk, opening a drawer, and removing a bank pouch. While doing this, Taylor was looking around. The second segment on the tape showed Taylor rising, turning, and exiting the frame of the video to the right. The detective testified that the "skip" in time occurred because there was no motion and so the recording stopped. As soon as the camera sensed motion, it started again. As to its authenticity, the detective indicated the recording had not been altered in any way. *Id.* ¶¶ 15-18. After considering the arguments of counsel, the trial court denied the objections and admitted the video recording. Taylor was convicted of misdemeanor

theft, and he appealed. The appellate court reversed the conviction, finding that the trial court erred in admitting the video recording, and the State filed a petition seeking leave to appeal in the Illinois Supreme Court.

¶ 125 Our supreme court, in a case of first impression, held that under the "silent witness" theory, photographs and videotapes may be introduced as substantive evidence so long as a proper foundation is laid. ***Id.*** ¶ 32. The supreme court addressed the question of what factors should be considered when determining whether a proper foundation has been laid for the admission of surveillance video footage as substantive evidence. ***Id.*** ¶ 33. In answering this question, the supreme court set forth the following factors:

> "(1) the device's capability for recording and general reliability; (2) competency of the operator; (3) proper operation of the device; (4) showing the manner in which the recording was preserved (chain of custody); (5) identification of the persons, locale, or objects depicted; and (6) explanation of any copying or duplication process." ***Id.*** ¶ 35.

The supreme court cautioned that the list of factors was nonexclusive. "Each case must be evaluated on its own and depending on the facts of the case, some of the factors may not be relevant or additional factors may need to be considered." ***Id.*** The court further stated: "The dispositive issue in every case is the accuracy and reliability of the process that produced the recording." ***Id.***

¶ 126 Turning now to the facts of this case, Schmidt, like the detective in ***Taylor***, had only recently purchased the video surveillance system. Schmidt did not offer testimony about how the surveillance system was set up to record. He did not testify about the surveillance system's general reliability, except to say that he knew the system was working because he could access and view recordings on his phone. While the evidence was scant, to say the least, I find that it was sufficient to show that the system was functioning and generally capable of recording.

¶ 127 As to the second factor, however, the testimony of Schmidt clearly indicated he was not a competent operator of his own equipment. While it was true that Schmidt stated that he could view the surveillance video recordings on his iPhone, he was not able to download or preserve those recordings from the surveillance system itself. He had no training on the operation of the system, and he had only read parts of the instruction manual. Schmidt attempted to download the entire video from the DVR onto a flash drive, but he was unable to do so, even after referencing the instruction manual. Then, instead of seeking assistance from the police or from his own IT person, Schmidt chose to have his wife use her iPhone to film two 20- or 30-second excerpts of the surveillance video and thereafter e-mail those excerpts to other devices. In addition, while Schmidt testified that the video system included a time and date stamp, he did not offer testimony as to how he set the "time and date stamp" function. There was no testimony or other evidence to indicate that the date and time stamp was correctly set when the system was installed or that the system kept accurate time. Assuming, ***arguendo***, that the date function could be used to pull up the video footage from the date of the burglary, no one testified that the time stamps on the video clips accurately corresponded with what Schmidt and his wife viewed. When it came to the operation of the video surveillance system, Schmidt's level of understanding and skill was well below that of the detective in ***Taylor***.

¶ 128 The third and fourth factors to be considered in determining the admissibility of these video clips pertain to the proper copying and duplication of the videos, as well as the chain of custody involved in making the video clips. In this case, the facts are muddled as they relate to the production of these video clips and their transfer from the original equipment to the compact disc. As previously noted, the evidence regarding whether the device was operating properly was scant. As to the preservation of the video, the entirety of the footage was not preserved because Schmidt

could not figure out how to download it onto a flash drive. Instead, Schmidt (and/or his wife) chose to film only two selected segments that they considered important. The result was that two 20-second clips were made, initially, using the wife's iPhone. Notably, Schmidt's wife did not testify, so there is no evidence indicating how she preserved the two video clips and no evidence indicating whether those clips were edited in any way. Schmidt testified that his wife e-mailed the video from her iPhone to Schmidt's business e-mail account. This is where the facts are truly murky. Schmidt testified that the images were on his iPhone at one point, although it is not clear how the images ended up there. It is not known how the images were transferred from Schmidt's phone to his e-mail account, or vice versa, and then to a compact disc. Indeed, Schmidt could not explain this because his IT person performed the task of burning the compact disc and the IT person was not called as a witness. This confusing sequence of events, in my view, eviscerates any reliability pertaining to the creation of the video clips and the chain of custody.

¶ 129 The lack of factual clarity also undermines the sixth ***Taylor*** consideration, which pertains to an explanation of the copying process. While the video may depict the defendant, there was also inconsistent testimony indicating that footage in the original surveillance video revealed the presence of another woman, along with several people up and down the hallway. None of these people were captured in the two video clips at issue here. Based upon the testimony offered, there is simply no way to know what was actually depicted in the original surveillance video footage. The fact that other people were present at various times in the hallway compels one to question why Schmidt chose to record and preserve only those segments of the surveillance video that contained images of the defendant in the vicinity of the victim's apartment, while excluding other persons who were also in the vicinity. Schmidt was not a trained investigator, and his decisions regarding what content to record and what to omit from the original surveillance video footage

raise questions about the reliability and the trustworthiness of these video clips and whether they accurately portray the entirety of what occurred on the afternoon of the burglary.

¶ 130 In light of the foregoing, I do not believe Schmidt's testimony was sufficient to lay a reliable foundation for the admissibility of the two 20-second video clips. I agree with my colleague's point, in the special concurrence, that "the ultimate issue" is " 'the accuracy and reliability of the process that produced the recording' " (***supra*** ¶ 93 (quoting ***Taylor***, 2011 IL 110067, ¶ 35), but, for the reasons stated herein, I respectfully disagree with my colleague's conclusion that this process was accurate and reliable. I would further note that the two video clips were not derived from simply "editing" a lengthy video to exclude unimportant and irrelevant material. Rather, because Schmidt was not trained or experienced in operating his system, he was unable to export and preserve the complete surveillance footage. The two video clips were made using an iPhone camera and there was no evidence as to the capability of that camera. In the absence of a reliable foundation, I find that this evidence was irreparably tainted and inadmissible, and that the trial court erred in admitting it.

¶ 131 The defendant also argued that the admission of the two video clips violated the best evidence rule. I agree that each video clip constitutes a "duplicate" as defined in Rule 1001(4) of the Illinois Rules of Evidence (eff. Jan. 1, 2011). Rule 1003 of the Illinois Rules of Evidence (eff. Jan. 1, 2011) provides that "[a] duplicate is admissible to the same extent as an original unless (1) a genuine issue is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Each clip is a 20-second snapshot produced from an original surveillance video. The record indicates that the original video was recorded on the video surveillance system's DVR. The video surveillance system was set to save the recordings for a period of 48 hours. The original video recording was not preserved by Schmidt

or by law enforcement. Schmidt did not know how to download the video footage or otherwise save it, and he did not want to take the time to make an iPhone video of the complete surveillance footage. The responding police officer did not obtain a copy of the complete video because the victim had initially declined to prosecute. As a result, the video clips are snippets in time and were selected by a person who had no apparent training in criminal investigation. Considering all of the circumstances, including the lack of foundation for the video clips discussed earlier, I conclude that the admission of the duplicate video clips was unfair to the defendant.

¶ 132 For the reasons stated, I find that the admission of the video clips was error and that the error resulted in unfair prejudice to the defendant. I would vacate the defendant's conviction and remand the case for a new trial without the two video clips.

No. 5-19-0066

Cite as:	***People v. Smith***, 2021 IL App (5th) 190066
Decision Under Review:	Appeal from the Circuit Court of Jackson County, No. 18-CF-303; the Hon. Ralph R. Bloodworth III, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Douglas R. Hoff, and Adrienne E. Sloan, of State Appellate Defender's Office, of Chicago, for appellant.
Attorneys for Appellee:	Joseph A. Cervantez, State's Attorney, of Murphysboro (Patrick Delfino, Patrick D. Daly, and Max C. Miller, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

2017 IL App (1st) 14-2566-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Appellate Court of Illinois, First District,
THIRD DIVISION.

PEOPLE of the State of
Illinois, Plaintiff–Appellant,
v.
Jeffrey **GRAFTON**, Defendant–Appellee.

No. 1–14–2566

February 8, **2017**

Appeal from the Circuit Court of Cook County, Illinois, Criminal Division. No. 12 CR 19279, The Honorable Mauricio Araujo, Judge Presiding.

ORDER

PRESIDING JUSTICE FITZGERALD SMITH, delivered the judgment of the court.

***1** *Held*: The trial court's admission into evidence of a "video of a video of a video" of the shooting, did not violate the best evidence rule, where the testimony of the police officer who obtained the video established the prior existence of the presently unavailable original video, the authenticity of the officer's substitute video and the detective's diligence in attempting to procure the original video. Further, the trial court did not abuse its discretion in permitting the victim to identify the defendant from that surveillance video. Pursuant to *People v. Thompson*, 2016 IL 118667, the victim had contact with the defendant that the trier of fact did not posses and therefore his opinion would have proved helpful to the trial judge. The trial court's admission of a police officer's out-of-court identification of the defendant as the shooter while improper hearsay constituted harmless error in the light of overwhelming evidence of the defendant's guilt. The State proved the defendant guilty beyond a reasonable doubt, where three eyewitnesses identified the defendant as the shooter, and their testimony was corroborated by the surveillance video. Pursuant to *People v. McFadden*, 2016 IL 117424, the defendant's armed habitual criminal conviction can stand even though it is premised on the defendant's prior AUUW conviction, which is *void ab initio* pursuant to *People v. Aguilar*, 2013 IL 112116. The trial court's use of the defendant's prior armed robbery conviction to prove both of the predicate felonies necessary to find the defendant guilty as an armed habitual criminal was not an improper double enhancement. In addition, the defendant's attempt murder and armed habitual criminal convictions were not based upon the same physical act so as to violate the one-act, one-crime rule. The defendant failed to establish that he was denied his constitutional right to effective representation of trial counsel, where he failed to establish prejudice pursuant to *Strickland v. Washington*, 466 U.S. 668. The trial court properly sentenced the defendant to consecutive sentences for his attempt murder and armed habitual criminal convictions with no double enhancements.

¶ 1 Following a bench trial in the circuit court of Cook county, the defendant, Jeffrey **Grafton**, was found guilty of attempt first degree murder, aggravated battery with a firearm, armed habitual criminal and aggravated unlawful use of a weapon (hereinafter AUUW). For purposes of sentencing, the aggravated battery conviction was merged with the attempt first degree murder conviction and the AUUW conviction was merged with the armed habitual criminal conviction. Accordingly, the defendant was sentenced to consecutive terms of 45 years' and 20 years' imprisonment. On appeal, the defendant argues that: (1) he was denied a fair trial by the court's improper admission of (a) hearsay testimony and (b) impermissible lay opinion; (2) the State's introduction of a "video of a video of a video" replete with police voice-overs, violated the best-evidence rule; (3) the State failed to prove him guilty beyond a reasonable doubt; (4) the State failed to prove the requisite two applicable predicate felonies for the armed habitual criminal conviction without double enhancement; (5) his conviction for armed habitual criminal is unconstitutional where the predicate conviction for AUUW violates the second amendment; (6) he was denied his constitutional right to effective assistance of counsel where counsel failed to challenge inadmissible impeachment testimony and inconsistent statements; (7) his convictions for attempt first degree murder and armed habitual criminal violated the one-act one-crime rule; and (8) the imposition of consecutive sentences is reversible error because the trial court used the same factor of "severe bodily injury" to enhance the sentence twice, and because it believed that

consecutive sentencing was mandatory. For the reasons that follow, we affirm.

¶ 2 I. BACKGROUND

***2** ¶ 3 The record before us reveals the following facts and procedural history. In October 2012, the defendant was charged in a 14–count indictment with numerous crimes arising from the September 17, 2012, shooting of the victim, Donald Rogers. The State proceeded with only four counts, namely: (1) attempt first degree murder, for having proximately discharged a firearm that caused great bodily harm (Count 4); (2) armed habitual criminal (Count 10); (3) aggravated battery with a firearm (Count 8); and (4) AUUW (Count 14).

¶ 4 A. Motion *In Limine*

¶ 5 Prior to trial, the State filed a motion *in limine* pursuant to *People v. Montgomery*, 47 Ill. 2d 510 (1971), seeking permission to introduce three of the defendant's prior convictions for purposes of impeachment if the defendant chose to testify at trial. According to that motion, the State sought to introduce the following prior convictions: (1) a February 7, 2008, conviction for AUUW in which the defendant was sentenced to 42 months' imprisonment (case No. 07 CR 20784); (2) a November 5, 1999, armed robbery conviction for which the defendant was sentenced to 10 years' imprisonment, and from which he was discharged from mandatory supervised release on July 15, 2006 (case No. 98 CR 11866); and (3) two February 26, 1999, convictions for terrorism and possession of a controlled substance with intent to deliver in which the defendant was sentenced to 10 years' imprisonment on each count to be served consecutively to each other (case No. CR 130586), but concurrently, to the armed robbery sentence (case No. 98 CR 11866).

¶ 6 At the hearing on the State's motion, the trial court inquired if defense counsel had any objections. Defense counsel stated that he did not, so long as the three prior convictions comported with the 10–year limitation set forth in *Montgomery*, 47 Ill. 2d 510. The State then described the convictions it sought to introduce to the court in the following manner: (1) a ten-year sentence in 1999 for armed robbery; (2) two consecutive ten-year sentences (for a total of 20 years) in Iowa for terrorism and possession with intent to deliver a controlled substance, which were served concurrently with the 10 year Illinois armed robbery sentence; and (3) a 42month sentence on February 7, 2008, for AUUW. The State argued that because the defendant had been "discharged from mandatory supervised release or parole in 2006" for his Illinois armed robbery sentence, which he was serving concurrently with the Iowa 20–year sentence, all three convictions (armed robbery, terrorism and possession of a controlled substance with intent to deliver) fell within the 10 year limit required under *Montgomery*. With respect to the prior AUUW conviction, the State argued that because the defendant had been "released from—sentenced on February 7th of 2008" the AUUW conviction also fell within the ten-year *Montgomery* rule.

¶ 7 Without objection from defense counsel, the trial court granted the State's motion *in limine*, permitting the State to use all three prior convictions for purposes of impeachment should the defendant choose to testify at trial.

¶ 8 B. Bench Trial

¶ 9 On December 12, 2013, the parties proceeded with a bench trial at which the following evidence was adduced. The victim, Donald Rogers (hereinafter the victim), first testified that on September 17, 2012, at about 10 p.m., he went to the tire shop at 4339 West Madison Street to fix a flat tire on his wife's car. The victim testified that the car was a gold 2005 Chevy Impala. The victim knew Billy Davis (hereinafter Davis), who worked at the tire shop. When the victim arrived at the tire shop he parked the car in the back alley and went to get Davis. Although Davis usually repairs cars in the alley, this time he instructed the victim to move his car to the front of the shop. The victim obliged and parked the car, facing east, on Madison Street, right in front of the shop. Davis then began working on the front right tire, while the victim stood next to him on the sidewalk. At trial, the victim identified photographs of the car parked in front of the shop.

***3** ¶ 10 The victim next testified that while he was standing next to Davis he observed two individuals, whom he had never seen before, approaching them. One was a man on foot, and the other an individual who rode up on a bicycle. The victim made an in-court identification of the defendant as the pedestrian. According to the victim, the defendant walked up to the tire shop door and stood there with his right hand in his pocket. The individual on the bicycle approached the pedestrian and the two had a brief conversation.

¶ 11 After Davis had finished changing the tire, he proceeded to the tire shop, and the victim followed him across the sidewalk toward the shop. As the victim was about to walk by the defendant, the defendant pulled a black gun out of his right pocket, said "F**k this," aimed it at the victim's head and shot at him. The victim stated that he ducked and started running into the middle of the street, which was filled with traffic, but that the defendant chased after him. The victim felt shots penetrating his back and shoulder, and after that, the defendant striking him with the gun on the back of the head.

¶ 12 The victim saw a Chicago police car traveling eastbound on Madison Street, heard the defendant drop the gun and watched him fleeing northbound across the street. The victim fell to the ground and observed the police car chase after the defendant.

¶ 13 Soon thereafter an ambulance arrived and the victim was transported to Mount Sinai Hospital. The victim underwent surgery for five bullet wounds, some in the neck and some in the chest area. At trial, he demonstrated all five scars, and testified that he still has one bullet remaining in his neck that the physicians were unable to remove.

¶ 14 The victim next testified that when he observed the defendant moments before the shooting, he was only four or five feet away from him. The victim explained that even though it was nighttime, because there are businesses on the street, there were lights illuminating the sidewalk where the defendant stood. According to the defendant, it was about 60 degrees Fahrenheit that day, and the streets were wet because it had rained previously.

¶ 15 The victim further averred that when the defendant started shooting at him, he saw fire and sparks coming from the gun, but did not hear a regular gunshot (which he had heard before and was familiar with). He described the sound coming from the gun as something like "chu chu chu, [like the gun] had something on it."

¶ 16 The victim stated that on September 18, 2012, while still at Mount Sinai Hospital, he spoke to two Chicago police detectives, who showed him a photo lineup, from which he selected the defendant as the shooter. The photo lineup was introduced as an exhibit into evidence. It contains photographs of six African American men (three per row), and indicates a circle mark, date and the victim's signature, next to the third individual in the top row, depicting the defendant's photograph.

¶ 17 At trial, the victim was next asked if he had previously viewed a video of the incident and he stated that he had. He averred that the video truly and accurately reflected what had happened. The video was then introduced into evidence, and the victim testified to its contents (with the help of the trial court). For the record, the court indicated that the video was actually a "video of a video."

¶ 18 Using the video, the victim testified that his vehicle was seen in the far right corner of the screen. He identified the two men standing in front of his vehicle as himself and Davis. The video next showed the individual whom the victim identified as the defendant walking on the sidewalk and approaching the open door of the tire shop, immediately followed by the bicyclist. On the video, the defendant hugs the bicyclist and they appear to stand on the corner having a conversation. According to the video, an individual carrying a car jack (presumably Davis) then walks by the defendant, while the victim stays behind. As the victim follows behind Davis, all of a sudden the defendant pulls out his arm and holds it straight out, shooting at the victim and running after him into the street. The victim falls to the ground in the middle of the street, while the defendant disappears from the screen, chased by a police car that makes a U–turn on Madison Street. The video next shows the individual on the bicycle cycling over to the victim lying in the middle of the street and talking with him. [2]

***4** ¶ 19 In the video, the individual identified by the victim as the defendant wore a black garment (hoodie) on top of a white garment, as well as dark baggie shorts, and white sneakers with black stripes.

¶ 20 At trial, the victim identified a photograph of the defendant taken upon the defendant's arrest and testified that the clothing the defendant wore in that photograph was the same as the clothing worn by the man who shot him. On cross-examination, however, the victim admitted that this was not the case, because according to the video, at the time of the shooting, the perpetrator wore shorts and a black hoodie on top of a white shirt, while the photograph depicted the defendant only in shorts and a white T–shirt.

¶ 21 The victim admitted that he has a prior 2006 conviction for possession of a controlled substance and that he had a pending felony drug case for possession of a controlled

substance with intent to deliver. He testified, however, that the State had not offered or promised him anything in return with regard to that case, in exchange for his testimony in the defendant's trial.

¶ 22 On cross-examination, the victim admitted that while he was standing in front of the tire shop neither the defendant nor the individual on the bicycle spoke to him, or asked him for money, or yelled any gang slogans at him. He acknowledged that the defendant never gave him a reason for shooting him.

