No. 125945

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- CROSETTI BRAND, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-17-1728. There on appeal from the Circuit Court of Cook County, Illinois , No. 15 CR 20441. Honorable Stanley J. Sacks, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

JAMES E. CHADD
State Appellate Defender

DOUGLAS R. HOFF
Deputy Defender

JOSEPH MICHAEL BENAK
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

E-FILED
5/27/2021 1:01 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

SUBMITTED - 13487703 - Marquita Harrison - 5/27/2021 1:01 PM

ARGUMENT

I. The State failed to authenticate the Facebook messages in question. The State was required to show that Brand controlled the Facebook account from which the messages were allegedly sent *and* that Brand actually authored the messages.

The parties agree that Shannon's testimony and the screenshot of the November 21 message are the only pieces of evidence with any bearing on the question of whether Brand authored the messages in question. The sole question is whether this evidence was sufficient to authenticate the messages in question. The State contends that it was, but it fails to point to a single case — from Illinois or any other jurisdiction — in which a social media communication was found to be authenticated based on such a meager showing. Instead, the State devotes the bulk of its argument to asserting that the proponent of a piece of evidence need only provide the faintest showing that the evidence is authenticated. This Court should reject the State's position, as it would allow for highly prejudicial evidence to be placed before the trier of fact without adequate assurance that the evidence is what its proponent claims it to be. *See* IRE 104(a) ("Preliminary questions concerning . . . the admissibility of evidence *shall be determined by the court"*)(emphasis added); *see also State v. Allcock*, 237 A. 3d 648, ¶ 26 (Vt. 2020) (The weight to be given the State's evidence as the authenticity of the message is ultimately a question for the jury, *but the court must play a gatekeeping role*) (emphasis added). Before a social media communication is admitted at trial, the proponent must provide a sufficient basis for concluding that the purported sender actually authored the communication. Here, the State failed to provide a sufficient basis that Brand authored the messages at issue. Accordingly, this Court should remand for a new trial.

<u>Proper Standard for Authentication</u>

The State asserts that a proponent need only establish a "rational basis" for concluding that the evidence in question is what the proponent says it is. (St.

SUBMITTED - 13487703 - Marquita Harrison - 5/27/2021 1:01 PM

Br. 14). To support its position, the State cites to the appellate court's decisions in *People v. Ziemba*, 2018 IL App (2d) 170048, ¶ 51 and *People v. Downin*, 357 Ill. App. 3d 193, 203 (3d Dist. 2005), which in turn derived the "rational basis" language from the appellate court's 1979 decision in *People v. Munoz*, 70 Ill. 2d App. 3d 76, 88 (1st Dist. 1979), (*citing U.S. v. Natale,* 526 F. 2d 1160 (2d Cir. 1975)). However, this Court has not adopted the rational basis standard for authentication and such a standard is inconsistent with the federal courts' more recent approach to the issue. In *Browne*, for example, the Third Circuit Court of Appeals held that the proponent of a piece of evidence must show that a reasonable juror could find by a *preponderance of the evidence* that the evidence is what the proponent claims it to be. *U.S. v. Browne*, 834 F. 3d 403, 409 (3d Cir. 2016); (*citing Huddleston v. U.S.*, 485 U.S. 681, 690 (1988)); *see also* Gino L. DiVito, The Illinois Rules of Evidence: A Color-Coded Guide, Article I and IX, at 37 and 280 (IRE 104(b) and 901(a) are substantively identical to their federal counterparts); *People v. Neal*, 2020 IL App (4th) 170869 (noting that the "Illinois Rules of Evidence . . . like our sister states in their rules of evidence, track the Federal Rules of Evidence very closely"); *State v. Sample*, 228 A. 3d 171, 194-195 (Md. 2020) (adopting the preponderance of the evidence standard). This Court should follow the guidance of the federal courts and adopt the preponderance of the evidence standard. That being said, the State failed to authenticate the messages under either standard.

The Two-Pronged Approach to Authenticating Social Media

The State accuses Brand of asking this Court to apply a "more stringent authentication analysis" — one requiring the proponent to "wholly disprove any theory of fabrication or tampering and affirmatively prove authorship — to social media communications. (St. Br. 15). As set forth in his opening brief, Brand is not asking this Court to do any such thing. His position is simply that, consistent with Illinois Rule of Evidence 901, courts must take into account the unique concerns associated with social media communications when evaluating whether a social

SUBMITTED - 13487703 - Marquita Harrison - 5/27/2021 1:01 PM

media communication has been authenticated. (Def. Br. 12). Addressing those concerns necessarily requires an evaluation of the evidence that the purported sender controlled the account from the which the message was sent and the evidence establishing the purported sender's authorship of the messages.

