Illinois Official Reports

Appellate Court

People v. Bliefnick, 2024 IL App (4th) 230707

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TIMOTHY W. BLIEFNICK, Defendant-Appellant.
District & No.	Fourth District No. 4-23-0707
Filed	November 8, 2024
Decision Under Review	Appeal from the Circuit Court of Adams County, No. 23-CF-170; the Hon. Robert K. Adrian, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	James E. Chadd, Catherine K. Hart, and James Henry Waller, of State Appellate Defender's Office, of Springfield, for appellant. Gary L. Farha, State's Attorney, of Quincy (Patrick Delfino, David J. Robinson, and Allison Paige Brooks, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.
Panel	JUSTICE STEIGMANN delivered the judgment of the court, with opinion. Justices DeArmond and Grischow concurred in the judgment and opinion.

OPINION

¶ 1 On February 23, 2023, Becky Bliefnick's father discovered her dead body lying on the floor of her upstairs bathroom with multiple gunshot wounds to her torso. At the time of her death, Becky was embroiled in a contentious divorce from defendant, Timothy W. Bliefnick.

¶ 2 In March 2023, defendant was arrested and charged with one count of home invasion (720 ILCS 5/19-6(a)(2) (West 2022)) and two counts of first degree murder (*id.* § 9-1(a)(1)). The charges alleged generally that on the morning of February 23, 2023, defendant broke into Becky's home in Quincy, Illinois, and shot and killed her.

¶ 3 In May 2023, a jury found defendant guilty of all three counts, and in August 2023, the trial court sentenced him to natural life in prison.

¶ 4 Defendant appeals, arguing that he was denied a fair trial because (1) the trial court erroneously admitted hearsay statements made by Becky under the forfeiture by wrongdoing doctrine, (2) a conflict of interest existed between the trial judge and the prosecutor in his case, and (3) during closing arguments, the prosecutor made representations to the jury of matters that were not in evidence. We disagree and affirm.

¶ 5 ### I. BACKGROUND

¶ 6 #### A. The Arrest and Charges

¶ 7 In March 2023, defendant was arrested and charged with home invasion and murder. The charges alleged generally that on the morning of February 23, 2023, defendant entered Becky's home at 2528 Kentucky Road, Quincy, Illinois, without authority and, with the intent to kill or cause great bodily harm, shot Becky and caused her death.

¶ 8 #### B. Pretrial Proceedings

¶ 9 ##### 1. *Defendant's "Suggestion of Conflict" Between the Prosecutor and the Trial Court*

¶ 10 In March 2023, defendant filed a document titled "Suggestion of Conflict," alleging that Josh Jones, who was prosecuting defendant's case, had a conflict of interest with Judge Robert Adrian, who was presiding over defendant's case. Defendant requested that Jones be removed as the prosecutor. Specifically, defendant alleged, relevant to this appeal, that Jones "[was] listed as a witness in an unrelated matter concerning assigned trial court Judge Robert Adrian and said testimony [was] scheduled in April of 2023 during the time that the above-entitled matter [would] also be in front of the Honorable Robert Adrian."

¶ 11 At the hearing on the motion, defendant argued that because Jones was an occurrence witness in a Judicial Inquiry Board (JIB) investigation of Judge Adrian, Jones should be removed from defendant's criminal prosecution to avoid the appearance of impropriety. Defendant concluded, "We're not saying that he would tailor his prosecution to meet anybody's needs or agendas in that matter, but it is an issue that we wanted to bring before the Court." The trial court declined to remove Jones, noting that it did not believe that there was an issue that would affect this case.

¶ 12 2. *The State's Request to Access Divorce Proceeding Materials*

¶ 13 After the trial court declined to remove Jones, the court addressed a discovery request raised by the State. Specifically, the State asked the court to enter an order permitting Becky's divorce attorneys, Jerry Timmerwilke and Denny Woodworth, to "release information, to cooperate with, and answer questions from the State's Attorney's Office and the Quincy Police Department related to their representation of [Becky]." The State told the court that the divorce attorneys needed the order after Timmerwilke "called the [Illinois Attorney Registration & Disciplinary Commission] to ask what [he and Woodworth] would need" to allow them to discuss privileged information regarding Becky's divorce with the State. The State noted, "The [c]ourt previously did a search warrant for their files but to ask [Timmerwilke and Woodworth] questions, they've asked for this, as well."

¶ 14 Defense counsel did not object to the State's request. Following the hearing, the trial court entered a written order permitting Timmerwilke and Woodworth "to release information to cooperate with, and answer questions from the Adams County State's Attorney's Office and the Quincy Police Department."

¶ 15 3. *The State's Motion to Admit the Hearsay Statements of Becky Pursuant to the Doctrine of Forfeiture by Wrongdoing*

¶ 16 In April 2023, the State filed a "Motion To Use Hearsay Statements of Rebecca 'Becky' Bliefnick," pursuant to the "forfeiture by wrongdoing" exception to the hearsay rule. The State argued that certain of Becky's out-of-court statements were admissible under the doctrine because defendant killed Becky, in part, to prevent her from testifying at their upcoming divorce trial.

¶ 17 Later in April 2023, the trial court conducted a hearing on the motion and (1) ruled that the statements were admissible under the "forfeiture by wrongdoing" doctrine, finding by a preponderance of the evidence "the wrongdoing was intended at least in part to procure the unavailability of [Becky] as a witness in the divorce case" and (2) examined statement-by-statement whether those statements were otherwise admissible. During that hearing, the State argued for the admission of testimony from (1) Nicole Bateman, (2) Rebecca Spotts, (3) Sarah Reilly, (4) Sara Murphy, (5) Christine Moore, and (6) Woodworth and Timmerwilke, who would each testify to statements Becky had made to them regarding defendant and their divorce. (Their testimony at trial is set forth later in this opinion (*infra* ¶¶ 109-44).)

¶ 18 The State generally argued that many of the statements should be admitted because they "show[ ] the state of mind of the victim" or motive of defendant to commit the charged offenses. Defense counsel argued against the admission of these statements on the grounds of relevance and unfair prejudice.

¶ 19 Ultimately, the trial court allowed the hearsay statements to be admitted into evidence. Specifically, the court found as follows: testimony relating to (1) Becky's fear of defendant was admissible as evidence of her state of mind; (2) defendant's having Becky's gun was admissible as evidence of opportunity and her state of mind; (3) Becky's belief that defendant would kill her to get custody of the children and wanted to hurt her was admissible as evidence of her state of mind and his motive; and (4) Becky's and defendant's disagreement about the children visiting his father and other custody issues was admissible as evidence of motive and

to show her state of mind.

¶ 20 C. The Jury Trial

¶ 21 On May 23, 2023, the trial court conducted defendant's jury trial.

¶ 22 1. *William Postle*

¶ 23 William Postle testified he was Becky's father. Before her death, Becky had been married to defendant, with whom she had three children. During their marriage, Becky had purchased a gun, but she did not have possession of the gun after she and defendant separated. On February 23, 2023, at about 3 p.m., Postle received a text message from defendant that said the following:

> "Can you please call Becky and ask her to tell me when she's getting the boys today? I had them last night because she said she was sick but she hasn't responded to any of the messages I sent today and I don't know if she's still sick or if she's coming to get them or what's happening. I can keep the [children] again tonight if needed but I just need her to let me know what she wants to do."

¶ 24 Postle immediately called defendant, but he did not answer. Postle drove to Becky's house to check on her, only to find the front door of her house open, "meaning the inside door, the heavy wooden door that was there [was open]." After checking the garage and seeing her car was there, he headed upstairs into the bedroom and discovered her dead body lying on the bathroom floor. Postle did not have his phone, so he went next door to Rolla Wike's house and called 911.

¶ 25 2. *Rolla Wike*

¶ 26 Rolla Wike testified that Becky, defendant, and their three children had moved into the house next door to her home approximately three years prior to Becky's death.

¶ 27 Wike testified that on February 23, 2023, at about 3:30 p.m., Postle came over to her house and asked to use her phone because Becky was dead. After calling 911, he called his wife, Bernie Postle. Because he wanted to remain at Becky's house and did not want his wife to drive, Wike went to pick up Bernie. On the drive back, Bernie called defendant, and Wike could hear their conversation. During that conversation, Bernie told defendant that Becky was dead. At some point, defendant said that "the school had called him to—because Becky didn't pick up the boys and so they called him."

¶ 28 3. *Roberta Hutson*

¶ 29 Roberta Hutson testified that she was a secretary at the children's school and she was familiar with the family. On February 23, 2023, at 11:51 a.m., defendant called the school and said that he could not get in touch with Becky. Hutson stated defendant said "he knew the boys were going to be walking home, *** he told me that he would be picking them up instead of having them walk home." Hutson found the call unusual because neither defendant nor Becky had ever previously called about how the children were going to get home. Hutson also testified that she did not call defendant that day and did not believe anyone from the school called him that day.

¶ 30 Hutson further testified that defendant picked the children up from school at 1:50 p.m., an hour before dismissal. He was driving a "rust, red-orange" Honda CR-V. Hutson added that defendant had also picked up the children the day before, but he did not arrive an hour early.

¶ 31 4. *Amy Schmiedeskamp*

¶ 32 Amy Schmiedeskamp testified that she lived down the street from Becky's house and next door to defendant's father, Ray Bliefnick. She had not seen the children visit Ray's house for over a year at the time of Becky's death. On the morning of February 23, 2023, Amy saw defendant visit Ray's house between 7:30 a.m. and 9 a.m. and drop off a Little Tikes basketball hoop.

¶ 33 5. *Amanda Keck*

¶ 34 Amanda Keck testified that she was the record supervisor at the Quincy Police Department. On February 10, 2023, at around 9:30 a.m., defendant called the police department, and the receptionist answered the call on speaker phone. Keck heard defendant say that he had a gun that he needed to return to his ex-wife and that he did not want to give it to "that crazy bitch." The phone call was then transferred to Shannon Pilkington, a lieutenant at the police department.

¶ 35 6. *Shannon Pilkington*

¶ 36 Shannon Pilkington testified that defendant said the reason for his phone call to the police department was the court order to give his "soon-to-be ex-wife" a gun because she had proof that she had a gun safe. He described the divorce as brutal and contentious. He did not want to personally give the gun to her because he did not feel safe and was afraid of what she might do if he met with her. Pilkington told him that the police department would not be involved in the return of the weapon.

¶ 37 7. *Ted Johnson*

¶ 38 Ted Johnson testified that he began talking to Becky in January 2022 "as friends" and became romantically involved with her in summer 2022. He knew that Becky was going through a divorce, which they often spoke about. He testified that the divorce was full of animosity on both sides. By February 2023, Becky was excited for the divorce to be over.

¶ 39 On February 13, 2023, he spent the night with Becky at her house. The next time he saw her was on the evening of February 21, 2023, when he brought over some food, visited for an hour, and left. On the evening of February 22, 2023, he spoke with Becky on the phone, and she said that she was excited to pick her children up the next day because she was allowed to drive for the first time since having abdominal surgery the past week. The following morning, he texted her multiple times, and she did not respond. He spoke with Becky's sister, Sarah, later that day, and she told him that Becky had been found dead in her home.

¶ 40 Later, Johnson met with Detective Nickolas Eddy at the Quincy Police Department. During their meeting, Johnson answered questions regarding Becky, allowed a photo of his shoes to be taken, shared his phone with the detective, submitted to gunshot residue testing of his hands, and volunteered a buccal swab for deoxyribonucleic acid (DNA) testing. Eddy asked Johnson if he owned any firearms, and he answered that he owned a .40-caliber Smith & Wesson

handgun. Johnson did not own any 9-millimeter handguns. Johnson also stated that he drove a truck with a Missouri license plate reading 8DCJ55 because he had "previously lived in Missouri."

¶ 41 Johnson further testified that Becky's children usually stayed with her on Wednesday nights, but on Wednesday, February 22, 2023, Becky had arranged for the children to stay with defendant because she was still recovering from her surgery.

¶ 42 On February 22, 2023, he did not go to Becky's house; instead, he had a visit with a friend that evening from 6:30 p.m. to 7:30 p.m. He did not leave his house after that.

¶ 43 8. *Matt Hermsmeier*

¶ 44 Matt Hermsmeier testified that he was a police officer with the Quincy Police Department. On February 23, 2023, he and another officer were dispatched to Becky's home to investigate her death. Hermsmeier and the other officer were the first officers to arrive, at 3:33 p.m.

¶ 45 Upon arriving, Hermsmeier spoke with paramedics and Postle, then went upstairs to the master bedroom, where he saw six to seven spent cartridge cases on the bedroom floor. The bedroom door appeared to have been forced inwards because there was damage to the door and pieces of the wooden frame on the floor. In the adjoining bathroom, Becky's body was lying supine on the floor, and a cell phone was lying a few feet away from her behind the bedroom door. Small pieces of plastic were lying on and around her body. (Forensic pathologist Dr. Scott Denton later testified that Becky had been shot nine times in her torso, three times in her right arm, and two times in her left hand. He opined that the hand wounds were defensive.)