¶ 23 On cross-examination, the victim also admitted that he never gave the police a description of the man that shot him. In addition, he acknowledged that before the defendant shot him, he only had a split second, which he described as "bam" to observe his face. The victim stated, however, that while Davis was fixing his tire, he was watching the pedestrian's face (for about 7 to 10 minutes), and that he had a photographic memory. When asked, the victim could not, however, describe the individual on the bicycle, and could not explain why he had focused on the defendant and not the cyclist while his tire was being repaired.

¶ 24 On cross-examination, the victim was asked if he was a member of any gangs, and responded in the negative.

¶ 25 Davis next testified that he owns the tire shop at 4339 West Madison Street, and that he went to grammar school with the victim, and that they are friends. He stated that on September 17, 2012, the victim came to his tire shop because he had a flat tire on the front passenger side. The victim pulled up with his car in the back alley and honked. Davis went to the door to see who it was. At that point, he saw a van pass by and a man standing in the alley, so he asked the victim if the man was with him. When the victim told him he was not, Davis became uneasy and told the victim to pull up to the front of the store. Davis then locked the back door of his store, and proceeded to the front where he met the victim on the street. Davis then worked on the victim's car, while the victim stood next to him. Davis had to go in and out of the tire shop a couple of times to select the appropriate replacement tire. While working outside, Davis saw a "young lady" on a bicycle approach the tire shop, followed by a pedestrian. The two struck up a conversation on the sidewalk in front of the tire shop. According to Davis, the victim (who had also been going in and out of the tire shop) had just come out of the store when these two individuals appeared. When Davis finished working on the tire, he walked by the two individuals and entered his shop. About two minutes later he heard what sounded like firecrackers. He jumped back and looked out and saw the victim running toward the middle of the street with a man behind him, trying to hit him in the head with a gun. Davis described the gun as long, with something built on top of it, not "like a regular gun," which he had seen "plenty of." At that moment, the police pulled up, and Davis observed the man drop the gun and run northbound.

***5** ¶ 26 Davis went to the victim who told him he had been shot. After the ambulance arrived to take the victim, Davis remained on the scene. The police later brought an individual for him to view. Davis identified the person as the man who chased the victim into the street and tried to hit him with the gun. He made an in-court identification of the defendant as that individual.

¶ 27 On cross-examination, Davis admitted that during this show-up, he could not see the defendant's clothes because the defendant was seated inside a police squad car. Davis could therefore not see how much the defendant weighed nor how tall he was. He stated that all he could see was the defendant's face. On cross-examination, Davis further admitted that the only opportunity he had to observe the defendant's face was as he passed by him on the sidewalk to go into his tire shop. He, therefore, admitted he did not have a "great opportunity to study the face" of the perpetrator.

¶ 28 Chicago Police Officer Salvador Michael Soraparu (hereinafter Officer Soraparu) next testified that at about 10:15 p.m. on September 17, 2012, together with his partner Officer Melissa Schroeder (hereinafter Officer Schroeder), he was in the vicinity of Davis' tire shop, on special assignment for neighborhood violence reduction. At about 10:18 p.m., Officer Soraparu was driving his marked squad car eastbound on Madison Street, between Kildare Avenue and Kostner Avenue, when he heard several muffled gunshots. Officer Soraparu described the sound as a CO2 gun with pellets, and therefore much quieter than a real gunshot.

¶ 29 Officer Soraparu then observed an individual chasing the victim into the street, firing from a dark colored automatic or semiautomatic pistol. The individual was running form the south side of Madison Street toward the median, chasing and shooting the victim. He was about 10 to 15 feet away from the officer's vehicle, and the officer could see his profile. The officer made an in-court identification of the defendant as the man he observed chasing and firing at the victim.

¶ 30 Officer Soraparu testified that he stopped his vehicle and made a u-turn to follow the defendant, who ran across the street and a little bit west into a vacant lot right off of Kostner Avenue, heading northbound towards Washington Boulevard. Officer Soraparu's partner attempted to exit the vehicle to follow the defendant on foot, but he ordered her back into the car because of the "neighborhood they were in," and they proceeded to chase the defendant with their vehicle. After the defendant ran over to Washington Boulevard he went over two fences, heading northbound, and the officers lost sight of him.

¶ 31 Officer Soraparu testified that as soon as they observed the shooting, he and his partner put a flash message over the radio, describing the offender. He explained that two separate flash messages were submitted because his partner had sent the first one to the "wrong police zone." Officer Soraparu acknowledged that his flash message described the offender as wearing a white baggy T–shirt and black long baggy shorts, while the defendant actually wore a black hoodie when the officer observed him shooting the victim. Officer Soraparu explained, however, that by the time he gave his second flash message the defendant had removed the dark hoodie he had been wearing over his T–shirt, and had thrown it into a vacant lot. Accordingly, the officer's flash message described the offender as African American male defendant about 5'8" tall, wearing a white baggy T–shirt and black long baggy shorts.

***6** ¶ 32 Officer Soraparu testified that as he and his partner continued to search for the defendant near Washington Boulevard, he received a radio call that another police unit had apprehended the suspect. Officer Soraparu and his partner relocated to the scene of the shooting, where they met Officer Matt McNicholas and Officer Vera, who had the defendant in custody. Officer Soraparu recognized the defendant as the shooter and was able to identify him. He stated that he made this identification only about 3 or 4 minutes after he observed the shooting. He also acknowledged that at the time of his identification, the defendant was wearing only a white T–shirt and black long baggy shorts.

¶ 33 On cross-examination, Officer Soraparu admitted that he never recovered the black hoodie. He claimed he believed other officers at the scene had recovered it but then later learned no one had. On cross-examination, Officer Soraparu also admitted that he never observed the defendant's face from the front, but only saw his profile. He acknowledged that he viewed the profile for only about 5 to 10 seconds.

¶ 34 Chicago Police Officer Anthony Chavez (hereinafter Officer Chavez) next testified that at about 10 p.m. on September 17, 2012, he was in the vicinity of 4339 West Madison Street with his partner Officer Matthew Brophy. Officer Chavez was driving his marked squad car, westbound on Madison Street when he saw an individual, whom he later learned was the victim, lying in the middle of the street. The officer rolled down his window and spoke to the victim. Over defense counsel's objection, Officer Chavez testified that the victim was yelling for help because "someone" had shot him. Officer Chavez stated that he and his partner immediately exited their vehicle and observed that the victim was injured and in pain. Officer Chavez radioed for assistance, and his partner remained with the victim until the ambulance arrived.

¶ 35 Officer Chavez testified that he also observed a weapon lying on the median about 10 feet away from the victim. He described the weapon as a small blue steel handgun with a silencer. Officer Chavez testified that while his partner assisted the victim, he stood next to the weapon until an evidence technician arrived at the scene to inventory it. The officer identified the weapon in court as the one that was recovered from the scene.

¶ 36 On cross-examination Officer Chavez admitted that he did not hear any flash messages on his radio at the time he observed the victim in the middle of the street.

¶ 37 Chicago Police Officer Matt McNicholas (hereinafter Officer McNicholas) next testified that at about 10:20 p.m. on September 17, 2012, he was working with his partner Officer Vera in the vicinity of the tire shop when they received a flash message from Officer Soraparu regarding a male African American suspect wearing a white T–shirt and black jeans shorts fleeing northbound from the area of Kostner Avenue and Madison Street. In response to the message, Officer McNicholas and his partner toured the immediate area. After entering the 4300 block of Washington Boulevard, with their vehicle, using their spotlight, Officer McNicholas and his partner began searching for the offender. Officer McNicholas observed an individual matching the description of the offender lying down on his stomach underneath a black SUV in the north alley of 4338 West Washington Boulevard. According to the officer, the individual was lying on his stomach with his head facing northbound and clutching an unknown object in one of his hands. According to the officer, it had been raining that day, so the ground the individual was lying on was wet. Officer McNicholas made an in-court

identification of the defendant as the man he observed hiding under the SUV.

***7** ¶ 38 According to Officer McNicholas, both officers exited the vehicle and ordered the offender to place his hands out from underneath the vehicle and to let go of what he had been holding—his cell phone. The defendant complied and the officers handcuffed and arrested him.

¶ 39 Officer McNicholas testified that they then took the defendant to the scene of the crime, where he was identified by both Officer Soraparu and his partner as the person they observed shooting the victim. The officers transported the defendant to the police station, where he was photographed. Officer McNicholas identified photographs of the defendant as he looked when he was arrested, and of the black SUV under which the defendant was seen hiding.

¶ 40 Officer McNicholas also testified that he received the flash message at 10:19 p.m. and detained the defendant at 10:22 p.m. He further stated the distance between where the defendant was found and where the shooting took place was one block.

¶ 41 On cross-examination, Officer McNicholas admitted that the flash message only indicated that the offender wore a white T–shirt and black jeans or black jeans shorts. He could not recall any height or weight or age being supplied in the message. He also did not remember whether any other police officers asked him to try and recover a hoodie.

¶ 42 Chicago Police Detective Greg Swiderek (hereinafter Detective Swiderek) next testified that at about 10:30 p.m. on September 17, 2012, he headed to the vicinity of 4339 West Madison Street in response to a radio call of a person shot. Once there, the detective learned that a suspect had been apprehended. The detective identified the defendant as the person detained.

¶ 43 While at the scene of the crime, Detective Swiderek also learned that there was as witness to the incident, namely Davis, the owner of the tire shop. Accordingly, the detective proceeded to interview Davis. Detective Swiderek asked Davis if he was willing to look at the apprehended suspect and determine if he was the offender, and Davis agreed. At about 10:43 p.m. that evening, a show-up was performed and Davis viewed the defendant who was seated in a Chicago police marked squad car. According to the detective, Davis identified the defendant as the man he had observed struggling with the victim and attempting to strike the victim in the head with a handgun before he was chased by the police.

¶ 44 On cross-examination, Detective Swiderek acknowledged that when the show-up was performed, Davis was about eight feet away from the defendant. He also admitted that it was still dark outside, but stated that the squad car spotlight shine was on the defendant.

¶ 45 Chicago Police Detective Timothy Thompson (hereinafter Detective Thompson) next testified that at about 10:45 p.m. on September 17, 2012, he proceeded to the scene to investigate the shooting. He stated that it was raining when he arrived and that he saw a gun on the ground in the middle of the street, which he described as a "dark semiautomatic handgun" with a "silencer and maybe some laser sights on it."

¶ 46 Detective Thompson further testified that after canvassing the area, he observed several businesses, including a convenience store, with a surveillance camera outside. The business was closed, so Detective Thompson returned the following day to try and obtain any video footage that was available. Detective Thompson spoke to one of the workers at the store, and was told that the cameras were not operational. He asked the worker if she would show him where the cameras were. The detective was taken to a small room in the back of the store, where the cameras were located. He noted that the cameras appeared functional and asked the worker if she would call the manager. Once the manager appeared, the detective asked that the footage from the previous night be played for him. After the video was shown to him, the detective telephoned his department hoping to get an officer to come and download the video, but no one answered his call. Based on the responses of the individuals in the store, the detective was not confident that the store would maintain the footage, and therefore asked that the video be shown to him again so that he could videotape it with his Iphone camera.

***8** ¶ 47 Detective Thompson testified that he was told that the footage would be retained for three days. However, when the police subsequently arrived to retrieve the video, they were told that "they must have made a mistake" and that videos were retained only for 18 hours, which had already passed. Accordingly, Detective Thompson was unable to obtain the original video footage.

¶ 48 Detective Thompson testified that the video he took with his Iphone camera on September 18, 2012, was a true and accurate copy of the video shown at trial, which was admitted into evidence.

¶ 49 Detective Thompson further testified that as part of his investigation of the shooting, on September 18, 2012, he visited the victim, in the hospital. Detective Thompson showed a photo-array to the victim, including a photograph of the defendant, and the victim identified the defendant as his shooter.

¶ 50 On cross-examination, Detective Thompson acknowledged that while at the hospital, he asked the victim whether he knew the motive for the shooting, and the victim responded that he believed it was related to him owing money to someone. Detective Thompson further admitted that although the victim told him the name of the person whom he owed money, the detective never attempted to talk or interview that individual.

¶ 51 On cross-examination, and over the State's objection, Detective Thompson also admitted that in his police report he noted that the victim was a member of the Four Corner Hustler gang, and that this information was obtained directly from the victim.

¶ 52 Chicago Police evidence technician Amy Campbell next testified that on September 17, 2012, at approximately 10:45 p.m. she was called to process the scene at 4339 West Madison Street. Once there, she met Detective Thompson who described the incident to her and walked her around to show her the evidence. Campbell observed several cartridge cases on the ground and the sidewalk, a red stain on the ground and a firearm with a silencer in slide lock (indicating that the weapon was empty). Campbell recovered the firearm (with the silencer), seven shell casings and some blood from the scene. All of the cartridges were the same caliber. She also photographed the scene and each piece of evidence. The evidence was then marked, inventoried and taken to the crime lab.

¶ 53 On cross-examination, Campbell admitted that six of the seven cartridges were found on the sidewalk or the curb. Specifically two were found right next to the curb, four were on the sidewalk and only one was recovered from the street. That last one was recovered near the other side of the victim's car. While Campbell could not testify to exactly where the cartridges were fired from, she did admit that from their location, it appeared that the gunman was shooting, at some point, from the general area of the sidewalk.

¶ 54 Illinois State Police firearms examiner Tonia Brubaker next testified that she received the firearm, silencer, magazine, and seven fired cartridges that were inventoried at the crime scene. She described the firearm as a Walther P22, .22 long rifle caliber semiautomatic with a sound suppressor and a detachable magazine. Brubaker testified that the serial number on the firearm was obliterated. Brubaker performed testing to compare the fired cartridges to the weapon retrieved and concluded that all seven cartridges were fired from the Walther .22 caliber gun.

***9** ¶ 55 The parties next proceeded by way of stipulation. They stipulated that if called to testify, Illinois State Police forensic scientist and latent fingerprint expert, Cassandra Richards, would testify that she performed a fingerprint analysis on the gun, the seven discharged cartridges and the magazine retrieved at the crime scene, and found no fingerprints suitable for comparison. She would also testify that whether prints are left on items depends on many factors including the texture of the surface and the amount of oil or sweat on the fingers of the person touching the object.

¶ 56 Chicago Police evidence technician Cara Kuprianczyk next testified that early in the morning [3] of September 18, 2012, she was called to perform a gunshot residue test on the defendant. She testified that when she first observed the defendant he appeared a little disheveled, and was handcuffed to the wall. After the defendant was un-handcuffed she performed the test on both of his hands and sent the kit to the Illinois State police forensic lab.

¶ 57 Illinois State Police forensic scientist, Ellen Chapman (hereinafter Chapman), next testified that she received that gunshot residue kit from the Chicago police. After testing it in the laboratory, she concluded that both of the defendant's hands were negative for gunshot residue. She testified, however, that an individual taking off his clothing, or grabbing onto items such as a fence, or touching wet pavement, could affect the amount of gunshot residue found on that person's hands. She explained that gunpowder residue is a little like chalk dust and eventually will wear off by itself, with the amount of time depending on the activity the person goes through after they fire the firearm. Chapman testified that if a person was not trying to get rid of the gunshot residue, it would disappear after about 6 hours of normal hand activity.

¶ 58 On cross-examination, Chapman acknowledged that the most effective way to remove gunshot powder residue would be to wash one's hands with soap. She admitted that the fact that it rained outside would have no effect on the removal of gunshot residue from a person's hands. On cross-examination, Chapman also acknowledged that no gunshot residue test was performed on the defendant's clothes, even though generally one would find gunshot residue on clothes worn by someone who fired a gun. On redirect she testified, however, that if a person removed an article of clothing after having used a firearm she would not expect to find any gunshot residue on any clothing underneath the removed garment.

¶ 59 The State next introduced into evidence copies of the defendant's two prior convictions for: (1) AUUW (Class 2 felony) on February 7, 2008 (case No. 07 CR 20784); and (2) armed robbery on November 5, 1999 (case No. 98 CR 11866). The court asked defense counsel if he had any objection to the introduction of these convictions and counsel stated that he did not because they were being introduced only for the armed habitual criminal charge.

¶ 60 After the State rested its case, the defense proceeded with its case-in-chief by calling the defendant to the stand. The defendant testified that on September 17, 2012, he was not at 4339 Madison Street. Instead, he was in the alleyway on the corner of Washington Boulevard and Kostner Avenue, underneath an SUV, which he was attempting to steal. The defendant testified that he had a screwdriver and a wire cutter, which he was going to use to cut the alarm on the SUV. He testified he was on his back and not on his stomach when the police arrested him. The defendant averred that he was working on dismantling the car's alarm system, using his tools and his Iphone as a flashlight to see what he was doing, when he heard voices. The defendant immediately threw the screw driver to his right (all the way to the fence), and put the wire cutter in a groove underneath the SUV's muffler. When the police showed up he believed he was being arrested because someone in the building had seen him under the SUV trying to steal the vehicle, and had called the police. The defendant denied knowing anything about a shooting or having a gun that night. He also denied having a black hoodie.

***10** ¶ 61 On cross-examination, the defendant admitted that the photograph taken by the police after his arrest depicted him in ripped jeans shorts exposing his undergarments. When asked if his clothes looked that way when he left the house that morning, the defendant replied that they did because he had stormed out of his house after having "gotten into it with his wife."

¶ 62 After the defendant testified at trial, in rebuttal the State introduced all three of the defendant's prior convictions as impeachment evidence, including: (1) AUUW (Class 2 felony) on February 7, 2008 (case No. 07 CR 20784); (2) armed robbery on November 5, 1999 (case No. 98 CR 11866); and (3) terrorism and possession of a controlled substance with intent to deliver on February 26, 1999, in Iowa District Court, Cole County (case No. CR 130586). At this juncture, defense counsel inquired into the release-date for the Iowa convictions and indicated that the defendant had told him that the sentences had not been consecutive. The trial court stated that it would not matter, since the defendant's release date (on parole) in 2006 was within ten years and therefore within the *Montgomery* rule. The court asked defense counsel if he had any objections, and counsel indicated that he did not. Accordingly, the three convictions were placed into evidence both for impeachment purposes and as proof for the armed habitual criminal charge.

¶ 63 After closing arguments, the trial court found the defendant guilty on all four charges: (1) attempt first degree murder (including personally discharging the firearm that caused the victim great bodily harm); (2) aggravated battery; (3) armed habitual criminal; and (4) AUUW. In doing so, the court noted that the central issue in the case was not whether the victim was shot or whether the gun retrieved from the middle of the street was the one used in the shooting, but rather whether the defendant was the one who shot the victim. The court found the testimony of all of the State's witnesses to be credible and based his guilty findings upon the three eyewitness (the victim, Davis and Officer Soraparu) identifications of the defendant as the shooter.

¶ 64 After trial, the defendant retained new counsel, who filed a supplemental (and subsequently amended supplemental) motion for judgment notwithstanding the verdict and for a new trial. Among numerous allegations, in that motion, the defendant alleged *inter alia*, that he was denied his right to effective assistance of trial counsel, when counsel failed: (1) to challenge the State's use of his prior convictions for impeachment pursuant to *Montgomery*, and (2) to confront Officer Soraparu with inconsistent statements and/or omission regarding the hoodie from the police reports and flash message. Attached as exhibits to the defendant's posttrial motion were *inter alia*: (1) handwritten and typed police reports reflecting the contents of the officers' flash messages;

and (2) Officer Soraparu's report of viewing the offender as wearing shorts, and no mention of the offender removing his hoodie during the pursuit.

¶ 65 Despite newly retained counsel's presence, at the hearing on the motion for a new trial, the State requested that the trial court conduct a "pre-*Krankel* hearing" with respect to the allegations of ineffective assistance of counsel.[4] In the presence of the newly retained counsel, the trial court then proceeded to question original defense counsel regarding his representation of the defendant. Defense counsel explained, *inter alia*, that he made no objections to the motion *in limine*, because one of those convictions was "used for the armed habitual criminal"charge to which *Montgomery* does not apply. In addition, he testified that he thoroughly cross-examined Officer Soraparu as to his failure in retrieving the hoodie, even without specifically using the officer's police report, which failed to mention the removal of that hoodie. The State requested that based on defense counsel's answer, the court make a finding that the defendant's claims with respect to counsel's ineffectiveness were meritless. The court agreed, and found that the claims were without merit.