The two-pronged approach proposed by Brand is not intended to function in a "rigid" manner. Rather, it is meant to illustrate why evidence that a social media communication originated from a social media account belonging to a defendant is, without evidence that the defendant actually authored the message, generally insufficient to authenticate the message. This is not to say that in all cases the State must establish both control of the account and actual authorship. For example, if the proponent can establish that the purported sender — and *only* the purported sender — had access to the account, such that no one else could have possibly authored the message, then it would likely be unnecessary to present evidence of actual authorship. Conversely, it may be unnecessary to establish that the purported sender of a message controlled the account from which the message was sent if the proponent can establish, through either the testimony of the purported sender or the testimony of a witness who saw the purported sender author the communication, that the purported sender, although not in exclusive control of the account, nevertheless authored the communication. However, given the ease with which a social media account can be accessed by unauthorized persons and the unlikelihood of someone actually seeing the purported author compose the communication, neither of these exceptions can be expected to arise with any degree of frequency.

The State's contention that social media communications do not pose any "novel" concerns — and thus can be evaluated the same as any other piece of evidence — is demonstrably false. (St. Br. 15); (Def. Br. 17-20). Based on the lack of handwriting and the ease with which one can "hack" into or access someone's account or even set up a completely fraudulent account, a social media

SUBMITTED - 13487703 - Marquita Harrison - 5/27/2021 1:01 PM

communication clearly poses different authentication concerns than, for example, a letter. *Allcock*, A. 3d at ¶ 18 ("It is not only theoretically possible for a person to set up a social media account purporting to belong to someone else; it is relatively common. By November 2019, Facebook had received more than five billion fake accounts in 2019, up from 3.3 billion in 2018")(*citing* B. Fung & A . Garcia, *Facebook Has Shut Down 5.4 Billion Fake Accounts this Year,* CNN Bus. (Nov. 13, 2019 3:57 pm), http://www.cnn.com/2019/11/13/tech/facebook-fake-accounts/index.html).

In his opening brief, Brand cited to *Curry* and *Harper* as examples of cases where Illinois courts have taken into account the unique authentication concerns posed by social media communications. *Curry*, 2020 IL App (2d) 1801148; *Harper*, 2017 IL App (4th) 150045; (Def. Br. 20-22). The State disputes this assessment, contending that *Curry* and *Harper* merely "applied established authentication principles." (St. Br. 18). But this only proves Brand's point. The *Curry* and *Harper* courts did indeed apply established authentication principles — and they concluded that those principles require the proponent of a social communication to do more than establish that the communication originated from an account belonging to the purported sender. *Curry*, 2020 IL App (2d) 1801148 at ¶ 7; *Harper*, 2017 IL App (4th) 150045 at ¶¶ 58, 62; (Def. Br. 20-22). To admit the content of the messages, the proponent must provide sufficient evidence to conclude that the purported sender actually authored the messages. Contrary to the State's assertion, Brand's proposal of a two-pronged approach to authenticating social media is no more "rigid" than that employed by the *Curry* and *Harper* courts.

The State Failed to Establish that Brand Controlled the Masetti Meech Account

The State contends that Shannon's uncorroborated testimony that Brand had used the Masetti Meech Facebook account to communicate with her in the past was sufficient to establish that Brand controlled the Masetti Meech account. (St. Br. 23). As support, the State cites to *Munoz* and *Downin*, but the facts of

SUBMITTED - 13487703 - Marquita Harrison - 5/27/2021 1:01 PM

these cases are inapposite as neither involved social media. *Munoz*, 70 Ill. App. 3d 76 (1st Dist. 1979); *Downin*, 357 Ill. App. 3d 193 (3d Dist. 2005). Moreover, in neither case was the testimony of a single witness found sufficient to authenticate the documents in question — a letter in *Munoz* and an email in *Downin* — as having been authored by the defendant.

