No. 127946

IN THE
SUPREME COURT OF ILLINOIS

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

BRIEF OF PLAINTIFF-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

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NATURE OF THE CASE

A jury found defendant guilty of residential burglary, and he appealed, arguing that the trial court erred in admitting certain video recordings that showed him approaching the victim's apartment and exiting it approximately twenty minutes later. The appellate court affirmed, and this Court granted defendant's petition for leave to appeal. No issue is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether video recordings reproduced from footage taken by a closed-circuit surveillance system were properly admitted under Illinois Rule of Evidence 1003 as "duplicates" of the original footage.

2. Whether, in the alternative, the same recordings were properly admitted under Illinois Rule of Evidence Rule 1004 as "other evidence" of the contents of the original footage.

3. Whether a common-law "diligence" requirement superseded by the Illinois Rules of Evidence bars admission of the video recordings.

4. Whether defendant waived any argument that the People did not establish a sufficient foundation for admission of the video recordings.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612(b). This Court granted leave to appeal on January 26, 2022.

STATEMENT OF FACTS

Defendant Carl Smith, Jr., was convicted of stealing money, pain medication, and jewelry from Michael Whittington's apartment in July 2018.

A. The burglary of Whittington's apartment

Defendant is a 67-year-old resident of Jackson County. C26.[1] Since 2015, he has lived at the Ambassador Studios building in Carbondale, where Whittington also lives. R463-64, 550-51. Before the burglary, defendant, his wife, and Whittington were friendly: All three would watch football in Whittington's apartment once or twice a week. R551-52. Defendant and his wife also cleaned Whittington's apartment from time to time to "earn a few dollars," always under Whittington's supervision. R467, 552-53.

On the morning of July 29, 2018, at Whittington's request, defendant and his wife cleaned Whittington's apartment. R468-69. After they finished, Whittington left the apartment and went to a local bar to see friends. *Id.* When he returned, he noticed that the lock on the door between his apartment and the hallway—which he had locked when he left home—was bent. R471-72. When he entered his apartment, he saw that someone had taken the change from his counter and forty to fifty hydrocodone pills. R472-73. Whittington called the police and the owner of the apartment building to report the theft. R473-74.

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[1] Citations to "AT Br." are to defendant's opening brief; citations to "A__" are to the appendix; citations to "C__" are to the common-law record; citations to "R__" are to the report of proceedings; and citations to "Ex. 1" are to the video recordings that are the subject of this appeal, which are lodged as an exhibit with this Court. The appellate court briefs were filed in this Court pursuant to Rule 318(c). Citations to defendant's opening and reply briefs appear as "Def. App. Ct. Br." and "Def. App. Ct. Reply Br.," respectively.

The officer on duty that evening was Michael McCrary. R497-98. McCrary drove to the apartment building to meet with Whittington, who described the burglary. R498-99. Whittington did not identify any suspects and expressed uncertainty about whether he wanted to pursue charges at all. R500-01. Shortly thereafter, however, Whittington realized both that he was also missing eight turquoise rings (in addition to the money and pain medication), and that his window had been broken—specifically, that it had been "pushed in" to the apartment, off the window tracks, and that the outside screen had been "all bent up." R474-77. Whittington called the police again, shared what he had learned, and told them he wanted to pursue an investigation into the theft. R477, 501, 514.

Prompted by Whittington's call on July 29, the apartment building's owner, Pieter Schmidt, reviewed security-camera footage of the hallway outside of Whittington's apartment. R525-26; *see* Ex. 1. The video footage showed that at approximately 1:53 p.m. defendant approached the door to Whittington's apartment, stood in front of it for roughly seven seconds, and then walked away. Ex. 1. The video footage also showed defendant leaving Whittington's apartment twenty minutes later, at approximately 2:13 p.m., holding a bag. *Id.* The video footage did not show defendant entering Whittington's apartment. R425-26.

Because Schmidt did not know how to export video content from the closed-circuit security system, he and his wife recorded the two portions of

the footage showing defendant on an iPhone and then had the clips transferred to a compact disc. R415-16. Schmidt did not record any additional footage from the day, and the security system automatically deleted all the footage after 48 hours. R412-13. Schmidt gave the disc to the police. R416. After viewing the recordings, McCrary arrested defendant for residential burglary. R503. When he searched defendant, McCrary found $3,000 in cash and a bottle of hydrocodone pills. *Id.*

B. Defendant's trial and conviction

Defendant was charged with residential burglary and pleaded not guilty. C12. At a pretrial hearing, defendant moved to exclude the video recordings, arguing that their admission would violate the best evidence rule and Illinois Rules of Evidence 1002 and 1003. C67; R54. Defendant argued that without the original footage, the jury would speculate as to what might have occurred in between the two clips, and the defense would not be able to introduce any footage that favored defendant. R54.

At the parties' request, the court held a hearing, at which Schmidt testified. R408. Schmidt explained that he had installed the security system several months before the burglary and was familiar with its use. R410-11. The system used four cameras, which recorded automatically to a DVR system. R412-13. It saved footage for 48 hours, then deleted it. *Id.*

Schmidt testified, as noted, *supra* p. 3, that at Whittington's request, he had viewed the footage taken on July 29, 2018. R414-15. He and his wife had attempted to save the footage from the video system directly onto a flash

drive, but had been unable to do so. R415. As a result, he and his wife had used an iPhone to record the two portions of the footage showing defendant (one showing him approaching the apartment and walking away, the other showing him exiting the apartment). R415-16. Schmidt explained that he had not recorded the footage in between these two portions because during this time the hallway was empty. R416-17. Schmidt then had an employee save the footage on a compact disc that he gave to the police. R416. Schmidt testified that at no time did he alter any aspect of the footage. *Id.*

On cross-examination, Schmidt agreed that the footage would have remained on the security system's DVR until July 31, and that during that 48-hour period no police officer had attempted to obtain the footage directly from the system. R421-22. He also agreed that the footage for the day showed other people walking in the hallway. R426-27. But he testified on redirect that between 1:53, when defendant stood in front of Whittington's door, and 2:13 p.m., when defendant left Whittington's apartment, no one had approached or exited Whittington's apartment except for defendant. R427-28.

The trial court denied the motion to exclude the recordings. R446. The court posited that, "in a perfect world, we would have clear and complete videos of every situation," but "we do not work in a perfect world and cases do not arise and are not handled in a vacuum." *Id.* The court explained that the

defense would "have wide discretion on cross-examination" to establish what the full footage would have shown or to impeach Schmidt. R446-47.

At trial, the People presented testimony from Whittington, McCrary, Schmidt, and a second officer who had investigated Whittington's report of a broken window. R462-538. All testified consistent with the above account, *supra* pp. 2-4, and the People played for the jury both of the recordings Schmidt had taken with the iPhone, R532. The defense cross-examined Schmidt regarding the recordings. R535-38. Schmidt agreed that he had not been able to export all of the footage from July 29 to a thumb drive, had not asked for help in doing so, and had not recorded any of the footage between the two clips he made. R536-37.

The defense put on brief testimony from defendant's wife and another resident of the apartment building. R548-65. Each stated that Whittington had in the past become intoxicated and accused them of theft. R557, 563. Defendant did not testify.

In closing, the People argued that the recordings and Whittington's testimony, taken together, established defendant's guilt beyond a reasonable doubt. R594-95. The People argued that the recordings showed defendant leaving Whittington's apartment, thus establishing that he had been inside without permission. R596-97. And the second recording further showed that when defendant left Whittington's apartment, he had a bag in his hands, which likely held the stolen items—a fact corroborated by defendant's

possession of hydrocodone pills at the time of his arrest. R597. The People argued that defendant had entered the apartment from the window, and had broken it in doing so, but had left the apartment through the hallway door. R595.