***11** ¶ 66 The court then proceeded to address the remainder of the defendant's claims and ultimately denied his motions for judgment notwithstanding the verdict and for a new trial.

¶ 67 At the subsequent sentencing hearing, in aggravation the State relied on the evidence presented at trial. In mitigation, the defense argued, *inter alia*, that the defendant had a stable home, an income, and children to support, and that he had expressed sympathy for the victim and maintained his innocence throughout trial.

¶ 68 After hearing arguments by both parties, the trial court found that consecutive sentencing was mandatory and sentenced the defendant to a total of 65 years' imprisonment. Specifically, the court sentenced the defendant to 45 years' imprisonment for the attempt murder conviction (20 years for the attempt murder and 25 years for the firearm enhancement), merging the attempt murder conviction with aggravated battery. The court also sentenced the defendant to 20 years' imprisonment for the armed habitual criminal conviction, merging that conviction with AUUW. The defendant now appeals.

¶ 69 III. ANALYSIS

¶ 70 On appeal, the defendant makes numerous contentions. He argues that: (1) the trial court improperly admitted into evidence: (a) impermissible hearsay identification testimony, (b) lay opinion, and (c) a "video of a video of a video," in contravention of the best-evidence rule; (2) the State failed to prove him guilty beyond a reasonable doubt; (3) the State failed to prove the requisite two applicable predicate felonies for the armed habitual criminal conviction without double enhancement; (4) his conviction for armed habitual criminal is unconstitutional where the predicate conviction for AUUW violates the second amendment; (5) he was denied his constitutional right to effective assistance of counsel where counsel failed: (a) to challenge inadmissible impeachment testimony and (b) to introduce prior inconsistent statements against the State's witnesses; (6) his convictions for attempt first degree murder and armed habitual criminal violate the one-act one-crime rule; and (7) the imposition of consecutive sentences is reversible error because the trial court used the same factor of "severe bodily injury" to enhance the sentence twice, believing that consecutive sentencing was mandatory. We will address each contention in turn.

¶ 71 A. Evidentiary Issues

¶ 72 We begin by focusing on the defendant's contentions regarding several pieces of evidence that were improperly admitted at trial, because our sufficiency of evidence analysis depends upon the propriety of their admission. The defendant argues that the trial court erred in admitting into evidence: (1) the "video of a video" of the camera surveillance video; (2) impermissible lay opinion on the identity of the offender in that surveillance video; and (3) an out-of-court identification of a non-testifying third party. We commence by addressing the introduction of the surveillance video.

¶ 73 1. Surveillance Video

¶ 74 On appeal, the defendant contends that the State's presentment of a murky "video of a video of a video" replete with voiceovers (narration and conversation), fast-forwarding, and frame manipulation by the police detective's use of his Iphone, violated the best evidence rule.

***12** ¶ 75 The State initially responds and the defendant concedes that he has forfeited this issue for purposes of appeal by failing to object to it at trial. See *People v. Thompson*,

238 Ill. 2d 598, 611–12 (2010) ("To preserve a claim for review, a defendant must both object at trial and include the alleged error in written posttrial motion") (citing *People v. Enoch*, 122 Ill. 2d 176, 186–87 (1988)). The defendant, nonetheless, urges us to consider his claim under the plain error doctrine, arguing that the evidence at trial was closely balanced so that the introduction of the "video of a video of a video" prejudiced the outcome of his trial. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967) ("Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court."); *People v. Herron*, 215 Ill. 2d 167, 18687 (2005).

¶ 76 The plain error doctrine "bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances." *Thompson*, 238 Ill. 2d at 613 (citing *People v. Averett*, 237 Ill. 2d 1, 18 (2010)). Specifically, the plain error doctrine permits "a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *Herron*, 215 Ill. 2d at186–87); see also *Thompson*, 238 Ill. 2d at 613; see also *People v. Adams*, 2012 IL 111168, ¶ 21. Under either prong of the plain error doctrine, the burden of persuasion remains on the defendant. *People v. Bowman*, 2012 IL App (1st) 102010, ¶ 29 (citing *People v. Lewis*, 234 Ill. 2d 32, 43 (2009)).

¶ 77 "The first step of plain-error review is to determine whether any error occurred." *Lewis*, 234 Ill. 2d at 43; *Thompson*, 238 Ill. 2d at 613; see also *People v. Wilson*, 404 Ill. App. 3d 244, 247 (2010) ("There can be no plain error if there was no error at all."). This requires "a substantive look" at the issue raised. *People v. Johnson*, 208 Ill. 2d 53, 64 (2003). We must therefore first determine whether any error occurred.

¶ 78 The defendant contends that the best evidence rule required the admission into evidence of the original surveillance video from the convenience store, as opposed to the Iphone camera recorded video of that surveillance video footage. He asserts that the State did not adequately account for the absence of the original video and that therefore the video should not have been admitted into evidence. We disagree.

¶ 79 "The *** purpose of the best evidence rule is the prevention of fraud, requiring that the [record] in issue be produced in its original form, or, if proven to be unavailable, that its substitute be a true and correct reproduction." *People v. Prince*, 1 Ill. App. 3d 853, 857 (1971) "The best evidence rule states a preference for the production of original documentary evidence when the contents of the documentary evidence are sought to be proved." *People v. Vasser*, 331 Ill. App. 3d 675, 685 (2002); see also *People v. Tharpe–Williams*, 286 Ill. App. 3d 605, 610 (1997); see also Ill. R. Evid. 1002 (eff. Jan. 1, 2011) ("To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute."). There is no general rule, however, that a party must produce the best evidence that the nature of the case permits. *Tharpe–Williams*, 286 Ill. App. 3d at 610. Under the best evidence rule, the original documentary evidence should be introduced into evidence unless the original is shown to be lost, destroyed, or unavailable. *Electric Supply Corp. v. Osher*, 105 Ill. App. 3d 46, 48 (1982). If the original is lost, destroyed, or unavailable, the offering party must prove the following: (1) the prior existence of the original, (2) the original is currently unavailable, (3) the authenticity of the substitute, and (4) the proponent's diligence in attempting to procure the original. *Electric Supply Corp.*, 105 Ill. App. 3d at 48–49. "The sufficiency of the evidence showing that it is not within the offering party's power to produce the original depends upon the circumstances of each case and is within the discretion of the trial court." *In re Estate of Weiland*, 338 Ill. App. 3d 585, 604, 788 N.E.2d 811, 827 (2003).

***13** ¶ 80 In the present case, Detective Thompson testified that when he attempted to retrieve the original copy of the surveillance tape from the convenience store, the employees indicated to him that the surveillance system was broken. Detective Thompson testified that he nevertheless insisted on going into the back room to see the surveillance system, and was therefore able to view the original video. After viewing

the video, the detective immediately made a telephone call to the police station to have someone from the recording team retrieve the video, but he was unsuccessful. Based on the evasive answers from the employees and manger of the store, the detective feared that the surveillance video may be destroyed and therefore asked those present to play the video for him again so that he could make a video of the surveillance footage using his Iphone camera. The detective further testified that even though he was informed by the store employees that the video would be kept for the next three days, when police returned to retrieve it, they were told that the video, like all surveillance videos, was destroyed within 18 hours. Under this record, we find that the State unequivocally established the prior existence of the now unavailable original surveillance video; the authenticity of the detective's substitute video; and the detective's diligence in attempting to procure the original. We therefore find no abuse of discretion by the trial court's admission of the substitute video into evidence. *Weiland*, 338 Ill. App. 3d at 604

¶ 81 Since we find no error in the admission of the "video of the video of the video," there can be no plain error. See ***People v. Smith,*** 372 Ill. App. 3d 179, 181 (2007) ("without error, there can be no plain error.")

¶ 82 2. Lay Opinion Testimony

¶ 83 We next address the defendant's contention that the victim's identification of the defendant in the surveillance video was "impermissible lay opinion," because it lacked foundation. Although the defendant acknowledges that in Illinois a witness may make an identification from a videotape, he argues that in order to do so: (1) the witness must have been familiar with the defendant prior to the offense; and (2) the testimony must aid in resolving the issue of identification without invading the function of the trier of fact. In support of this position, the defendant relies on our appellate decisions in ***People v. Thompson***, 2014 IL App (5th) 120079 and ***People v. Starks,*** 119 Ill. App. 3d 21 (1983).

¶ 84 We note, however, that after the defendant filed his appeal in the instant case, our supreme court reversed the appellate court's decision in *Thompson*, explicitly rejecting *Starks* as being "at odds with the great weight of authority." See ***People v. Thompson***, 2016 IL 118667, ¶ 52. Instead, the court held that:

> "[O]pinion identification testimony is admissible *** if (a) the testimony is rationally based on the perception of the witness and (b) the testimony is helpful to a clear understanding of the witness's testimony or a determination of a fact in issue. Lay opinion identification testimony is helpful where there is some basis for concluding the witness is more likely to correctly identify the defendant from the surveillance recording than the [trier of fact.] A showing of sustained contact, intimate familiarity, or special knowledge of the defendant is not required. Rather, the witness must only have had contact with the defendant that the [trier of fact] would not possess, to achieve a level of familiarity that renders the opinion helpful."
>
> *Thompson*, 2016 IL 118667, ¶ 50.

¶ 85 Our supreme court adopted a totality of circumstances approach, listing the following factors as those that should be considered by the trial court in determining whether there is some basis for concluding that the witness is more likely to correctly identify the defendant: (1) the witness's general familiarity with the defendant; (2) the witnesses' familiarity with the defendant at the time the recording was made or where the witness observed the defendant dressed in a manner similar to the individual depicted in the recording; (3) whether the defendant was disguised in the recording or changed his/her appearance between the time of the recording and trial; and (4) the clarity of the recording and extent to which the individual is depicted. *Thompson*, 2016 IL 118667, ¶ 51. Our supreme court explained that "the absence of any particular factor does not render the testimony inadmissible." *Thompson*, 2016 IL 118667, ¶ 51.

***14** ¶ 86 In addition, the court held that the extent of the witness's opportunity to observe the defendant goes to the weight of the testimony and not its admissibility. *Thompson*, 2016 IL 118667, ¶ 52. Accordingly, the court held that the trial court's decision "to admit lay opinion identification testimony is reviewed for an abuse of discretion." *Thompson*, 2016 IL 118667, ¶ 52.

¶ 87 Applying the aforementioned ruling to the cause at bar, we find no abuse of discretion in the trial court's decision to permit the victim to identify the defendant from the surveillance video. First, the victim testified in detail to all of the events that occurred on the night of the shooting, prior to being shown the video at trial. He stated that he had

ample opportunity to observe the defendant chatting with the individual on the bicycle, while waiting for the tire on his car to be repaired. In addition, the victim identified the defendant as the shooter from a photo array, after having been taken to the hospital, and prior to having viewed the surveillance video. Also, the victim testified that when the defendant shot at him, he wore a black hoodie, which was depicted in the video, but which the defendant was not wearing when he was arrested and which was not retrieved from the scene of the crime. Since the video recording of the surveillance video is blurry and does not plainly show the shooter's face, there was ample basis for concluding that the victim was more likely to correctly identify the defendant from that recording than the trial judge. The victim here clearly had contact with the defendant that the trial judge did not possess, and therefore his opinion would have proved helpful to the trier of fact. *Thompson*, 2016 IL 118667, ¶ 50.

¶ 88 3. Out–of Court Identification of the Defendant by Non–Testifying Witness

¶ 89 On appeal, the defendant next contends that the trial court erred in permitting Officer McNicholas to testify that when he apprehended the defendant and brought him to the crime scene for a show-up, both Officer Soraparu, and Officer Soraparu's partner, Officer Schroeder identified the defendant as the individual they observed shooting the victim. The defendant asserts that because Officer Schroeder did not testify at trial, Officer McNicholas's testimony regarding her identification of the defendant constituted inadmissible hearsay evidence.

¶ 90 Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ***People v.*** *Gonzalez*, 379 Ill. App. 3d 941, 954 (2008). As such " '[t]estimony by a third party as to statements made by another nontestifying party identifying an accused as the perpetrator of a crime constitutes hearsay testimony and is inadmissible.' " ***People v.*** *Yancy*, 368 Ill. App. 3d 381, 385 (2005) (citing ***People v.*** *Lopez*, 152 Ill. App. 3d 667, 672 (1987)). "The fundamental reason for excluding hearsay is the lack of an opportunity to cross-examine the declarant." *Yancy*, 368 Ill. App. 3d at 385; see also ***People v.*** *Jura*, 352 Ill. App. 3d 1080, 1085 (2004) (citing ***People v.*** *Shum,* 117 Ill. 2d 317, 342 (1987)); see also ***People v.*** *Dunmore*, 389 Ill. App. 3d 1095, 1106 (2009). A trial court has discretion to determine whether statements are hearsay, and a reviewing court will reverse that determination only for an abuse of discretion, *i.e.*, where the trial court's ruling is "arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the trial court." ***People v.*** *Leak*, 398 Ill. App. 3d 798, 824 (2010); see also ***People v.*** *Spicer*, 379 Ill. App. 3d 441, 449 (2008).

***15** ¶ 91 In the present case, the State concedes that Officer McNicholas's testimony regarding Officer Schroeder's identification of the defendant as the shooter was inadmissible hearsay that should not have been considered by the trial court. The State, nevertheless, maintains that the officer's testimony regarding Officer Schroeder's identification of the defendant was admissible as an exception to the hearsay rule showing the course of the police investigation. We disagree.

¶ 92 Statements are not inadmissible hearsay when they are offered for the limited purpose of showing the course of a police investigation, but only where such testimony is necessary to fully explain the State's case to the tier of fact. *Jura*, 352 Ill. App. 3d at 1085; see also ***People v.*** *Edgecomb*, 317 Ill. App. 3d 615, 627 (2000); see also ***People v.*** *Warlick*, 302 Ill. App. 3d 595, 598–99 (1998) (quoting ***People v.*** *Simms*, 143 Ill. 2d 154, 174, (1991)). Accordingly, a police officer may testify about a conversation that he had with an individual and his actions pursuant to the conversation to recount the steps taken in his investigation of the crime, and such testimony will not constitute hearsay, since it is not being offered for the truth of the matter asserted. ***People v.*** *Hunley*, 313 Ill. App. 3d 16, 33 (2000) (citing ***People v.*** *Pryor*, 181 Ill. App. 3d 865, 870 (1989)). However, the police officer may not testify to information beyond what was necessary to explain the officer's actions. *Jura*, 352 Ill. App. 3d at 1085; *Hunley*, 313 Ill. App. 3d 16, 33 (2000). As such our courts have repeatedly held that the State may not use the limited investigatory procedure exception to place into evidence the substance of any out-of-court statement that the officer hears during his investigation, but may only elicit such evidence to establish the police investigative process. See *Hunley*, 313 Ill. App. 3d at 33–34; Jura, 352 Ill. App. 3d at 1085; see also ***People v.*** *Gacho*, 122 Ill. 2d 221, 248 (1988) (holding that it was permissible for a police officer to testify that after he spoke

to the victim he went to look for the defendant, but indicated that it would have been error to permit the officer to testify to the contents of that conversation); see also *People v. Trotter*, 254 Ill. App. 3d 514, 527 (1993) ("[T]here is a distinction between an officer testifying to the fact that he spoke to a witness without disclosing the content of that conversation and an officer testifying to the content of the conversation. [Citation.] Under the investigatory procedure exception, the officer's testimony must be limited to show how the investigation was conducted, not place into evidence the substance of any out-of-court statement or conversations for the purpose of establishing the truth of their contents. [Citation.] The police officer should not testify to the contents of the conversation [citation], since such testimony is inadmissible hearsay. [Citation.]").

¶ 93 In the present case, contrary to the State's position, there can be no doubt that Officer McNicholas's testimony as to Officer Schroeder's identification of the defendant was offered for the truth of the matter asserted and was not necessary to describe the course of the police investigation. The State's contention that this identification was not offered to show the defendant's guilt is at best disingenuous, since in closing argument, the State explicitly enumerated all of the individuals who had identified the defendant as the shooter, including the non-testifying Officer Schroeder, in asking the court to find the defendant guilty. Moreover, it was absolutely unnecessary for Officer McNicholas to testify about Officer Schroeder's identification in order to explain the course of his investigation. Officer McNicholas could simply have testified that after he apprehended the defendant, he brought him to the scene of the crime for a show-up with Officer Soraparu, Officer Schroeder, and Davis, whereupon the defendant was taken to the police station. This testimony would have been sufficient to explain his police conduct, without disclosing Officer Schroeder's identification. This is particularly true where Officer Soraparu had already testified at trial that he positively identified the defendant during that same show-up. Accordingly, we find that Officer McNicholas's testimony regarding Officer Schroeder's identification of the defendant as the shooter constituted improperly admitted hearsay. See *Warlick*, 302 Ill. App. 3d 600; *Jura*, 352 Ill. App. 3d 627.

***16** ¶ 94 Nonetheless, for the reasons set forth below, we find that the admission of this evidence was harmless error. It is well-accepted that an evidentiary error will not serve as a reason to overturn a verdict if other properly admitted evidence was overwhelming, rather than closely balanced. See *People v. Nixon*, 2015 IL App (1st) 130132, ¶ 120; see also *People v. Miller*, 173 Ill. 2d 167, 195 (1996); *People v. Carlson*, 92 Ill. 2d 440, 449 (1982) (evidentiary errors may be considered harmless if the other properly admitted evidence is overwhelming). In the harmless-error analysis, the State bears the burden of persuasion, and must prove beyond a reasonable doubt that the verdict would have been the same absent the error. *People v. Thurow*, 2013 Ill. 2d 352, 363 (2003).

¶ 95 "Hearsay identification is reversible error only when it serves as a substitute for courtroom identification or when it is used to strengthen or corroborate a weak identification." *People v. Davis*, 285 Ill. App. 3d 1039, 1045 (1996) (citing *People v. Colon*, 162 Ill. 2d 23, 34 (1994)). "If it is merely cumulative or supported by a positive identification and by other corroborative circumstances, it constitutes harmless error." *Davis*, 285 Ill. App. 3d at 1045.

¶ 96 In the present case, we find that the State has met its burden in establishing that the admission of the hearsay identification could not have prejudiced the outcome of the defendant's trial. The record before us reveals that at trial, three witnesses, the victim, Davis, and Officer Soraparu, identified the defendant as the shooter. Two of those identifications were made less than 45 minutes after the shooting, and all three identifications were made within 24 hours. The surveillance video introduced into evidence, although murky, corroborated in full the testimony of the three witnesses as to what transpired at the scene. In addition, the video established that, apart from the hoodie, which Officer Soraparu positively testified he observed the defendant removing during the chase, the shooter wore baggy shorts, a white shirt, and white sneakers with black stripes. The evidence at trial further established that the defendant was arrested only minutes after the shooting, one block from the scene (in the direction of where Officer Soraparu had observed the shooter running after jumping over a fence) also wearing baggy shorts, a white T–shirt and white sneakers with black stripes. Although at trial the defendant claimed he had no involvement in the shooting, and no gunpowder residue was found on the defendant's hands, the arresting officer testified that when he observed the defendant hiding under the SUV, the defendant was lying on his stomach with his hands on the wet pavement, and the State's forensic scientist testified that the amount of gunshot residue could be affected by a person taking off his clothes, grabbing a fence, or touching wet pavement. Under this record, we hold that the evidence was not so closely balanced that the introduction of Officer McNicholas's

hearsay statement about a fourth individual's identification of the defendant as the shooter could have changed the outcome of the defendant's trial. Officer McNicholas's testimony regarding Officer Schroeder's out-of-court identification of the defendant was merely cumulative of the already properly introduced in-court identifications of three other witnesses, the victim, Davis, and Officer Soraparu. Accordingly, any error in its introduction was harmless. See *Davis*, 285 Ill. App. 3d at 1045 (holding that the admission of a witness's out-of-court identification of the defendant was harmless error where the defendant was positively identified in court by the victims of the crime, so that any out-of-court identification would have merely been cumulative).