In *Munoz*, the appellate court found that the trial court properly admitted a letter allegedly written by the defendant from his prison cell and addressed to the defendant's accomplice in a murder and robbery. 70 Ill. App. 3d at 88. The letter was signed "Compa," which the accomplice testified was the defendant's nickname. *Id.* at 84. According to the State's recitation of the facts of *Munoz*, this was the *only* evidence the appellate court relied on in finding the letter sufficiently authenticated. The State neglects to mention that, in addition to the accomplice, *two other witnesses* testified that the defendant was known by Compa. *Id.* Not only that, the letter was addressed from defendant's jail cell and included his specific cell number. *Id.* Thus, in addition to the anonymity of social media as contrasted to a hand written letter, the State's attempt to analogize the facts of this case to those in *Munoz* fails on its own terms. Here, not on was social media involved, no one other than Shannon testified that Brand was known to go by Masetti Meech, and there was no evidence comparable to the jail cell number in *Munoz* tying Brand to the Masetti Meech account.

Likewise, the State's reliance on *Downin* is misplaced. In *Downin,* the defendant was charged with criminal sexual abuse stemming from his alleged sexual relationship with the 15-year old complainant. 357 Ill. App. 3d at 194. At trial, the State introduced two emails: one from the complainant and a responsive email allegedly from the defendant in which he admitted to having a sexual relationship with her. *Id.* at 195-196. The complainant's email was sent at the suggestion of the detective investigating the case, as part of an attempt to elicit incriminating information from the defendant. *Id.* As with its analysis of *Munoz*,

SUBMITTED - 13487703 - Marquita Harrison - 5/27/2021 1:01 PM

the State implies that the complainant's testimony that she and the defendant had previously communicated via email was the only evidence that the *Downin* court relied on in finding the emails authenticated. However, the decision in *Downin* makes clear that the court also considered the fact that the email allegedly sent by the defendant was responsive to the email sent by the complainant and, according to the complainant, contained information "known exclusively to her and [the defendant]." *Id.* at 203.

In this case, the State did not introduce any physical proof of the November 8 message and introduced only a purported screenshot of the November 21 message. The screenshot contains no date nor sender information. Moreover, there is no preceding or subsequent messages included. In fact, there is no indication that the message is even a Facebook message and not a message from a different social media or messaging service. Therefore, unlike in *Downin*, where the defendant's email was responsive to the complainant's, there is no context in the case at bar from which to discern the identity of the author of the messages. Moreover, although the decision in *Downin* does not specify the exact nature of the information conveyed in the defendant's response email, it was apparently information that *only* the defendant would have known, which distinguishes it from the Facebook messages at issue here.

Unlike its reliance on *Munoz* and *Downin*, the State's reference to the *Kent* court's hypothetical regarding a flyer found on the street is exactly on point — although not for the reason the State posits. (St. Br. 16). This hypothetical was first posed by the Second Circuit Court of Appeals in *U.S. v. Vayner*, 769 F. 3d 125, 132 (2nd Cir. 2014). The defendant in *Vayner* was charged with unlawful transfer of a false identification document. *Id.* at 127. At trial, the government introduced what it claimed to be a printout of the defendant's profile on a website known as "VK"; the government claimed that VK was the Russian equivalent of Facebook. *Id.* at 128. The page was under an alternate spelling of the defendant's

SUBMITTED - 13487703 - Marquita Harrison - 5/27/2021 1:01 PM

name, included his photograph, identified his place of business as the internet café where the recipient of the false document alleged he had communicated with the defendant, and listed a Skype address that was nearly identical to the email address that the recipient of the documents claimed the defendant had used to communicate with him on numerous occasions. *Id.* at 128-129.

Despite this evidence, the *Vayner* court found that the government had failed to authenticate the VK page. The court analogized the defendant's alleged VK page to a flyer found on the street:

> Had the government sought to introduce, for instance, a flyer found on the street that contained [the defendant's] Skype address and was purportedly written or authorized by him, the district court surely would have required some evidence that the flyer did, in fact, emanate from [the defendant]. Otherwise, how could the statements in the flyer be attributed to him? *Id.* at 132.

According to the State, the point of the *Vayner* hypothetical is that "an individual's Facebook profile poses the very same reliability concerns that exist where the same information is contained on a flyer found on a street." (St. Br. 16). The State is absolutely correct, which is why it was incumbent upon the State to present some evidence, beyond Shannon's uncorroborated testimony, that Brand controlled the Masetti Meech account. As in *Vayner*, where the court found that "Rule 901 required that there be *some* basis beyond [the document recipient's] own testimony on which a reasonable juror could conclude that the page in question was not just any Internet page, but in fact [the defendant's] profile," Shannon's uncorroborated testimony was by itself insufficient to establish that Brand controlled the Masetti Meech account. *Id.* at 133.