¶ 46 In the bedroom on the east side of the second story of the house, one of the windows was open. The window glass was broken, and there was damage to the upper right portion of the window frame. Inside, just under the window, there was a partial impression of a shoe or boot.

¶ 47 9. *James Brown*

¶ 48 James Brown testified that he was a detective sergeant with the Quincy Police Department and involved with the investigation into Becky's death. One of his responsibilities was to prepare and execute search warrants for electronics that may be helpful to the case. On March 1, 2023, Brown executed a traffic stop of defendant pursuant to a search warrant. During the stop, defendant was wearing a WHOOP fitness tracker device on his left wrist. Brown seized that tracker and defendant's phone.

¶ 49 Brown testified that both (1) defendant's phone records obtained from his service provider and (2) data from defendant's phone showed that on February 23, 2023, at 11:51 a.m., defendant made a phone call to the children's school, which lasted under a minute. He also reviewed a report from Becky's ADT security system, which showed that on February 23, 2023, there was an alert that the front door had been opened at 1:12 a.m.

¶ 50 10. *Michael Price*

¶ 51 Michael Price testified that he worked for United Systems, a company that installed and monitored surveillance systems. Price provided the Quincy Police Department with videos obtained from a camera installed at the residence of Mary and Harold Knapheide, which was located about a half mile away from Becky's house, between her home and the Quincy Public

Schools' bus garage, for three dates: (1) February 14, 2023, (2) February 21, 2023, and (3) February 22, 2023. The videos were entered into evidence and played for the jury.

¶ 52 11. *Taylor Heimann*

¶ 53 Taylor Heimann testified that he lived on Kentucky Road in the house directly east of Becky's house. He had a surveillance camera affixed to his house that pointed down his driveway towards Kentucky Road. He testified that the camera was motion sensitive and would record when movement triggered the sensor. On February 14, 2023, the camera filmed a person walking down Heimann's driveway at 12:37 a.m. The video was entered into evidence and played for the jury. On February 22, 2023, Heimann's camera recorded two other videos of a person walking down his driveway at 1:05 a.m. and then walking back up the driveway at 1:53 a.m. There was no video for February 23, 2023. These videos were admitted and played for the jury.

¶ 54 When asked about whether there had been a person roaming around the neighborhood late at night and in the early morning, Heimann stated there had not been a person like that in the neighborhood before February 14, 2023, or since Becky's death on February 23, 2023.

¶ 55 12. *Lynn Breeden*

¶ 56 Lynn Breeden testified that she was the security secretary for Quincy Public Schools and part of her job was to ensure that all of the different school video cameras were working correctly. The school district maintained a camera at 121 North 20th Street, which was the location of a bus garage. As part of the investigation, she provided the Quincy Police Department with videos from that camera for the following dates: (1) February 13, 2023, to February 28, 2023, and (2) March 13, 2023.

¶ 57 13. *Bradley Ehmen*

¶ 58 Bradley Ehmen testified that he lived next door to defendant. In January 2023, defendant asked him if he had any cameras that showed his backyard. Ehmen told him no.

¶ 59 14. *Bryan Dusch*

¶ 60 Bryan Dusch testified that he was a detective sergeant in the criminal investigations unit with the Quincy Police Department and helped investigate this case. On March 1, 2023, he executed a search of defendant's residence. At defendant's house, in the garage, he found a black, red, and white Mongoose bicycle. Its rear tire was flat, and it had reflectors on both wheels. Dusch also recovered plastic Aldi shopping bags from defendant's home.

¶ 61 In defendant's basement, on a shelving unit, Dusch found multiple boxes of firearm ammunition. One of the boxes contained both unfired bullets and spent 9-millimeter cartridge cases. Dusch testified that the spent cartridge cases found at Becky's house were also 9-millimeter. Dusch also found a crowbar on the top shelf of the unit where no other tools were located.

¶ 62 Dusch also testified that he found a large gun safe on the main floor of defendant's house that contained multiple firearms, firearm accessories, and ammunition. He conducted a gun purchase check on both Becky and defendant and learned that she had purchased a CZ 75 B, 9-millimeter handgun. However, Dusch did not find that gun at defendant's house. He noted

that defendant had in the past purchased two 9-millimeter handguns: a Ruger LC9 and a Ruger SR9. He did find the Ruger LC9 in defendant's gun safe but not the Ruger SR9.

¶ 63 Dusch further testified that at Becky's house, around her body, he recovered multiple pieces of roughly shredded plastic. Officers conducted tests using a 9-millimeter handgun and plastic Aldi bags that were the same as the ones found in defendant's home. As part of the test, officers fired the gun inside a bag or a couple bags, which created multiple pieces of finely shredded plastic similar to what they found on and around Becky's body.

¶ 64 On cross-examination, Dusch acknowledged that Becky and defendant had both reported stolen guns to the police department. Specifically, in 2021, Becky reported the CZ 75 stolen because she did not know where it was. During his investigation, Dusch had asked defendant whether he knew where it was, but defendant said he had not seen it in a year.

¶ 65 15. *Patrick Hollensteiner*

¶ 66 Patrick Hollensteiner, a police officer with the Quincy Police Department, testified that he was tasked with looking for a bicycle in a particular area of Quincy. He found a blue Schwinn sidewinder bicycle half a block or less from defendant's residence on February 27, 2023. The bicycle did not have reflectors on it. The bicycle appeared to not have been there very long because (1) the tires had air in them, (2) there was no rust damage, and (3) there were no weeds growing over it.

¶ 67 A few days after the crime, Hollensteiner climbed the side of Becky's home to the roof. He described the climb as difficult and believed a person would need to be somewhat athletic to make the climb.

¶ 68 16. *Michael Blaesing*

¶ 69 Michael Blaesing testified that in October 2022, through Facebook, he sold a blue Schwinn bicycle that did not have reflectors on either wheel. The buyer was a tall white man, a little shorter than Blaesing's height (6'6" or 6'7"), and had an athletic build. He could not remember anything else about the buyer.

¶ 70 17. *Zach Bemis*

¶ 71 Zach Bemis testified that he was a detective for the Quincy Police Department. He rode a bike of the same make and model as the blue Schwinn recovered from near defendant's house north of the school bus garage to Becky's house. That ride took under five minutes.

¶ 72 18. *Erik Cowick*

¶ 73 Erik Cowick, a police officer with the Quincy Police Department, testified that he recovered data from Becky's cell phone, which showed that at 1:11 a.m., she dialed 91126.

¶ 74 He also reviewed the Internet search history found on defendant's laptop, which was seized from defendant's home in March 2023. The history showed that on February 14, 2023, starting at 1:10 a.m., a series of searches were performed for queries such as "license plate lookup," "Illinois license plate lookup," "title and registration," and "Illinois license plate lookup free vehicle history, [vehicle identification number (VIN)] check dot info." Eventually, on that date at 1:25 a.m., searches were conducted for Missouri license plate number 8DCJ55, which was

Ted Johnson's license plate number. Defendant's laptop also showed a search for VIN decoder sites to find out who owned a 2021 Toyota Tundra with same VIN as Johnson's truck.

¶ 75 Cowick also recovered data from the Facebook application on defendant's cell phone. The name associated with the profile was "John Smith," and the account did not have a photo. On the phone, Cowick found messages using Facebook Messenger from user "John Smith" to other individuals.

¶ 76 One message to Bob Singleton read, "Bob, any interest in pushing back to roughly 11:00 a.m. in Hannibal tomorrow?" "John Smith" also wrote, "I'll be in an orange Honda CR-V when you arrive." Cowick testified that in February 2023, defendant drove an orange Honda CR-V.

¶ 77 Cowick testified that "John Smith" sent another message to Singleton, "Hey Bob, I got down here a little early. I'll be inside having coffee. I'm in a green, zip-up hoodie—hooded jacket. I have long brown hair." Cowick testified that in February and March 2023, defendant had long brown hair.

¶ 78 Cowick also found a message from the "John Smith" account on defendant's phone to Amy Trevor Webster about a 26-inch Mongoose mountain bike she was selling on Facebook Marketplace. Smith asked if the mountain bike was still available for purchase on October 12, 2022. Webster replied that it was still available and asked what time he would like to pick it up. "John Smith" replied between 1 p.m. and 2 p.m. Webster replied, "Yeah. That's fine. I'm not sure if I will be[home], but if I'm not, I will set it out front and you can just pay money in the mailbox." On October 13, 2022, Smith wrote, "money is in the mailbox, thank you."

¶ 79 Cowick testified that police officers found a 26-inch Mongoose mountain bike in defendant's garage.

¶ 80 Cowick also found Facebook notifications to John Smith's profile about a Facebook Marketplace post for a 26-inch Schwinn mountain bike being sold by Mike Blaesing. On October 11, 2022, a notification for the bike was sent to defendant's phone from Facebook saying that the listed title was changed to sold. Minutes later, another message was sent to defendant's phone saying that the price had been reduced to $75.

¶ 81 During his investigation, Cowick found a blue Schwinn mountain bike about a half block from defendant's home on February 23, 2023. He testified that the bike appeared very similar to the one that was sold online because both (1) were blue, (2) were the same make and model, (3) had a damaged kickstand, and (4) lacked reflectors. Cowick testified that bike seats on the bike found in defendant's garage and on the blue Schwinn were set respectively at a height of 97.5 centimeters and 98 centimeters, or within 0.5 centimeters of each other.

¶ 82 Cowick testified that defendant's phone was factory reset on October 15, 2021, meaning that all user data, files, and settings had been deleted on the device on that date.

¶ 83 Cowick also testified that the search histories recovered from defendant's computer and phone showed that the user visited a website on his phone for improvised silencers. The search histories on defendant's laptop and phone also showed queries for the following phrases: "average QPD response time," "[D]oes my WHOOP record the exact times I wear it?," " how to check if a gun is registered to me," "Does my WHOOP catch up when I'm not wearing it," "how to make a homemade pistol silencer," and "can you just wash off gunpowder residue."

¶ 84 Other searches and websites visited included information about how to identify if a shotgun shell was fired from a specific gun, why criminals do not use shotguns despite cartridge cases

being untraceable, how to open a window from the outside, using a crowbar to force a door open, lockpicking techniques, and information about WHOOP data and tracking.

¶ 85 Cowick stated that he was unable to determine when most of those searches were conducted, including whether they were conducted before or after Becky's death.

¶ 86 19. *Kelly Maciejewski*

¶ 87 Kelly Maciejewski, a forensic scientist at the Illinois State Police Forensic Science Laboratory specializing in DNA analysis, testified that she collected DNA from the handlebars of the blue bicycle and compared it to the known DNA standards of defendant, Becky, their children, and Johnson. Maciejewski concluded that the DNA on the handlebars did not belong to any of those known individuals.

¶ 88 Maciejewski attempted to collect DNA from a chair outside Becky's house, but she was not able to collect a sample that was suitable for comparison because there was so little DNA present. She also tested swabs the police had collected from Becky's door handle and concluded that it was unlikely that the DNA was deposited by Johnson or defendant but may have come from Becky or one of the children.

¶ 89 Maciejewski also collected DNA from a piece of the plastic that was found around Becky's body and concluded that it was likely that Becky's DNA was in the sample and not likely that Johnson's DNA was in the sample. She said that "there was more support for [defendant] being a contributor to that sample as opposed to not being a contributor; however, that support was limited in nature." The prosecutor asked, "In fact, it is eight times more likely that the DNA originated form the defendant and an unknown unrelated individual than it came from two unknown related individuals?" Maciejewski answered, "Yes."

¶ 90 Last, Maciejewski testified that she tested a spent 9-millimeter cartridge case found in Becky's hallway and concluded that the DNA on the casing belonged to Becky and not defendant or Johnson.

¶ 91 20. *Kathryn Doolin*

¶ 92 Kathryn Doolin testified that she was a forensic scientist at the Illinois State Police Forensic Science Laboratory specializing in firearms, tool marks, tire tracks, and footwear analysis. She compared defendant's shoes to footwear imprints found in the carpet below the broken window in Becky's home. None of defendant's shoes that she was provided to compare matched those footwear impressions from Becky's home.

¶ 93 Doolin also compared the crowbar collected from defendant's home to the marks on Becky's window, but her analysis was inconclusive. She could not eliminate the crowbar as having made the marks on the window, but neither could she recreate the marks with the crowbar.

¶ 94 21. *Vicky Steele*

¶ 95 Vicky Steele testified that she was a forensic scientist at the Illinois State Police Forensic Crime Laboratory specializing in firearms and firearm ammunition. She examined the cartridge cases found at defendant's house and the eight cartridge cases found at Becky's house and concluded that they were all fired from the same gun. She further testified that the eight cartridge cases found at Becky's house and the projectiles in her body were all fired from the

same gun. Steele also opined that either a CZ 75 9-millimeter handgun or a Ruger 9-millimeter handgun could have fired the rounds. However, none of the weapons that the police collected from defendant's home had fired the rounds.