¶ 97 B. Sufficiency of Evidence

***17** ¶ 98 Having disposed of all of the evidentiary issues, we next address the defendant's contention that the State failed to prove him guilty beyond a reasonable doubt.

¶ 99 We initially begin by rejecting the defendant's contention that multiple standards of review should guide our analysis. It is well-established that when reviewing a challenge to the sufficiency of evidence, a reviewing court must determine whether the evidenced, when viewed in the light most favorable to the State, would have permitted any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48; see also *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004) (citing *People v. Smith*, 185 Ill. 2d 532, 541 (1999)). It is the responsibility of the trier of fact to resolve conflicting testimony to weigh the evidence and to draw reasonable inferences from those facts. See *Brown*, 2013 IL 114196, ¶ 48. Where the evidence produces "conflicting inferences" it is the trier of fact's responsibility to resolve that conflict. *People v. Pryor*, 372 Ill. App .3d 422, 430 (2007). Therefore, a reviewing court will not substitute its judgment for that of the trier of fact on issues of weight of evidence, or the credibility of witnesses. See *Brown*, 2013 IL 114196, ¶ 48. A criminal conviction will be reversed only where evidence is so contrary to the verdict, or so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt regarding defendant's guilt. *Brown*, 2013 IL 114196, ¶ 48. This same standard will apply regardless of whether the evidence is direct or circumstantial, and regardless of whether the defendant receives a bench or a jury trial. *Brown*, 2013 IL 114196, ¶ 48; see also *People v. Cooper*, 194 Ill. 2d 419, 431 (2000).

¶ 100 On appeal, the defendant contends that the State failed to establish beyond a reasonable doubt that he was the shooter. In that vein, the defendant first contends that the evidence at trial established the three individuals who identified him had little or no opportunity to view him, thereby placing their identifications, particularly the two suggestive show-ups with the defendant inside the police car, into doubt. For the reasons that follow, we disagree.

¶ 101 Identification by a single eyewitness is sufficient to support a conviction if the defendant is viewed under circumstances permitting a positive identification. *People v. Gabriel*, 398 Ill. App. 3d 322, 341 (2010). The following five factors articulated in *Neil v. Biggers*, 409 U.S. 188, 192 (1972) are relevant in assessing the reliability of identification testimony of a witness: (1) the witness's opportunity to view the suspect during the offense; (2) the witness's degree of attention; (3) the accuracy of any prior description provided; (4) the witness's level of certainty at the time of the identification procedure; and (5) the length of time between the crime and the identification. See *Piatkowski*, 225 Ill. 2d at 567; see also *People v. Slim*, 127 Ill. 2d 302, 307–08 (1989).

¶ 102 We begin by addressing the reliability of the victim's identification. In that respect, there can be no doubt that the victim identified the defendant with certainty, as he identified him three times: (1) from a photo array within 24 hours of the shooting; (2) from the surveillance video footage; and (3) in court. While it is true that the victim never had the opportunity to describe his shooter to the police, as he was immediately transported to the hospital, he had ample opportunity to view the defendant's face. The victim testified that he first observed the defendant and another individual on a bicycle approach Davis's tire shop. He stated that while Davis was fixing his tire, he watched the defendant's face for about 7 to 10 minutes, while the defendant conversed with the cyclist, in front of the tire shop. According to the victim, there were numerous businesses nearby and there was ample light illuminating the sidewalk where the defendant stood. The victim testified that as he began walking toward the tire shop he came as close to about 4 or 5 feet from the defendant, before the defendant began to shoot and chase him down the street. The victim's

testimony was corroborated by the surveillance video, which shows ample illumination on the sidewalk, the victim leaving the tire shop to walk over to his car, as the defendant and the cyclist approach the tire shop, with the victim looking in the direction of the defendant. The video further shows the victim subsequently walking to near-touching distance of the defendant before the defendant begins to shoot. Accordingly, the *Neil* factors weigh in favor of sufficient reliability.

***18** ¶ 103 Addressing Officer Soraparu's reliability, we being by noting that, just as the victim, the officer had sufficient opportunity to view the offender before the identification. Officer Soraparu testified that he was working in the vicinity, driving his squad car eastbound on Madison Street when he heard several muffled gunshots, and then observed the defendant chasing the victim into the street firing at him. The officer explained that the defendant was only about ten to fifteen feet away from him when he viewed his profile. In addition, the officer's description of the offender matched that of the defendant. At trial, the officer testified that when he first observed the defendant, the defendant as wearing a dark-colored hoodie, long black baggy shorts and a white T–shirt. The officer explained at trial that he observed the defendant remove his black hoodie while escaping, and therefore radioed an updated description to other officers in the area. That updated flash message described the offender as a 5' 8" tall African American male wearing a white baggy T–shirt and black long baggy shorts. It was undisputed at trial that upon his arrest the defendant wore just such a white baggy T–shirt and black long baggy shorts. Finally, the officer testified that after losing the suspect, he learned the offender had been apprehended and returned to the crime scene to identify him. He testified that only three or four minutes elapsed between his first observation of the defendant and his identification. Just as with the victim, the video surveillance corroborated the officer's testimony. Accordingly, just as with the victim's identification, the *Neil* factors weigh in favor of reliability.

¶ 104 With respect to Davis's identification of the defendant as the shooter, we acknowledge that at first blush, the factors of reliability are not as favorable to the State. Davis testified that his only opportunity to view the defendant's face was a brief one, as he passed the defendant on his way into the tire shop, and therefore admitted that he did not have "a great opportunity to study the [offender's] face." In addition, Davis acknowledged that during the show-up, the defendant was seated inside a marked squad car, with Davis only viewing his face. On the other hand, a very short period of time elapsed between the crime and the identification. What is more, Davis's entire testimony regarding the events of that night were corroborated by the surveillance video, and the testimony of both Officer Soraparu and the victim. In addition, Davis made a second positive in-court identification of the defendant as the shooter.

¶ 105 Based on the totality of circumstances, we conclude that all three witness identifications were sufficiently reliable, so that the court's finding that the defendant was the shooter was not against the manifest weight of the evidence.

¶ 106 The defendant nonetheless contends that the State failed to prove him guilty beyond a reasonable doubt because the surveillance footage introduced at trial does not corroborate the testimony of the State's identification witnesses, but rather irrefutably establishes that the defendant did not commit the crime. In that vein, the defendant asserts that the surveillance footage shows that the facial features and clothes of the perpetrator (namely his sneakers) do not match the features and clothes of the defendant upon his arrest only minutes after the crime was committed. We disagree.

¶ 107 Our review of the rather murky footage of the surveillance video introduced at trial does not support the defendant's interpretation. Nothing in that video indisputably excludes the defendant as the shooter. In fact, contrary to the defendant's position, the video depicts the perpetrator wearing white sneakers with black stripes, as does the photograph of the sneakers worn by the defendant upon his arrest. Any difference in the angle of the black stripes on the sneakers of the perpetrator and the sneakers worn by the defendant upon his arrest, pointed to by the defendant, can reasonably be attributed to glare, shadow and lighting. Similarly, contrary to the defendant's position, because of the blurry quality of the surveillance footage, the facial features of the perpetrator (mostly facing away from the camera) are indistinguishable.

¶ 108 Moreover, even if the video did positively reveal certain discrepancies in the appearance of the shooter's clothing or facial features, which because of its murkiness we find that it does not, it would be for the trier of fact to reconcile the defendant's arrest photo with that video. *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 21 (it is "the province of the trier of fact to *** resolve conflicts in the evidence, and draw conclusions based on all the evidence. [Citation]. A reviewing court will not substitute its judgment for that of the trier of fact on these matters.").

***19** ¶ 109 The defendant next contends that the negative gunshot residue test and the testimony of the State's forensic chemist regarding the extent of time, namely six hours, it normally takes for gunshot residue to dissipate from a person's hands after using a firearm proved his innocence beyond a reasonable doubt because his gunshot residue test was performed only two and a half hours after the crime was committed. We disagree.

¶ 110 The forensic scientist did not testify that it invariably a takes six hours for gunshot residue to dissipate. Instead, she merely testified that it would take six hours if a person was not attempting to get the gunshot residue off his hands. Moreover, she specifically testified that if a person's hands were coming in contact with objects, such as while a person was removing his clothing, jumping over a fence, or lying on wet pavement, she would expect this to affect the amount of trace gunshot residue found on that person's hands. Considering the fact that it was undisputed at trial that the shooter in this instance used a silencer, as well as took off his hoodie while being chased by police, it would not have been unreasonable for the trial judge to infer that the same sophisticated shooter would also have known how to remove gunshot residue from his hands after being chased by police. Since it was uncontroverted that the defendant was out of sight of police officers for at least a few minutes, the court could have inferred any number of ways in which the defendant removed the gunshot residue from his hands. More specifically, since the arresting officer in this case testified that the defendant was found hiding under the SUV, lying on his stomach with his hands on the wet pavement, it would not have been unreasonable for the trier of fact to infer that the defendant had rubbed his hands against the wet pavement so as to remove the gunshot residue. The fact that the defendant testified to the contrary, is unavailing, since the trier of fact is in the best position to judge the credibility of the witnesses (*Brown*, 2013 IL 114196, ¶ 48), and in this case found all of the State's witnesses to be credible. Accordingly, in our view, neither the lack of physical evidence nor the disagreements in the witnesses' accounts render the evidence in this case so unreasonable, improbable or unsatisfactory as to justify this court's reversal of the trial court's determination that the defendant is guilty beyond a reasonable doubt. See *People v. Rodriguez*, 2012 IL App (1st) 972758–B, ¶ 48*People v. Rodriguez*, 2012 IL App (1st) 972758–B, ¶ 48 ("lack of physical evidence and minor inconsistencies do not render the evidence so unreasonable, improbable or unsatisfactory to justify reversal of the [trier of fact's] determination."); see also *People v. Wheeler*, 401 Ill. App. 3d 304, 31299 (2010); see also *People v. Berland*, 74 Ill. 2d 286, 305–06 (1978).

¶ 111 B. Constitutionality of the
Armed Habitual Criminal Conviction

¶ 112 On appeal, the defendant next contends that his armed habitual criminal conviction is unconstitutional because it is predicated upon his prior AUUW conviction, which was itself held to be void *ab initio* under the decision in *People v. Aguilar*, 2013 IL 112116.

¶ 113 The defendant is correct that to sustain a conviction for armed habitual criminal, the State was required to prove that he possessed a firearm after having been convicted of at least two qualifying predicate offenses. See 720 ILCS 5/24–1.7(a) (West 2012). In the present case, the two predicate offenses were armed robbery (720 ILCS 5/18–2(A) (West 2012)) in case number 98 CR 11866, and a Class 2 AUUW (720 ILCS 5/24–1.6(a)(1) (West 2012)) in case number 07 CR 20784.

***20** ¶ 114 The defendant is further correct that in *Aguilar*, our supreme court found that section 241.6(a)(1) of the AUUW statute, which prohibited the carrying outside of the home of a firearm which is uncased, loaded, and immediately accessible, was facially unconstitutional under the second amendment of the United States Constitution. See *Aguilar*, 2013 IL 112116, ¶ 22; see also *People v. Burns*, 2015 IL 117387, ¶ 21 (clarifying the holding in *Aguilar*).

¶ 115 The defendant contends that because under *Aguilar*, his AUUW conviction was void *ab initio*, his armed habitual criminal conviction, which was necessarily predicated on the AUUW conviction must also be vacated.

¶ 116 The State contends that since the defendant's predicate AUUW conviction was never vacated pursuant to *Aguilar* (*i.e.*, was not vacated before he possessed the firearm in 2012 when he was charged with armed habitual criminal in the instant cause, and has yet to be vacated), the defendant cannot retroactively assert that his armed habitual criminal conviction is improper. We agree.

¶ 117 Since the defendant filed his appeal in this cause and after the State filed its response brief, our supreme court issued its decision in *People v. McFadden*, 2016 IL 117424, resolving this issue in the State's favor. In *McFadden*, the defendant was convicted of UUWF based on his possession of a firearm after having been convicted of AUUW. *McFadden*, 2016 IL 117424, ¶ 1. On appeal, the defendant argued that his UUWF conviction must be vacated because it was predicated on his prior AUUW conviction, which was entered under the section of the statute that was held facially unconstitutional in *Aguilar* and, thus, the State failed to prove all the elements of the UUWF offense. *McFadden*, 2016 IL 117424, ¶ 8.

¶ 118 Our supreme court held that the defendant was properly convicted of UUWF even though his felony status arose from his AUUW conviction under a statute that had been found unconstitutional by *Aguilar*. *McFadden*, 2016 IL 117424, ¶ 37.

¶ 119 In doing so, the court first examined the language of the UUWF statute, which prohibits a person from knowingly possessing a firearm after having been convicted of a felony. *McFadden*, 2016 IL 117424, ¶ 27 (citing 720 ILCS 5/24–1.1(a) (West 2008)). The court explained that the statute only requires the State to prove the defendant's felon status, and does not require the State to prove the predicate offense at trial. *McFadden*, 2016 IL 117424, ¶ 27. The court expressly found that "[n]othing on the face of the statute suggests any intent to limit the language to only those persons whose prior felony convictions are not later subject to vacatur." *McFadden*, 2016 IL 117424, ¶ 27.

¶ 120 The court further held that "the language of section 24–1.1(a) is 'consistent with the common-sense notion that a disability based upon one's status as a convicted felon should cease only when the conviction upon which that status depends has been vacated.' " *McFadden*, 2016 IL 117424, ¶ 29 (citing *Lewis v. United States*, 445 U.S. 55, 61 n. 5 (1980)). In addition, the court noted that the because the purpose of the statute was to "protect the public from persons who are potentially irresponsible and dangerous," it was immaterial whether the predicate conviction ultimately turned out to be invalid. *McFadden*, 2016 IL 117424, ¶ 29. As the court explained:

> "[T]he *** statute is not concerned with prosecuting or enforcing the prior conviction. Rather, the legislation is concerned with 'the role of that conviction as a disqualifying condition for the purposes of obtaining firearms.' [Citation.]" *McFadden*, 2016 IL 117424, ¶ 29.

***21** Therefore, the court found that the UUWF statute is a "status offense," and that the legislature intended that the defendant clear his felon status through the judicial process by having his prior conviction vacated or expunged prior to obtaining firearms. *McFadden*, 2016 IL 117424, ¶ 29.

¶ 121 Our supreme court in *McFadden* further stated:

> "It is axiomatic that no judgment, including a judgment of conviction, is deemed vacated until a court with reviewing authority has so declared. As with any conviction, a conviction is treated as valid until the judicial process has declared otherwise by direct appeal or collateral attack. Although *Aguilar* may provide a basis for vacating defendant's prior 2002 AUUW conviction, *Aguilar* did not automatically overturn that judgment of conviction. Thus, at the time defendant committed the [UUWF] offense, defendant had a judgment of conviction that had not been vacated and that made it unlawful for him to possess firearms." *McFadden*, 2016 IL 117424, ¶ 31.

¶ 122 Accordingly, the court found that, although the defendant could seek to vacate his prior conviction for AUUW under the *void ab initio* doctrine based on the holding of *Aguilar*, under the UUWF statute, he was still required to clear his felon status prior to obtaining a firearm. *McFadden*, 2016 IL 117424, ¶ 37. As such, the court concluded that the defendant's prior conviction for AUUW properly served as proof of the predicate felony conviction for UUWF. *McFadden*, 2016 IL 117424, 37.

¶ 123 Since McFadden, in *People v. Perkins*, 2016 IL App (1st) 150889, this appellate court has applied the *McFadden* analysis to an armed habitual criminal conviction. In *Perkins*, the defendant was convicted as an armed habitual criminal and filed a postconviction petition alleging the State failed to prove him guilty beyond a reasonable doubt because his armed habitual criminal conviction was predicated on the AUUW statute found facially unconstitutional under *Aguilar*

and void *ab initio*. *Perkins*, 2016 IL App (1st) 150889, ¶ 2. The State appealed the trial court's grant of the postconviction petition. *Perkins*, 2016 IL App (1st) 150889, ¶ 3.

¶ 124 On appeal, the defendant argued that the reasoning in *McFadden* was limited to the offense of UUWF, which requires the State to prove only his felon status and does not require proof of a specific felony conviction. *Perkins*, 2016 IL App (1st) 150889, ¶ 6. The defendant contended that because the offense of armed habitual criminal requires the State to prove that he was convicted of specific enumerated offenses, the armed habitual criminal offense "imposes a conduct-based disability by allowing for harsher punishment based on a defendant's commission of specific acts." *Perkins*, 2016 IL App (1st) 150889, ¶ 6. The defendant therefore asserted that because the conduct for which he was previously convicted (possession of a firearm) was constitutionally protected, it could not serve as the predicate for his armed habitual criminal conviction. *Perkins*, 2016 IL App (1st) 150889, ¶ 6.

¶ 125 The appellate court disagreed, explaining:

> "We find this to be a distinction without a difference. In order to sustain its burden to prove that a defendant is an armed habitual criminal, the State need only prove the fact of the prior convictions of enumerated offenses [citations], just as the State need only prove the fact of a prior felony conviction to support a UUWF conviction. Nothing in the armed habitual criminal statute requires a court to examine a defendant's underlying conduct in commission of the enumerated offenses in order to find that the State has sustained its burden of proof. And because here, as in *McFadden*, [the defendant's] prior convictions had not been vacated prior to his armed habitual criminal conviction, they could properly serve as predicates for that conviction." *Perkins*, 2016 IL App (1st) 150889, ¶ 7

***22** ¶ 126 Consequently, the appellate court held that because the defendant's prior AUUW conviction had not been vacated at the time he possessed a firearm, it could serve as the predicate for his armed habitual criminal conviction. *Perkins*, 2016 IL App (1st) 150889, ¶ 10.

¶ 127 In the present case, it is undisputed that the defendant's AUUW conviction in case number 07 CR 20784 was not vacated prior to his armed habitual criminal conviction. Accordingly, applying the holdings in *McFadden* and *Perkins* we conclude that the defendant's AUUW conviction properly served as the predicate for the defendant's armed habitual criminal conviction. See *Perkins*, 2016 IL App (1st) 150889, ¶ 10; *McFadden*, 2016 IL 117424, ¶ 37.

¶ 128 C. Double Enhancement

¶ 129 The defendant nonetheless contends that his armed habitual criminal conviction must be reversed because he was subjected to an improper double enhancement. Specifically, the defendant argues that the trial court improperly used his 1999 armed robbery conviction (case No. 98 CR 11866) twice to prove both of the predicate felonies necessary for an armed habitual criminal conviction: once as its own predicate felony and once as an element of the second predicate felony (his 2008 AUUW conviction in case No. 07 CR 20784). For the reasons that follow, we disagree.

¶ 130 An impermissible double enhancement occurs when either: (1) a single factor is used as an element of an offense and as a "basis for imposing 'a harsher sentence than might otherwise have been imposed' "; or (2) "when the same factor is used twice to elevate the severity of the offense itself." *People v. Phelps*, 211 Ill. 2d 1, 12–13 (2004) (quoting *People v. Gonzalez*, 151 Ill. 2d 79, 83–84 (1992)). Our supreme court has explained that "[t]he reasoning behind this prohibition is that it is assumed that the legislature, in determining the appropriate range of punishment for a criminal offense, necessarily took into account the factors inherent in the offense." *Gonzalez*, 151 Ill. 2d at 84. Where our legislature "designates the sentences which may be imposed for each class of offenses," it "necessarily considers the factors that make up each offense in that class." *Gonzalez*, 151 Ill. 2d at 84. "Thus, to use one of those same factors that make up the offense as [a] basis for imposing a harsher penalty than might otherwise be imposed constitutes a double use of a single factor." (Emphasis omitted.) *Gonzalez*, 151 Ill. 2d at 84. Whether a defendant has been subjected to an improper double enhancement is a question of statutory construction, which is reviewed *de novo*. *Phelps*, 211 Ill. 2d at 12.