<u>The State Failed to Establish that Brand Authored the Messages</u>

In a footnote, the State observes that the *Kent* factors are merely "examples" and "intended only as a guide." (St. Br. 29-30, footnote 2).The State is correct, and Brand has never contended otherwise. Nor could he, as the sixth *Kent* factor — "other circumstances peculiar to the case that would establish *prima facie*

SUBMITTED - 13487703 - Marquita Harrison - 5/27/2021 1:01 PM

authenticity" — makes explicit that the *Kent* factors are not intended to be exhaustive. *Kent*, 2017 IL App (2d) 140917, ¶ 118. Critically, however, the State never identifies any such circumstances. The State seems to rely primarily on the fourth method, contending that the Facebook messages contained information that only Brand would have known. (St. Br. 26-30).

The State asserts that the purported November 8 message was authenticated because it "contained the location of Shannon's vehicle, which defendant was uniquely positioned to know." (St. Br. 25). As an initial matter, it is more accurate to say that the November 8 message *allegedly* told Shannon where she could find her car, since no physical proof of the message was ever introduced into evidence and there is therefore no way of knowing its exact contents. Regardless, as set forth in Brand's opening brief, the fact that the message allegedly informed Shannon where she could find her car was not a permissible basis for finding the message authenticated. (Def. Br. 27-28). The State's position is tautological, as it treats it as a given that Brand was responsible for the theft of Shannon's car. Following the State's logic would open the door to the admission of almost any type of communication. For example, under the State's approach, the letter in *Munoz* would have been admissible based not on the fact it was sent from the defendant's jail cell or the testimony of the three witnesses who identified the defendant as using the name Compa but rather solely because it contained references to the charged crime. The *Kent* court rejected this type of argument as "circular," and the State offers no reason for this Court to depart from that analysis. *Kent*, 2017 IL App (2d) 140917 at ¶ 112.

For the same reason, this Court should reject the State's contention that the purported November 21 message was sufficiently authenticated because it referenced "defendant's violent entry in Shannon's home." (St. Br. 29). Again, this position is circular, as it treats as a given the very fact the November 21 message was introduced to prove: that Brand committed a violent entry into Shannon's

SUBMITTED - 13487703 - Marquita Harrison - 5/27/2021 1:01 PM

home. Critically, 18 days elapsed between the alleged incident at Shannon's apartment and when the November 21 message was allegedly sent. During this time, a third party who was either sympathetic to Shannon or had a grudge against Brand could have sent the November 21 message to make Brand criminally culpable. Morever, unlike in *Curry*, where the State presented evidence that the messages from the defendant ceased as soon as his cell phone was taken away from him, there was no evidence in this case that Shannon stopped receiving messages from the Masetti Meech account following Brand's arrest on November 24. *Curry,* 2020 IL App (2nd) at ¶ 20. In fact, as discussed, the screen shot of the November 21 message was the only message presented at trial. Thus, in addition to the lack of identifying information contained in the screenshot of the message, the lack of any other messages means that there is no context from which the identity of the sender can be discerned.

The State maintains that the Brand's failure to present evidence that other people knew about their volatile relationship — and therefore could have sent the messages — distinguishes this case from *Kent*. (St. Br. 29). Specifically, the State notes that the defendant in *Kent* presented evidence that the shooting he was charged with committing had attracted attention from the neighborhood, giving rise to the possibility that someone had set up a Facebook account with the defendant's name and picture and posted the status "it's my way or the highway . . . leave em dead in the driveway," as part of an attempt to frame the defendant. *Kent*, 2017 IL App (2d) 140917, ¶ 112-113. This amounts to improper burden shifting. Brand was not required to show that other people knew about his and Shannon's relationship or the information contained in messages. As the proponent of the evidence, it was incumbent on the State to present evidence regarding authentication.

The State's other attempts to distinguish *Kent* are similarly unavailing. The State did even less to authenticate the messages at issue in this case than

SUBMITTED - 13487703 - Marquita Harrison - 5/27/2021 1:01 PM

it did with the Facebook post at issue in *Kent*. The Facebook profile in *Kent* included a picture of the defendant and his real first name as well as his nickname. 2017 IL App (2d) 140917 at ¶ 6. In this case, all we have is Shannon's claim that Brand went by Masetti Meech and a single screenshot, with no identifying information, of a message allegedly sent by Masetti Meech. (St. Ex. 6). The State failed to present any evidence whatsoever regarding the Masetti Meech account. Not only does the screenshot of the purported November 21 message not include a photograph of the profile from which the message was sent, it does not even show that the undated message was, in fact, sent from a Facebook, let alone from an account under the name of the Masetti Meech. Moreover, the purported "addresses" included in the message are far from specific. They are not full street addresses but rather two digit combinations that allegedly correspond with the street numbers of Shannon's work and the residences of her relatives. Anyone could have found out this information through social media or an internet search. Brand was certainly not one of a small group of people privy to this information.