¶ 96 22. *Nickolas Eddy*

¶ 97 Eddy, a police officer with the Quincy Police Department, testified that he reviewed the data extracted from defendant's cell phone. Among that data were messages sent between defendant and Becky on the phone application "Our Family Wizard," which is a messaging application that divorced or separated parents can use to communicate. In particular, on February 21, 2023, at 7:46 p.m., Becky messaged defendant, "Are you able to keep the kids tomorrow? I do not feel good today and feeling worse as the night goes on." Defendant responded, "Yes, I can keep them. I assume you're referring to overnight as well, unless something drastic changes tomorrow during the day with how you feel." Becky replied, "Correct, overnight. So, you would pick them up from school and keep them Wednesday overnight." Defendant agreed to those arrangements.

¶ 98 Eddy also testified about (1) the videos taken from the school bus garage, the Knapheide residence, and Heimann's camera, (2) information recovered from defendant's phone showing when it was in use, and (3) information obtained from defendant's WHOOP account for his WHOOP armband showing when that device was paired to his smartphone. He described the WHOOP armband as a battery powered wearable device that uses a Bluetooth connection to send data to a paired smartphone that is then transmitted via the Internet to defendant's WHOOP account. According to Eddy, that evidence showed the following timeline of events:

¶ 99 a. The Morning of February 14, 2023

¶ 100 At 12 a.m., defendant's WHOOP device disconnected from his phone. At 12:37 a.m., Heimann's camera recorded an individual walking in the driveway next to Becky's house. At 1:10 a.m., defendant's WHOOP device reconnected to his phone. At that same time, defendant's laptop was used to search for information about Johnson's truck, which was parked that night outside of Becky's house.

¶ 101 b. The Morning of February 21, 2023

¶ 102 At 12:44 a.m., defendant's cell phone screen locked, which meant the phone was not being used. At 12:45 a.m., defendant's WHOOP device disconnected from his phone. At 1 a.m., the bus garage camera recorded a bicyclist headed south in the direction of Becky's house. At 1:17 a.m., the bicyclist passed the camera headed north. At 1:41 a.m., he passed by the camera headed south. At 1:56 a.m., he passed by the camera headed north. At 2:11 a.m., defendant's WHOOP reconnected to defendant's phone. At 5:30 a.m., defendant's phone was unlocked.

¶ 103 c. The Morning of February 22, 2023

¶ 104 At 12:45 a.m., defendant's WHOOP device disconnected from his phone. At 12:50 a.m., defendant's cell phone screen locked. At 12:57 a.m., the bicyclist passed the bus garage headed south. At 1:05 a.m., Heimann's camera showed someone in the driveway next to Becky's house. At 1:10 a.m., the bicyclist passed the bus garage headed north. At 1:15 a.m., defendant's phone unlocked, and at 1:16 a.m., defendant's WHOOP device reconnected to his phone.

¶ 105 At 1:39 a.m., defendant's phone again locked and the WHOOP device disconnected from his phone. At 1:46 a.m., the bicyclist passed by the bus garage headed south. At 1:53 a.m., Heimann's camera recorded an individual in the driveway next to Becky's house. At 2:08 a.m., a bicyclist passed the bus garage headed north. At 2:19 a.m., the WHOOP device reconnected to defendant's phone.

¶ 106 d. The Morning of February 23, 2023

¶ 107 At 12:36 a.m., defendant's WHOOP device disconnected from his phone. At 12:38 a.m., defendant's phone was locked. At 12:55 a.m., a bicyclist passed the bus garage headed south. The bike did not have reflectors. (We note that data from Becky's phone showed that she attempted to dial 911 at 1:11 a.m. but dialed the wrong number.) At 1:16 a.m., the bicyclist passed the bus garage headed north. At 2:01 a.m., defendant's WHOOP device reconnected to his phone.

¶ 108 Eddy testified that he examined data from defendant's WHOOP device from February 15 through February 28, 2023, and found no other times that the device disconnected from defendant's phone for a significant duration. In other words, the only gaps in the WHOOP device data were those Eddy identified as having occurred on February 14, 21, 22, and 23 2023.

¶ 109 23. *Witnesses Who Were Discussed at the Pretrial Hearing*

¶ 110 a. Denny Woodworth

¶ 111 Attorney Woodworth testified that in April 2021, he began representing Becky in her divorce proceedings with defendant.

¶ 112 In that case, a temporary order regarding child custody was entered in October 2021, which provided that defendant's father would have no unsupervised contact with the children. The order also required defendant to pay maintenance and child support to Becky. During the divorce proceedings, Becky filed a petition for defendant to return to her a CZ 75 9-millimeter handgun, which the trial court granted in October 2021. The court ordered defendant to provide Becky with that particular weapon or a different 9-millimeter handgun if he could not find the CZ 75 9-millimeter once Becky purchased a gun safe. The court also ordered that neither party would go to the other party's residence, except for the exchange of the children, and neither party would have the children enter the home of the other party without prior permission.

¶ 113 Immediately after the order was entered, Becky purchased a gun safe and told defendant that she wanted the handgun. However, defendant never provided her with either the CZ 75 or any other handgun. Becky had told Woodworth that she wanted the gun for protection from defendant.

¶ 114 Woodworth also testified that, in July 2021, he filed a petition for rule to show cause, alleging that defendant failed to pay maintenance. He also stated that defendant was making substantially more income than Becky.

¶ 115 Woodworth's involvement in the divorce proceedings ended in November 2021, when he handed the case off to his partner, Timmerwilke. No final divorce hearing occurred, and no permanent maintenance order had been entered due to Becky's death.

¶ 116 b. Jerry Timmerwilke

¶ 117 Attorney Timmerwilke testified that in November 2021, he took over Becky's divorce case from Woodworth and represented her in that case until her death in February 2023. Timmerwilke characterized the divorce as "[v]ery contested." He said, "They were fighting over mostly the children, the three boys. They were fighting over an issue concerning the defendant's father and his supervised or unsupervised visits with the grandchildren, property division, *** and maintenance and child support."

¶ 118 In August 2022, the trial court entered an order that prescribed how the children would be exchanged. In December 2022, the parties were nearing a final hearing in the divorce. The marital finances were particularly contested; defendant and Becky disagreed on the division of approximately half a million dollars of marital assets. Becky was planning on testifying about "discrepancies on money that her husband had either taken or things that he had understated, [which] she felt that she should be entitled to."

¶ 119 Timmerwilke further testified that defendant's divorce attorney sent a settlement proposal letter. In that letter, among other things, defendant requested that his father be allowed to have unsupervised contact with the children. However, Becky viewed unsupervised contact with defendant's father as a nonstarter and was ready to put on evidence regarding why defendant's father should not be allowed to spend time with the children unsupervised. Ultimately, Becky rejected the settlement proposal.

¶ 120 On February 15, 2023, an order was entered in the divorce case, setting the case for trial on March 2, 2023. Timmerwilke expected Becky to testify about the marital finances, her objections to defendant's father having the children unsupervised, parenting time, and maintenance. Timmerwilke further testified that after Becky's death, defendant did not have to pay maintenance.

¶ 121 c. Sarah Reilly

¶ 122 Sarah Reilly testified that she was Becky's older sister. On September 4, 2021, Becky sent the following text message to Reilly and her husband:

> "[I]f something ever happens to me, please make sure the number one person of interest is [defendant] as that is who would do something to me. I'm putting this in writing that I'm fearful he will somehow harm me, come after me, or will try to [do] something to me that takes away from the kids or the kids away from me. He already has lied multiple times to paint himself as a victim and me as the perpetrator when it is absolutely the other way around. No, I have not sent this to mom and dad as I don't want them to be out of their mind with worry."

¶ 123 d. Sara Murphy

¶ 124 Sara Murphy testified that she worked with Becky at Blessing Hospital. They spoke regularly about Becky's divorce. During these conversations, Becky said that she did not want the children to be alone with defendant's father. Becky expressed excitement about the divorce being finalized.

¶ 125 Murphy also testified that during one of the last conversations she had with Becky, Becky read her a text message defendant had sent, in which defendant told Becky he was "tired of playing [her] stupid little games." However, nothing that Becky ever said to Murphy made her

concerned for Becky's physical safety.

¶ 126 e. Christine Moore

¶ 127 Christine Moore testified that she was friends with Becky. In May 2021, she received text messages from Becky. In one message, on May 7, 2021, Becky wrote the following:

> "[Defendant] has screamed in my face, shoved me in front of the kids, and has thrown things across the room where the kids and I were standing, punched a hole in the wall. If things really don't go his way, I feel he can be very unstable and unpredictable, and the thought has gone through my mind on of if I may need a restraining order. I'm definitely changing the locks as soon as I can."

¶ 128 During that same conversation, Becky also wrote, "The only way to ensure all three [children] choose him over me is to eliminate me as a choice." Defense counsel cross-examined Moore about the timing of the message. She agreed with defense counsel that the message occurred years earlier, at the beginning of the divorce.

¶ 129 f. Nicole Bateman

¶ 130 Nicole Bateman testified that she was a friend of Becky's. On May 9, 2021, Bateman received a text message from Becky that said, "[defendant] told me if I outed his dad that he, Ray, would probably have to move and then he would kill himself." She later told Bateman that she worried defendant would take the kids, even if she was awarded custody, because "he will be pissed and he will do whatever he feels like doing."

¶ 131 On September 8, 2021, Becky texted Bateman, "[A] friend and coworker of mine from the ER was murdered last Friday by her ex." In that same conversation, Becky wrote, "Yes, I literally had a panic attack Friday night thinking [defendant] is going to come after me and do the same if he continues to not get his way." In the same message, Becky also wrote that defendant filed for an order of protection, which was based on lies, and she was worried about what else he might be willing to do. Becky also wrote that she told her lawyer that "[defendant's] erratic behavior and constant lies facilitate the need for protection on top of that he has all of our guns and ammunition, including mine."

¶ 132 g. Amber Wittler

¶ 133 Amber Wittler testified that she worked with Becky at Blessing Surgery Center. In winter 2021, Becky told her that (1) she wanted to change the locks on her home, but defendant would not let her, and (2) if anything happened to her, defendant would be to blame. At the time of the conversation, Becky and defendant were about a year into their divorce.

¶ 134 h. Becky Spotts

¶ 135 Becky Spotts testified that she was Becky's coworker and friend. On June 4, 2021, Becky sent Spotts messages on Facebook Messenger.

¶ 136 In one message, Becky wrote, "I'm wanting to never have my children around [defendant's father] alone ever again." She also wrote, "[I]t has gotten to the point that I even hate going to work for fear he will secretly take off with the kids and I won't see them for a long time ever." Spotts said that she and Becky had multiple similar conversations about that same topic.

¶ 137 Becky also wrote the following:

"I truly believe [defendant] has serious mental health problems and his is becoming more vengeful and unpredictable and it scares me, but I'm scared to even try to get an order of protection because it will piss him off and he will try to punish me somehow. And I don't think an order of protection will be issued because they will say his violent outbursts have not been egregious enough and incidents have been stretched out over too long of a period.

Temporary custody has not even been set yet because we haven't been to court, and I don't even have exclusive possession of our house, so I can't even legally keep him away from me or the kids. Plus, if I ask for an order of protection, I won't be able to come see my children at his house anymore, and he may cut off their communication with me while they are there and that scares me too."

¶ 138 i. Melissa Young

¶ 139 Melissa Young testified that she had worked with Becky at Blessing Hospital. On January 5, 2023, she spoke with Becky about the divorce. Becky told Young that she thought defendant "could snap at any moment." She had found out that defendant was hiding money and defendant told her, "[Y]ou'll be dead before you have any of my money."

¶ 140 j. Gary Collins

¶ 141 Gary Collins testified that he knew Becky and defendant when they lived in Indiana. When they moved from Indiana, he kept in contact with Becky by phone. During the divorce proceedings, Collins had conversations with Becky about the divorce. Becky told him that she believed defendant was hiding money and concealing his assets. She told Collins that she did not want defendant's father to be around the children. During a conversation in June or July 2022, Becky became distraught and was crying. She said, "If anything ever happens to me, it was [defendant]." Collins told her that defendant "wouldn't do it." At that time, Collins was a police officer in Indiana. He told her to get a protective order but did not call anyone on her behalf. He said that he wished he would have.

¶ 142 k. Christine Mandel

¶ 143 Christine Mandel testified that she was Becky's friend and the two kept in touch over Facebook Messenger. On March 14, 2022, they had a conversation on Facebook Messenger. Mandel asked Becky if she was safe. Becky responded, "I feel safe right now. I'm super nervous for when this ends. If he doesn't get his [way,] I feel he may literally lose his mind." Later, Becky wrote that she had obtained a security system and "[h]e wants everything, wants sole custody of the kids, wants all the money, all the assets, wants me to suffer." She also wrote, "But I've had some serious PTSD with all this and things I've found out. Plus, I've had not one, but two workers—coworkers get murdered by their exes in the last year, which has totally made me a nervous Nellie." She also wrote, "He literally cares more about hurting me than anything else" and "I literally would never trust [defendant] to ever let him in my house if it was just us."

¶ 144 After the State rested, defendant elected not to testify and did not present any evidence on his behalf.