¶ 131 In the present case, the statutory provision at issue is section 24–1.7 of the Criminal Code of 2012 (Criminal Code), which provides in pertinent part:

> "(a) A person commits the offense of being an armed habitual criminal if he *** possesses *** any firearm after having been convicted of a total of 2 or more times any combination of the following offenses:
>
> (1) a forcible felony ***;
>
> (2) unlawful use of a weapon by a felon ***; or
>
> (3) any violation of the Illinois Controlled Substances Act *** that is punishable as a Class 3 felony or higher.
>
> (b) Sentence. Being an armed habitual criminal is a Class X felony." 720 ILCS 5/24–1.7 (West 2012).

***23** ¶ 132 This appellate court has had several opportunities to consider and reject the same arguments raised here by the defendant. See *e.g.*, *People v. Johnson*, 2015 IL App (1st) 133663; see also *People v. Fulton*, 2016 IL App (1st) 141765.

¶ 133 In *Johnson*, 2015 IL App (1st) 133663, the defendant was convicted as an armed habitual criminal based on his possession of a weapon after having been previously convicted of residential burglary, which qualifies as a forcible felony pursuant to section 2–8 of the Code (720 ILCS 5/2–8 (West 2012)), and UUWF (720 ILCS 5/24–1.1 (West 2012)). *Johnson*, 2015 IL App (1st) 133663, ¶ 16. The defendant in *Johnson* argued on appeal that he was subject to an improper double enhancement because his prior residential burglary conviction "was used to prove both predicate felonies of the armed habitual criminal offense—once by itself, and then again as an element of the second predicate felony of UUWF." *Johnson*, 2015 IL App (1st) 133663¶ 13. This court disagreed, found no double enchantment and affirmed the armed habitual conviction. *Johnson*, 2015 IL App (1st) 133663, ¶ 12.

¶ 134 In doing so, the appellate court first noted that both of the predicate offenses relied on by the trial court were "clearly enumerated" by section 24–1.7 of the Code "as valid offenses upon which to base an armed habitual criminal conviction." *Johnson*, 2015 IL App (1st) 133663, ¶ 16. The court then held that the "fact that the residential burglary conviction was the felony upon which defendant's UUWF conviction was based does not negate the validity of the two offenses as the predicate offenses for defendant's armed habitual criminal conviction." *Johnson*, 2015 IL App (1st) 133663, ¶ 16. The court explained its reasoning, as follows:

> "Finding that a UUWF conviction could not be predicated on the same conviction (here, residential burglary) as that used for one of the predicate offenses required for an armed habitual criminal conviction would render the armed habitual criminal statute illogical. If defendant's construction of the armed habitual criminal statute were to be accepted, any defendant whose armed habitual criminal conviction consisted of the offense of UUWF would then have to have a third conviction—one that did not serve as a predicate offense to his UUWF conviction. Defendant's conclusion reads into the armed habitual criminal statute an element that is not there: that a court can only use the predicate felony of UUWF if that UUWF conviction is based on a felony other than the one used as the second predicate felony for the armed habitual criminal conviction. In other words, when using UUWF as a predicate felony for an armed habitual criminal conviction, the offender would have to have at least three prior felony convictions instead of two. There is no such language in the armed habitual criminal statute, and we refuse to read it into the statute. [Citation.] Accordingly, we find that there was no improper double enhancement in this case." *Johnson*, 2015 IL App (1st) 133663, ¶ 18.

¶ 135 For these same reasons, in *Fulton*, 2016 IL App (1st) 141765, this appellate court similarly

rejected the defendant's contention that he was subjected to an improper double enhancement when his 2006 conviction for delivery of a controlled substance was used twice to support his armed habitual criminal conviction, once as its own predicate felony and once as an element of the second predicate felony, his 2007 conviction for AUUWF. See *Fulton*, 2016 IL App (1st) 141765, ¶¶ 9–12.

***24** ¶ 136 Applying the rationale of *Johnson* and *Fulton* to the cause at bar, we are compelled to conclude that the defendant was not subjected to a double enhancement when his 1999 and 2008 convictions for armed robbery and AUUW were used to convict him as an armed habitual criminal. Both predicate felonies are clearly enumerated as valid offenses

upon which to base an armed habitual criminal conviction. See 720 ILCS 5/24–1.7 (West 2012). As *Johnson* explains, the fact that the 1999 armed robbery conviction supported the defendant's 2008 AUUW conviction "does not negate the validity of the two offenses as the predicate offenses" for the defendant's armed habitual criminal conviction. *Johnson*, 2015 IL App (1st) 13363, ¶ 16. ; see also *Fulton*, 2016 IL App (1st) 141765, ¶¶ 12–13.

¶ 137 D. One–Act One–Crime Rule

¶ 138 On appeal, the defendant next contends that his conviction for armed habitual criminal was entered in violation of the one-act, one-crime doctrine, and should have been merged with the attempt murder conviction, because both convictions were based upon the same physical act—the defendant's shooting of the victim (which required his possession of the firearm). Under the one-act, one-crime rule, multiple convictions may not be based on the same physical act. See ***People v.*** *King*, 66 Ill. 2d 551, 566 (1977); ***People v.*** *Kuntu*, 196 Ill. 2d 105, 130 (2001); see also ***People v.*** *Segara*, 126 Ill. 2d 70, 77 (1988) (holding that if the same physical act forms the basis for two separate offenses charged, a defendant can be prosecuted for each offense, but only one conviction and sentence may be imposed); see also ***People v.*** *Garcia*, 179 Ill. 2d 55, 71 (1997) (holding that where guilty verdicts are obtained for multiple counts arising from the same act, a sentence should be imposed on the most serious offense). An "act" is defined as "any overt or outward manifestation which will support a different offense." *King*, 66 Ill. 2d at 566. However, if more than one offense stems from "incidental or closely related acts" but one offense is not a lesser included offense of the other, multiple convictions with concurrent sentences may stand. *King*, 66 Ill. 2d at 566.

¶ 139 When as here, a defendant is charged with multiple offenses, and the issue is whether one offense is a lesser included offense, our supreme court has held that to determine whether the one-act, one-crime rule has been violated, reviewing courts must rely on the abstract elements approach. See ***People v.*** *Miller*, 238 Ill. 2d 161 (2010). Under this approach the reviewing court compares the statutory elements of the charged offenses. See *Miller*, 238 Ill. 2d at 166. If that comparison reveals that "all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second," and the defendant can properly be convicted only of the greater offense. *Miller*, 238 Ill. 2d at 166. The question of whether the defendant's conviction violates the one-act, one-crime rule is reviewed *de novo*. ***People v.*** *Artis*, 232 Ill. 2d 156, 161 (2009).

¶ 140 To determine whether the defendant's attempt murder and armed habitual criminal convictions here were based upon the same physical act, we turn to the relevant statutes defining those offenses. As to the charge of armed habitual criminal, under the Criminal Code: "A person commits the offense of being an armed habitual criminal if he *** possesses *** any firearm after having been convicted a total of 2 or more times of any combination of [certain qualifying] offenses." (Emphasis added.) 720 ILCS 5/24–1.7 (West 2012).

***25** ¶ 141 With respect to the attempt murder charge, the Criminal Code provides in pertinent part:

> "A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense." (Emphasis added.) 720 ILCS 5/8–4 (West 2012).
>
> "A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:
>
> > (1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause the death to that individual or another; or
> >
> > (2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another."
>
> 720 ILCS 5/9–1(a) (West 2012). "

¶ 142 Comparison of the statutory elements of the offenses at issue here reveals that the armed habitual criminal charge was not a lesser included offense of attempt murder. Each offense required proof of distinct acts not necessary to prove the other offense. Namely, although the armed habitual criminal conviction was based upon the possession of the firearm,

the mere act of possessing the firearm was not sufficient to convict the defendant of the attempt first degree murder. Rather, that charge also required proof of separate and distinct acts "with intent to kill," in addition to the possession of the firearm. Accordingly, the defendant's convictions were not improperly based on a single physical act, and are therefore not a violation of the one-act, one-crime doctrine. See *Tolentino*, 409 Ill. App. 3d at 610–11 (holding that a defendant's convictions for *inter alia*, attempt first degree murder of a peace officer, did not violate the one-act, one-crime rule, because although the convictions had possession of firearm as a common element, the mere act of possessing the firearm was not sufficient to convict the defendant of both charges, and his conviction for attempt first degree murder also required proof of separate and distinct acts in addition to the possession of a firearm).

¶ 143 E. Ineffective Assistance of Counsel

¶ 144 On appeal, the defendant next contends that he was denied his constitutional right to effective representation of counsel when counsel: (1) failed to exclude evidence of his prior convictions; and (2) failed to impeach Officer Soraparu with his police report.

¶ 145 It is axiomatic that every defendant has a constitutional right to the effective assistance of counsel. See U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. Claims of ineffective assistance of counsel are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); see also *People v. Lacy*, 407 Ill. App. 3d 442, 456 (2011); see also *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (citing *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*)). According to *Strickland*. in order to prevail on a claim of ineffective assistance of counsel a defendant must establish both: (1) that his counsel's conduct fell below an objective standard of reasonableness under prevailing professional norms; and (2) that he was prejudiced by counsel's conduct, *i.e.*, that but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. See *Lacy*, 407 Ill. App. 3d at 456; see also *People v. Ward*. 371 Ill. App. 3d 382, 434 (2007) (citing *Strickland*. 466 U.S. at 687–94); see also *Domagala*, 2013 IL 113688, ¶ 36. Failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. See *People v. Henderson*, 2013 IL 114040, ¶ 11; see also *People v. Patterson*, 217 Ill. 2d 407, 438 (2005).

***26** ¶ 146 While the parties agree that *Strickland* is applicable, at the outset, they dispute the appropriate standard of review. The State contends that because the trial court conducted a *Krankel* inquiry, during which it heard the testimony from the defendant's trial counsel, and made a determination that his conduct was not ineffective, we should review the defendant's claims of ineffective assistance of counsel under a manifest weight of the evidence standard. The defendant, on the other hand, argues that he should not suffer a lesser standard of review merely because the trial court conducted a *Krankel* hearing, and that our review should be *de novo*. We agree with the defendant.

¶ 147 The State misconstrues *Krankel*. "*Krankel* serves the narrow purpose of allowing the trial court to decide whether to appoint independent counsel to argue a defendant's *pro se* posttrial ineffective assistance [of counsel] claims." *People v. Patrick*, 2011 IL 111666, ¶ 39. Accordingly, *Krankel* is triggered only "when a defendant raises a *pro se* posttrial claim of ineffective assistance of trial counsel," and the court must determine whether to appoint new counsel. *People v. Jolly*. 2014 IL 117142, ¶ 29; see also *People v. Taylor*, 237 Ill. 2d 68, 75 (2010) (citing *People v. Krankel*, 102 Ill. 2d 181 (1984)); see also *People v. Patrick*, 2011 IL 111666, ¶ 39. Under *Krankel*, new counsel is not automatically required in every case where a defendant brings such a motion. *Taylor*, 237 Ill. 2d at 75. Instead, the trial court must employ a two step procedure. *Taylor*, 237 Ill. 2d at 75.

¶ 148 First, the court must conduct a preliminary examination of the factual basis underlying the defendant's claim—the so-called *Krankel* inquiry (*i.e.*, pre-*Krankel* hearing). *Taylor*, 237 Ill. 2d at 75; see also *People v. Moore*, 207 Ill. 2d 68, 77–78 (2003); see also *People v. McLaurin*, 2012 IL App (1st) 102943, ¶¶ 39–40. During this preliminary evaluation, a trial court may: (1) question trial counsel about the facts and circumstances surrounding the defendant's allegations; (2) engage in a discussion with the defendant; or (3) rely on its own knowledge of counsel's performance at trial. *Jolly*. 2014 IL 117142, ¶ 30; *Moore*, 207 Ill. 2d at 78–79. "[A]

preliminary *Krankel* inquiry should operate as a neutral and nonadversarial proceeding," and the "State's participation at that proceeding, if any, [must] be *de minimis*." *Jolly*, 2014 IL 117142, ¶ 38.

¶ 149 If, after the preliminary inquiry, the court determines that the defendant's claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. *Jolly*, 2014 IL 117142, ¶ 29; see also *Moore*, 207 Ill. 2d at 77–78. If, however, the court finds that the allegations show "possible neglect of the case," new counsel must be appointed to represent the defendant at the next stage of the proceeding—*i.e.*, the hearing on the defendant's *pro se* claims of ineffective assistance of counsel. This new counsel can independently evaluate the defendant's ineffectiveness claim and avoid any conflict of interest that might be created were trial counsel forced to justify his or her actions contrary to the defendant's position. See *Moore*, 207 Ill. 2d at 78.

¶ 150 In the present case, contrary to the State's position, the defendant is not seeking review of the trial court's *Krankel* inquiry. The defendant is nowhere arguing that the trial court erred when it refused to appoint him new counsel for his posttrial proceedings, nor could he since the record affirmatively establishes that he was represented by private counsel during the entirety of those proceedings, including the preliminary *Krankel* inquiry. Rather, on appeal, the defendant is making a constitutional argument that he was denied his Sixth Amendment right to effective representation of trial counsel. Our supreme court has repeatedly held that "the standard of review for determining if an individual's constitutional rights have been violated is *de novo*." See *People v. Hale*, 2013 IL 113140, ¶ 15 (applying *de novo* standard of review to ineffective assistance of counsel claims). Accordingly, we review *de novo*, the defendant's claims of ineffective assistance of trial counsel.

¶ 151 1. Failure to Challenge Introduction of Prior Convictions

***27** ¶ 152 We begin by addressing trial counsel's failure to challenge the introduction of the defendant's prior convictions as impeachment evidence. In that respect, the defendant contends that counsel's conduct was deficient because he failed to challenge the introduction of the defendant's: (1) prior AUUW conviction on the basis of our supreme court's decision in *Aguilar*; and (2) his prior 1999 armed robbery conviction on the basis that it was outside of the 10-year limit required under *Montgomery*.

¶ 153 With respect to the AUUW conviction, the defendant contends that competent counsel would have been aware that under our supreme court's decision in *Aguilar*, 2013 IL 112116, which had been decided three months before the defendant's trial, the defendant's AUUW conviction was void *ab initio*, and accordingly could not be used for any purpose. As such, the defendant contends, trial counsel should have objected to the use of the AUUW conviction for impeachment purposes.

¶ 154 The State concedes that *Aguilar* was decided prior to the defendant's testimony but argues that his AUUW conviction was not voided by that decision because his conviction was for a Class 2 and not Class 4 AUUW. See *Aguilar*, 2013 IL 112116. The State contends that it was not until the *Burns*, 2015 IL 117387, decision, two years later, that the court clarified that its holding in *Aguilar* should have extended to all AUUW convictions (including Class 2 AUUW). Accordingly, the State contends trial counsel was not incompetent for failing to challenge the introduction of the AUUW conviction. We disagree.

¶ 155 As already noted above, to succeed on a claim of ineffective assistance of counsel, pursuant to *Strickland*. the defendant must first establish that his defense counsel's performance was deficient. "A defendant meets this burden by establishing that 'counsel's representation fell below an objective standard of reasonableness.' " *People v. Peeples*, 205 Ill. 2d 480, 512 (2002) (citing *Strickland*, 466 U.S. at 688). "In so doing, a defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence." *People v. Clendenin*, 238 Ill. 2d 302, 317 (2010).

¶ 156 In the present case, we find it difficult to ascertain any trial strategy that could have justified trial counsel's failure to in the very least attempt to argue *Aguilar* so as to exclude the introduction of the prior AUUW conviction for impeachment purposes. Contrary to the State's position, *Aguilar* itself was not initially limited to Class 4 convictions and did not suggest the limitation language until the State's

rehearing petition, which was then relegated to a footnote. See *Aguilar*, 2013 IL 112116, FN 3. Even then, *Aguilar* was non-committal and never actually held that Class 2 AUUW convictions were constitutional or enforceable. See *Aguilar*, 2013 IL 112116, FN 3 ("In response to the State's petition for rehearing in this case, we reiterate and emphasize that our finding of unconstitutionality in this decision is specifically limited to the Class 4 form of AUUW, as set forth in section 24–1.6(a)(1), (a)(3)(A), (d) of the AUUW statute. *We make no finding, express or implied, with respect to the constitutionality or unconstitutionality of any other section or subsection of the AUUW statute.*"). Moreover, numerous decisions immediately following *Aguilar*, some only a few days afterwards, explicitly held that *Aguilar* was not limited to Class 4 convictions. See *e.g.*, ***People v.*** *Campbell*, 2013 IL App (4th) 120635, ¶ 14 ("The State seems to misunderstand the nature of the supreme court's decision in *Aguilar*. The court in *Aguilar* did not merely hold that section 24–1.6(a)(1), (a)(3)(A) of the Code was unconstitutional as applied in that case—the court held that the statute was unconstitutional on its face."); see also ***People v.*** *Gayfield*, 2014 IL App (4th) 120216–B (holding that pursuant to Aguilar, a Class 2 AUUW conviction was void *ab initio*). What is more, competent counsel should have been aware that the Seventh Circuit Court of Appeals had enjoined enforcement of both the Illinois UUW and AUUW statues as a Second Amendment violation, more than a year before the defendant testified. See *Moore v. Madigan*, 702 F. 3d 933, 942 (7th Cir. 2012).

***28** ¶ 157 Nevertheless, even though we are troubled by counsel's failure to at least attempt to object to the introduction of the AUUW conviction as impeachment evidence on the basis of *Aguilar*, we find that the defendant cannot meet his burden in establishing the prejudice prong of *Strickland*. so as to succeed on his ineffective assistance of counsel claim.

¶ 158 To establish prejudice the defendant must show that but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *Clendenin*, 238 Ill. 2d at 317. "A reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome —or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." ***People v.*** *Evans*, 209 Ill. 2d 194, 220 (2004).

¶ 159 In the present case, because of the overwhelming nature of the evidence presented at the defendant's trial we find that there was no reasonable probability that but for the introduction of the prior AUUW conviction for purposes of impeachment, the outcome of the proceeding would have been different. As already articulated in detail above, three individual eyewitnesses (including one police officer) identified the defendant as the shooter. Two of those identifications took place within an hour after the shooting, and all were made within 24 hours. In addition, the State presented a surveillance video which corroborated in full the testimony of all three witnesses as to what transpired at the scene. Although it is true that the defendant claimed to be somewhere else during the shooting, his testimony as to his whereabouts, namely that he was mistakenly arrested while robbing the SUV under which he was found, was, at best, tenuous, particularly since the arresting officer's testimony regarding what the defendant was doing under the SUV when he was arrested contradicted that of the defendant. What is more, even if the defendant's testimony would have been more believable, there was no reasonable probability that the exclusion of the prior AUUW conviction for purposes of impeachment would have affected the outcome of his trial. Three prior convictions were introduced for purposes of impeachment, and the defendant only challenges trial counsel's failure to exclude two of them. Consequently, at least one prior conviction, namely the Iowa terrorism and possession with intent to deliver conviction, was admissible and properly used for impeachment purposes at trial. We find it highly improbable that the trial court's credibility determination as to the defendant's testimony would have been swayed by three, but not one, prior impeaching conviction so as to undermine the outcome of the defendant's trial. Accordingly, we conclude that the defendant has failed in his burden to demonstrate prejudice under *Strickland*.