Tellingly, the State does not claim that *Kent* was wrongly decided; its challenge to Brand's reliance on *Kent* is limited to arguing that *Kent* is factually distinguishable. (St. Br. 27-30). As a result, the State has, in effect, conceded that the reasoning in *Kent* is sound. Accordingly, this Court should follow the reasoning in *Kent* and find that the State below failed to authenticate the Facebook messages at issue as having been authored by Brand.

The State Failed to Authenticate the Messages

Because the State failed to establish that Brand sent the purported Facebook messages at issue, or even that he controlled the account from which the messages were sent, the State failed to authenticate either the November 8 or the November 21 message. This conclusion has ample support in Illinois case law, which the State fails to distinguish, as well as case law from other jurisdictions, which the State almost completely ignores. (Def. Br. 17-20). Regarding the cases from other

SUBMITTED - 13487703 - Marquita Harrison - 5/27/2021 1:01 PM

jurisdictions cited in *Brand's* opening brief, the State maintains only that "none required a proponent of social media messages to definitely prove a purported author's control of the associated account or actual authorship." (St. Br. 20). As discussed, Brand is not asking this Court to hold that the State must definitely establish the provenance of a given of a social media communication. Rather, Brand has cited these cases to illustrate how, if the messages at issue here were indeed authenticate, it would have been relatively easy for the State to authenticated them. (Def. Br. 30-32) (setting forth methods by which the State could potentially have authenticated the messages); *see Allcock*, 237 A. 3d at ¶16 ("Assuming the messages at issue were authentic, it would have been very easy for the State to authenticate them through a number of strategies, but it failed to do so here"). Authenticating the messages required more than just Shannon's uncorroborated testimony and the contents of the messages itself, and the State failed to meet this burden. Accordingly, this Court should find that the messages were not authenticated and reverse Brand's convictions for possession of a stolen motor vehicle and home invasion and remand for a new trial.

The Erroneous Admission of the Messages was Not Harmless Error

Despite acknowledging that defense counsel objected to the admissibility of the Facebook messages both at trial and in a post-trial motion, the State nevertheless asserts that this issue is forfeited because Brand raised only "general objections" regarding the November 8 message and "did not specify the particular ground upon which he based his general foundation objection" to the November 21 message. (St. Br. 10-11). Contrary to the State's contention, Brand preserved this error. In *Mohr*, this Court held that the forfeiture rule "does not state that a defendant must object to the instruction on identical grounds — only that the defendant must object during and after trial." 228 Ill. 2d 53, 65 (2008). The purpose of the forfeiture rule is to ensure that the trial court "had an opportunity to review the same essential claim that was later raised on appeal." *People v. Heider*, 231

SUBMITTED - 13487703 - Marquita Harrison - 5/27/2021 1:01 PM

Ill. 2d 1, 18 (2008). The State cites to *Thomas* and *Casillas* in support of its position, but both of those decisions predate *Mohr* and *Heider*. *Thomas*, 178 Ill. 2d 215 (1997); *Casillas*, 195 Ill. 2d 461 (2000). By raising a general objection to the November 8 message and a foundational objection to November 21 messages and then renewing the challenge to the admissibility of both the November 8 and November 21 message in the motion for a new trial, defense counsel provided the trial court with an opportunity to review the same claim that Brand is now raising on appeal. (C. 103; R. 129-131, 134). This is all that was required under *Mohr* and *Heider*.

Notably, the appellate court appropriately rejected the State's argument on direct appeal:

> This record indicates to us that the trial court was made aware of defendant's claim that the November 8 and November 21 messages from Masetti Meech were not properly authenticated because there was insufficient evidence that they actually came from him but that the court rejected that claim on the basis of Ms. Shannon's testimony that defendant previously had used the name Masetti Meech when messaging her on Facebook. Where, as here, the trial court clearly had the opportunity to review the same essential claim that is later raised on appeal, *there is no forfeiture. People v. Brand,* 2020 IL App (1st) 171728, ¶ 27 (emphasis added) (*citing People v. Heider*, 231 Ill. 2d 1, 18 (2008)).