¶ 145 24. *Closing Arguments*

¶ 146 In closing, defense counsel argued, among other things, as follows:

> "Now, additionally, the elephant in the room, the Google searches. The State did not tell you when those were done, and they cannot tell you when those searches were done, and they cannot tell you who did those searches.
>
> If those searches took place before Becky's death, I would admit it should be considered by you for whatever that's worth. But they can't tell you that. Nobody can tell you that, and you can't guess.
>
> If these searches took place after Becky's death, then the searches should indicate that it's nothing more than [defendant] looking into the investigation like half of the town did, and following the investigation as the news allowed us to follow the evidence.
>
> But they can't tell us when those searches were done, and it's not my job to tell you or prove to you when those were done. These searches indicate nothing more than somebody looking on the Internet.
>
> I think it's logical to do if something like this were to happen to your family. But the State wants you, each and every one of you to speculate, and the State wants each and every one of you to guess when those searches took place."

¶ 147 Related to that portion of defendant's closing argument, during the State's rebuttal, the prosecutor told the jury the following:

> "The defense says maybe the searches were done after Becky was found murdered. One of the things about this trial that's been complained about is how tight-lipped we've been. Information hasn't been released to the public. If he was searching for this information after Becky was murdered, how did he know that a crowbar was used? He just got lucky and guessed? How did he know to even look about gunshot powder residue? He just got lucky and guessed? Nobody knew that a crowbar was used. That wasn't released to the public. Nobody knew that a window was used. That wasn't released to the public. Nobody knew that the neighbors didn't hear shots, that an improvised silencer might have been used. That wasn't released to the public. None of those things were released to the public, but they all appeared on his phone."

¶ 148 Defendant did not make any objections during the State's rebuttal argument.

¶ 149 25. *The Jury's Deliberations*

¶ 150 Following closing arguments, the jury deliberated for five hours. During that time, the jury sent two questions and requested to review certain pieces of evidence. The trial court denied each of these requests.

¶ 151 The jury later returned guilty verdicts on all three counts.

¶ 152 D. Posttrial Proceedings

¶ 153 In July 2023, defendant filed a posttrial motion, in which he alleged that the prosecutor made prejudicial comments and erroneous statements in closing argument that denied him the right to a fair trial. He also alleged he was denied due process by the trial court's admitting (1) statements made by Becky under the forfeiture by wrongdoing doctrine and (2) defendant's search history without a proper foundation—namely the time and dates of the searches.

¶ 154 The trial court denied the motion and later sentenced defendant to natural life in prison.

¶ 155 This appeal followed.

¶ 156 E. Matters Relating to the JIB

¶ 157 We note that defendant has filed a motion in this appeal requesting this court to take judicial notice of an order entered by the Illinois Courts Commission (Commission) on February 23, 2024, in which the Commission ordered Judge Adrian removed from office as sanctions for his conduct relating to Adams County case No. 21-CF-396, People v. Clinton. The Commission order concluded, "[Adrian] has engaged in multiple instances of misconduct, he abused his position of power to indulge his own sense of justice while circumventing the law, he lied under oath on multiple occasions, and he has failed to acknowledge his misconduct."

¶ 158 Defendant asks this court to take judicial notice of the Commission's ruling and also the following factual findings from the Commission's written order.

¶ 159 "In October 2021, [Adrian] was assigned to hear criminal cases in Adams County. Beginning on October 13, 2021, [Adrian] presided over a three-day bench trial in People v. Clinton, 2021-CF-396." In October 2021, Adrian "found Clinton not guilty on the first two counts of criminal sexual assault and guilty on the third count of criminal sexual assault."

¶ 160 On January 3, 2022, at a hearing on the posttrial motions and sentencing, Adrian reversed his guilty finding, discharging the defendant from custody. Following that hearing, "there were local, national, and international news reports about [Adrian]'s reversal of the guilty finding in the criminal sexual assault trial of Drew Clinton."

¶ 161 On January 12, 2022, prosecutor Joshua Jones was in Adrian's courtroom when he took the bench. Before any case was called, Adrian made the following statements in open court: "Mr. Jones, you may leave the courtroom. Mr. Jones, you may leave the courtroom. I don't get on social media but my wife does, and she saw the thumbs up you gave to people attacking me. I can't be fair with you. Get out."

¶ 162 In February 2022, the JIB sent Adrian a letter requiring him to appear before the JIB on April 8, 2022, regarding "allegations of misconduct in connection with the matter of *People v. Drew Clinton*, 2021 CF 396." The letter alleged that Adrian reversed his guilty finding in the Clinton case in order to circumvent the law that required Adrian to impose a mandatory sentence of imprisonment upon Clinton. The letter also asked Adrian to be prepared to respond to questions about his conduct toward Jones on January 12, 2022.

¶ 163 In March 2022, Adrian submitted a written response to the letter.

¶ 164 In April 2022, Adrian appeared before the JIB and testified under oath regarding his conduct in the Clinton case and toward Jones on January 12, 2022. He testified that the reason he reversed the guilty finding was because he had concluded the State had totally failed to prove the victim was unable to give consent. He testified he did not reverse his decision in order to thwart the law or keep Clinton from serving a mandatory minimum four-year prison term in the Illinois Department of Corrections.

¶ 165 On January 26, 2023, the JIB filed a complaint with the Commission, charging as follows:

> "[Adrian committed] willful misconduct, conduct that was prejudicial to the administration of justice and that brought the judicial office into disrepute, in violation of the Code of Judicial Conduct, Illinois Supreme Court Rule 61, Canon 1; Rule 62, Canon 2(A); and Rule 63, Canon 3(A)(1), (A)(9). In summary form, the amended

> complaint alleged that on January 3, 2022, [Adrian] reversed a guilty finding in an underlying criminal case to circumvent the law requiring the defendant to serve a mandatory prison sentence. The amended complaint further alleged that on January 12, 2022, [Adrian] retaliated against a prosecutor in open court by ordering the prosecutor to leave the courtroom because the prosecutor had 'liked' a post on social media that was critical of [Adrian]'s reversal of that guilty finding. Finally, the amended complaint alleged that on April 8, 2022, [Adrian] gave false and misleading testimony before the [JIB] when he testified that his reason for the reversal was based on the lack of evidence presented in the criminal case and was not to circumvent the law requiring the imposition of a mandatory prison sentence upon the defendant."

¶ 166 The Commission conducted a hearing on the matter on November 7 and 8, 2023, at which Adrian and Jones testified.

¶ 167 Regarding his conduct towards Jones, Adrian testified that in January 2022, he learned that Jones had "liked" a post on social media that was critical of his actions. He said that he was angry when he sent Jones out of the courtroom and, because he was in "no condition to continue to preside over cases," he had another judge take over the rest of his court call. Sometime later, Adrian apologized to Jones for his conduct.

¶ 168 Jones testified that he was not involved in the prosecution of the Clinton case, nor was he present at any time in court during trial or sentencing. He said that on January 12, 2022, he was sitting at the counsel table with his trial partner, when Adrian entered the courtroom. Jones then heard Adrian angrily say, "Mr. Jones, get out." Jones thought Adrian was speaking to someone else, but Adrian called on him to leave the courtroom, saying something to the effect of, "Mr. Jones, get out. I'm not on social media, but my wife is, and I know that you liked a post that was critical of me. I can't be fair with you. Get out." After Adrian ordered him out and as Jones was still sitting at the counsel table, a bailiff came up to Jones and said he had to go, and Jones got up and left the courtroom without saying anything.

¶ 169 Jones stated that he was not sure to which social media post Adrian was referring. Jones noted that there had been several social media posts about the Clinton case leading up to that day, and one post was from a victim's advocacy group that made a post on Facebook that said, "Hold rapists accountable." Because he felt like holding rapists accountable was part of his job as a prosecutor, he "liked" that post. That was the only social media post Jones "liked" or "disliked" regarding the Clinton case.

¶ 170 Some days later, Chief Judge Frank McCartney called Jones and asked whether it would be okay for Adrian to call Jones. Jones said it was okay, and minutes later, Adrian called Jones to apologize. Jones accepted Adrian's apology, and they continued to talk for several minutes. Jones had since tried cases and appeared before Adrian.

¶ 171 II. ANALYSIS

¶ 172 Defendant appeals, arguing that he was denied a fair trial because (1) the trial court erroneously admitted hearsay statements made by Becky under the forfeiture by wrongdoing doctrine, (2) a conflict of interest existed between the trial judge and the prosecutor in his case, and (3) the prosecutor made representations to the jury of matters that were not in evidence during closing argument. We disagree and affirm.

¶ 173 A. Hearsay Evidence

¶ 174 Defendant argues that he is entitled to a new trial because (1) defense counsel was ineffective for failing to object to testimony by Becky's divorce attorneys on the basis of her attorney-client privilege and (2) the trial court erred by admitting hearsay statements made by Becky under the forfeiture by wrongdoing doctrine when those statements were not otherwise admissible. We address each argument in turn.

¶ 175 1. *Attorney-Client Privilege*

¶ 176 Defendant argues his counsel provided ineffective assistance by failing to object to the trial court (1) ordering Becky's attorneys, Woodworth and Timmerwilke, to share their privileged case files with the Quincy Police Department before trial and (2) allowing the attorneys to testify at trial to private, privileged conversations with Becky. Specifically, defendant contends that because (1) the State failed to present any evidence or arguments that Becky waived her attorney-client privilege and (2) the privilege survives her death, any evidence presented contravening that privilege was inadmissible, and counsel should have objected to its usage.

¶ 177 We disagree. As we explain below (*infra* ¶ 188-205), any objection based on Becky's attorney-client privilege would have been fruitless because (1) defendant lacked standing to assert Becky's evidentiary privilege and (2) privileged information related to the prosecution for her murder was impliedly waived or excepted from the usual protections of attorney-client privilege. Accordingly, we conclude that defense counsel did not provide ineffective assistance of counsel. See *People v. Brennan*, 2023 IL App (2d) 220190, ¶ 75, 236 N.E.3d 1046 (stating counsel's failure to make a fruitless objection does not constitute deficient performance); *People v. Simpson*, 2015 IL 116512, ¶ 35, 25 N.E.3d 601 (stating a failure to satisfy either of the prongs of the *Strickland* test (see *Strickland v. Washington*, 466 U.S. 668 (1984)) precludes a finding of ineffectiveness).

¶ 178 a. The Applicable Law

¶ 179 i. *The Attorney-Client Privilege, Generally*

¶ 180 The attorney-client privilege, which protects both the client's communications to the attorney and the attorney's advice to the client, is one of the oldest privileges for confidential communications in common law. *People v. Radojcic*, 2013 IL 114197, ¶¶ 39-40, 998 N.E.2d 1212. The privilege's purpose is to "promote full and frank communication between the client and his or her attorney, without the fear that confidential information will be disseminated to others," which in turn promotes sound legal advice and advocacy. *Id.* ¶ 39. However, "Illinois also has a general public policy of strongly encouraging disclosure of information, with a view to ascertaining the truth, which is essential to the proper disposition of a lawsuit," such that the "attorney-client privilege is to be strictly confined within its narrowest bounds." *Robert R. McCormick Foundation v. Arthur J. Gallagher Risk Management Services, Inc.*, 2019 IL 123936, ¶ 20, 158 N.E.3d 219.

¶ 181 "Except as otherwise required by the Constitution of the United States, the Constitution of Illinois, or provided by applicable statute or rule prescribed by the Supreme Court, [attorney-client privilege] shall be governed by the principles of the common law as they may be interpreted by Illinois courts in the light of reason and experience." Ill. R. Evid. 501 (eff. Jan. 1, 2011). The party asserting the privilege bears the burden of establishing all of the privilege's

necessary elements. *Doe v. Catholic Diocese of Rockford*, 2015 IL App (2d) 140618, ¶ 53, 38 N.E.3d 1239. A statement falls within the attorney-client privilege if the statement (1) originated in confidence that it would not be disclosed, (2) was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services, and (3) remained confidential. *Hayes v. Burlington Northern & Santa Fe Ry. Co.*, 323 Ill. App. 3d 474, 478, 752 N.E.2d 470, 474 (2001).

¶ 182 ii. *Ineffective Assistance of Counsel*

¶ 183 " 'To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant.' " *People v. Veach*, 2017 IL 120649, ¶ 30, 89 N.E.3d 366 (quoting *People v. Domagala*, 2013 IL 113688, ¶ 36, 987 N.E.2d 767, citing *Strickland*, 466 U.S. at 687). "Specifically, a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Id.* " 'A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." ' " *Id.* (quoting *Simpson*, 2015 IL 116512, ¶ 35, quoting *Strickland*, 466 U.S. at 694). "A defendant must satisfy both prongs of the *Strickland* test and a failure to satisfy [either] of the prongs precludes a finding of ineffectiveness." (Internal quotation marks omitted.) *Id.*

¶ 184 b. This Case

¶ 185 Regarding the specific evidence that is in dispute, defendant argues that, in addition to Becky's client files that Woodworth and Timmerwilke turned over to the police, the following statements were protected by attorney-client privilege: (1) Becky's statements to Woodworth "about the court's order for Tim to turn over the handgun upon proof that Becky has purchased a gun safe," (2) "Becky's anticipated testimony, as well as her litigation strategy," (3) Becky's insistence that defendant's father not be allowed around the children unsupervised "was non-negotiable" and she "would have fought through trial court and above," and (4) Timmerwilke's expectation that at the divorce trial Becky would have "testif[ied] about her finances, issues of parenting, and parenting time, and maintenance."