The defense's primary argument was that Whittington had made a mistaken accusation, as defendant's wife and Whittington's neighbor testified Whittington had done in the past. R598-601. The defense also argued that the jury should place little weight on the video because it was incomplete. R601-602. The defense argued that the video did not show defendant or anyone else enter Whittington's apartment, and that the jury could not know what happened in the hallway before the first recording, in between the two recordings, or after the second recording. R602. Defense counsel also argued that the People had failed to produce any evidence other than the recordings, such as DNA evidence, fingerprint evidence, or other eyewitness accounts. R602, 608.

After deliberating for approximately 25 minutes, the jury asked to view a still photograph of the recording showing defendant leaving Whittington's apartment. R624-25; *see* C99. The court denied the request. R625. After another 45 minutes, the jury asked to view the recordings in their entirety. R625-26; C99. The court brought the jury back to the courtroom and, at the jury's request, replayed each recording three times.

R629-31. The jury deliberated for 45 more minutes, then returned a guilty verdict. R633; C79.

Defendant moved for a new trial and for a judgment of acquittal notwithstanding the verdict, arguing among other things that the video should not have been admitted. C101-02; R644-46. The trial court denied the motion. R650-51.

Because of defendant's prior criminal history, he was sentenced as a Class X offender, requiring the imposition of a six-year mandatory minimum sentence. *See* 730 ILCS 5/5-4.5-25(a); *id.* 5/5-4.5-95(b). The trial court heard evidence from the People that defendant had multiple prior convictions for theft, burglary, and larceny, and, weighing that criminal history against mitigating evidence presented by defendant, sentenced him to six years and six months in prison. R695; C106.

C. Appellate proceedings

Defendant appealed, arguing, *inter alia*, that the admission of the recordings violated the best evidence rule. A21. In a divided opinion, the appellate court affirmed defendant's conviction and sentence. A33.

The two justices in the majority held different views as to the reason the recordings were admissible. Justice Wharton reasoned that the recordings were admissible under *People v. Taylor*, 2011 IL 110067, which allows a videotape to be admitted under the so-called "silent witness" theory

under certain circumstances. A33.[2] Justice Wharton explained that, in his view, the recordings were also admissible under Illinois Rule of Evidence 1003, which allows "duplicates" to be admitted unless there is a genuine question as to the authenticity of the original or their admission would be unfair. A38. For his part, Justice Vaughan reasoned that *Taylor* was inapplicable, because it did not concern the best evidence rule (the sole basis of defendant's evidentiary challenge) and because defendant had not raised any challenge to the foundation for admission of the recordings. A22-23. He also explained that, in his view, the recordings were admissible under Rule 1004, which allows "other evidence" of a recording to be admitted where the original is not available. A24-28.[3]

Justice Cates dissented. A39. In her view, *Taylor* provided the best framework for analyzing the recordings' admissibility, but unlike Justice Wharton, Justice Cates concluded that under *Taylor*, the recordings should not have been admitted. A45-50. Moreover, while she would have found that the recordings were "duplicates" under Rule 1003, she would have held that

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[2] Under the "silent witness" theory, the proponent of photographic evidence, including videotapes, can introduce that evidence as substantive evidence of what it depicts without the need for an eyewitness to verify the accuracy of what is depicted. *See Taylor*, 2011 IL 110067, ¶ 32.

[3] Justice Vaughan also stated that he agreed with Justice Wharton's application of *Taylor* to the facts of the case. A23. Justice Wharton, for his part, stated that he agreed with Justice Vaughan's "analysis of the best evidence rule." A38.

they should not have been admitted because their admission was unduly prejudicial to defendant. A50-52.

STANDARDS OF REVIEW

The Court reviews the interpretation of the Illinois Rules of Evidence *de novo*. *People v. Deroo*, 2022 IL 126120, ¶ 19. It reviews the trial court's application of those rules for an abuse of discretion. *People v. Peterson*, 2017 IL 120331, ¶ 39; *People v. Ward*, 2011 IL 108690, ¶ 21. Under that standard, the Court will reverse a trial-court ruling only if "the ruling [was] arbitrary, fanciful, unreasonable, or when no reasonable person would adopt the trial court's view." *Ward*, 2011 IL 108690, ¶ 21.

ARGUMENT

The trial court did not abuse its discretion admitting the video recordings. The recordings were admissible under Illinois Rule of Evidence 1003 because they are "duplicates" of the original footage and their admission was not unfair to defendant. Alternatively, the recordings were also admissible under Rule 1004 as "other evidence" of the original footage, and the People did not "destroy" the original footage, much less in "bad faith." Defendant's counterarguments lack merit: No rule requiring the People to show "diligence" with respect to the recordings applies here, and the Court's decision in *Taylor* is inapplicable here, given that defendant has waived any challenge to the foundation laid by the People for the recordings' admission.

I. The Illinois Rules of Evidence Establish a Policy Favoring Admission of Evidence Regarding Writings, Recordings, and Photographs.

This case concerns the interpretation and application of the Illinois Rules of Evidence, which this Court adopted in 2010 to codify longstanding common-law evidentiary rules used by Illinois courts for decades. *See* Ill. R. Evid. Comm. Comment. 1 (2010) ("Committee Commentary"); *Peterson*, 2017 IL 120331, ¶ 19.[4] It specifically concerns a set of evidentiary rules that govern the circumstances under which evidence of a "writing, recording, or photograph" that is not the writing, recording, or photograph itself may be admitted at trial.

Rule 1002 sets out a general rule that, "[t]o prove the content of a writing, recording or photograph, the original writing, recording, or photograph is required." Ill. R. Evid. 1002. The rules then set out multiple exceptions to that rule. As relevant here, Rule 1003 provides that "[a] duplicate" of any such evidence "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. And Rule 1004 allows a party to introduce "other evidence of the contents of a writing, recording, or photograph" if, among other things, "[a]ll originals are lost or have been

[4] The committee commentary accompanying the Rules of Evidence was "accepted by this [C]ourt," *Deroo*, 2022 IL 126120, ¶ 23, and is available at https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/2795eb95-0a4d-42ef-b7a8-18b0a7602304/092710_2.pdf.

destroyed, unless the proponent lost or destroyed them in bad faith." Ill. R. Evid. 1004(1).

Taken together, these rules—which are substantively identical to Federal Rules of Evidence 1002, 1003, and 1004[5]—establish a policy favoring the admission of all reliable evidence regarding writings, recordings, and photographs. Although Rule 1002 establishes a baseline preference for an "original" writing, recording, or photograph, Rule 1003 provides that under most circumstances a "duplicate" shall be treated identically to an original. And even where no "original" or "duplicate" is available, Rule 1004 does not bar a party from presenting "other evidence"—generally, live testimony—about the contents unless the proponent of that evidence is responsible, in bad faith, for the loss or destruction of the original evidence. Rules 1003 and 1004 work together to allow parties to introduce multiple different forms of evidence regarding an original writing or recording: A party may introduce a duplicate of an original, regardless of whether the original is available, unless doing so is "unfair," Ill. R. Evid. 1003, or, if the original has been destroyed or lost, may introduce other evidence of the original as long as the proponent did not cause its loss or destruction, Ill. R. Evid. 1004(1). These rules give courts "great flexibility to admit secondary evidence of the contents of a writing,

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[5] With only ministerial exceptions, Rules 1002, 1003, and 1004 are identical to the analogous federal rules in effect in 2010. The Illinois rules differ from the current version of the federal rules only because the federal rules were comprehensively "restyled" in 2011, with "no intent to change any result in any ruling on evidence admissibility." Fed. R. Evid. 1001 committee note.

recording, or photograph, reflecting the judgment that excluding such evidence often will retard, not promote, accurate fact-finding." 31 Wright et al., *Federal Practice & Procedure* § 7182 (2d ed. 2021) ("Wright & Miller").