The appellate court's reasoning is sound and consistent with this Court's decisions in *Mohr* and *Heider*. This Court should therefore find that this error is fully preserved.

In claiming that the admission of the Facebook messages was not harmless error, the State does little more than recount Shannon's trial testimony. (St. Br. 30-31). Of note, however, is the State's contention that, as part of its harmless error analysis, this Court should consider the fact that Shannon's car keys were allegedly recovered from Brand following his arrest. (St. Br. 37). As the appellate court correctly found, the State failed to establish a sufficient chain of custody showing that the car keys were recovered from Brand following his arrest. *Brand*, 2020 IL App (1st) 171728 at ¶ 43. Where the State failed to establish that Brand possessed Shannon's keys, this Court should decline to consider this aspect of

SUBMITTED - 13487703 - Marquita Harrison - 5/27/2021 1:01 PM

the State's argument.

Moreover, this Court should reject the State's assertion that, in light of Shannon's testimony, "The Facebook messages thus added little to the robust evidence of defendant's guilt." (St. Br. 31). The trial court *specifically* cited to the November 8 message in finding Brand guilty of PSMV, and the State used the Facebook messages throughout its closing argument as admissions of guilt on Brand's part. (R. 225, 229, 232). Given the inconsistencies in Shannon's testimony, the messages were a critical factor in the trial court's decision to find Brand guilty of the charged offenses, and thus the error was not harmless. (Def. Br. 32-36).

Even if this Court determines that this error was not preserved, it should nevertheless review it as first-prong plain error, as the evidence at trial was closely balanced such that the admission of the Facebook messages threatened to "tip the scales of justice" against Brand. Ill. S. Ct. R. 615; *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Here, the critical issue at trial was credibility, and the State used the purported messages to bolster Shannon's testimony and compensate for deficiencies in its weak case. *See People v. Sebby*, 2017 IL 119445, ¶ 63 (evidence is closely balanced when case turns on a "contest of credibility"). The State contends that Brand cannot show plain error because no error occurred; it makes no argument regarding the closeness of the evidence. (St. Br. 12-13). Thus, for the same reasons that the admission of the Facebook messages was not harmless error, this Court should find that the evidence was closely balanced. (Def. Br. 33-36).

In sum, the State failed to provide sufficient authentication to permit the introduction of the purported messages. This error is fully preserved, and the admission of the messages was not harmless. Alternatively, this Court may review this issue for plain error, as the evidence was closely balanced. In either case, this Court should reverse Brand's convictions and remand for a new trial.

SUBMITTED - 13487703 - Marquita Harrison - 5/27/2021 1:01 PM

II. The State Failed to show that Brand took Shannon's car with the intention of permanently depriving her of its use.

The State does not dispute that, where it is alleged that the defendant was personally responsible for the taking of the vehicle in question, a conviction for possession of a stolen motor vehicle ("PSMV") cannot be sustained absent proof that the defendant took the car with the intention of permanently depriving the owner of its use. However, the State nevertheless asserts that this principle does not apply to possession of a converted motor vehicle. According to the State, by alleging that Brand took Shannon's car knowing it to have been stolen or converted, the State relieved itself of the burden of showing an intent to permanently deprive. (St. Br. 33-40). This Court should reject this argument and reverse Brand's conviction for PSMV.

The State was required to prove that Brand took Shannon's car with the intention of permanently depriving her of its use

Initially, it must be recognized that the State's argument regarding conversion is forfeited. As discussed in Brand's opening brief the State never alleged at trial that Brand had converted Shannon's car. The State never even uttered the word conversion or convert. The State's theory of prosecution at trial was that Brand had stolen Shannon's car, and the State cannot now excuse it's failure to prove an intent to permanently deprive by advancing a legal theory it did not argue below. *See People v. Adams,* 131 Ill. 2d 387, 395 (1989) (State's argument that the police's stop of defendant was justified as a *Terry* stop forfeited where the State advanced entirely different theory at trial: "The State may not now, almost as an afterthought, argue that the defendant was stopped under a totally different theory than argued in both the trial and appellate courts"). *People v. Centeno,* 333 Ill. App. 3d 604, 618 (2002)(where the court refused to consider the State's argument on appeal since it was directly at odds with its position taken at the hearing on defendant's motion to quash arrest).