¶ 186 (We note that defendant also argues that these statements were erroneously admitted hearsay. We address that argument later (*infra* ¶¶ 222-26).)

¶ 187 We first address whether defendant has standing to assert Becky's attorney-client privilege.

¶ 188 i. *Defendant Lacks Standing to Assert Becky's Privilege*

¶ 189 Defendant argues that he had standing to raise the issue of Becky's attorney-client privilege because Becky was deceased and could not raise the attorney-client privilege herself. Accordingly, defendant asserts, "other interested parties, like Mr. Timmerwilke, Mr. Woodworth, the court, or [defendant] [were required] to raise it for her."

¶ 190 Defendant compares this case to *People v. Gomez-Ramirez*, 2021 IL App (3d) 200121, ¶ 1, 192 N.E.3d 851, in which a medical center was subject to contempt proceedings for refusing to comply with a subpoena for medical records that it asserted were protected by the physician-patient privilege. On appeal, the Appellate Court, Third District, concluded that, despite (1) the

medical center not being a party to the physician-patient privilege itself and (2) the patient having notice of the hearing on the motion to quash the subpoena and ability to have asserted the privilege himself, the medical center was an interested party that not only *could* raise that privilege on the behalf of the patient in question but was actually *required* to do so. *Id.* ¶¶ 16, 27-29.

¶ 191 *Gomez-Ramirez* is easily distinguishable from the present case. Unlike the attorney-client privilege, the physician-client privilege at issue in *Gomez-Ramirez* had been codified in section 8-802 of the Code of Civil Procedure as follows: "No physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient, except [under enumerated exceptions]." 735 ILCS 5/8-802 (West 2018). Interpreting that statutory language and case law regarding the privilege, the appellate court concluded that the medical center, as "the only entity from whom the records were sought," was required by statute to assert the patient's privilege to prevent disclosure of the patient's medical information. *Gomez-Ramirez*, 2021 IL App (3d) 200121, ¶ 16.

¶ 192 Unlike the medical center in *Gomez-Ramirez*, which was (1) the entity that possessed the privileged records and (2) required by statute not to disclose the records, defendant states no right or cognizable interest he has in Becky's privileged communications and records, nor does defendant cite any authority that rebuts the overwhelming amount of case law holding that a stranger does not have the authority to invoke another person's attorney-client privilege. See, *e.g.*, *Williams v. Big Picture Loans, LLC*, 303 F. Supp. 3d 434 (E.D. Va. 2018); *United States v. Martoma*, 962 F. Supp. 2d 602 (S.D.N.Y. 2013); *United States v. Smith*, 454 F.3d 707 (7th Cir. 2006); *In re Grand Jury Subpoena GJ2/00-345*, 132 F. Supp. 2d 776 (S.D. Iowa 2000); *United States v. Ortega*, 150 F.3d 937 (8th Cir. 1998); *United States v. Kouzmine*, 921 F. Supp. 1131 (S.D.N.Y. 1996); *Womack v. State*, 393 S.E.2d 232, 234 (Ga. 1990); *Henderson v. United States*, 815 F.2d 1189 (8th Cir. 1987); *United States v. Fortna*, 796 F.2d 724 (5th Cir. 1986); *Commonwealth v. Trolene*, 397 A.2d 1200, 1204 (Pa. Super. Ct. 1979); *United States v. Juarez*, 573 F.2d 267, 276 (5th Cir. 1978).

¶ 193 We particularly reject defendant's contention that he has standing to assert Becky's attorney-client privilege, the effect of which would be to preclude the jury from hearing evidence that potentially incriminates defendant in her murder. Certainly, defendant has a personal interest in asserting Becky's attorney-client privilege; he is being tried for her murder, and the confidential information could be harmful to his case. But that interest is entirely self-serving and has nothing to do with the purpose of the attorney-client privilege, which is to "promote full and frank communication between the client and his or her attorney" (*Radojcic*, 2013 IL 114197, ¶¶ 39-40).

¶ 194 ii. *Becky's Attorney-Client Privilege Does Not Prevent Disclosure of Confidential Information*

¶ 195 Even if he lacks standing to assert Becky's privilege, defendant argues in the alternative that in order to preserve a decedent's attorney-client privilege, the privilege became absolute upon her death. In essence, defendant asserts that regardless of whether the privilege was actually raised by a party, before the State could introduce privileged evidence, it needed to assert facts overcoming the privilege. Because the State failed to do so, defendant contends the evidence was improperly admitted. However, even assuming, *arguendo*, defendant has

standing to raise the issue of Becky's privilege, given the circumstances of this case, we conclude that an exception to attorney-client privilege applies.

¶ 196 As an initial matter, we note that whether a criminal defendant has standing to assert a decedent's attorney-client privilege and whether that privilege is subject to an exception in the prosecution of the victim's alleged killer are both matters of first impression in Illinois. Although a similar case appeared before the supreme court in *People v. Peterson*, 2017 IL 120331, 106 N.E.3d 944, a case in which the defendant was convicted of murdering his wife, the supreme court did not decide these issues because the statements were not confidential and thus not protected by attorney-client privilege. *Id.* ¶ 63.

¶ 197 The testamentary exception to the attorney-client privilege provides some guidance to our navigation of these matters of first impression—namely, that an attorney's representation may under some circumstances last only as long as the client is alive and after her death is impliedly waived to serve the purposes of the representation. Although, in general, the attorney-client privilege survives the death of the client, a different rule applies with respect to a will. In such cases, there is only a temporary privilege. When an attorney prepares a will for a client and witnesses the same, the attorney-client privilege exists only during the lifetime of the client. The theory underlying this exception to the privilege is that a decedent would (if one could ask her) waive the privilege so that the distribution scheme she actually intended would be put into effect. *DeHart v. DeHart*, 2013 IL 114137, ¶ 69, 986 N.E.2d 85; *John Doe Corp. 1 v. Huizenga Managers Fund, LLC*, 2021 IL App (2d) 200513, ¶ 83, 188 N.E.3d 1259; *Adler v. Greenfield*, 2013 IL App (1st) 121066, ¶ 60, 990 N.E.2d 1219 (noting that the only context in which a client's death might affect the existence of the privilege is a will contest).

¶ 198 We emphasize that the purpose of the attorney-client privilege is to encourage full and frank communication between the client and legal counsel. *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). However, because it is an impediment to the truth-seeking process, the privilege should be interpreted narrowly. We conclude that the application of the attorney-client privilege in this case would serve no purpose to the client or the courts and would undermine the client's interests.

¶ 199 The following dissent by Justice O'Connor in *Swidler* is very apt to our conclusion:

> "We have long recognized that '[t]he fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth.' *Funk v. United States*, 290 U.S. 371, 381 (1933).
> ***
>
> The attorney-client privilege promotes trust in the representational relationship, thereby facilitating the provision of legal services and ultimately the administration of justice. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The systemic benefits of the privilege are commonly understood to outweigh the harm caused by excluding critical evidence. A privilege should operate, however, only where 'necessary to achieve its purpose,' see *Fisher v. United States*, 425 U.S. 391, 403 (1976), and an invocation of the attorney-client privilege should not go unexamined 'when it is shown that the interests of the administration of justice can only be frustrated by [its] exercise,' *Cohen v. Jenkintown Cab Co.*, 238 Pa. Super. 456, 464, 357 A. 2d 689, 693-694 (1976).
>
> I agree that a deceased client may retain a personal, reputational, and economic interest in confidentiality. [Citation.] But, after death, the potential that disclosure will

harm the client's interests has been greatly diminished, and the risk that the client will be held criminally liable has abated altogether. *** This diminished risk is coupled with a heightened urgency for discovery of a deceased client's communications in the criminal context. *** After a client's death, however, if the privilege precludes an attorney from testifying in the client's stead, a complete 'loss of crucial information' will often result, see 24 C. Wright & K. Graham, Federal Practice and Procedure § 5498, p. 484 (1986).

*** [A]n exception may be appropriate where the constitutional rights of a criminal defendant are at stake. An exception may likewise be warranted in the face of a compelling law enforcement need for the information. '[O]ur historic commitment to the rule of law ... is nowhere more profoundly manifest than in our view that the twofold aim of criminal justice is that guilt shall not escape or innocence suffer.' *Nixon*, *supra*, at 709 (internal quotation marks omitted); see also *Herrera v. Collins*, 506 U.S. 390, 398 (1993). Given that the complete exclusion of relevant evidence from a criminal trial or investigation may distort the record, mislead the factfinder, and undermine the central truth-seeking function of the courts, I do not believe that the attorney-client privilege should act as an absolute bar to the disclosure of a deceased client's communications. When the privilege is asserted in the criminal context, and a showing is made that the communications at issue contain necessary factual information not otherwise available, courts should be permitted to assess whether interests in fairness and accuracy outweigh the justifications for the privilege." *Id.* at 411-14 (O'Connor, J., dissenting, joined by Scalia and Thomas, JJ.).

¶ 200 Applying the same logic underlying the testamentary exception to the facts of the present case, we ask whether Becky would have asserted her attorney-client privilege. We conclude the answer is no.

¶ 201 Just as with the forfeiture by wrongdoing doctrine, defendant's success in silencing Becky should not be rewarded by his use of her own privilege to frustrate the truth-seeking process looking into her death. It is true that Becky may have had specific information she preferred to remain confidential under ordinary circumstances, but a murder trial is not an ordinary circumstance. Indeed, in nearly every way, the jury has been made privy to the most intimate aspects of Becky's life. The jury was publicly presented information about her love life, medical history, children, associations, fears, desires, employment, and lifestyle. The jury was publicly shown photos of the interior of her house and graphic photos of her body, not limited to photos taken of the crime scene but also from her autopsy.

¶ 202 We quoted at length from Justice O'Connor's dissent in *Swidler* because we found her analysis very sound and persuasive. But some of what the majority of the United States Supreme Court wrote in *Swidler* also supports our conclusion, where the Court wrote the following:

"[This Court has] said that the loss of evidence admittedly caused by the [attorney-client] privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place. [Citations.] *** Without assurance of the privilege's posthumous application, the client may very well not have made disclosures to his attorney at all ***." *Id.* at 408 (majority opinion).

¶ 203 Like the testamentary exception, we need not speculate in this case about whether Becky would have asserted her attorney-client privilege. The privileged information her divorce

attorneys shared at defendant's trial was information that Becky was clearly intending to present at her divorce trial against defendant. For example, Becky's intent not to allow defendant's father to visit with the children unsupervised was a core part of her demands in the divorce. Indeed, she was slated to testify as a witness. Further, Becky made numerous statements to people that she believed defendant would have been the cause of her death if she was found dead. She wanted a gun for her protection from defendant and said that she was afraid of him.

¶ 204 Given the obvious interest any person has in the successful prosecution of his or her killer and the particular facts of this case—namely, (1) the "privileged information" was not intended to remain confidential because it was intended to be utilized at the divorce hearing and (2) Becky unquestionably would have waived the privilege under the circumstances of this case—we conclude that an exception to the attorney-client privilege applies here.

¶ 205 Accordingly, we conclude that because (1) defendant did not have standing to assert Becky's attorney-client privilege and (2) the attorney-client privilege did not apply in this case, any objection by defense counsel would have been fruitless. As a result, defense counsel did not render ineffective assistance by failing to raise the issue of Becky's attorney-client privilege.

¶ 206 2. *Hearsay Statements Introduced Through Becky's Friends and Acquaintances*

¶ 207 Defendant argues that the trial court erroneously allowed "the State to call at least half a dozen witnesses to testify about irrelevant and inadmissible statements purportedly made by Becky ***, introduced to demonstrate her state of mind towards [him]" under the forfeiture by wrongdoing doctrine. Defendant specifies that he is not challenging the court's finding the forfeiture by wrongdoing doctrine applies because he caused Becky's unavailability to prevent her from testifying in their divorce case. Instead, defendant challenges the court's finding that the hearsay evidence was relevant—a prerequisite for the admission of hearsay statements under the doctrine.

¶ 208 a. The Applicable Law

¶ 209 i. *Admission of Evidence, Generally*

¶ 210 Evidence that is irrelevant is inadmissible. Ill. R. Evid. 402 (eff. Jan. 1, 2011). Evidence is relevant where it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan. 1, 2011).

¶ 211 Under Illinois Rule of Evidence 403 (eff. Jan. 1, 2011), relevant 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."