¶ 160 In doing so, we have considered the decision in ***People v.*** *Naylor*, 229 Ill. 2d 584 (2008) relied upon by the defendant and find it inapposite. In that case, the court found that improper admission of a prior conviction was prejudicial to the defendant, requiring reversal because the trial was "a contest of credibility." *Naylor*, 229 Ill. 2d at 606–07. In coming to this conclusion, the court in *Naylor* explained that at trial two officers testified that the defendant sold them heroin, while the defendant testified that he had left his apartment to pick up his son from school when he was mistakenly swept up in a drug raid. *Naylor*, 229

Ill. 2d at 607. The court further noted that since there was no extrinsic evidence corroborating or contradicting either version of events, the trial court's finding of guilty necessarily involved the court's assessment of the credibility of the two officers against that of the defendant. *Naylor*, 229 Ill. 2d at 607. Accordingly, the court held that "[a]rguably, defendant's erroneously admitted incompetent prior conviction was the State's *only* successful attack on the defendant's testimony." *Naylor*, 229 Ill. 2d at 607. The same is not true here. As already explained above, unlike in *Naylor*, regardless of the introduction of the prior AUUW conviction, in the present case, the defendant would have been properly impeached with at least one other prior conviction. In addition, the defendant here was positively identified by three eyewitnesses, whose testimony as to what transpired during the shooting was corroborated by the surveillance video. Accordingly, *Naylor* does not apply.

29** ¶ 161 The defendant also contends that trial counsel was ineffective for failing to challenge the introduction of his prior armed robbery conviction under *Montgomery*. He asserts that under *Montgomery*, evidence of a prior conviction is not admissible for impeachment purposes if a period of over ten years has elapsed since the date of conviction or release from confinement, whichever is the later date, and the probative value of admitting the conviction outweighs any danger of unfair prejudice. ***People v. *McCoy*, 2016 IL App (1st) 130988, ¶ 64 (citing *Montgomery*, 47 Ill. 2d at 516). The defendant argues that the State's reference to a 2006 discharge-date off MSR was not the operative date for measuring the ten-year period, for purposes of *Montgomery*. Rather, he asserts that because he was arrested on the armed robbery charge on April 22, 1998, and served five years of this ten-year sentence, he was released in the Spring of 2003, which was more than ten years before his December 2013 testimony. The defendant therefore argues that trial counsel was ineffective for failing to object to the introduction of his armed robbery conviction for impeachment purposes.

¶ 162 However, we need not determine whether counsel's conduct was deficient, since the defendant cannot meet his burden in establishing prejudice under *Strickland*. Our supreme court has repeatedly held that we may "dispose of an ineffective assistance of counsel claim by proceeding directly to the prejudice prong" without making a determination as to the counsel's performance. *Hale*, 2013 IL 113140, ¶ 17; see also *Albanese*, 104 Ill. 2d at 527. As already fully explained above, the defendant cannot meet the prejudice prong, since the evidence of his guilt at trial was overwhelming, and regardless of the introduction of the armed robbery conviction, he would have properly been impeached by his prior Iowa conviction.

¶ 163 2. Failure to Impeach Officer Soraparu

¶ 164 The defendant nonetheless also asserts that he was denied his constitutional right to effective representation when trial counsel failed to impeach Officer Soraparu with an inconsistent police report. The defendant concedes that his trial counsel cross-examined Officer Soraparu regarding why the officer did not recover the defendant's hoodie, but argues that counsel failed to confront the officer with impeaching statements from the police report, which failed to note both the existence of the hoodie and the officer observing the defendant removing that hoodie. Accordingly, the defendant contends that counsel failed to present "impeachment by omission" evidence that would necessarily have discredited the officer's testimony and impacted the outcome of his trial. For the reasons that follow, we disagree.

¶ 165 Our courts have repeatedly held that the decision whether to cross-examine or impeach a witness is generally a matter of trial strategy that will not support a claim of ineffective assistance of counsel. *Clay*, 379 Ill. App. 3d at 481.

¶ 166 The purpose of impeachment is to attack the credibility of the witness and not to show the truth of the impeaching material. ***People v.*** *Acklin*, 208 Ill. App. 3d 616, 624 (1990); see also ***People v.*** *Salgado*, 263 Ill. App. 3d 238, 247 (1994). Under the rule for impeachment by omission it is permissible to use prior silence to discredit a witness' testimony if: (1) it is shown that the witness had an opportunity to make a statement, and (2) under the circumstances, a person normally would have made the statement. ***People v.*** *Clay*, 379 Ill. App. 3d 470, 481 (2008).

¶ 167 In the present case, the defendant faults his trial attorney for not using a police report to impeach Officer Soraparu. It has long been held that a police report may be used for impeachment purposes, but not as substantive evidence. ***People v.*** *Wilder*, 356 Ill. App. 3d 712, 724 (2005) (citing ***People v.*** *Shief*, 312 Ill. App. 3d 673, 680 (2000). What is more, our courts have repeatedly held "the testimony of a police officer cannot be impeached by the contents of a police

report which he neither prepared nor signed." *People v. Currie*, 84 Ill. App. 3d 1056, 1060 (1980); see also, *e.g.*, *People v. Gomez*, 107 Ill. App. 3d 378, 382 (1982) ("it is well established that a police report which an identifying officer neither prepared nor signed does not constitute grounds for impeachment"); *People v. Beard*, 271 Ill. App. 3d 320, 331 (1995) (police report can only be used to impeach report's author); *People v. Gagliani*, 210 Ill. App. 3d 617, 629 (1991) (same).

***30** ¶ 168 A review of the arrest reports attached to the defendant's motion for a new trial, upon which the defendant's ineffective assistance of counsel argument is based, reveal that Officer Soraparu did not prepare those reports. The documents list a "reporting officer" and at the bottom the person who "printed" the document, neither of whom are Officer Soraparu. Accordingly, trial counsel could not have used the arrest report to impeach Officer Soraparu's testimony.

¶ 169 What is more, any impeachment by omission would not have minimized Officer Soraparu's credibility. At trial, Officer Soraparu testified that when he first saw the defendant, the defendant was wearing a dark-colored hoodie, long black baggy shorts and a white T–shirt. This testimony was corroborated by the video surveillance footage of the shooter. Officer Soraparu further testified that during his pursuit of the defendant, he observed the defendant removing the black hoodie. On cross-examination, the officer was asked about the hoodie and why he did not recover it, to which he responded that the defendant had ditched it in the vacant lot through which he was fleeing, and the officer had assumed someone else would recover it. Under this record, the defendant cannot establish that the use of another officer's arrest report excluding the mention of the hoodie would have had a reasonable probability of affecting the outcome of his trial. See *e.g.*, *Wilder*, 356 Ill. App. 3d at 724.

¶ 170 In reaching this conclusion, we have considered the decision in *People v. Williams*, 329 Ill. App. 3d 846, 853–56 (2002), and find the defendant's reliance upon it misplaced. In that case, two eyewitnesses gave testimony that conflicted with their earlier statements to police. *Williams*, 329 Ill. App. 3d at 853–56. Defense counsel cross-examined the witnesses, but they did not admit that their statements to the police were inconsistent with their trial testimony. *Williams*, 329 Ill. App. 3d at 854–55. Rather than calling the officers at trial to prove up the impeachment, defense counsel agreed to a stipulation that the witnesses spoke to police, but the stipulation mentioned nothing about the inconsistencies. *Williams*, 329 Ill. App. 3d at 856 The reviewing court found the cross-examination and the stipulation were inadequate substitutes for the live testimony of the police officers. *Williams*, 329 Ill. App. 3d at 856–57.

¶ 171 *Williams* differs greatly from the facts of this case. In *Williams*, the witnesses refused to admit they made inconsistent statements and counsel failed to prove that they did through the testimony of officers. Moreover, in *Williams* the impeachment evidence challenged the credibility of both eyewitnesses. In the present case, the testimony of the remaining two eyewitnesses, Rogers and Davis, remained unchallenged, and their credible account of the shooting would have been sufficient alone to support a guilty verdict. See *People v. Petermon*, 2014 IL App (1st) 113536, ¶ 30 ("the testimony of even a single witness is sufficient to convict where the witness is credible and viewed the accused under conditions permitting a positive identification to be made."). Accordingly, we conclude that the defendant cannot establish that he was denied effective representation.

¶ 172 F. Sentencing Issues

¶ 173 On appeal, the defendant next contends that the trial court committed reversible error when it ordered that his 45–year attempt murder sentence (20 years' for the attempt murder and 25 years for the firearm enhancement), and his 20–year armed habitual criminal sentence had to be served consecutively. The defendant specifically argues that the trial court: (1) erroneously believed that consecutive sentencing was mandatory; and (2) improperly used the same factor of "severe bodily injury" to enhance his sentence twice (once for the personal discharge of the firearm which caused great bodily harm and the second time to require consecutive sentences). For the reasons that follow, we disagree.

***31** ¶ 174 Pursuant to section 5–8–4 (d)(1) of the Illinois Unified Code of Corrections (Code of Corrections) (730 ILCS 5/5–8–4(d)(1) (West 2012)) consecutive sentence terms are mandatory where one of the offenses for which the defendant is convicted is, *inter alia*, a Class X offense, and the defendant has inflicted "severe bodily injury."

¶ 175 It is undisputed here that both the offense of attempt first-degree murder and the offense of armed habitual criminal are Class X felonies. See 720 ILCS 5/8–4(c)(1) (West 2012) ("the sentence for attempt to commit first degree murder is the sentence for a Class X felony"); see also 720 ILCS 5/24–1.7 (West 2012) ("Being an armed habitual criminal is a Class X felony."). As such, if the defendant inflicted "severe bodily harm" during the commission of either offense, the trial court had no choice but to impose mandatory consecutive sentences.

¶ 176 The transcript of the proceedings below reveals that in imposing consecutive sentences, the trial court explained:

> "I think the State has correctly pointed out, as I have in my notes, that it is mandatory consecutive, and that is if it inflicted severe bodily harm, and I think having your body pierced with five bullets and some of you r intestines taken out and severe scarring, which were shown on the stand, and I believed [the victim] also testified to a bullet still remaining inside his body, that is severe bodily harm. That is consecutive sentencing."

¶ 177 We find nothing erroneous in this reasoning, and conclude that the trial court properly found that consecutive sentences were mandatory. 730 ILCS 5/8–4(d) (West 2012). [5]

¶ 178 The defendant nonetheless contends that the consecutive sentences constituted an improper double enhancement because the same factor, namely "severe bodily injury" was used both to mandate such consecutive sentencing and to impose the 25–year enhancement to the defendant's attempt murder sentence. According to the defendant, absent such an improper double enhancement, the court could have sentenced him up to a maximum of 55 years' (*i.e.*, between 6 and 30 years' for either Class X felonies, plus the additional 25 years' for the discharge of the firearm which caused the great bodily harm.). We disagree.

¶ 179 As already discussed above, an impermissible double enhancement occurs when either: (1) a single factor is used both as an element of an offense and as a "basis for imposing 'a harsher sentence than might otherwise have been imposed' "; or (2) "the same factor is used twice to elevate the severity of the offense itself." *Phelps*, 211 Ill. 2d at 12–13 (quoting *Gonzalez*, 151 Ill. 2d at 83–84). Whether a defendant has been subjected to an improper double enhancement is reviewed *de novo* *Phelps*, 211 Ill. 2d at 12.

¶ 180 Our appellate courts have previously rejected the argument that the 25–year sentence enactment for first-degree murder is a double enhancement, holding that firearm use is not implicit in the offense of first-degree murder. See *People v. Thompson*, 354 Ill. App. 3d 579, 592 (2004). The rationale has been that in enacting that enhancement, it was the legislature's intent to curb gun-crimes. See *People v. Butler*, 2013 IL App (1st) 120923, ¶ 36 (The purpose of the firearm-add-on provisions is "to promote public health and safety, and to impose severe penalties that will deter the use of firearms in the commission of felonies.") Accordingly the 25–year firearm enhancement provision is triggered not by the death of the victim itself, but rather by the personal discharge of the firearm that caused that death. See *Thompson*, 354 Ill. App. 3d at 592; see also *People v. Sawczenko–Dub*, 345 Ill. App. 3d 522, 537–39 (2003) (it is the use of the firearm to cause the death of the victim that triggered the enhancement, not the death itself); *People v. Bloomingburg*, 346 Ill. App. 3d 308, 325–26 (2004) (it is the manner of death, that it occurred as a result of a discharge of a firearm, rather than the fact of death, that is the focus of the enhancing provision).

***32** ¶ 181 The same rationale applies to an attempt murder charge. It is the defendant's personal discharge of the firearm that triggers the 25–year enhancement of the attempt murder charge, not the "great bodily harm" to the victim that was caused by the defendant's personal discharge of the firearm. As such, the defendant's sentence for attempt murder including the additional 25 years' for the personal discharge of the firearm and the court's order requiring that that sentence be served consecutively with the armed habitual criminal sentence does not constitute a double enhancement. Rather, it is "the discretionary act of a sentencing court in fashioning a particular sentence tailored to the needs of society and the defendant, within the available parameters," which "is a requisite part of every individualized sentencing determination." *People v. Thomas*, 171 Ill. 2d 207, 224–45 (1996).

¶ 182 III. CONCLUSION

¶ 183 For the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 184 Affirmed.

Justices Lavin and Cobbs concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2017 IL App (1st) 14-2566-U, 2017 WL 531062

Footnotes

1 At trial the parties subsequently stipulated to the content of the video.

2 We further note that the video, which is a video of a video is 4 minutes 56 seconds in length. The video contains a soundtrack of voices of unseen individuals replete with conversation, narration and commentary. A human arm from a person seemingly in a police uniform is visible on the video handling a VCR. At the outset a female voice announces that a USB device is "broke[n]." The video shows the first frames of the surveillance video on the VCR being fast-forwarded. The surveillance video then resumes in real time when two persons enter the scene in front of the tire shop (the individual on the bicycle followed by the shooter).

3 Although not introduced or discussed at trial, we note that in his posttrial motion the defendant argued that the gunshot residue test was performed less than 2 hours after the shooting and the defendant's arrest. A copy of the gunshot residue forensic report was attached to the defendant's motion for a new trial. According to that report, the gunshot residue test was performed at exactly 12:30 a.m. on September 18, 2012.

4 We note some confusion in the record before us as to this point. While in his brief the defendant states that prior to retaining private counsel, he filed a *pro se* motion alleging ineffective assistance of counsel, that *pro se* motion is not part of the record on appeal. In fact, the record contains no *pro se* motions filed by the defendant. What is more, the transcript of the proceedings affirmatively establishes that the defendant was represented by private counsel prior to, during, and after the State requested that the court conduct the preliminary *Krankel* hearing.

5 We note that the decision in ***People v.*** *Ramirez*, 2015 IL App (1st) 130022, relied on by the defendant for the proposition that not all attempt murder convictions with "great bodily harm" mandate consecutive sentences, has since been vacated by our supreme court. See ***People v.*** *Ramirez*, 50 N. E. 3d 1136.

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E.D. Pennsylvania.

UNITED STATES of America
v.
Miguel ORTIZ, a/k/a "Miguelito".

Criminal Action No. 11–251–08.

Jan. 7, 2013.

MEMORANDUM

DuBOIS, District Judge.

I. INTRODUCTION

***1** Defendant is charged in the Third Superseding Indictment with: one count of conspiracy to distribute five kilograms or more of cocaine, twenty-eight grams or more of cocaine base ("crack"), and marijuana, in violation of 21 U.S.C. § 841(a)(1) and (b)(1) (A)-(C); two counts of distribution of, and aiding and abetting the distribution of, five kilograms or more of cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) and 18 U.S.C. § 2 and one count of distribution of, and aiding and abetting the distribution of, five kilograms or more of cocaine within 1,000 feet of a school, in violation of 21 U.S.C. § 860(a) and 18 U.S.C. § 2.

Presently before the Court is defendant's Motion to Preclude Testimony, which the Court denies for the reasons set forth below.

II. BACKGROUND

On May 11, 2012, defendant filed a document entitled Omnibus Pre–Trial Motions, which contained ten separate motions, including the instant Motion to Preclude Testimony. The Motion to Preclude Testimony arises from the fact that certain video footage from cameras attached to utility poles ("pole cameras") by Drug Enforcement Agency ("DEA") to record activity around a warehouse, located at 3075 Jasper Street, Philadelphia, Pennsylvania, was missing. (Resp. at 43.) The warehouse was allegedly used in connection with the drug conspiracy and other substantive crimes charged in the Third Superseding Indictment. (Third Superseding Indictment at 2, 12, 13.) The pole cameras were installed, respectively, at the intersection of Clearfield and Jasper Street, and at the intersection of Clearfield and Helen Street. (Resp. at 43 .) The pole cameras digitally recorded footage 24–hours a day, beginning January 10, 2011, and the footage was transmitted to a DEA server, such that agents working on the case could review the recordings at any time. (*Id.*) The missing video footage covered the period from January 12, 2011, to February 26, 2011.

During a Motions Hearing on June 21, 2012, the Government presented testimony regarding how the video footage was viewed and subsequently handled. Specifically, in the course of the investigation, DEA Special Agents David Pedrini and Paul Gimbel viewed the video footage recorded by the two pole cameras. (Motions Hearing, June 21, 2012, at 72–74) ("H1.") Following their viewings, Special Agents Gimbel and Pedrini each created investigative reports summarizing their observations, known as DEA–6 reports. (*Id.*) In their reports, based on pole-camera footage, Gimbel and Pedri ni claim to have observed defendant at the Jasper Street warehouse on multiple occasions. (Motions Hearing, November 30, 2012, at 42, 75) ("H3.")

The pole cameras were removed on April 11, 2011. (Resp. at 44; H3 at 12.) Then, on April 13, 2011, DEA personnel downloaded the pole-camera footage from the central server to external hard drives. (Resp. at 44; H1 at 168.) When the downloaded footage was reviewed that same day, DEA personnel discovered that the footage from the Helen Street pole camera, from January 12 to February 26, 2011, was missing. (Resp. at 44; H1 at 23.) DEA technical personnel, in concert with the FBI and private companies responsible for the hardware and software used to play the footage, immediately attempted to recover the missing footage. (H 1 at 172–76.) This initial effort was unsuccessful. (*Id.*)

***2** Anticipating that the Government would seek to have Special Agents Gimbel and Pedrini testify as to their observations of the lost footage, defendant moved to preclude any such testimony. Addressing this issue at a Motions Hearing on June 21 and 22, 2012, the Government agreed to attempt further efforts to reconstruct the missing footage from the Helen Street pole camera. (Motions Hearing, June 22, 2012, at 80) ("H2.")

Following several months of recovery efforts, the Government reported that it had been unable to extract any relevant footage or still pictures from the hard drives that contained the Helen Street pole camera footage. (Supp. Resp. at 1–5.) Defendant thereafter renewed his motion to preclude any testimony by l aw enforcement agents covering the missing video footage. (Reply at 3.)

The Court conducted a second Hearing on the Motion on November 30, 2012. At that Hearing, the Government stated its intent to have Special Agents Pedrini and Gimbel testify at trial as to the missing pole camera footage on the basis of their respective DEA–6 reports. (H3 at 12.) Specifically, the Government sought to have Special Agent Gimbel testify on the basis of certain portions of his report dated February 14, 2011, designated Government Exhibit 5. (*Id.* at 14–16.) The Government also sought to have Special Agent Pedrini testify on the basis of certain portions of his report dated February 10, 2011, designated Government Exhibit 6.(*Id.*) Accordingly, the Court heard testimony from both agents regarding their authorship of the respective reports, and the observations each allegedly made of the missing pole camera footage.

Special Agent Gimbel testified that, upon viewing the footage, he typed his observations into his computer and then "cut and paste[d]" those notes directly into his formal report. (*Id.* at 40.) Special Agent Gimbel also testified that in writing his investigative report, Government Exhibit 5, in addition to relating his observations of the pole camera footage, he sometimes incorporated information conveyed to him by other law enforcement agents. (*Id.* at 52.) As a result, for certain portions of his report, Special Agent Gimbel stated that he could not be certain whether the observations described were based solely upon his own viewing of the now-missing pole camera footage, or upon information from other agents. (*Id.* at 51, 56.) Finally, Special Agent Gimbel stated that other portions of the report were, in fact, based entirely on his personal observations of the video footage. (*Id.* at 45–46, 57–58.)