In addition to being forfeited, the State's assertion that it was not required

SUBMITTED - 13487703 - Marquita Harrison - 5/27/2021 1:01 PM

to show an intent to permanently deprive because Brand was charged with possession of a converted vehicle is, as detailed in Brand's opening brief, logically untenable. (Def. Br. 42-43). The State makes no effort to explain why it would ever bother charging a defendant with possession of a stolen motor vehicle when, according to the State's position, it is much easier to secure a conviction for possession of a converted motor vehicle. Nor does the State explain why possession of a converted vehicle would carry the same penalty as possession of a stolen vehicle if it were truly the case that the latter involves the more culpable mental state of an intent to permanently deprive. (Def. Br. 42-43).

By asserting that conversion of a motor vehicle does not require an intent to permanently deprive but rather is satisfied whenever a defendant interferes with the rightful owner's possessory interest in the vehicle, the State is essentially equating possession of a converted vehicle, a Class 2 felony, with criminal trespass to a vehicle, a Class A misdemeanor. 720 ILCS 5/21-2(a) ("A person commits criminal trespass to vehicles when he or she knowingly and without authority enters any part of or operates any vehicle [.]"); 720 ILCS 5/21-2(b) (criminal trespass to a vehicle is a Class A misdemeanor); 625 ILCS 5/4-103(b) (PSMV is a Class 2 felony). For this reason, the State's contention that the PSMV statute allows the State to secure convictions for PSMV under two "distinct legal theories" — *i.e.* by showing that the vehicle was converted *or* showing that it was stolen — is without merit. (St. Br. 33). The theories proposed by the State are not, in fact, distinct. According to the State, where a defendant is alleged to have personally taken the vehicle in question, a conviction for possession of a stolen motor vehicle requires all of the same proof necessary to secure a conviction for possession of a converted vehicle *plus* the additional requirement of a showing of an intent to permanently deprive. Under the State's interpretation, whenever a defendant is found to have stolen a vehicle, he necessarily must have also been found to have converted it. Clearly, PSMV cannot rest on two legal theories that permit one offense to be subsumed

SUBMITTED - 13487703 - Marquita Harrison - 5/27/2021 1:01 PM

by the other.

The State's reliance on *People v. Perkins*, 2020 IL App (2d) 170963, ¶ 68 in support of the "distinct legal theories" concept is misplaced as it neglects to mention that *Perkins* itself derived this illogical concept from the appellate court's decision in *Brand*. The question thus remains whether the *Brand* court's conclusion was correct. To that end, Brand's opening brief cited to three cases — *Sergey*, *Podzoll*, and *Pollards* — in support of his contention that the distinction drawn by the *Brand* court between possession of a converted vehicle and possession of a stolen vehicle is unwarranted. *Sergey*, 137 Ill. App. 3d 971 (2d Dist. 1992); *Podzoll*, 230 Ill. App. 887 (2d Dist. 1992); *Pollards*, 367 Ill. App. 3d 17 (1st Dist. 2006); (Def. Br. 40-41). The State claims that *Sergey* and *Pozdoll* are distinguishable because both cases "assessed whether the defendants intended to permanently deprive the owners of their vehicles only in determining whether they knew the vehicles were stolen." (St. Br. 37). Even a cursory reading of *Sergey* and *Pozdoll* shows that the distinction drawn by the State is flawed.

Both *Sergey* and *Pozdoll* involved converted vehicles and the requirement of an intent to permanently deprive. In *Sergey*, the defendant was acquitted of theft after borrowing a car that he mistakenly believed belonged to his employer, but he was found guilty of PSMV "premised upon his unauthorized possession of a car which he knowingly *converted* to his own use." *Sergey*, 137 Ill. App. 3d at 974 (emphasis added). The defendant raised two arguments on appeal: 1) his interference with the owner's right to the car was insufficient to constitute a conversion; and 2) because he believed that the car belonged to his employer, who had given him permission to use the car in the past, he did not commit a knowing conversion. *Id.* The appellate court looked to the common law definition of conversion and determined that the defendant had not committed a conversion because "there was no proof of damage to the car and the owner did recover it. Also, *defendant had no intention to permanently deprive the owner* [.]" *Id.* at 975 (emphasis added).