¶ 212 "If the evidence is prejudicial such that it serves only to arouse and influence the emotions of the jury, it is error to submit it to the jury." (Internal quotation marks omitted.) *People v. Reichert*, 2023 IL App (5th) 180537, ¶ 111, 239 N.E.3d 728. "All evidence is prejudicial in the sense that it compels the factfinder in one direction or the other; the issue posed by Rule 403 is when it becomes unfair[ly] so." (Internal quotation marks omitted.) *People v. Woodson*,

2023 IL App (1st) 191353, ¶ 101. "Unfair prejudice" is a term that " 'speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.' " *People v. Parker*, 335 Ill. App. 3d 474, 487-88, 781 N.E.2d 1092, 1104 (2002) (quoting *Old Chief v. United States*, 519 U.S. 172, 180 (1997)).

¶ 213 We review a trial court's decision to admit evidence for an abuse of discretion. *People v. King*, 2020 IL 123926, ¶ 35, 161 N.E.3d 143. "An abuse of discretion occurs only where the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *People v. Rivera*, 2013 IL 112467, ¶ 37, 986 N.E.2d 634.

¶ 214 ii. *Harmless Error Review*

¶ 215 "The improper admission of evidence is harmless when there is no reasonable probability the outcome of the trial would have been different had the evidence been excluded." *People v. Guerrero*, 2021 IL App (2d) 190364, ¶ 88, 194 N.E.3d 961.

> " 'When deciding whether error is harmless, a reviewing court may (1) focus on the error to determine whether it might have contributed to the conviction; (2) examine the other properly admitted evidence to determine whether it overwhelmingly supports the conviction; or (3) determine whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence.' " *People v. Brothers*, 2015 IL App (4th) 130644, ¶ 98, 39 N.E.3d 1101 (quoting *In re Rolandis G.*, 232 Ill. 2d 13, 43, 902 N.E.2d 600, 617 (2008)).

¶ 216 The State carries the burden of persuasion in a harmless-error analysis. *Guerrero*, 2021 IL App (2d) 190364, ¶ 88.

¶ 217 iii. *The Forfeiture by Wrongdoing Doctrine*

¶ 218 "Ordinarily, the rule against hearsay would prohibit the introduction at trial of out-of-court statements offered to prove the truth of the matter asserted." *People v. Chatman*, 2024 IL 129133, ¶ 33, 238 N.E.3d 1055. However, the common law doctrine of forfeiture by wrongdoing, as codified in Illinois Rule of Evidence 804(b)(5) (eff. Jan. 1, 2011), provides that "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness" is not excluded by the hearsay rule.

¶ 219 Once the trial court has found that a defendant intended to and did prevent a witness from testifying, he or she "forfeits his or her right to object to the victim's statements on hearsay, confrontation, and reliability grounds." *People v. Zimmerman*, 2018 IL App (4th) 170695, ¶ 110, 107 N.E.3d 938 (citing *People v. Hanson*, 238 Ill. 2d 74, 98-99, 939 N.E.2d 238, 253 (2010)). Nevertheless, for statements to be admitted pursuant to the forfeiture by wrongdoing doctrine, those statements must still be "relevant and otherwise admissible." (Internal quotation marks omitted.) *Peterson*, 2017 IL 120331, ¶¶ 32-33.

¶ 220 In other words, the forfeiture by wrongdoing doctrine serves only as a vehicle for testimony to overcome the general exception to hearsay and is not a catchall provision allowing for the introduction of otherwise inadmissible evidence. See *People v. Gardner*, 2024 IL App (4th) 230443, ¶ 51 ("The State is to be placed in the same position it would have been in had the witness testified, including any evidentiary limitations on such testimony; it should not be

placed in a better position." (Emphasis omitted.)). In determining whether the hearsay was properly admitted, the operative question is the following: Had the unavailable witness been able to testify at trial, would the witness be permitted testify to the proffered hearsay statements?

¶ 221 b. This Case

¶ 222 The following statements by Becky are at issue:

(1) "And yes, i absolutely worry he will try to take the kids sometime, especially if I get awarded the custody I want. He will be pissed and he will do whatever he feels like doing";

(2) "On top of that, a friend and coworker of mine from the ER was MURDERED last Friday by her ex";

(3) "Yes, I literally had a panic attack Friday night thinking [defendant] is going to come after me and do the same if he continues to not get his way. If he's crazy enough to file this OOP and make all this crap up and blame it on me, what else is he willing to do?";

(4) "But I told my lawyer I either want an OOP for myself and the kids or at least make a statement in court and on the record of what he might do and his erratic behavior and constant lies facilitate the need for protection. On top of the fact that he has all our guns and ammunition, including mine.";

(5) "I'm wanting to never have my children around them alone ever again.";

(6) "It has gotten to the point that I hate even going to work for fear he will secretly take off with the kids and I won't see them for a long time, or ever.";

(7) "I truly believe [defendant] has serious mental health problems and he is becoming more vengeful and unpredictable, and it scares me. But I'm scared to even try to get an order of protection because it will piss him off and he will try to punish me somehow.";

(8) "And I don't think an order of protection will be issued because they will say his violent outbursts have not been egregious enough and incidents have been stretched out over too long of a period. Temporary Custody has not even been set yet bc we haven't been to court, and I don't even have exclusive possession of our house, so I can't even legally keep him away from me or the kids, plus if I ask for an order of protection, I won't be able to come see my children at his house anymore and he may cut off their communication with me while they are there, and that scares me too.";

(9) "it is a fucking nightmare";

(10) "If something ever happens to me, please make sure the number one person of interest is [defendant] as that is who would do something to me. I'm putting this in writing that I'm fearful he will somehow harm me, come after me, or will try something to me that takes me away from the kids or the kids away from me. He already has lied multiple times to paint himself as a victim and me as the perpetrator when it is absolutely the other way around. No, I have not sent this to mom or dad as I don't want them to be out of their mind with worry.";

(11) "if something ever happened to her that we should make sure we look at—at [defendant]";

(12) "the only way to ensure all three [children] choose him over me is to eliminate me as a choice."; and

(13) statements to Woodworth and Timmerwilke that she wanted the gun from defendant for protection from him.

¶ 223 Defendant contends that all these statements were irrelevant and erroneously admitted as evidence of Becky's "state of mind." The State counters that (1) many of these statements were admissible for purposes other than these cited by the trial court at the pretrial hearing and (2) any improperly admitted statements were harmless error. We agree with the State.

¶ 224 i. *The Other Purposes for Which the Hearsay Statements Were Properly Admissible*

¶ 225 Contrary to defendant's argument, not all of the statements at issue were admitted into evidence solely for the purpose of showing Becky's state of mind. The trial court found that Becky's statements about wanting her handgun returned to her by defendant were relevant to defendant's opportunity to commit the crime because that gun, which she believed was in his possession, could have been the murder weapon. Regarding her statements that the only way defendant could ensure that the boys chose him over her was to eliminate her as an option and other custody-related statements, the court found that they were relevant to defendant's motive. Becky's belief that defendant desired to hurt her was likewise found to be evidence of motive.

¶ 226 We conclude that the trial court's findings regarding these statements were in no way unreasonable and, thus, not an abuse of discretion. See *Rivera*, 2013 IL 112467, ¶ 37 ("An abuse of discretion occurs only where the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it."). The record shows that Becky had been shot 14 times. Accordingly, the contentious nature of the divorce and defendant's anger were highly relevant evidence of defendant's motive to kill Becky, explaining why he (1) shot her so many times and (2) chose to kill her in the first place.

¶ 227 However, the same cannot be said for the statements regarding Becky's fear of defendant that were admitted for the purpose of showing her state of mind.

¶ 228 Defendant cites *Zimmerman* and *People v. Floyd*, 103 Ill. 2d 541, 470 N.E.2d 293 (1984), in support of his argument that evidence of Becky's state of mind was not a proper basis to admit what he contends amounted to pure propensity evidence because Becky's state of mind was wholly irrelevant to this case.

¶ 229 In *Zimmerman*, the defendant was on trial for the murder of his wife, and the State sought to introduce purported statements by her regarding her fear of the defendant. *Zimmerman*, 2018 IL App (4th) 170695, ¶¶ 1, 35-37. Those statements included comments to her friends and family that " '[i]f anything happens to me, [the defendant] did it.' " *Id.* ¶ 37. Other statements the State sought to introduce were from before, during, and after the divorce concerning the decedent wife's fear of what defendant might do to her and statements made by defendant to the wife about the divorce and child support. *Id.* The trial court ruled that, except for specific financial details regarding the ongoing divorce litigation, the rest of the statements in question were inadmissible. *Id.* ¶ 54.

¶ 230 On appeal, this court affirmed, holding that *Floyd* provided a basis to exclude the victim's statements that she was afraid of defendant and the statement that " 'if anything happened to her, defendant did it.' " *Id.* ¶ 122. We provided the following explanation:

> "As in *Floyd*, it is unclear how [the decedent wife's] generalized statements in this case concerning her fear or suspicion of her ex-husband, on their own, relate in any way to defendant's motive, intent, or opportunity to commit murder. Had the testimony shown defendant made threats to [his wife], and these threats caused her fears and suspicions, then the statements might be probative of defendant's state of mind—that is, his motive and intent. [Citation.] [His wife's] statements that she was afraid of defendant, without any further context, amount to an opinion as to defendant's character, opening the door to the possibility that the jury would convict defendant on an impermissible basis." (Emphases omitted.) *Id.* ¶ 124.

¶ 231 In *Floyd*, the defendant had been charged with the murder of his wife, and her divorce attorney testified that the wife had told him that she feared physical violence by the defendant. *Floyd*, 103 Ill. 2d at 544. Likewise, other friends and family of the decedent testified that she had expressed concerns for her own safety. *Id.* at 544-45. The appellate court reversed the conviction, holding that the trial court erred in admitting the testimony concerning the decedent's fears for her own safety. *Id.* at 546. In affirming the appellate court, the Illinois Supreme Court agreed that (1) evidence of the statements concerning her fear of harm served no purpose other than to create the inference that the defendant was guilty of murder and (2) admitting the testimony was reversible error. *Id.* at 547.

¶ 232 The same concerns that the supreme court had in *Floyd* and this court had in *Zimmerman* regarding the independent relevance of the statements also exist in the present case. Unlike Illinois Rule of Evidence 803(3) (eff. Jan. 25, 2023), the forfeiture by wrongdoing doctrine and its statutory equivalent do not limit the subject matter of the admissible statements (*Zimmerman*, 2018 IL App (4th) 170695, ¶ 109) but like statements that indicate the declarant's state of mind, which was the evidence question at issue in *Floyd*, it is merely an exception to the rule against hearsay; the evidence must still be relevant.

¶ 233 The State argued in the trial court that the majority of Becky's statements were admissible because they revealed Becky's state of mind. The court overruled defendant's objections to these statements when defendant argued Becky's state of mind was not relevant, but neither the court nor the State ever explained why Becky's state of mind was relevant.

¶ 234 In fact, defendant was correct that Becky's state of mind was not relevant regarding any issue in this case. As we discussed, some of Becky's statements were relevant (and thus admissible), but the State should not have offered into evidence statements whose only purpose was to reveal Becky's state of mind, and the trial court erred by overruling defendant's objections to those statements.

¶ 235 ii. *Any Error in Admitting the Statements Was Harmless Because the Evidence of Defendant's Guilt Is Compelling and Overwhelming*

¶ 236 Although the trial court committed some evidentiary errors, we conclude that any error is harmless because the trial evidence weighs overwhelmingly in favor of defendant's guilt. We review that evidence as follows.

¶ 237 (a) The Contentious Divorce

¶ 238 Defendant filed for divorce in January 2021, and the divorce became increasingly contentious. Becky began telling her friends that she was scared of defendant. In August 2021,

Becky obtained a court order prohibiting defendant's father, Ray, from having unsupervised contact with his grandchildren. In September 2021, Becky told her sister that defendant had all of her guns and ammunition. The month prior, the divorce court had ordered defendant to return to Becky her CZ75 9-millimeter handgun.

¶ 239 By December 2022, multiple areas of serious contention had emerged, including (1) alimony and support, (2) custody of the children, (3) the marital residence, (4) Ray's contact with the children, and (5) whether defendant had hidden $500,000 in assets. Defendant did not want to pay child support, and he wanted Becky removed from the marital home. He also demanded more custody than Becky, but she was adamant that Ray would not have unsupervised contact with the children.

¶ 240 In February 2023, the divorce came to a head when the trial court set the final divorce hearing for March 2, 2023, at which the aforementioned issues would be determined. That same month, defendant had not yet returned Becky's handgun to her. He called the police to ask for assistance with that task, telling them that he had to "return a gun to that crazy bitch." The police department responded that they would not be involved in the matter.

¶ 241 Despite the acrimony, on February 21, 2023, Becky asked defendant to keep the children because she was not feeling well. Defendant agreed to pick them up from school on Wednesday, February 22, 2023, and keep them overnight.