II. The Recordings Were Properly Admitted Under Rule 1003 as "Duplicates" of the Original Footage.

The recordings at issue here were properly admitted under Rule 1003 because they are "duplicates" of the original footage captured by Schmidt's closed-circuit surveillance system, and, as the trial court held, their admission was not unfair to defendant. *See* Ill. R. Evid. 1003.

A. The recordings are "duplicates" of the original footage.

The recordings fall within the ambit of Rule 1003 because they are "duplicates" of the original footage captured by Schmidt's surveillance system. Rule 1001 defines a "duplicate" as a "counterpart produced" by a technique that "accurately reproduces the original," including one produced "by mechanical or electronic re-recording." Ill. R. Evid. 1001(4). The recordings at issue here are exactly that: accurate "electronic re-recording[s]" of a video recording taken originally by Schmidt's surveillance system.

Courts in other jurisdictions agree that a video recording of another video constitutes a "duplicate" within the meaning of Rule 1003's federal and state analogues. *See, e.g.*, *Hamilton v. State*, 182 N.E.3d 936, 938-39 (Ind. Ct. App. 2022); *State v. Brown*, 739 N.W.2d 716, 722 (Minn. 2007). As defendant agrees, these cases are probative because Rule 1003 is "functionally identical" to the analogous federal rule, AT Br. 12, as well as most state analogues,

Wright & Miller, *supra*, § 8001 & nn.14-17.[6] Because this Court has not had the occasion to interpret the Illinois rules at issue in this appeal, the holdings of these out-of-state cases are "persuasive authority" that should bear on the Court's construction of the Illinois rules. *See Smith v. Illinois Cent. R.R. Co.*, 223 Ill. 2d 441, 448 (2006) (same with respect to substantively identical Federal Rules of Civil Procedure); *People v. Walker*, 211 Ill. 2d 317, 336 (2004) (similar with respect to common-law evidentiary principles).

Here, courts interpreting Rule 1003's federal and state analogues agree that video recordings of other videos constitute "duplicates" within the meaning of Rule 1003. In *Hamilton v. State*, 182 N.E.3d 936, for instance, a homeowner copied a video recording taken by his home's surveillance system onto his phone, uploaded the copy onto a computer, and then "put it on a memory stick." *Id.* at 938. The appellate court held that the copy was properly admitted as a "duplicate" under Indiana's Rule 1003. *Id.* at 938-39. Other courts overwhelmingly agree. *See, e.g.*, *Wise v. State*, 26 N.E.3d 137, 143 (Ind. Ct. App. 2015) (video originally taken on cellular phone but re-recorded on camcorder); *United States v. Chapman*, 804 F.3d 895, 902 (7th Cir. 2015) (video originally taken on Hawk recording device but re-recorded on DVD); *Brown*, 739 N.W.2d at 722 (digital re-recording of video originally recorded on VCR tape); *see also* Wright & Miller, *supra*, § 7167 (explaining

[6] Unless noted, we cite only state cases from States that have adopted a rule that is substantively identical to Illinois's.

that the analogous federal rule "recognize[s] re-recording as an electronic technique for producing a duplicate" video); 6 *Weinstein's Federal Evidence* § 1001.09[8][a] (2d ed. 2021) ("Weinstein") (under federal rules, "[m]echanical or electronic re-recordings are duplicates, including re-recordings of audio tapes and videotapes").

Defendant does not dispute this basic point. Instead, he argues that the recordings at issue here are not "duplicates" for Rule 1003's purposes because they do not fully reproduce the original closed-circuit surveillance video. AT Br. 10-15. But there is no requirement that a duplicate *fully* reproduce the original, only a requirement that it do so "accurately," Ill. R. Evid. 1001(4)—a requirement satisfied by the accurate reproduction of the relevant portions of the original, as occurred here. Again, that rule is consistent with the weight of the caselaw from other jurisdictions. In *United States v. Sinclair*, 74 F.3d 753 (7th Cir. 1996), for instance, the defendant argued that the trial court had erred in admitting partial copies of certain documents under Rule 1003, *id.* at 760. The Seventh Circuit rejected that argument, explaining that the partial copies were "duplicates" and that their admission was not unfair because the omitted content "did not affect the substance of the documents." *Id.*

Similarly, in *State v. Jones*, 2015-Ohio-4694, 2015 WL 7078756 (Ct. App.), the Ohio Court of Appeals considered facts substantively identical to those in this case and rejected an argument that the trial court had erred in

admitting those "portions of . . . original surveillance video deemed relevant to [a] police investigation by [an] apartment manager." *Id.* ¶¶ 34-35. The court explained that because "the sections of the video" that *had* been duplicated "were not altered in any way," Rule 1003 was satisfied. *Id.* ¶ 36. The same is true here.[7]

Defendant's counterarguments are incorrect or misplaced. Most go to the prejudicial effect of showing only a partial recording of the events of July 29, which defendant argues was substantial. AT Br. 10-11, 13-15. But these arguments are germane to the separate question whether the admission of the duplicate recordings was "unfair," Ill. R. Evid. 1003; *see infra* pp. 18-23, rather than whether the recordings in question are "duplicates." Indeed, even the dissenting justice below, whose arguments defendant otherwise embraces, *e.g.*, AT Br. 14, conceded that the recordings were duplicates under Rule 1001(4) and argued only that their admission was "unfair" under Rule 1003, *see* A50. That concession makes sense: If edited duplicates categorically fall outside the scope of Rule 1003, a party would need to choose between introducing unedited duplicates, even if they were lengthy or

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[7] *Accord, e.g.*, *State v. Martinez*, No. 13-20-00169-CR, 2022 WL 178279, at *1, 3 (Tex. App. Jan. 20, 2022) (no error admitting video where police officer "recorded only parts of" original recording with cell phone and where there was "a gap of more than two hours" between portions of the recordings); *see also* Wright & Miller, *supra*, § 7167 (explaining that an "edited version of a recording . . . should qualify as a duplicate under [the relevant federal rule] if it is shown that the changes are not material or misleading"); *id.* § 8004 n.7 (collecting cases).

contained irrelevant material, or satisfying one of the remaining exceptions to Rule 1002. That would force juries in many cases to sit through lengthy, irrelevant, and potentially confusing video recordings, which would thwart rather than aid the fact-finding process. Indeed, below defendant conceded that it is common to introduce edited video recordings, contending only that in his case the admission of the edited recordings was unfair. *See* R53-54. But that has no bearing on whether the recordings are categorically outside the scope of Rule 1003 because they are not "duplicates," as he now contends.

Defendant's observation that several of the federal opinions cited in the committee notes to Federal Rule of Evidence 1003 did not concern edited duplicates, AT Br. 12-13, is unavailing. None of these opinions addresses whether a partial re-recording qualifies as a "duplicate" under Rule 1003; they simply hold that a complete duplicate *does*, a position that is unchallenged here. The same is true of *United States v. Condry*, No. 21-cr-322, 2021 WL 5756385 (N.D. Okla. Dec. 3, 2021), on which defendant relies: That opinion, like the cases discussed above, holds that a complete re-recording of an original video *does* qualify as a "duplicate" under Rule 1003, not that a partial re-recording does not. *See id.* at *4. Indeed, defendant cites no case holding that a partial re-recording of an original video recording is not a "duplicate" for purposes of Rule 1003. That is unsurprising, given that the text of Rule 1001(3) and the caselaw applying it all point toward the

opposite conclusion: A re-recording that accurately reproduces the relevant portions of an original recording is a "duplicate" under Rule 1003.

B. The recordings are admissible under Rule 1003 because there is no authenticity question and their admission was not unfair.