For his part, Special Agent Pedrini testified that while watching the pole camera recordings, he took rough notes which he later transferred into his investigative reports. (*Id.* at 74.) He further stated that for the observations noted in his report at issue in this case, Government Exhibit 6, each was based solely on his own observations of the camera footage. (*Id.* at 74–75.)

***3** Defendant makes several arguments in support of his motion to preclude the agents' testimony. They are addressed in turn.

III. DISCUSSION

A. *Best Evidence Rule*

Defendant first argues that the agents' testimony should be barred under the Best Evidence Rule, Fed.R.Evid. 1002. That rule states that the original writing, recording or photograph in question must be produced in evidence. However, Fed.R.Evid. 1004 eliminates this requirement where "all the originals are lost or destroyed, and not by the proponent acting i n bad faith." The Advisory Committee notes to Fed.R.Evid. 1004 state that "if failure to produce the original is satisfactorily explained, secondary evidence is admissible.... The rule recognizes no 'degrees' of secondary evidence." As such, if the Court finds that the Helen Street pole-camera footage was lost, and not by the bad faith of the Government, testimony regarding the footage is not barred by the Best Evidence Rule.

"It is the burden of the proponent of the evidence to prove that the originals were not lost or destroyed in bad faith." *Stocchi v. Kmart Corp.,* No. 96–cv–4884, 1997 WL 611619, at * 1 (E.D.Pa. Sept. 24, 1997). The proponent's burden may be satisfied by "circumstantial evidence such as evidence of a diligent but unsuccessful search for the document." *Id.* (quoting *Remington Arms v. Liberty Mut. Ins.,* 810 F.Supp. 1420, 1426 (D.Del.1992)).

In *Stocchi v. Kmart Corp.,* the Court found no bad faith where defendant Kmart offered testimony as to the chain of custody of a lost videotape and evidence of a diligent search for the tape. *Id* . The case most on point, *United States v. Brown,* concerned a videotape that had been erased while in possession of the D EA. Cr. No. 08–0098, 2009 W L 2338112, at * 1 (W.D.Pa. July 29, 2009) The Government i n that case sought to offer the testimony of D EA agents who had previously viewed the tape. *Id.* The court held, "While we are troubled by the Government's failure to take any steps to determine forensically how the video tape was destroyed, we find that there is no evidence that the Government destroyed the tape in bad faith. Accordingly, we hold that the Government met its burden under Rule 1004(1)." *Id.*

At the June 21 and June 22, 2012 Hearings, the Government presented evidence as to how the Helen Street video

footage was handled, and subsequently lost, when it was downloaded from the DEA server to external hard drives. (Resp. at 44; H 1 at 168–69.) The testimony supports the Government's contention that the footage was not lost as the result of any bad faith, but rather was the result of some still-unexplained computer malfunction. Further, i n their Supplemental Response, the Government detailed their additional, unsuccessful effort lasting several months, to recover any relevant footage or still frames from the dates i n question. (Supp.Resp.1–4.)

At the November 29 Hearing, defendant argued that the Government was negligent, and thus acted in bad faith, by failing to adequately back up the Helen Street pole camera footage. (H3 at 20, 22–23.) Defendant's argument is both factually and legally incorrect.

***4** First, the Government presented testimony from D EA technical personnel at the June 21, 2012 Hearing, establishing that the server where the footage was stored had multiple backup hard drives, "[s]o that, if one fails, the backups can rebuild those portions of data that is lost." (H 1 at 166.) There was no contrary evidence. Thus, defendant's argument based on the alleged failure to adequately backup the Helen Street pole camera footage is refuted by the evidence.

Second, assuming *arguendo* that the Government was negligent i n failing to back up the footage of the Helen Street pole camera, such negligence is insufficient to establish bad faith. *See* *Stocchi,* 2009 WL 2338112, at *1 ("The fact that agents of [defendant] might have been negligent in losing an important piece of evidence neither establishes a 'bad faith' destruction according to Fed.R.Evid. 1004. nor detracts from the reasonableness of [defendant's] subsequent search.")

The Government provided evidence both as to the loss of the footage, and the subsequent recovery effort. The Court finds that, based on this evidence, the Government has met its burden of establishing the absence of bad faith in the loss of the Helen Street pole camera footage. Thus, testimony regarding the missing footage, as secondary evidence, is not barred by the Best Evidence Rule, and defendant's motion on this ground is denied.

B. *Hearsay*

Although the Best Evidence Rule does not bar the agents' testimony, the Court finds that certain portions of the testimony are hearsay, and do not fall into any exception to the Hearsay Rule, Fed.R.Evid. 802. Those portions of the testimony containing such hearsay are thus precluded.

Under Fed.R.Evid. 801, hearsay is an out of court statement which is offered in evidence to prove the truth of the matter asserted i n the statement. At the November 30 Hearing, the Government stated its intention to have Special Agents Gimbel and Pedri ni testify as to their observations of the now-missing pole camera footage, based on certain sections of their respective investigation reports. (H3 at 12.) Special Agent Gimbel testified that in writing investigative reports, he would sometimes incorporate information from other l aw enforcement agents, and he did so in this case. (*Id.* at 52.) Specifically, he stated that for several parts of his report, Government Exhibit 5, he did not know whether what was written was based solely on his own observations of the video footage, or on information conveyed to him by other agents. (*Id.* at 51, 56.) The Court concludes that testimony from Government Exhibit 5, based in whole or in part on information provided by other agents is hearsay. The Government has not identified, and the Court has not found, any applicable exception to the Hearsay Rule regarding such testimony. It is therefore excluded.

The Court concludes that Special Agent Gimbel and Special Agent Pedrini may testify regarding their observation of the missing pole camera footage but only as to what each personally observed. That is, neither agent may offer any testimony about the missing video which is based on any source other than their own observation of the now-missing camera footage.

C. *Undue Prejudice*

***5** Defendant additionally argues that the agents' testimony regarding the missing footage is unduly prejudicial and should be precluded, pursuant to Fed.R.Evid. 403. That rule provides that: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed.R.Evid. 403. The Government contends that the evidence is probative and that it is of only minimal prejudice to defendant.

In making his argument, defendant relies on *Brown,* noted above. In *Brown,* the court precluded testimony of D EA agents regarding missing video on Fed.R.Evid. 403 grounds because: (1) cross-examination of the testifying agents would be virtually impossible in that "[n]one of the agents took

contemporaneous notes that could qualify as present sense impressions of the video tape ... Instead, they intend[ed] to testify ... regarding what they remember seeing on the recording when they watched it once, three years ago;" (2) the jury could be misled into believing that the agents were eyewitnesses to the crime; and (3) the testimony was cumulative, given the other evidence of the crime available. *Brown,* 2009 WL 2338112, at * 2.

This case is materially distinguishable from *Brown.* First, cross-examination of Agents Pedrini and Gimbel may be effectively conducted on the basis of the agents' contemporaneous notes and/or reports of the observations made on the footage. The Court heard testimony that Special Agent Pedri ni took rough notes as he watched the video, and that he later transferred those notes into his DEA–6 reports. (H3 at 74.) Both Special Agent Pedrini's notes and reports have been made available to defense counsel i n discovery. (*Id.* at 17; Resp. at 46.) Further, while Special Agent Gimbel did not take rough notes during his observation of the video footage, he in fact typed contemporaneous notes into his computer and then "cut and paste[d]" those notes directly into the DEA–6 reports. (H3 at 40.) Defense counsel has also been provided with Special Agent Gimbel's DEA–6 reports. (Resp. at 46.) Thus, defense counsel has been given contemporaneous notes or reports for both agents, enabling effective cross-examination as to what the agents observed on the video.

Second, given the use of the reports and notes, the Court finds that there is minimal risk that the jury will be misled into believing that the testifying agents were eyewitnesses to the event in question. The Court also notes that a limiting instruction further addressing this issue may be requested by either party during trial.

Finally, in *Brown* the Government had "an audio tape of the telephone conversation between the confidential informant and defendant arranging the purchase purportedly depicted on the corrupted video tape ....[and] an audio recording of the alleged illegal transaction." *Brown,* 2009 WL 2338112, at *2. Accordingly, the *Brown* court ruled that the agents' testimony regarding the video of the alleged drug purchase was cumulative evidence. *Id.* In this case, apart from the missing video, there exists no similar recording of the defendant's alleged actions at or near the Jasper Street warehouse during the dates in question.

***6** Defendant also argues that the proposed testimony of the agents is cumulative because the Government has stated it will offer additional evidence against defendant such as testimony of witnesses and phone records. The Court rejects this argument because the missing pole camera footage would corroborate such other evidence, it would not be cumulative.

Based on the foregoing, the Court concludes that the probative value of the agents' testimony is not substantially outweighed by the danger of unfair prejudice or confusion, and that the evidence is not cumulative. Thus, defendant's motion based on Fed.R.Evid. 403, is denied.

D. *Spoliation*

Defendant asserts that because the Government lost the video, the Court should preclude testimony regarding its contents as a sanction pursuant to the spoliation doctrine. Under this concept, where a court finds that evidence was destroyed or lost, precluding its use by another party in litigation, the court may impose a variety of sanctions on the party at fault. *See, e.g., United States v. Bunty,* 617 F.Supp.2d 359, 370 (E.D.Pa.2008) Generally, such sanctions involve an adverse inference against the party responsible for the loss, but the court may also impose fines, preclude other evidence, or assign responsibility for certain costs. *Id.; see also Brewer v. Quaker State Oil Ref. Corp.,* 72 F.3d 326, 334 (3d Cir.1995).

The Third Circuit has stated that, "No unfavorable inference arises when the circumstances indicate that the document or article i n question has been lost or accidentally destroyed, or where the failure to produce it is otherwise properly accounted for." *Brewer,* 72 F.3d at 334. As noted above, the Government has met its burden to show an absence of bad faith i n the loss of the pole camera footage. Accordingly, the doctrine of spoliation does not apply i n this case, as the evidence at issue was "lost or accidentally destroyed." *Id.* The defendant's motion on this ground is denied.

E. *Due Process*

Defendant next argues that testimony regarding the missing footage would amount to a Constitutional Due Process violation. Specifically defendant argues that allowing the agents' testimony would be akin to giving the jury "a fact to find." (Mot. at 9.) However, the Court agrees with the Government that this claim is essentially a Fed.R.Evid. 701 argument. That is, the defendant appears to argue that the agents' testimony would not be "rationally based on

the perception of the witness, [and] helpful to a clear ... determination of a fact in issue." Fed.R.Evid. 701.

The Court rejects defendant's Due Process argument. To ensure that the agents' testimony at trial is rationally based upon their own perception, and to preclude any hearsay evidence, the Court will permit Special Agent Gimbel and Special Agent Pedri ni to testify as to the descriptions of the pole camera footage based solely on those sections of their respective reports which were based on their individual observations.

V. CONCLUSION

***7** For the reasons set forth above, defendant's Motion to Preclude Testimony is denied. An appropriate order follows.

ORDER

AND NOW, this 7th day of January, 2013, upon consideration of the Defendant's Motion to Preclude Testimony (Document No. 266, filed May 11, 2012) and related filings of the parties,[2] following Hearings on June 21, June 22, and November 30, 2012, with the defendant, Miguel Ortiz, and al l counsel present, for the reasons set forth i n the Memorandum dated January 7, 2013, **IT IS ORDERED** that Defendant's Motion to Preclude Testimony is **DENIED.** Special Agent Paul Gimbel and Special Agent David Pedrini may testify at trial regarding the now-missing video obtained from the Helen Street pole camera for the period from January 12, 2011, to February 26, 2011, subject to the proviso that their testimony shall be limited to those sections of their respective reports which were derived entirely from their personal observation of the now-missing pole camera footage.[3] Neither agent may testify regarding any part of his report which was based, i n whole or i n part, on any source other than his personal observation of the now-missing camera footage.

All Citations

Not Reported in F.Supp.2d, 2013 WL 101727

Footnotes

1 Defendant also cites a Ninth Circuit decision, *Loud Hawk,* in support of his motion to preclude the agents' testimony. In that case, then-judge Kennedy discussed how a court should address the loss or destruction of criminal evidence. *United States v. Loud Hawk,* 628 F.2d 1139, 1151 (9th Cir.1979). This analysis is not binding in the Third Circuit and this Court declines to follow it.

2 The related filings of the parties considered by the Court are: Government's Response to Motion to Preclude Video (Document No. 277, filed June 1, 2012); Government's Supplemental Response in Opposition to Defendant Miguel Ortiz's Motion to Preclude Testimony (Document No. 339, filed October 5, 2012); Miguel Ortiz's Reply to the Government's Supplemental Response in Opposition to his Motion to Preclude Testimony (Document No. 340, filed October 22, 2012).

3 Special Agent Gimbel authored the report designated Government Exhibit 5, and Special Agent Pedrini authored the report designated Government Exhibit 6, at the November 30, 2012 hearing.

1997 WL 611619
Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

Samuel STOCCHI and Virginia Stocchi,
v.
KMART CORPORATION

No. CIV. A. 96–CV–4884.

Sept. 24, 1997.

Attorneys and Law Firms

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Michelle D. Carter, White and Williams, Phila, PA, W. Kelly MC Williams, Gibley and McWilliams, P.C., Media, PA, for Kmart Corporation, Defendant.

ORDER MEMORANDUM

BRODY, J.

***1** Plaintiffs Samuel and Virginia Stocchi ("Stocchi") filed a motion in limine to preclude the testimony of two trial witnesses of the Defendant Kmart ("Kmart"). The witnesses would testify as to the contents of a lost surveillance videotape which recorded the accident underlying Stocchi's claim. I will deny the motion because Fed.R.Evid. 1004 allows the admission of other evidence of the contents of a writing, recording or photograph when, under certain circumstances, the originals have been lost or destroyed.

Fed.R.Evid. 1004 allows the admission of other evidence of the contents of a writing, recording or photograph when "[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith." It is the burden of the proponent of the evidence to prove that the originals were not lost or destroyed in bad faith. *Remington Arms v. Liberty Mut. Ins.,* 810 F.Supp. 1420, 1426 (D.Del.1992). The proponent's burden may be satisfied by "circumstantial evidence such as evidence of a diligent but unsuccessful search for the document." *Id. See also Servants of the Paraclete v. Great American Ins.,* 857 F.Supp. 822, 828 (D.N.M.) (describing the Fed.R.Evid. 1004 test as a "due diligence" requirement).

At an evidentiary hearing Kmart met its burden and will be permitted to present its evidence at trial. Kmart presented the testimony of an employee who made the initial viewing of the videotape and of two claims adjusters who had consecutive responsibility for Kmart's claims file. (Tr., 9/12/97 at 4–89). Kmart also introduced records kept by one of the claims adjusters documenting the chain of custody of the videotape and the subsequent search for it. (*Id.* at 43–59, 76–77). One of the witnesses, a Ms. Lee, the last person to have viewed the videotape, testified that the videotape was lost when all of the office's files were packed up and shipped to another office. (*Id.* at 59–63).

Kmart also demonstrated a diligent search was made for the videotape. The two claim adjusters testified that they looked in files, inquired at file rooms, spoke to employees who might have possession of the tape and notified building lost-and-found rooms.(*Id.* at 63, 77–80). The fact that agents of Kmart might have been negligent in losing an important piece of evidence neither establishes a "bad faith" destruction according to Fed.R.Evid. 1004. nor detracts from the reasonableness of Kmart's subsequent search.

AND NOW, this 24th day of September, 1997, IT IS ORDERED that Plaintiff's Motion in Limine to preclude trial testimony relating to the contents of a security videotape is DENIED.

All Citations

Not Reported in F.Supp., 1997 WL 611619

A-86

2009 WL 2338112
Only the Westlaw citation is currently available.
United States District Court,
W.D. Pennsylvania.

UNITED STATES of America,
v.
Jerome BROWN, Defendant.

Criminal No. 08-0098.

July 29, 2009.

West KeySummary

1 **Criminal Law** Special Types of Photographs; Enlargements, Motion and Sound Pictures, X-Rays

In drug prosecution, government was not entitled to offer into evidence the testimony of four government agents regarding the contents of a video they had viewed three years earlier to prove the contents of the video, which had inexplicably been destroyed. It was determined that the government did not destroy the video in bad faith. However, allowing the agents to testify as to the contents of the video would have resulted in unfair prejudice to the defendant. The agents had not taken notes or recorded their recollections of the video and the government had other first hand original evidence of the alleged crime. Fid.Rules 403, 1004(1), 28 U.S.C.A.

Attorneys and Law Firms

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MEMORANDUM and ORDER

GARY L. LANCASTER, District Judge.

***1** Before the court is the government's motion *in limine* requesting admission of other evidence of the contents of a video tape due to destruction of original evidence [doc. no. 61]. The government requests that it be permitted to offer the testimony of government agents who viewed a video tape prior to the tape's inexplicable destruction to prove its contents. The court held an evidentiary hearing on July 13, 2009 regarding the circumstances of the destruction of the video tape. The government's motion *in limine* will be denied for the following reasons. In turn, the defendant's companion motion *in limine* to exclude the same evidence [doc. no. 73] will be granted.

I. *Findings of Fact*

Task Force Officer James Hensell and Special Agent Barry Baldwin of the Drug Enforcement Administration (DEA) testified at the evidentiary hearing. The court finds each of them to be a credible witness.

On July 17, 2006, Officer Hensell viewed the video recording at issue at the DEA Pittsburgh office along with three other DEA agents. The tape played flawlessly. He then sealed the recording in an evidence envelope and gave it to a DEA evidence custodian for storage. On April 1, 2008, Officer Hensell removed the evidence envelope containing the recording from the DEA evidence locker and gave it to Special Agent Barry Baldwin for copying.

Special Agent Baldwin unsealed the evidence envelope, removed the recording, and placed it into a duplicating machine. He began the duplication process, saw approximately less than two minutes of the recording, and then the recording went blank. He attempted to watch the recording on the original recording device and again was unable to view the video. He knows of no way to recover the recording and has no equipment to recover the recording.

The government's attorney proffered, which we have no reason to disbelieve, that Officer Hensell called the DEA laboratory in Dallas, Texas to ask how to recover the recording. He learned that there was no way of retrieving the video.

II. *Conclusions of Law*

Federal Rule of Evidence 1004(1) provides that "other evidence of the contents of a writing, recording, or photograph is admissible if ... [a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith." Accordingly, here the government must prove that the original recording was lost or destroyed, but not in bad faith. *See Stocchi v. Kmart Corp.,* No. 96-4884, 1997 WL 611619, at * 1 (E.D.Pa. Sept.24, 1997) (citing *Remington Arms Co. v. Liberty Mut. Ins. Co.,* 810 F.Supp. 1420, 1426 (D.Del.1992)).

While we are troubled by the government's failure to take any steps to determine forensically how the video tape was destroyed, we find that there is no evidence that the government destroyed the tape in bad faith. Accordingly, we hold that the government met its burden under Rule 1004(1).

That does not, however, end our inquiry. Rule 403 provides that otherwise admissible evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed.R.Evid. 4 03. The court of appeals has held that this court is "in the best position to assess the extent of the prejudice caused a party" and that, therefore, "the trial judge must be given very substantial discretion in balancing probative value on the one hand and unfair prejudice on the other." *U.S. v. Universal Rehab. Services (PA), Inc.,* 205 F.3d 657, 665 (3d Cir.2000) (internal citations and quotations omitted).

***2** Here, the government intends to offer the testimony of four (4) DEA agents. The agents are to testify as to what they remember seeing on the approximately one hour long video recording. The only time they viewed it was over three years ago, on July 17, 2006. None of the agents took contemporaneous notes that could qualify as present sense impressions of the video tape, or even be used to refresh their recollections. Nor did the agents otherwise record their recollections regarding the content of the video recording while it was fresh in their memories. Instead, they intend to testify now regarding what they remember seeing on the recording when they watched it once, three years ago.