¶ 242 (b) The Discovery of Becky's Death and Evidence Collected

¶ 243 On the afternoon of Thursday, February 23, 2023, at 3:30 p.m., Becky's father went to her home to check on her and found her lifeless body lying on her bathroom floor. She had been shot 14 times. Members of the Quincy Police Department recovered eight cartridge cases around her body. Forensic scientists determined that all 8 cartridge cases were fired from the same gun as the 27 cartridge cases that police recovered from defendant's house when they searched it the week after Becky's death. Notably, police did not find Becky's CZ75 at defendant's home or a Ruger SR9 that purchase records showed defendant owned. Forensic scientists could not identify the particular gun that fired the casings but testified that they could have been fired by a CZ75 or a Ruger.

¶ 244 Police officers also found pieces of shredded plastic around Becky's body that were consistent with a plastic Aldi shopping bag. They believed that the assailant shot through the bag to attempt to catch the cartridge cases. When they searched defendant's home, they found similar Aldi bags. Moreover, DNA recovered from a piece of the plastic retrieved from the scene of the shooting was eight times more likely to have come from defendant than an unrelated individual.

¶ 245 Additionally, DNA recovered from under Becky's fingernails was three times more likely to have come from defendant or her children. However, Becky had not been around her children since February 19, 2023, and since seeing them, she had scrubbed in for surgery.

¶ 246 Finally, police officers identified the point of entry as a second-story bedroom window. The window had been pried open. Police officers found a crowbar at defendant's home that they could not conclusively say was used to pry the window open, but a forensic scientist testified that it could have been used, having left consistent marks during tool mark analysis.

¶ 247 Police found no signs of a burglary, noting that nothing was missing from Becky's home. Moreover, Becky's autopsy showed she had not been sexually assaulted. The assailant had

climbed to the second floor of Becky's house and passed four other windows before entering through one of the children's bedroom windows, all of whom were sleeping at defendant's home at the time.

¶ 248 (c) Surveillance Footage and Data From Defendant's Cell Phone, WHOOP Device, and Laptop

¶ 249 Members of the Quincy Police Department collected surveillance footage from three separate cameras around Quincy (the Quincy bus barn, a camera at South 20th Street, and a camera at North 20th Street), which captured an unknown person riding a blue bicycle with no reflectors in the early morning hours of February 14, 21, 22, and 23. They compared that footage to data obtained from defendant's cell phone and WHOOP fitness device (which communicated data with his cell phone). The data showed the following.

¶ 250 On February 14, 2023, defendant's WHOOP device ceased tracking his location at 12 a.m. Thirty-seven minutes later, Becky's neighbor's surveillance camera captured someone walking in the driveway next to her house. Defendant's WHOOP began tracking again at 1:10 a.m. During this gap in the tracking data, the surveillance cameras at (1) the Quincy bus barn, (2) South 20th Street, and (3) North 20th Street captured the figure on the blue bicycle riding in the direction of Becky's house, and then about 15 minutes later, travelling in the opposite direction. After defendant's WHOOP started tracking again at 1:10 a.m., defendant's laptop was used to conduct license plate and VIN searches for Becky's paramour's truck that had been parked outside her home that night.

¶ 251 On February 21, 2023, defendant's cell phone screen locked at 12:44 a.m. and his WHOOP stopped tracking at 12:45 a.m. The surveillance cameras captured a figure on a blue bicycle without reflectors travelling in the direction of Becky's house at 1 a.m., then in the opposite direction approximately 15 minutes later. Fifteen minutes after that, the cameras captured the figure travelling again in the direction of Becky's house, then in the opposite direction approximately fifteen minutes later, at 1:56 a.m. Defendant's WHOOP device began tracking again at 2:11 a.m.

¶ 252 On February 22, 2023, the same pattern emerged. Defendant's WHOOP stopped tracking at 12:42 a.m. and his cell phone locked at 12:50 a.m. The bicyclist was captured riding southbound at 12:57 a.m., then in the opposite direction at 1:10 a.m. Defendant's cell phone unlocked at 1:15 a.m., and his WHOOP started tracking again at 1:16 a.m.

¶ 253 Shortly thereafter, at 1:39 a.m., defendant's cell phone again locked and his WHOOP stopped tracking. At 1:46 a.m., the camera showed the bicyclist riding southbound, toward Becky's house, and at 2:08 a.m., heading northbound. Becky's neighbor's camera showed someone in the driveway next to Becky's house at both 1:05 a.m. and 2:08 a.m.

¶ 254 Defendant's WHOOP began tracking again at 2:19 a.m.

¶ 255 On February 23, 2023, the morning of Becky's murder, the evidence showed the same bicycle ride coinciding with gaps in defendant's cell phone and tracking data. Specifically, defendant's WHOOP stopped tracking at 12:36 a.m. and his cell phone locked at 12:38 a.m. The bus barn camera recorded the bicyclist riding toward Becky's house at 12:55 a.m. Becky's cell phone shows she attempted to dial 911 at 1:11 a.m. The same camera recorded the bicyclist heading in the opposite direction at 1:16 a.m. Defendant's cell phone began tracking again at 2:01 a.m.

¶ 256 The gaps in defendant's WHOOP tracking data occurred only during the aforementioned times.

¶ 257 (d) The Blue Schwinn Bicycle

¶ 258 Members of the Quincy Police Department located a Facebook account on defendant's cell phone under the pseudonym "John Smith." The account contained notifications about a bicycle being sold by Blaesing. Blaesing testified that, in October 2022, he sold a blue Schwinn bicycle with no reflectors to a tall, white man. Police also found a message in the account from "John Smith" to an unrelated recipient stating that he would be driving an orange Honda CR-V, which is the type of car defendant drove.

¶ 259 Four days after Becky's murder, police officers located a blue Schwinn bicycle with no reflectors abandoned approximately half a block from defendant's home. They compared the seat height to that of a Mongoose bicycle in defendant's garage (which was also purchased by "John Smith" using Facebook), and the seats were seat at a nearly identical height, differing by only half a centimeter.

¶ 260 (e) Defendant's Odd Behavior on the Day After the Murder

¶ 261 On the morning of February 23, 2023, while Becky's body was lying on her floor, defendant was seen bringing a basketball hoop to his father's home. This was unusual because the children had not been to Ray's home in two years because of a court order. Whether the order would continue was to be decided by the divorce court the following week.

¶ 262 That same morning, defendant called St. Peter's school at 11:51 a.m. and told the secretary he would be picking the boys up and not to let them walk home. He had never done that before. Moreover, he arrived an hour early to pick them up and sat in his car in the parking lot until the boys were released from school, which was also unusual.

¶ 263 Only after defendant retrieved the boys from school at 2:47 p.m. did he reach out to Becky's father to express concern. When Becky's father called defendant back, he did not answer. After Becky's father found her body at 3:30 p.m., defendant returned his call. Defendant also lied to Becky's mother, telling her that the school had called him to pick up the boys because Becky had not arrived. The school made no such call.

¶ 264 (f) Defendant's Internet Searches

¶ 265 Defendant's laptop had been used to conduct Internet searches for multiple topics related to Becky's murder. For most of the searches, the police were unable to determine the date of the search. However, on unknown dates, defendant's computer was used to make the following queries: (1) How to force my door open with a crowbar? (2) How to unlock privacy locks? (3) How many cops in Quincy, Illinois? (4) Average Quincy Police Department response time? (5) How can I check if a gun is registered to me? (6) Can you wash off gunshot residue? (7) Can you tell if a shotgun shell was fired from a particular shotgun? (8) Does WHOOP record the exact times I wear it? and (9) Does WHOOP catch up when I'm not wearing it?

¶ 266 Police were able to determine that in October 2022, defendant's laptop was used to conduct an Internet search for how to make a homemade silencer.

¶ 267 (g) Summary of the Evidence

¶ 268 Looking at all the evidence, we can infer as follows. Leading up to Becky's murder, defendant and Becky were hotly disputing the terms of their divorce and child custody. He prepared to kill Becky to prevent her from testifying at their divorce proceedings by (1) purchasing a bicycle without reflectors, which made him less visible at night, and (2) scouting out the route to her house multiple times from February 14, 2023, until February 23, 2023. As part of his preparations, he searched for information about how to break into her house, police response times, how to clean gunshot residue, and how to avoid being tracked by his WHOOP device, among other searches. He also asked his next-door neighbor, Ehmen, whether he had security cameras, impliedly to see if he would be recorded leaving his home.

¶ 269 On the morning of February 23, 2023, defendant locked his cell phone and disconnected his WHOOP device to avoid being tracked. He then rode the bicycle that he purchased on Facebook Marketplace to Becky's house. Once he arrived at her house, he then climbed to the second-story window and forced it open using a crowbar. Once inside, defendant made his way to Becky's bedroom, forced the bedroom door open, and shot Becky 14 times with a 9-millimeter handgun.

¶ 270 He then immediately fled through the front door of the house, leaving behind eight cartridge cases on the floor, along with shredded plastic from an Aldi bag that he had fired the gun through in an attempt to catch the cartridge cases. He rode the bicycle towards his house but dismounted before getting home, leaving the bicycle in a ditch nearby. Later that morning, despite the children having not visited defendant's father's house in over a year and Becky's insistence in their divorce case that she would not let the children visit defendant's father, defendant brought over a basketball hoop for the children. The implication was that defendant knew Becky's wishes no longer mattered because she was dead.

¶ 271 Later that morning, to prevent the children from walking home to Becky's house from school, he called the school to let administrators know that he would be picking the children up, which did not normally happen. He arrived an hour early. Only once he had the children in his custody at around 3 p.m. did he contact Becky's father to let him know that he had not heard from Becky, which led her father to the discovery of her body. He also lied to Becky's mother on the phone in order to hide his suspicious behavior, saying that the school had called him to pick the children up.

¶ 272 The Supreme Court of Illinois has explained that in a criminal case, an evidentiary error is harmless "where there is no *reasonable probability* that the jury would have acquitted the defendant absent the error." (Emphasis in original and internal quotation marks omitted.) *In re E.H.*, 224 Ill. 2d 172, 180, 863 N.E.2d 231, 235 (2006). In contrast to that standard, the Illinois Supreme Court in *E.H.* also noted that " 'before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless *beyond a reasonable doubt*.' " (Emphasis in original.) *Id.* (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

¶ 273 In this case, defendant has not challenged the application of the forfeiture by wrongdoing doctrine but only the relevancy of Becky's hearsay statements after that doctrine has been applied. As a result, the confrontation clause of the sixth amendment (U.S. Const., amend. VI) is not at issue regarding Becky's hearsay statements that the trial court admitted into evidence. Instead, as defendant argued before the trial court and this court, the *relevancy* of those statements (admitted to show Becky's state of mind) is at issue.

¶ 274 However, a trial court's ruling that certain evidence is relevant, if incorrect, does not constitute a "federal constitutional error." (Internal quotation marks omitted.) *Id.* Rulings on the relevancy of evidence are routine during criminal trials, and if a trial court has erred by determining certain evidence was relevant and therefore admissible, then the question for this court on appeal is the following: Is there any *reasonable probability* that the jury would have acquitted the defendant absent the error?

¶ 275 In this case, applying that standard, we conclude that because the evidence of defendant's guilt was overwhelming, any error in the admission of inadmissible hearsay was harmless. Moreover, even if the evidentiary errors in this case were deemed to be of a constitutional dimension and we were required to determine whether they were harmless beyond a reasonable doubt, we would have no hesitancy on this record to so conclude.

¶ 276 iii. *Defendant's Argument That the Jury Deliberations Show He Was Prejudiced*

¶ 277 Defendant argues that the mere fact the jury's deliberation took five hours, during which it sent notes asking questions and requesting to review certain pieces of evidence, shows that the evidence of his guilt was not overwhelming. We reject defendant's argument.

¶ 278 Although the length of jury deliberations and notes from a jury indicating that it could not reach a verdict could conceivably in the right case suggest that the evidence may be closely balanced, whether such an inference would be warranted depends greatly on the facts of a particular case (see *People v. Scott*, 2015 IL App (4th) 130222, ¶ 37, 25 N.E.3d 1257 ("[W]here the evidence against a defendant is overwhelming and there is no indication in the record that the jurors themselves considered the evidence closely balanced, a lengthy deliberation and notes from the jury are inconsequential.")).

¶ 279 In the present case, nothing about the deliberations were extraordinary, such as in *People v. Davis*, 393 Ill. App. 3d 114, 133, 913 N.E.2d 536, 552 (2009), in which the jury sent numerous notes over a few days saying that it was at an impasse and then reached a verdict only 20 minutes after the trial court gave an erroneous response to a jury question.

¶ 280 Even though defendant presented no evidence, the State presented a significant amount of testimony and physical evidence. Defendant implies that five hours of deliberation is a significant period of time for the jury to deliberate, but five hours of deliberations following a week-long murder trial is hardly unexpected. Further, "[t]hat the jury asked for guidance during deliberations merely indicates that the jury took its job seriously and conscientiously worked to come to a just decision." *People v. Minniweather*, 301 Ill. App. 3d 574, 580, 703 N.E.2d 912, 916 (1998). Indeed, "[c]areful consideration of the evidence adduced and exhibits admitted is what we expect of jurors in any trial." *People v. Wilmington*, 2013 IL 112938, ¶ 35, 983 N.E.2d 1015.