Moreover, defendant is incorrect that "it would be unfair to admit the duplicate in lieu of the original" under the circumstances of this case. *See* Ill. R. Evid. 1003. Defendant does not contest the authenticity of the original footage; he contends only that the admission of the duplicates was "unfair." AT Br. 15-19; *see also id.* at 10-15.[8] But the trial court rejected that argument, R446-47, and defendant identifies no reason that conclusion was flawed, much less "arbitrary, fanciful, [or] unreasonable," *Ward*, 2011 IL 108690, ¶ 21.

As the trial court found, R446-47, the admission of the recordings was not "unfair." Defendant's argument, here and below, is that the admission of the recordings was "unfair" because they did not show the full events of July 29. AT Br. 10-12, 16-18. But the trial court correctly rejected that argument. Schmidt testified during the pretrial hearing that he watched the footage taken by the closed-circuit camera on the afternoon of July 29, and that he re-recorded the relevant material on the iPhone. R414-16, 426-28. Schmidt

[8] Defendant asserts once that he does "contest[] the accuracy of the original," AT Br. 19, but he does not further develop or support that assertion, and so it is forfeited. *See* Ill. S. Ct. R. 341(h)(7); *Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill. 2d 64, 95 (2002).

confirmed that during the time period he did not record, no other individual approached or exited Whittington's apartment. R427-28. The trial court at the motion hearing and the jury at trial evidently viewed Schmidt's testimony as credible. Accordingly, there is no non-speculative basis on which to conclude that the footage that Schmidt did not record contained relevant evidence, or to impugn Schmidt's credibility in recording the footage.

Further, as the trial court explained, R446-47, defendant had—and exercised—ample latitude to exploit the gaps in the footage for his purposes. He asked Schmidt before the jury whether it would have been "possible" for him to record additional footage and whether he did not do so just because he "felt like it would take too long" to do so. R536. And defendant argued at length during closing arguments that the People's "whole case" rested on "20 seconds of video" that did not show "[w]hat happened in between" 1:53 and 2:13 p.m. R601-602. (Defendant did not ask Schmidt at trial what he *had* seen on the surveillance-system video during this window, presumably because he could think of no credible basis on which to impeach Schmidt's testimony that no one else had approached or exited Whittington's apartment.) Defendant's ability to attempt to exploit the gaps in the footage to question whether the People had established his guilt thus eliminated any potential unfairness resulting from his inability to show the jury additional surveillance-system footage.

Defendant has no effective response. According to defendant, had the full video been introduced at trial, it would have allowed him to "establish[] the time of his authorized entry into [Whittington's] apartment" (that is, for the purpose of cleaning it) and "may have" allowed him "to demonstrate an unauthorized entry by someone else entirely." AT Br. 11 (emphasis omitted). But the trial court heard these arguments at the pretrial hearing and rejected them. Defendant contended there that the admission of the recordings would be "unduly prejudicial to [him], because the jury [wouldn't] have the opportunity to [see] the whole original." R53. After hearing Schmidt's testimony, R408-47, the court denied defendant's motion, explaining that the admission of the recordings did not violate any of the evidentiary principles invoked by defendant, including Rule 1003, R446.

Defendant identifies no basis on which this Court could conclude that this finding was "arbitrary, fanciful, [or] unreasonable," *Ward*, 2011 IL 108690, ¶ 21, as the abuse-of-discretion standard requires. Nor could he. Rules 1002, 1003, and 1004 reflect the goal of "secur[ing] the most reliable information in disputes over the contents" of writings and recordings. Wright & Miller, *supra*, § 8001 n.8. Here, the trial court correctly found that the most reliable evidence available about the events of July 29, 2018, came from Schmidt's recordings of his closed-circuit surveillance video. R446-47. No genuine question has ever been raised as to the accuracy of those recordings: Defendant, for instance, has never argued that he is not the individual

depicted on the recordings, nor denied that he exited Whittington's apartment at 2:13 p.m. on July 29. Nor is there any argument that Schmidt's re-recording somehow altered the portions of the surveillance-system video that were shown to the jury in a way that was material to the case.

Rather, defendant argues that had the full video been available to him, he might have been able to show that another person entered Whittington's apartment between Whittington's departure and his return. AT Br. 11. But, as discussed, defendant identifies no evidence in support of that hypothesis, and courts in other jurisdictions routinely reject arguments founded, like defendant's, in mere "speculation" about the contents of the original record. *United States v. Leight*, 818 F.2d 1297, 1305 (7th Cir. 1987); *accord, e.g.*, *United States v. Benedict*, 647 F.2d 928, 932-33 (9th Cir. 1981) (rejecting defendant's argument that original evidence "might have revealed a customs stamp affording [him] an alibi" as "unsupported by any corroborating evidence" and "purely speculative"). Here, Schmidt testified that no one other than defendant had approached or exited Whittington's apartment between 1:53 and 2:13 p.m., which is why he did not record the surveillance-system footage during that window. R427-28. Defendant identifies no reason to second-guess the trial court and the jury's implicit findings that Schmidt's testimony was truthful, nor any other non-speculative basis to suggest that the full original footage would have supported defendant's conjecture regarding an alternative perpetrator.

The trial court's conclusion that the introduction of the recordings was not unfair is also consistent with caselaw from other jurisdictions. In *State v. Jones*, for instance, as here, the State introduced video recordings consisting of "portions" of a video taken by a closed-circuit surveillance system "deemed relevant to the police investigation by [an] apartment manager." 2015-Ohio-4694, ¶ 34. The defendant argued that the admission of the videos violated Ohio Rule of Evidence 1003, but the appellate court disagreed. *Id.* ¶¶ 34-37. It explained that the admission of the recordings was consistent with Rule 1003 because the apartment manager acted in good faith in "copy[ing] the relevant portions of the video" and testified that "the sections of the video she duplicated were not altered in any way." *Id.* ¶¶ 35-36. The same is true here: Defendant advances no serious argument that Schmidt acted in bad faith in recording only those portions of the underlying closed-circuit footage that appeared "relevant to the police investigation," *id.* ¶ 34, and does not suggest that the sections of the video Schmidt duplicated were altered in any way, so there is no basis to exclude the recordings. *See also, e.g.*, *Wise*, 26 N.E.3d at 143 (admitting selective re-recordings over Rule 1003 objection); *Martinez*, 2022 WL 178279, at *3 (similar).

Defendant's remaining arguments lack merit. Defendant suggests that the "sparse" caselaw interpreting Illinois Rule of Evidence 1003 generally consists of cases "where the opposing party does not claim that the copy was altered or inaccurate." AT Br. 18. Setting aside that defendant

does not advance any meaningful argument that the recordings here were "inaccurate," the fact that most Rule 1003 cases do not concern partial duplicates is irrelevant to whether the admission of such a duplicate is "unfair" under the circumstances of this case. Defendant is also wrong that these cases somehow establish that admission of a duplicate under Rule 1003 is permissible only "where there is no detriment to either party in doing so." AT Br. 18. After all, most evidence is admitted because it is detrimental to one party or the other. Rather, the rule permits the admission of duplicates unless the trial court, in its discretion, concludes that admitting them would be "unfair." Ill. R. Evid. 1003; *see* Wright & Miller, *supra*, § 8004 ("unfair" standard "leav[es] considerable room for judicial discretion to admit or exclude duplicates"). The fact that a partial re-recording is relevant evidence tending to demonstrate defendant's guilt—to his detriment—does not mean that its admission is "unfair" such that it should be excluded. The court here reasonably exercised its discretion to conclude that the admission of the recordings was not "unfair" to defendant in this case because they included all relevant footage and because defendant had the opportunity to exploit any doubt generated by the excluded portions of the recording.