The proffered testimony is substantially outweighed by the danger of unfair prejudice to defendant. Specifically, it will be extremely difficult for defendant's counsel to cross-examine these witnesses as to the accuracy of their recollection given that counsel has not viewed the video and does not have any other objective account of the content of the tape with which to compare. Further, the jury may be left with the improper impression that the DEA agents were eyewitnesses to the alleged crime, as opposed to merely being present when the video tape was viewed.

Finally, the proffered evidence is cumulative. Specifically, the government has other first hand, original evidence of the alleged crime: the government has an audio tape of the telephone conversation between the confidential informant and defendant arranging the purchase purportedly depicted on the corrupted video tape; the government has an audio recording of the alleged illegal transaction; and the identity of the confidential informant is no longer confidential, allowing the government to call the informant to testify at trial if it so chooses.

On balance, the probative value of the proffered testimony is substantially outweighed by the danger of unfair prejudice, misleading the jury, and by considerations of undue delay, waste of time, and needless presentation of cumulative evidence. Therefore, we will exclude the testimony of the DEA agents regarding the contents of the recording pursuant to Federal Rule of Evidence 403.

An appropriate order follows.

ORDER

AND NOW, this *29th* day of July, 2009, IT IS HEREBY ORDERED THAT defendant's motion *in limine* [doc. no. 73] is GRANTED. IT IS FURTHER ORDERED THAT the government's motion *in limine* [doc. no. 61] is DENIED

All Citations

Not Reported in F.Supp.2d, 2009 WL 2338112

Footnotes

1 Pursuant to Federal Rule of Evidence 1001, a video tape is a “photograph” as used in Federal Rule of Evidence 1004.

2020 WL 4432450
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Eric A. ELLIOTT (p/k/a Fly Havana), Plaintiff,
v.
Joseph Anthony CARTAGENA (p/k/a Fat Joe), et al., Defendants.

19 Civ. 1998 (NRB)

Signed 07/31/2020

Attorneys and Law Firms

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MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD, UNITED STATES DISTRICT JUDGE

***1** Plaintiff Eric A. Elliott ("Elliott" or "plaintiff") brought a copyright infringement action, alleging that he is a co-author of the song "All The Way Up." Defendants now move for summary judgment on the ground that plaintiff contractually gave up all of his rights in the song. For the following reasons, defendants' motion is denied.

I. Background

1. The Song "All The Way Up" and the "Piece of Paper"

At the outset, the Court summarizes the facts relevant to this motion as drawn from the complaint filed on March 6, 2019 ("Complaint"), see ECF No. 6, and the materials submitted by the parties in connection with this motion. [2]

In late 2015, plaintiff and defendant Shandel Green (p/k/a Infared) created a soundtrack at a studio in Miami, Florida. See Compl. (ECF No. 6) at ¶ 8. Plaintiff alleges that this soundtrack was the prototype of the song "All The Way Up," which was publicly released on March 2, 2016 as a song created by defendants Joseph Cartagena (p/k/a Fat Joe) ("Fat Joe"); Karim Kharbouch (p/k/a French Montana); Reminisce Smith Mackie (p/k/a Remy Ma); and others. Id. at ¶¶ 9, 39. Plaintiff was not named as one of the song's authors. Id. Shortly after the song was released, in early March 2016, plaintiff and Fat Joe spoke over the phone. Id. at ¶ 41. During the call, plaintiff "said he wanted to get paid up front or have publishing going forward." Id.

In mid-March, plaintiff and Fat Joe had a meeting at an IHOP restaurant. See Parties' Rule 56.1 Stmts. ¶ 5. [3] At the meeting,

Fat Joe gave plaintiff a check for $5,000. Id. at ¶ 8; Compl. ¶ 50. The check denoted that it was for "write." Id. At the same meeting, Fat Joe also put a "piece of paper" in front of plaintiff. See Parties' Rule 56.1 Stmts. ¶ 9. Plaintiff signed the "piece of paper" and took the $5,000 check. Id. at ¶ 10; Compl. ¶ 56. Plaintiff was not provided a copy of the signed "piece of paper." See Parties' Rule 56.1 Stmts. ¶ 11; Compl. ¶ 54. After the meeting, plaintiff deposited the check. See Parties' Rule 56.1 Stmts. ¶ 12.

2. The Court's Order to Submit Any Versions of the "Piece of Paper" in Parties' Possession

***2** Plaintiff commenced this action by filing the Complaint. See ECF No. 6. On August 16, 2019, a subgroup of defendants —Fat Joe and his publishing entities; Remy Ma and her publishing entity; and Warner entities, which allegedly own part of the song "All The Way Up"—filed a pre-motion letter, proposing a motion to dismiss the Complaint in its entirety. See ECF No. 112. Plaintiff filed a letter response on August 26, 2019. See ECF No. 120. After reviewing the parties' letters, the Court filed a letter on September 5, 2019, directing the parties to file "whatever versions of the ['piece of paper'] are in their possession" and "sworn statements from the relevant parties addressing the lack of possession (i.e. total or unsigned)." See ECF No. 125. On September 19, 2019, plaintiff submitted a sworn declaration, certifying that he did not possess any copy of whatever version of the "piece of paper" referenced in the Complaint. See Elliott Decl. (ECF No. 132-1), ¶ 2.

Of greater relevance here among the submissions by defendants are the sworn declarations by Fat Joe and Erica Moreira, who was Fat Joe's attorney at the relevant time. See ECF No. 131.[4] On September 19, 2019, defendants submitted a sworn declaration by Moreira, claiming that she had prepared the "piece of paper." See Moreira Decl. (ECF No. 131-2), ¶¶ 4-7. Moreira states that, on March 2, 2016, Fat Joe requested her to draft an agreement that would put to rest plaintiff's assertion of interests in the song "All The Way Up." See Id. at ¶ 4. According to Moreira, on March 11, 2016, Pacheco—who was then Fat Joe's manager—emailed her a photograph of plaintiff's Florida driver's license, and she sent Fat Joe and Pacheco a draft agreement tailored to reflect the information about plaintiff ("Draft Agreement"). See Id. ¶¶ 5-6. Moreira submitted a copy of the Draft Agreement along with her declaration. See Id., Ex. B. Fat Joe states in his declaration that he printed out the Draft Agreement without making any changes and brought it to his meeting with plaintiff at the IHOP restaurant. See Cartagena Decl. (ECF No. 131-1), ¶¶ 6, 8.

As to the whereabouts of the signed copy of the "piece of paper," Moreira states in her declaration that she never received it. See Moreira Decl., ¶ 8. Fat Joe also certifies in his declaration that he could not locate a signed copy of the "piece of paper" after a reasonable search of his home, his personal belongings and the people "in [his] circle at the time." Id. at ¶ 9. However, Fat Joe further states that he "may have provided the document to [his] then-manager, Mr. Elis Pacheco." Id. According to Fat Joe, "Pacheco was contacted by e-mail regarding this matter," but it is Fat Joe's "understand[ing] that [Pacheco] indicated he was unable to locate a signed copy of the [document]." Id.

3. Pending Motion for Summary Judgment:

After reviewing the materials submitted by the parties, the Court held a pre-motion conference on October 17, 2019. See ECF No. 135. At the conference, the Court granted defendants leave to make a pre-discovery motion for summary judgment limited to the issue of establishing the content of the parties' agreement in the absence of a signed copy of the "piece of paper," see ECF No. 141, which motion defendants filed on November 8, 2019. See ECF No. 143.

II. Discussion

A. **Legal Standard: Federal Rule of Civil Procedure 56**

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. A fact is "material" if it "might affect the outcome of the suit under the governing law." See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is "genuine" if, considering the record as a whole, a rationale jury could find in favor of the non-moving party. Ricci v. DeStefano, 557 U.S. 557, 586 (2009). At summary judgment, the movant bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "Where the non-movant bears the burden of proof at trial, the movants' initial burden at summary judgment can be met by pointing to a lack of evidence supporting the non-movant's claim." Ramos v. City of New York, No. 18

Civ. 4938 (ALC), 2020 WL 4041448, at *2 (S.D.N.Y. Jul. 16, 2020) (citing Celotex Corp., 477 U.S. at 325). Once the movant satisfies its initial burden, the non-movant must then respond with specific facts demonstrating that there are remaining material issues for trial. Ricci, 557 U.S. at 586 (quoting Celotex Corp., 477 U.S. at 324).

***3** "Although a pre-discovery motion for summary judgment is permitted under Federal Rule of Civil Procedure 56, it should be granted only in the rarest cases because the nonmoving party must have had the opportunity to discover information that is essential to his opposition to the motion for summary judgment." Baskett v. Autonomous Research LLP, No. 17 Civ. 9237 (VSB), 2018 WL 4757962, at *4 (S.D.N.Y. Sept. 28, 2018). Rule 56(d) addresses the need for additional discovery in the context of a summary judgment motion. Specifically, Rule 56(d) provides that, "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition," the court may defer decision on the motion, deny the motion, allow additional time to take discovery, or issue any other appropriate order. Fed. R. Civ. Pr. 56(d). In this Circuit, a Rule 56(d) affidavit "must include the nature of the uncompleted discovery; how the facts sought are reasonably expected to create a genuine issue of material fact; what efforts the affiant has made to obtain those facts; and why those efforts were unsuccessful." Paddington Partners v. Bouchard, 34 F.3d 1132, 1138 (2d Cir. 1994).

B. **Analysis**

The central issue presented in this motion is whether, in the apparent absence of a signed copy of the "piece of paper," defendants may prove the content of the parties' agreement. A multi-step analysis is required to answer this question.

At the outset, the Court concludes that the Draft Agreement is admissible under Federal Rule of Evidence 1003 as a duplicate of the "piece of paper" that was presented to plaintiff at the meeting between Fat Joe and him. Moreira has submitted a copy of her email to Fat Joe, dated March 11, 2020, which shows the Draft Agreement as an attachment. See ECF No. 145-1. Fat Joe states in his declaration that he printed out the attachment without any modification and brought it to his meeting with plaintiff. See Cartagena Decl., ¶¶ 6, 8. These sworn statements are sufficient to establish the authenticity of the Draft Agreement as a duplicate of the "piece of paper" that was presented to plaintiff.

In his Rule 56(d) declaration, plaintiff's counsel suggests several arguments to challenge the authenticity of the Draft Agreement as a duplicate of the "piece of paper." See ECF No. 153 at ¶¶ 7-9. [5] However, those arguments amount to no more than just mere speculation that the Draft Agreement might not be an authentic duplicate of the "piece of paper," which is insufficient to raise a genuine question about authenticity under Rule 1003. See United States v. Grimmer, 199 F.3d 1324, 1324 (2d Cir. 1999) ("Simply speculating that there is no assurance that the proffered document is actually a duplicate of the original does not raise a genuine question under Rule 1003.") (citing United State v. Chang An-Lo, 851 F.2d 547, 557 (2d Cir. 1988)).

Given our conclusion that the Draft Agreement is admissible under Rule 1003 as a duplicate of the "piece of paper" and given the plaintiff's concession that he signed a "piece of paper" that was presented to him at the meeting with Fat Joe, the parties' dispute becomes whether the Court may consider the Draft Agreement for the purpose of inferring the terms of the parties' signed agreement. This dispute calls for the application of the "best evidence" rule, which is codified at Federal Rule of Evidence 1002. Burt Rigid Box, Inc. v. Travelers Prop. Cas. Corp., 302 F.3d 83, 91 (2d Cir. 2002). Federal Rule of Evidence 1002 provides that "[a]n original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise." Of particular relevance here, Federal Rule of Evidence 1004 provides:

> ***4** An original is not required and other evidence of the content of a writing, recording or photograph is admissible if:
>
> (a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;
>
> (b) an original cannot be obtained by any available judicial process;
>
> (c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
>
> (d) the writing, recording, or photograph is not closely related to a controlling issue.

"The party seeking to prove the contents of the writing must establish a proper excuse for the non-production of the document and that the original did exist." A.F.L. Falck, S.p.A. v. E.A. Karay Co., Inc., 722 F. Supp. 12, 16 (S.D.N.Y. 1989). Because defendants seek to prove the content of the signed copy of the "piece of paper" through other evidence, defendants bear the burden of establishing that at least one of the conditions specified in Rule 1004 has been satisfied. Here, defendants invoke Federal Rule of Evidence 1004(a). Accordingly, defendants bear the burden of establishing that "all the originals are lost or destroyed, and not by the proponent acting in bad faith." Fed. R. Evid. 1004(a).

As discussed above, Fat Joe states in his declaration that he "may have provided the document to [his] then-manager, Mr. Elis Pacheco," see Cartagena Decl. ¶ 9, and Pacheco was named as a recipient in Moreira's email to Fat Joe, providing the Draft Agreement. These facts support an inference that the signed copy of the "piece of paper" may currently be in Pacheco's possession. In order to discount that possibility, Fat Joe states in his declaration that "Pacheco was contacted by e-mail regarding this matter, but I understand that he indicated he was unable to locate a signed copy of the Agreement." Id. Consistent with Fat Joe's position, Moreira also states in her declaration: "It is my understanding that Mr. Pacheco, who is no longer Mr. Cartagena's manager, was asked to search for the signed Agreement, but has indicated that he has been unable to locate it." See Moreira Decl. ¶ 9. Further, along with their reply brief, defendants submitted a declaration by Andrew D. Kupinse, who has served as Fat Joe's attorney since 2016. See Kupinse Decl. (ECF No. 161) ¶ 4. In the declaration, Kupinse states that, in response to his request to send a signed copy of the "piece of paper," Pacheco stated that "following some 'digging' in storage, [Pacheco] was '100% sure he was never in possession of [it].' " Id. at ¶ 8.

Plaintiff objects to our consideration of these statements about Pacheco on the ground that they are inadmissible hearsay. See, e.g., ECF No. 154 at 26-27. This argument is without merit. Our consideration of these statements is limited to the issue of whether defendants have satisfied their burden to invoice the exception to best evidence rule under Federal Rule of Evidence 1004(a), which will determine the Draft Agreement's admissibility for the purposes of establishing the terms of parties' agreement. Under Federal Rule of Evidence 104(a), the Court is "not bound by evidence rules," including the rule against hearsay, in deciding a preliminary question about admissibility of evidence, which includes a Rule 1004(a) inquiry.

***5** The Court nonetheless concludes that defendants have failed to fully satisfy their burden to invoke Rule 1004(a). It is defendants' burden to prove by the preponderance of proof that all copies of the signed agreement between the parties are lost or destroyed. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592 n.10 (1993) (concluding that preliminary questions concerning the admissibility of evidence should be established by a preponderance of proof). Having considered the various statements attributed to Pacheco that were offered by Fat Joe, Moreira and Kupinse, the Court concludes that these hearsay statements fall short of direct testimony by Pacheco assuming his availability. While there is no obvious reason to believe that these hearsay statements offered are not true, given the centrality of the issue of whether Rule 1004(a) can be invoked to establish the contractual terms between the parties, the Court concludes that defendants should be required to exhaust all effort to obtain a sworn testimony by Pacheco. [6]

III. Conclusion

For the foregoing reasons, defendants' motion for summary judgment is denied without prejudice. Defendants are granted leave to renew this motion on the existing motion papers at such time as they conclude that they have secured non-hearsay evidence from Pacheco sufficient to meet the requirements of Rule 1004 (a) and have filed that evidence as a supplement to the existing motion papers. If defendants renew their motion, plaintiff will have fourteen (14) days to file a response. This Memorandum and Order resolves ECF Entry No. 143.

SO ORDERED.

All Citations

Slip Copy, 2020 WL 4432450

Footnotes

1 In this action, plaintiff has sued over 25 defendants who can be roughly categorized as 1) individuals named as the co-authors of the song "All The Way Up"; 2)their publishing entities; 3) other entities that allegedly own copyrights in the song; and 4) entities that distributed and exploited the song. This motion has been made by a limited number of defendants, including some who do not have any direct involvement in the factual issues raised by this motion. For convenience, "defendants" in this Memorandum and Order collectively refers to the moving defendants and other defendants who joined them.

2 Because this motion is a pre-discovery motion for summary judgment under Rule 56, some of the statements of facts proffered by the parties in connection with this motion are predicated solely on the allegations in the Complaint. Because plaintiff has verified the Complaint as "true, accurate, and correct to the best of [his] information and belief," see Elliott Decl. (ECF No. 155) at ¶ 2, we treat the allegations in the Complaint as sworn statements by plaintiff. See Colon v. Coughlin, 58 F.3d 865, 872 (2d Cir. 1995) ("A verified complaint is to be treated as an affidavit for summary judgment purposes."). We also reference the allegations in the Complaint that are not cited by the parties in their statements of facts for the limited purpose of placing this motion in context without regarding those allegations as established facts.

3 "Parties' Rule 56.1 Statements" refer to Defendants' Rule 56.1 Statement (ECF No. 146) and Plaintiff's Rule 56.1 Counterstatement (ECF No. 156).

4 Universal Music-Z Tunes LLC; Songs of Universal Inc.; Roc Nation LLC; and Roc Nation Management LLC, which joined this motion, also submitted declarations certifying their non-possession of the signed copy of the "piece of paper." See ECF Nos. 129 & 130.

5 Although plaintiff's counsel erroneously designated his declaration as one submitted under Rule 56(f), which is the earlier placement of Rule 56(d), the Court will treat the declaration of plaintiff's counsel as one submitted under Rule 56(d).

6 Both plaintiff and defendants requested oral argument on this motion. Because we resolve this motion without prejudice based on a threshold question, we also deny those requests without prejudice. The parties may renew their request for oral argument if this motion is restored.

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STATE OF ILLINOIS
IN THE CIRCUIT COURT FOR THE FIRST JUDICIAL CIRCUIT
JACKSON COUNTY

THE PEOPLE OF THE STATE OF ILLINOIS	)	
	)	
	)	
VS.	)	**NO. 2018 CF 303**
	)	
CARL SMITH, JR.,	)	
Defendant	)	

NOTICE OF APPEAL

An Appeal is taken from the Order described below:

1. Court to which Appeal is taken: Fifth District Court of Appeal for the State of Illinois.

2. Name of Appellant and address to which notices shall be sent: Carl Smith, Jr., Menard Correctional Center, Post Office Box 1000, Menard, Illinois 62259.

3. Name and address of Appellant's Attorney on appeal: Defendant is indigent and wishes for the State Appellate Defender's office to be appointed.

4. Date of Judgement Order: October 31, 2018 (Conviction); January 18, 2019 (Sentence & Order Denying Motion for New Trial).

5. Offenses of which convicted: Residential Burglary.

6. Sentence: Six and a half years IDOC, three years MSR, with 122 days credit for time served

7. Conviction and nature of Order appealed from: Conviction on October 31, 2018, Sentence on January 18, 2019, and Order Denying Motion for New Trial entered January 18, 2019.

Respectfully Submitted,

Christian Baril

Christian J. Baril
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No. 127946

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- CARL SMITH JR., Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 5-19-0066. There on appeal from the Circuit Court of the First Judicial Circuit, Jackson County, Illinois, No. 18-CF-303. Honorable Ralph R. Bloodworth, III, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@ilag.gov;

Mr. Patrick D. Daly, Deputy Director, State's Attorneys Appellate Prosecutor, 730 East IL Hwy 15, Ste. 2, Mt. Vernon, IL 62864, 05dispos@ilsaap.org;

Mr. Joe Cervantez, Jackson County State's Attorney, 1001 Walnut St., 3rd Floor, Murphysboro, IL 62966-0730, statesattorney@jacksoncounty-il.gov;

Mr. Carl Smith, Jr., Register No. B86102, Lawrence Correctional Center, 2006 W. Woodriver Dr., Carbondale, IL 62901

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On March 25, 2022, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Danielle V. Lockett
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