¶ 281 B. Conflict of Interest

¶ 282 Defendant argues that he was denied the right to a fair trial when the trial court allowed Jones to remain as the prosecutor in this case while his potentially adverse testimony against Judge Adrian was pending in a contemporaneous matter before the JIB. We disagree.

¶ 283 As an initial matter, defendant argues that he preserved this issue for review by his filing of a "suggestion of conflict" because that filing sufficiently allowed Judge Adrian to make a

decision regarding recusal. He acknowledges that he did not raise the issue in a posttrial motion. Even so, he contends that even if we conclude that he forfeited the issue, Judge Adrian's conflict of interest with Jones constituted second-prong plain error. See *People v. Belknap*, 2014 IL 117094, ¶ 48, 23 N.E.3d 325 (excusing forfeiture under the plain error doctrine).

¶ 284 We conclude that defendant forfeited the issue not only because he failed to raise the issue in a posttrial motion, but also because this appeal is the first time Judge Adrian's recusal has been raised at all. Before the trial court, defendant's suggestion of a conflict did not ask that Judge Adrian recuse himself; instead, the only relief defendant requested was that Jones be removed as the prosecutor. Accordingly, defendant did not preserve for review Judge Adrian's alleged error in not recusing himself. Nonetheless, we will consider whether Judge Adrian's failure to *sua sponte* recuse himself was second-prong plain error. For the reasons that follow, we conclude it was not.

¶ 285 1. *Plain Error*

¶ 286 The plain error doctrine permits this court to review unpreserved errors when a clear and obvious error occurred and (1) the evidence was closely balanced such that "the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error" or (2) the error was "so serious that it affected the fairness of the *** trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Id.* The usual first step in a plain error analysis is determining whether there was error, because without error, there can be no plain error. *People v. Padilla*, 2021 IL App (1st) 171632, ¶ 122, 195 N.E.3d 740.

¶ 287 Regarding second-prong plain error, the supreme court has said:

> "The second prong of the plain error rule can be invoked 'only in those exceptional circumstances where, despite the absence of objection, application of the rule is necessary to preserve the integrity and reputation of the judicial process.' [Citation.] This court has equated the second prong of the plain error rule with 'structural error.' [Citation.] It is a type of error that 'erode[s] the integrity of the judicial process and undermine[s] the fairness of the defendant's trial.' [Citation.] Unlike an error reviewable under the first prong of the plain error rule, if a defendant succeeds in establishing that structural error occurred, he need not show that he was prejudiced by the error. [Citation.] Instead, regardless of the strength of the evidence of the defendant's guilt, prejudice to the defendant is presumed because of the importance of the right involved." *People v. Jackson*, 2022 IL 127256, ¶ 28, 211 N.E.3d 414.

¶ 288 Examples of structural error "include a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction." *People v. Thompson*, 238 Ill. 2d 598, 609, 939 N.E.2d 403, 411 (2010).

¶ 289 2. *This Case*

¶ 290 Because in the present case Judge Adrian's determination of whether he should recuse himself was a matter exclusively for him to decide, his decision not to recuse cannot be considered error. See *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 45, 958 N.E.2d 647

("Whether a judge should recuse himself is a decision in Illinois that rests exclusively within the determination of the individual judge, pursuant to the canons of judicial ethics found in the Judicial Code." (Emphasis omitted.)). Absent any error, the defendant's plain error argument on that point necessarily fails.

¶ 291 Nonetheless, notwithstanding our conclusion that Judge Adrian's failure to *sua sponte* recuse himself under Illinois law cannot be considered error, recusal can be required by the United States Constitution when the "probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); see *Williams v. Pennsylvania*, 579 U.S. 1, 16 (2016) ("When the objective risk of actual bias on the part of a judge rises to an unconstitutional level, the failure to recuse cannot be deemed harmless.").

¶ 292 In *O'Brien*, the Illinois Supreme Court described the appropriate constitutional inquiry:

> "The proper *** inquiry, [when determining whether recusal is required], is whether under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented. [Citation.] Stated differently, recusal is required when the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. [Citation.]
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> * * *
>
> *** [T]he [United States Supreme] Court [in *Caperton*] took great pains to stress that its decision was limited to an extraordinary situation where the Constitution requires recusal [citation] in an exceptional case [citation] comprised of extreme facts and thus [a]pplication of the constitutional standard implicated *** will *** be confined to rare instances." (Internal quotation marks omitted.) *O'Brien*, 2011 IL 109039, ¶¶ 32, 47 (citing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883-90 (2009)).

¶ 293 The facts of the present case are far from "extreme" or "extraordinary" and contain no basis to find an unconstitutionally high risk of actual bias by Judge Adrian. We reject defendant's contention that Jones's participation as a potentially adverse witness in Judge Adrian's JIB case, which ran contemporaneously to defendant's trial, essentially created the equivalent of a *per se* conflict of interest. Defendant is alleging that Judge Adrian somehow had an interest in currying favor with Jones by making erroneous evidentiary rulings benefitting the State in the hope that Jones would testify more favorably in his JIB case. We deem this allegation to be totally without merit.

¶ 294 Accordingly, we conclude that Judge Adrian's presiding over defendant's case with Jones as the prosecutor did not violate due process and was not structural error.

¶ 295 C. The State's Closing Arguments

¶ 296 Defendant argues that the trial court erred by denying his motion for a new trial based on his allegations of prosecutorial misconduct. Specifically, defendant argues that the prosecutor made prejudicial comments and erroneous statements in closing arguments, which included "[i]nforming the jury that the file had been sealed prior to trial when in fact there was no evidence presented to this jury of such a fact."

¶ 297 Defendant acknowledges that he forfeited appellate review of this issue by failing to object at trial (see *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988)), but he argues that this court should review his claim as second-prong plain error.

¶ 298 1. *The Applicable Law*

¶ 299 Because a defendant cannot obtain relief on an unpreserved error under the plain error doctrine if he would not have been entitled to relief on the same error if preserved, the ordinary first step in a plain error analysis is to determine whether there was a clear and obvious error at all. *People v. Williams*, 2022 IL 126918, ¶ 49, 210 N.E.3d 1207.

¶ 300 Here, that requires us to examine the issue under the standard for evaluating prosecutorial closing arguments.

¶ 301 In *People v. Jackson*, 2020 IL 124112, ¶ 78, 162 N.E.3d 223, the Illinois Supreme Court addressed the defendant's contention that the prosecutor's closing argument was improper because the prosecutor mischaracterized two pieces of evidence. Rejecting those contentions, the supreme court wrote the following:

> "Generally, prosecutors have wide latitude in the content of their closing arguments. [Citation.] They may comment on the evidence and on any fair and reasonable inference the evidence may yield, even if the suggested inference reflects negatively on the defendant. A reviewing court will consider the closing argument as a whole, rather than focusing on selected phrases or remarks. [Citation.]
>
> The standard of review applied to a prosecutor's closing argument is similar to the standard used in deciding whether a prosecutor committed plain error. [Citations.] A reviewing court will find reversible error only if the defendant demonstrates that the remarks were improper and that they were so prejudicial that real justice was denied or the verdict resulted from the error." *Id.* ¶¶ 82-83.

¶ 302 The Illinois Supreme Court has long held that a "prosecutor may also respond to comments by defense counsel which clearly invite a response." *People v. Hudson*, 157 Ill. 2d 401, 441, 626 N.E.2d 161, 178 (1993); see *People v. Glasper*, 234 Ill. 2d 173, 204, 917 N.E.2d 401, 420 (2009) ("Statements will not be held improper if they were provoked or invited by the defense counsel's argument."). In addition, a "trial court can cure erroneous statements made during arguments by giving proper jury instructions on the law ***, telling the jury arguments are not evidence and should be disregarded if not supported by the evidence, or by sustaining an objection and instructing the jury to disregard the improper statement." *People v. Kallal*, 2019 IL App (4th) 180099, ¶ 35, 129 N.E.3d 621.

¶ 303 2. *This Case*

¶ 304 a. Clear and Obvious Error

¶ 305 During her closing argument, defense counsel argued to the jury that the State could not tell the jurors when the Internet searches for topics dealing with gunshot residue, silencers, and forcing a door with a crowbar took place. She specifically noted that the Internet searches could have taken place after Becky died, arguing as follows: "If these searches took place after Becky's death, then the searches should indicate that it's nothing more than [defendant] looking into the investigation like half of the town did, and following the investigation as the news allowed us to follow the evidence." She continued, "[T]he judge is going to tell you that

you can't guess, that you can't speculate, and if you have to guess, or if you have to speculate, I submit to all of you that that is not proof beyond a reasonable doubt."

¶ 306 During the State's rebuttal, the prosecutor made the following statements, which defendant now argues were improper:

> "The last point I will make is this, and it goes to the searches on his cell phone. The defense says maybe the searches were done after Becky was found murdered. One of the things about this trial that's been complained about is how tight-lipped we've been. Information hasn't been released to the public. If [defendant] was searching for this information after Becky was murdered, how did he know that a crowbar was used? He just got lucky and guessed? How did he know to even look about gunshot powder residue? He just got lucky and guessed? Nobody knew that a crowbar was used. That wasn't released to the public. Nobody knew that a window was used. That wasn't released to the public. Nobody knew that the neighbors didn't hear shots, that an improvised silencer might have been used. That wasn't released to the public. None of those things were released to the public, but they all appeared on his phone."

¶ 307 Defendant suggests that these statements undermined the fairness of his trial because they "were completely unsupported and were used to challenge a defense theory that was a valid possible interpretation of the evidence that was admitted." However, defendant's argument fails because it was defense counsel who first argued to the jury matters not in evidence, and the State was merely responding thereto.

¶ 308 Defense counsel arguably invited the State's response when she argued, "If these searches took place after Becky's death, then the searches should indicate that it's nothing more than [defendant] looking into the investigation like half of the town did, and *following the investigation as the news allowed us to follow the evidence*." (Empasis added.) However, neither party presented any evidence of what information was released to the public during the investigation. In particular, the record contains no evidence that the news reports regarding this murder mentioned anything about (1) a crowbar, (2) gunshot powder residue, (3) a broken window used for entry, (4) an improvised silencer, or (5) the neighbors not hearing shots. Yet, defendant's closing argument strongly implied that these subjects were mentioned in local news reports. Indeed, absent that implication, the whole point of defendant's closing argument about the timing of defendant's Internet searches would make no sense. See *People v. Gorosteata*, 374 Ill. App. 3d 203, 221, 870 N.E.2d 936, 952 (2007) ("The invited response doctrine allows a party who is provoked by his opponent's improper argument to right the scale by fighting fire with fire.").

¶ 309 Defendant attempts to justify this statement by contending that he was merely offering "conditional interpretations of the evidence that *was* presented at trial." (Emphasis in original.) But—again—no evidence at all on this matter was presented at trial.

¶ 310 Nonetheless, the State's comments go farther than necessary to rebut defendant's argument. See *People v. James*, 2017 IL App (1st) 143036, ¶ 55, 82 N.E.3d 548 ("Of course, improper comments do not become proper simply because they respond to the arguments of an opponent.").

¶ 311 Instead of directly refuting defendant's improper suggestion that the jury should consider matters not in evidence, the State also argued matters not in evidence, and (as opposed to defense counsel) did so directly and not merely by implication. Nonetheless, given the full context of the oral arguments, we view the improprieties in the State's rebuttal argument as

harmless error, at worst. *Jackson*, 2020 IL 124112, ¶ 83 ("A reviewing court will find reversible error only if the defendant demonstrates that the remarks were improper and that they were so prejudicial that real justice was denied or the verdict resulted from the error."). In so concluding, we note that the evidence of defendant's guilt was overwhelming, as we discussed previously (*supra* ¶¶ 235-72).

¶ 312 Although the State did not introduce any evidence establishing when most of the Internet searches occurred, the inference that they occurred in preparation for Becky's murder is strong. Notably, defendant's Internet search history included not only searches relevant to the murder as it happened—for example, cleaning gunshot residue and local law enforcement response times—but other searches that appeared to be part of defendant's plan to commit the murder, such as searches about identifying cartridge cases with a particular shotgun, picking locked doors, entry through a window, and forcing a door with a crowbar.

¶ 313 b. Second-Prong Plain Error

¶ 314 Under the plain error doctrine, a reviewing court may grant relief for unpreserved errors when (1) the evidence was closely balanced such that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) the error was so serious that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence—first-prong and second-prong plain error, respectively. *Belknap*, 2014 IL 117094, ¶ 48.

¶ 315 Here, defendant argues that the State's comments during closing argument constituted second-prong plain error. However, as the supreme court has noted, "comments in prosecutorial closing arguments will rarely constitute second-prong plain error because the vast majority of such comments generally do not undermine basic protections afforded to criminal defendants." *Williams*, 2022 IL 126918, ¶ 56. In this case, the prosecutor's rebuttal argument does not come remotely close to constituting second-prong plain error.

¶ 316 III. CONCLUSION

¶ 317 For the reasons stated, we affirm defendant's conviction and sentence.

¶ 318 Affirmed.