In sum, the trial court properly concluded that the recordings here were admissible under Rule 1003 as "duplicates" whose admission would not be "unfair" to defendant, Ill. R. Evid. 1003, and defendant identifies no basis to second-guess that judgment.

III. The Recordings Were Properly Admitted Under Rule 1004 as "Other Evidence" of the Original Footage.

Alternatively, the recordings were properly admitted under Rule 1004, which provides that "other evidence of the contents of a writing, recording, or photograph" is admissible if, as relevant here, "[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith." Ill. R. Evid. 1004(1). Here, the recordings were properly admitted under this rule, because the original closed-circuit surveillance footage had been deleted and, as the trial court held, the People did not "destroy[] [it] in bad faith." *Id.*

A. The recordings are, at a minimum, "other evidence" of the original footage.

The recordings at issue here are, at minimum, "other evidence" of the contents of the original video, and so fall comfortably within the scope of Rule 1004. That rule does not define "other evidence," but as its plain text reflects, the rule's scope is expansive, and permits "the party seeking to prove the contents of a writing, photograph or recording [to] do so by any kind of secondary evidence ranging from photographs and handwritten copies to oral testimony of a witness." Weinstein, *supra*, § 1004.02[1]; *see, e.g.*, *United States v. Gerhart*, 538 F.2d 807, 809 (8th Cir. 1976) (under analogous federal rule, proponent may "prove the contents of a writing by any secondary evidence" available). The recordings here are, at the very least, "other evidence" of the original surveillance-system footage, insofar as they depict that footage, and thus fall within Rule 1004, as courts in other jurisdictions have held. *See, e.g.*, *Wise*, 26 N.E.3d at 143 (recording of an iPhone video

taken with a camcorder admissible as "other evidence" of the first video); *Condry*, 2021 WL 5756385, at *4 (similar).

Defendant does not genuinely contest that the recordings here are "other evidence" within the meaning of that term. Instead, he argues that the application of Rule 1004 is categorically inappropriate in a case in which evidence is "considered, first and foremost, as a potential duplicate" under Rule 1003. AT Br. 19. But defendant identifies no authority supporting his counterintuitive reading of the rules, and the Court should not adopt it.

Defendant's primary position appears to be that because Rule 1004 is generally used to admit evidence that could *not* qualify under Rule 1003 as a "duplicate" (for instance, a transcript of a lost video recording, or live witness testimony about the contents of a destroyed document) it cannot be used for evidence that *could* qualify under Rule 1003. *See* AT Br. 20-23 & n.1. Again, though, none of the cases defendant cites rests on any such reading of Rules 1003 and 1004. In *Hale v. Mayor & City Council of Baltimore City*, No. 20-cv-00503, 2022 WL 374512 (D. Md. Feb. 8, 2022), which defendant discusses at length, AT Br. 21-23, the court found admissible a party's testimony as to the contents of text messages that she had inadvertently deleted, *see* 2022 WL 374512, at *8. But the court did not hold—or even imply—that the party's live testimony was the *only* such evidence admissible under Rule 1004. To the contrary, the court discussed at length whether it might have been possible to obtain "screen shots of the messages" in question—screen shots

that, like the recordings here, would have depicted only the portions of the text messages that the party deemed relevant. *Id.* at *5-6. This discussion would have been unnecessary had the court believed, as defendant asserts, that the screenshots in question would have been inadmissible under Rule 1004.

The remaining cases defendant cites, AT Br. 20-23 & n.1, likewise do not support his reading of the rules, and many refute it. In *United States v. Maxwell*, 383 F.2d 437 (2d Cir. 1967), for instance, the federal government was allowed to admit as secondary evidence a transcript of a re-recording of an original tape, *id.* at 442-43. And in *United States Fidelity & Guaranty Co. v. Ulbricht*, No. 20-cv-0369, 2022 WL 110457 (W.D. Wash. Jan. 12, 2022), a party was likewise allowed to reconstruct insurance policies based in part on a "partial copy," *id.* at *9, of one of the policies that the proponent had made. Each opinion thus found "duplicate" evidence admissible under Rule 1004, contrary to defendant's reading of the rules. Defendant's other cases, which concern only evidence that could not have been admitted under Rule 1003, have no bearing on whether evidence that *could* have been admitted under Rule 1003 may also be admitted under Rule 1004.

Indeed, courts regularly treat Rules 1003 and 1004 as complementary rather than mutually exclusive. In *Condry*, for instance, on which defendant otherwise extensively relies, AT Br. 13-15, the court considered first whether a rerecording was admissible under Rule 1003 as a "duplicate," and then also

proceeded to ask whether the re-recording was admissible under Rule 1004 as "other evidence." 2021 WL 5756385, at *3-4. And in *Wise*, the court also examined both rules in turn: After recounting the defendant's argument that Rule 1003 barred the admission of the re-recordings in question, the court proceeded to explain that the argument "disregard[ed] Rule 1004(a), under which the best evidence rule permits admission into evidence of a duplicate recording when 'all originals are lost or destroyed, and not by the proponent acting in bad faith.'" 26 N.E.3d at 143. The court proceeded to hold that the re-recordings were admissible under Rule 1004. *Id.* *Wise*, then, rejects the exact argument that defendant presses: that a court must choose between Rules 1003 and 1004, rather than treat them as complementary.

More broadly, there is no principled basis for defendant's suggestion that a witness's testimony as to the contents of a document may be admitted under Rule 1004, but a partial duplicate cannot. Rule 1004, like its federal counterpart, "recognizes no 'degrees' of secondary evidence." Fed. R. Evid. 1004 advisory committee's note. That choice makes good sense and reflects the view "that the reliability of secondary evidence frequently is high while the exclusion of that evidence sometimes poses an even greater danger to accurate fact-finding." Wright & Miller, *supra*, § 8012. Indeed, defendant identifies no reason why witness testimony should generally be preferred over a partial duplicate of the original. Although defendant posits that a partial duplicate may not be "trustworthy," insofar as it may reflect

someone's attempt to "cherry-pick[]" favorable evidence, AT Br. 23, the same is true of witness testimony, which may also be incomplete, as well as untrue or unreliable. Accordingly, there is no basis to allow only witness testimony, and not a partial recording, to be admitted under Rule 1004.

Indeed, defendant tacitly concedes as much by suggesting that, had Schmidt been asked about the section of the video taken by the closed-circuit surveillance system that he did not record on the iPhone, his testimony would have been unduly prejudicial and thus inadmissible under Rule 403. AT Br. 24-26. Defendant is wrong to suggest that such testimony would not have been admissible had it (hypothetically) been elicited.[9] But he is correct that Rule 403, not Rule 1004, offers the primary guardrail against the admission of evidence that is not "trustworthy," AT Br. 23, whether it comes in the form of a partial duplicate or of witness testimony. Beyond that, as the trial court

[9] Defendant suggests, for instance, that Schmidt was "an admittedly incompetent operator of his surveillance equipment." AT Br. 26. But this refers only to Schmidt's statement that he was "not competent enough to" transfer surveillance footage to a flash drive, R415, which says nothing about his ability to watch the footage in the first instance. And defendant is simply wrong that Schmidt "provided inconsistent testimony regarding whether there were other people present in the original footage." AT Br. 26. Schmidt testified that (a) the footage showed a woman "com[ing] around the corner" at the time defendant exited Whittington's apartment and (b) other people were captured on the footage "walking in the hallway" on July 29, R426-28. At no time did he offer testimony that could be viewed as "inconsistent" with either statement. Finally, defendant's analogy to *State v. Miranda*, 465 P.3d 618 (Haw. 2020), is inapt: The testimony there was offered by a police officer who had one "rushed" viewing of a four-minute video two years earlier. *Id.* at 632. Schmidt, by contrast, would have testified to events that occurred a matter of months prior and to footage that he had viewed on multiple occasions.

here reasoned, R446-47, it is ultimately for the jury to make judgments as to the credibility and weight of *all* admissible secondary evidence, whether live testimony or, as here, a duplicate. *See People v. Swenson*, 2020 IL 124688, ¶ 36. Those checks on fairness are sufficient, and, accordingly, there is no need to categorically bar admission of duplicate recordings under Rule 1004.

B. The recordings are admissible under Rule 1004 because the People did not "destroy" the original in "bad faith."

The recordings are otherwise admissible under Rule 1004. That rule allows "other evidence" to be admitted if, as relevant here, "[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith." Ill. R. Evid. 1004(1). Defendant argues at length that the destruction of the original recording should be attributed to the People, AT Br. 34-42, but the trial court heard and rejected that argument, R446-47, and defendant identifies no reason to find that its conclusion was "arbitrary, fanciful, [or] unreasonable," *Ward*, 2011 IL 108690, ¶ 21.

The record here reflects that the People had no role at all in the deletion of the original closed-circuit surveillance video, much less did so in bad faith. Schmidt testified that the apartment building's closed-circuit surveillance system "automatically deleted" video footage 48 hours after its capture. R412-13. Defendant does not dispute that this is how the original footage was deleted. In other words, the People not only did not delete the footage in "bad faith," Ill. R. Evid. 1004(1); they are not responsible for its deletion in the first place. *Cf.* Wright & Miller, *supra*, § 8014 (a "common

example" of non-culpability under Rule 1004(1) "involves the automatic overwriting of a surveillance video").

Defendant's main response is that the People—namely, Officer McCrary—"neglect[ed] to capture the original footage" before it was deleted, and thus should be deemed responsible for its deletion. AT Br. 36. But even if in some cases the government's failure to obtain an original video recording held by a private party might rise to the level of "bad faith," this is not such a case. The trial record reflects that the original footage was recorded on the afternoon of July 29; that McCrary did not meet with Schmidt until July 30; and that Schmidt did not give McCrary the video recordings until July 31, the same day the original footage was automatically deleted. R510-11. There is thus no basis to suggest that McCrary acted in "bad faith" by failing to preserve the original footage; on the contrary, as the lead opinion below observed, it is not clear whether McCrary even could have "download[ed] the surveillance footage in its entirety after [he learned] that Schmidt recorded only the portions he found relevant." A27.

Indeed, the trial court heard and rejected defendant's argument that the deletion of the videos should be ascribed to the People. Defendant argued during the pretrial hearing that McCrary "had a chance to at least try to get the video," yet had failed to do so, making the recordings inadmissible under

Rule 1004(1). R430, 435.[10] The trial court rejected defendant's argument, reasoning that, although "in a perfect world" the parties would "have clear and complete videos of every situation," under the circumstances, the recordings were not inadmissible. R446-47.

Defendant cannot show that the trial court abused its discretion in applying Rule 1004(1) to the facts of his case. He argues that McCrary could have acted with more diligence, given that he was on the case as early as July 29 and thus could have sought the footage at any time beginning on that date. AT Br. 36. But even if it would have been preferable for McCrary to obtain the complete footage when it was available, that hardly means that his failure to do so demonstrates "bad faith." *See* Ill. R. Evid. 1004(1). Indeed, the evidence showed that McCrary acted reasonably under the circumstances. As he testified, R509-11, he did not speak to Schmidt on July 29 because Schmidt was not in the building; he did not collect any evidence until the following day because Whittington initially did not want to press charges; and, when he did ultimately speak with Schmidt, on July 30, Schmidt told him he would "make a copy of the video," which McCrary presumably interpreted to mean the *entire* video. *See* A27 ("Nothing in the record indicates that . . . police knew Schmidt would be incapable of

[10] Defendant's argument rested in part on his assertion that McCrary had arrested him on July 30, 2018, when the original footage was still available. R430. But defendant was not arrested until July 31, 2018, the date McCrary first saw the recordings and on which the original footage was automatically deleted. C26; R502-03, 511.

transferring the video in its entirety."). In sum, McCrary at all times took investigative actions that were reasonable under the circumstances.

Defendant's counterarguments lack merit. Defendant cites several federal cases that allowed the admission of evidence under Rule 1004(1) where the government was "not at fault" for the destruction of the relevant originals, which he posits are in tension with this one, given his assertion that the People were "at fault." AT Br. 36-37. But the trial court determined that the People were *not* at fault for the deletion of the footage, *supra* p. 30, so these cases are fully consistent with admission of the evidence here.

Defendant also suggests that McCrary did not display "diligence" in seeking to recover the original, AT Br. 37-38, but, as discussed below, *infra* pp. 35-40, there is no requirement that the proponent of secondary evidence affirmatively show "diligence." *Eckman v. Encompass Home & Auto Insurance Co.*, No. 19-cv-4038, 2021 WL 3271051 (E.D. Pa. July 30, 2021), which defendant cites, is not to the contrary: That case observes only that a party that has lost an original document may show that the loss was genuine by carrying out a "diligent but unsuccessful search for the document," *id.* at *6. *Accord* Weinstein, *supra*, § 1004.13[1] ("Proponents generally prove that an original has been lost or destroyed by circumstantial evidence showing a diligent but unsuccessful search and inquiry for the document."). Here, the People did not lose original evidence; Schmidt testified without contradiction that the original footage was automatically deleted. Defendant's suggestion

that the People were required to take some further step to "fully reconstruct the original footage" after it had been automatically erased, AT Br. 38, would impose a burden on proponents of secondary evidence that is inconsistent with the rules' plain language and general preference for the admission of reliable evidence.

Defendant's remaining arguments fare no better. Defendant compares this case to *United States v. Cooper*, 983 F.2d 928 (9th Cir. 1993), and *United States v. Zaragoza-Moreira*, 780 F.3d 971 (9th Cir. 2015), two cases in which, he argues, the government knew that video footage had "exculpatory value" and yet allowed it to be destroyed. AT Br. 38-40. But these cases are inapposite. In *Cooper*, the government affirmatively destroyed evidence in its constructive possession after arresting the defendant and assuring his lawyer that it would preserve the evidence. 938 F.2d at 930. Understandably, the government there did not even contest on appeal that its agents had "acted in bad faith." *Id.* at 931. In *Zaragoza*, too, the government affirmatively destroyed evidence in its possession after the defendant had been arrested and her attorney had expressly requested that the evidence be preserved. 780 F.3d at 976-77. This case looks nothing like these examples of egregious government misconduct, among other reasons because here the People did not have the evidence at the time it was deleted.

Defendant finally suggests that the fact that Schmidt captured only a portion of the original footage on the iPhone somehow demonstrates that the

People destroyed the original in "bad faith." AT Br. 41-42. But he fails to explain the connection, other than to note that the court in *Maxwell*, 383 F.2d 437, observed at one point in its opinion that the duplicate there, which it held was admissible, omitted only "inaudible, irrelevant, and repetitive" material, *id.* at 442. But the two questions are distinct: The quality of the secondary evidence does not answer whether its proponent acted in bad faith in losing or destroying the original evidence. In any event, Schmidt was not an agent of the government, but rather a private citizen making a good-faith effort to provide information to police. Moreover, he testified credibly that he made a reasonable effort to capture all relevant footage. Schmidt's decision to record only those portions of the footage he deemed relevant does not establish that the People acted in bad faith to destroy the original video.

In the end, defendant cannot show that the trial court abused its discretion in concluding that the recordings were admissible under Rule 1004, insofar as the People did not "destroy" the original footage in "bad faith." *See* Ill. R. Evid. 1004(1).

IV. Defendant's Remaining Arguments Are Irrelevant or Incorrect.

Defendant advances two additional arguments against the admission of the video recordings, but both lack merit. Defendant is wrong to suggest that caselaw predating the adoption of the Illinois Rules of Evidence required the People to establish that they had been "diligent" in seeking the original surveillance video. And defendant has waived any argument that the People failed to establish a proper foundation for admission of the recording.

A. The common-law "diligence" requirement has been abrogated by the Illinois Rules of Evidence and, regardless, would not require exclusion here.

Defendant argues that the recordings were inadmissible under case law that predates the 2011 adoption of the Illinois Rules of Evidence. AT Br. 26-34. But defendant is incorrect for two reasons: The "diligence" rule on which he primarily relies has been abrogated, and it would not have required exclusion of the evidence here in any event.

Defendant contends that "[t]he best evidence rule is still applicable in Illinois" even after the adoption of Rules 1002, 1003, and 1004, and under that rule, the recordings here should not have been admitted. AT Br. 26-31. But defendant misunderstands the relationship between the "best evidence rule," as articulated in pre-Rules caselaw, and Rules 1002, 1003, and 1004. The Illinois Rules of Evidence were adopted to codify "the current law of evidence in Illinois." Committee Commentary 1. Rules 1002 through 1004 thus codified—they did not supplement—the common-law "best evidence rule." *See People v. Baptist*, 76 Ill. 2d 19, 26 (1979); *see also* Wright & Miller, *supra*, § 7182 (Federal Rule 1002 and its exceptions codify "the best-evidence doctrine"). Defendant is therefore correct that "[t]he best evidence rule is still applicable in Illinois," AT Br. 26, but only insofar as Rules 1002, 1003, and 1004 themselves embody that rule.

For that reason, defendant is wrong to suggest that courts should apply *both* the "best evidence rule" *and* Rules 1002, 1003, and 1004, as if they established separate standards of admissibility. *See* AT Br. 31 (arguing that

the court below should have "determin[ed] whether the evidence it sought to allow under Rule 1003 or 1004 would *also* be admissible under the best evidence rule" (emphasis added)). Rather, by applying Rules 1002 through 1004, the court below *did* apply the best evidence rule. None of the federal authorities that he cites is to the contrary. Each of these cases simply applies the relevant rules and describes those rules—correctly—as reflecting best evidence principles. *See, e.g.*, *United States v. Chavez*, 976 F.3d 1178, 1194-95 (10th Cir. 2020) (Rules 1002 and 1003 reflect "[t]he best-evidence rule"); *Maxwell*, 383 F.2d at 442 (similar). The court below correctly analyzed this case under the Illinois Rules of Evidence.[11]

In any event, the question whether common-law articulations of the best evidence rule are "still applicable," AT Br. 26, is largely beside the point here because defendant identifies only one aspect of pre-Rules of Evidence case law that he says would require the exclusion of the recordings: the rule set out in *Electric Supply Corp. v. Osher*, 105 Ill. App. 3d 46 (2d Dist. 1982), that when an original writing or recording is unavailable, the party seeking

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[11] Defendant also cites two unpublished appellate court opinions that cite pre-Rules common-law articulations of the best evidence rule. *See* AT Br. 28 (citing *In re Marriage of Greenberg*, 2021 IL App (1st) 210325-U, ¶ 27, and *People v. Grafton*, 2017 IL App (1st) 142566-U, ¶ 79). But neither holds, or even suggests, that courts should apply *both* the Illinois Rules of Evidence *and* common-law tests. And to the extent defendant intends to cite these authorities as evidence that a "diligence" requirement still exists, any such argument is barred by Supreme Court Rule 23 and unpersuasive, given that these opinions do not consider either the text of the committee commentary or the role of the diligence requirement in pre-Rules caselaw.

to introduce secondary evidence of that writing or recording must show his or her "own diligence in attempting to secure the original," *id.* at 49. *See* AT Br. 27-29, 31-34.

This argument is unavailing for several reasons. First, and most importantly, the Rules' commentary expressly rejects any requirement that the proponent of secondary evidence display "diligence." The drafters of the Illinois Rules of Evidence generally intended to "incorporate[]" into the Rules "the current law of evidence in Illinois" if this Court or the appellate court had "clearly spoken on a principle of evidentiary law within the last 50 or so years." Committee Commentary 1. But the drafters incorporated fourteen changes to the law of evidence that they drew from other jurisdictions, including one to Rule 1004. *Id.* at 2, 4. The commentary explains that "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." *Id.* at 4 (citing *Prussing v. Jackson*, 208 Ill. 85 (1904)). The committee commentary—which was "accepted by this [C]ourt," *Deroo*, 2022 IL 126120, ¶ 23—accordingly rejects the very "diligence" requirement that defendant presses, as the lead opinion below explained, A24-25.

Defendant asserts that the commentary applies only to "a situation wherein a party is attempting to subpoena" documents from a third party, AT Br. 32, but he is mistaken. The case cited by the drafting committee for the common-law rule being superseded, *Prussing v. Jackson*, expressly imposes a

requirement that the proponent of secondary evidence prove the original's "destruction, or [a] due and diligent but unsuccessful search for it," and faults the proponent there for not conducting a "search" for the missing evidence "with the utmost good faith." 208 Ill. at 92, 95. In other words, the rule imposed in *Prussing* (and superseded by the adoption of Rule 1004) is exactly the same rule from *Osher* on which defendant relies, and the committee commentary makes clear that it no longer applies in Illinois.

In any event, any common-law "diligence" rule reflected in pre-Rules caselaw would not have applied here. As discussed, *supra* p. 32, courts generally apply a "diligence" rule only in one circumstance: to ensure that an original writing or recording has, in fact, been lost or destroyed. The Seventh Circuit's decision in *United States v. McGaughey*, 977 F.2d 1067 (7th Cir. 1992), reflects this principle. The defendant there argued that the trial court had erred in admitting secondary evidence of an original writing under Rule 1004, contending in part that the federal government had not shown it had conducted a "thorough search for the original." *Id.* at 1071. The court rejected that argument, explaining that "Rule 1004 does not contain an independent requirement that a search be conducted; rather, the concept of a diligent search is an avenue by which the larger issue of the document's destruction may be proved." *Id.*[12] *Prussing* and *Osher* are consistent with

[12] *Accord, e.g.*, Weinstein, *supra*, § 1004.13[1] ("Proponents generally prove that an original has been lost or destroyed by circumstantial evidence showing a diligent but unsuccessful search and inquiry for the document.");

this understanding of the diligence requirement. In *Prussing*, this Court articulated the diligence rule as an alternative to showing "proof of [the] destruction" of an original, 208 Ill. at 92, and in *Osher*, the appellate court faulted the proponent of secondary evidence for failing to conduct a search for the purpose of showing whether the original still existed, 105 Ill. App. 3d at 49. Thus, rather than serving as a freestanding check on the good or bad faith of the proponent, the "diligence" requirement has always been understood as a method to show loss or destruction of an original. Here, there was no need for any such showing because Schmidt's unrebutted testimony—which defendant has never challenged—was that the original footage was automatically deleted after 48 hours.

Finally, even if the People were required to demonstrate "diligence" in order to admit the recordings—and they were not—the record evidence shows sufficient diligence under the facts of this case. As discussed, *supra* p. 30, McCrary acted reasonably under the circumstances: He spoke to Schmidt as soon as Whittington indicated he was interested in pressing charges, and he was not given the recordings until July 31, the same day they were deleted automatically by the closed-circuit system. That is sufficient "diligence" under the circumstances, especially given the wide "discretion" accorded to

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Crawford v. Tribeca Lending Corp., 815 F.3d 121, 127 (2d Cir. 2016) (party's "search for the originals" relevant only to whether originals "had been lost"); *Montoya v. Romero*, 956 F. Supp. 2d 1268, 1280 (D.N.M. 2013) (explaining that "loss or destruction may commonly be proven by use of evidence showing a diligent but unsuccessful search and inquiry for the original" (cleaned up)).

the trial court even under pre-Rules caselaw to assess whether a proponent has shown it is "not within [its] power to produce the original." *Osher*, 105 Ill. App. 3d at 49.

B. Defendant waived any argument that the People failed to lay a proper foundation for admission of the recordings.

Defendant also argues that one of the three justices below erred in finding that he had waived his response to *People v. Taylor*, 2011 IL 110067, a case the People cited in their brief before the appellate court. AT Br. 44-50. But the Court need not address this issue. *Taylor* concerns only the circumstances under which a video may be admitted as substantive evidence at trial under the so-called "silent witness" theory (which permits the admission of photographic and video evidence under some circumstances even when no eyewitness viewed the events depicted). *See* 2011 IL 110067, ¶ 32. But defendant did not press—indeed, he affirmatively disclaimed—any argument that the People failed at trial to lay an adequate foundation to warrant admission under *Taylor*. And to the extent he seeks to revive any such argument in this Court, the Court should not entertain it, because it was expressly abandoned and thus waived below, and is forfeited here given defendant's failure to explain either his abandonment of the argument below or why he might be entitled to relief here.

The question in *Taylor* was whether footage taken by a surveillance camera could be admitted as substantive evidence at trial, as opposed to as demonstrative evidence (i.e., to illustrate something that a witness actually

saw). *See* 2011 IL 110067, ¶¶ 4-7, 32. The footage in question contained a short gap, which the People explained was caused by a motion sensor that shut off the camera when it did not detect movement. *Id.* ¶¶ 12-16. This Court held that the footage—and video evidence more generally—could be admitted as substantive evidence at trial "if the accuracy of the process that produced the evidence is established with an adequate foundation." *Id.* ¶ 32. The Court expressed its agreement with a non-exhaustive list of factors set out by the appellate court to "determin[e] whether a proper foundation had been laid," including the device's reliability, the competency of the operator, the chain of custody, and the explanation of any copying or duplication that occurred. *Id.* ¶ 35. Applying those factors, the Court held that the People had laid a proper foundation for admission of the footage. *Id.* ¶ 46. *Taylor* thus articulates the basic legal principles for deciding whether video footage is admissible as substantive evidence.

But *Taylor* is irrelevant here, because defendant has waived any argument that the People failed to lay a foundation sufficient to admit the recordings as substantive evidence. Although defendant argued briefly at the pretrial hearing that the People had not laid an adequate foundation to introduce the recordings under the "silent witness" theory, *see* R436-37, defendant subsequently abandoned this argument. He did not raise a foundation objection in his post-trial motion, C101-02, nor did he raise a foundation argument in his opening brief in the appellate court, Def. App. Ct.

Br. 21-26. And although defendant argued in his reply brief that *Taylor* was distinguishable on its facts, he affirmatively disclaimed any intent to raise a silent-witness argument, asserting that "the foundation for the video [was] entirely beside the point," given that he argued only "that the video tapes were inadmissible" under "the best evidence doctrine." Def. App. Ct. Reply Br. 7. The lead opinion therefore correctly found that defendant had waived any argument on appeal that the recordings "lacked a proper foundation," and that *Taylor* was thus inapplicable. A21-23 & n.2. *See Gallagher v. Lenart*, 226 Ill. 2d 208, 229 (2007) (waiver "consists of an intentional relinquishment of a known right").

Defendant does not genuinely contest any of this. Most notably, he does not ask the Court to decide, on plain-error review or otherwise, whether the People laid a proper foundation for the recordings. He has thus forfeited any argument that the Court should review that issue, including on plain-error review. *See, e.g.*, *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 23 ("[T]his court has repeatedly held an appellant's failure to argue a point in the opening brief results in forfeiture under" Rule 341(h)(7)).[13] Rather, defendant argues only that under this Court's Rule 341(j) he was

[13] Any foundation challenge would fail on plain-error review, in any event. *See People v. Adams*, 2012 IL 111168, ¶ 21. Schmidt testified as to the full chain of events that led to the creation of the iPhone recordings and their transmission to the police. *See* R410-18. Had defendant challenged the foundation of the recordings, moreover, the People could have put on additional testimony as to the challenged aspect. Under these circumstances, defendant cannot show error, much less plain error.

permitted to respond to the People's own invocation of *Taylor*. AT Br. 45-46. Defendant thus asks this Court to clarify that Rule 341(j) had that effect, and to remand to the appellate court with instructions to "consider the foundation issue." AT Br. 44. The Court should decline that invitation, for multiple reasons.

To start, as presented to the Court, defendant's Rule 341(j) question is largely an academic one. Rule 341(j) would, at most, have allowed defendant to present arguments about the applicability of *Taylor* to his case. But all of the justices below did consider defendant's arguments on that score. Two of the three agreed that Rule 341(j) permitted defendant to discuss *Taylor*. *See* A33 (concurrence); A46 (dissent). And while the third held that defendant had waived any argument based on foundation, he also wrote that he agreed with the concurring justice's holding that the evidence was admissible under *Taylor*. A23. There is thus no need to remand for the court below to consider *Taylor* because the court below already did so, and a majority held that the evidence was admissible.

Rule 341(j) is even less relevant in this Court. Defendant has not attempted to rely on *Taylor* in his opening brief before this Court (setting aside his Rule 341(j) argument), and the People are not relying on *Taylor* here because they agree with defendant's position in the appellate court, which is that *Taylor* has no bearing on defendant's best evidence challenge to the admission of the recordings. Accordingly, because no party appears to

believe that *Taylor* is relevant here, the Rule 341(j) question that defendant seeks to have the Court answer is not relevant, either.

To the extent defendant argues that Rule 341(j) allows him to resuscitate a challenge to the People's foundation for the recordings' admission (i.e., to make an actual *Taylor* claim), he is mistaken. Most importantly, as discussed, *supra* p. 41, defendant did not merely forfeit this argument below, he affirmatively waived it by stating in his reply brief that the foundation of the recordings was "beside the point." Def. App. Ct. Reply Br. 7. Indeed, defendant insisted before the appellate court that he was *not* raising a foundation argument; he discussed *Taylor* to explain only why it was distinguishable as a factual matter. *See* Def. App. Ct. Reply Br. 5 ("The best evidence doctrine concerns an entirely different set of factors than the foundational requirements announced in *Taylor*."). So even if Rule 341(j) might in some case allow a defendant to revive a *forfeited* challenge to the admission of evidence simply because the People cited a case in their brief addressing that issue, this is not such a case, because defendant *waived* the relevant claim by expressly stating in his appellate court reply brief that he had no intent to raise a foundational challenge. *See People v. Sophanavong*, 2020 IL 124337, ¶ 20; *see also People v. Williams*, 2015 IL App (2d) 130585, ¶ 6 ("Although a forfeited error may qualify for review under the plain-error rule, *waiver* of a right forecloses review of a claim of error predicated on the waived right.").

This Court should therefore enforce defendant's waiver and decline his invitation to "remand" with instructions to the appellate court.

CONCLUSION

The Court should affirm the appellate court's judgment.

June 10, 2022

Respectfully submitted,

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RULE 341(c) CERTIFICATE

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(a), is 45 pages.

/s/ Alex Hemmer
ALEX HEMMER
Deputy Solicitor General

CERTIFICATE OF FILING AND SERVICE

I certify that on June 10, 2022, I electronically filed the foregoing Brief of Plaintiff-Appellee People of the State of Illinois with the Clerk of the Court for the Illinois Supreme Court using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system and so will be served electronically using that system.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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Deputy Solicitor General