SUBMITTED - 13487703 - Marquita Harrison - 5/27/2021 1:01 PM

Contrary to the State's assertion, the *Sergey* court never analyzed whether the defendant knew the vehicle was stolen. (St. Br. 35-37). The reason for this is simple: The defendant had already been acquitted of theft, meaning the trier of fact had already concluded that the defendant did not know the car was stolen. Thus, the only way his conviction for PSMV could be sustained if is he had committed a knowing conversion, and consequently this was the only question with which the appellate court was concerned. *Sergey* therefore stands for the proposition that the requirement of an intent to permanently deprive applies equally to stolen and converted vehicles. The *Brand* court erred in concluding otherwise.

Similarly, the question in *Pozdoll* was whether "defendant was proved guilty beyond a reasonable doubt of unlawful possession of a converted motor vehicle." *Pozdoll*, 230 Ill. App. 3d at 888. On appeal, the defendant contended that his actions did not constitute a conversion or, alternatively, that the State had failed to prove he knew a conversion had occurred. *Id.* at 889. In rejecting these arguments, the appellate court observed, "Intent to permanently deprive another of his property may be inferred from the lack of any evidence of an intent to return the property or to leave it in a place where the owner could safely recover it." *Id.* at 890. The court found that the defendant had manifested an intention to permanently deprive by giving the police four different stories as to how he came to be in possession of the car. *Id.* In the court's view, "[O]ne who intended property to its rightful owner would have no need to rationalize possession of the property in such a manner." *Id.* In other words, as in *Sergey*, the *Pozdoll* court looked to whether the defendant had shown an intent to permanently deprive when analyzing whether the State had proven the defendant guilty of possessing a converted vehicle.

The State's assertion that *Sergey* and *Pozdoll* were concerned with an intent to permanently deprive only as it related to whether the defendants knew the cars were stolen perfectly illustrates the absurdity of the State's position. Under the State's view, there would have been no need for the *Sergey* and *Pozdoll* courts

SUBMITTED - 13487703 - Marquita Harrison - 5/27/2021 1:01 PM

to consider whether the State had proven beyond a reasonable doubt that the defendants knew the cars were stolen. The *Sergey* and *Pozdoll* courts would have simply reviewed the defendants' convictions for evidence of conversion, which according to the State does not require the State to prove an intent to permanently deprive.

The State's contention that *Pollards* is distinguishable is groundless. (St. Br. 38-39). In *Pollards*, the appellate court reversed the defendant's convictions for PSMV. The court found that, because the State had alleged that the defendant was personally responsible for taking the complainant's vehicle, the court erred by not instructing the jury that the State was required to prove that the defendant took the complainant's car with an intent to permanently deprive. The State claims that *Pollards* is distinguishable because, unlike in Brand's case, the prosecutor's approach in *Pollards* "placed the defendant's intent to permanently deprive at issue by charging him with possession of a stolen motor vehicle and claiming during argument that he stole the vehicle[.]" *Pollards*, 367 Ill. App. 3d 17; (St. Br. 35). As an initial matter, the State seems to suggest that the charging instrument in *Pollards* was limited to alleging possession of a stolen motor vehicle, rather than stolen or converted motor vehicle. (St. Br. 39). However, it is unclear from the decision in *Pollards* whether this is accurate. Either way, the *Pollards* court never stated that its analysis would have been different had the defendant also been charged with possession of a converted vehicle. Critically, the IPIs referenced in *Pollards* do not draw such a distinction. *Pollards*, 367 Ill. App. 3d at 19-21. As set forth in Brand's opening brief, the Committee Note to Illinois Pattern Jury Instruction 23.36 directs that, "when a defendant is charged with possession of a *stolen or converted* vehicle and it is alleged, or the evidence shows, that [defendant] participated in the actual taking of the vehicle, it may be necessary to include the phrase 'intent to permanently deprive' in the definition and issues instructions." (Def. Br. 41).

SUBMITTED - 13487703 - Marquita Harrison - 5/27/2021 1:01 PM

Lastly, the State cites to this Court's decision in *In re Karavidas*, in which this Court discussed the common law definition of conversion. 2013 IL 115767; (St. Br. 34). However, the State omits from this discussion the proviso that "a conversion is any unauthorized act, which deprives a man of his property *permanently or for an indefinite time*." *Id.* at ¶ 60 (emphasis added). This supports the position that conversion requires more than a mere temporary interference with the property of another. Rather, it must be an interference so severe as to be tantamount to a theft. *See Sergey*, 137 Ill. App. 3d at 975 ("The measure of damages for conversion is the full value of the chattel, so the tort of conversion is usually confined to those major interferences with a chattel or the owner's rights therein which are so egregious as to merit what is, in essence, a forced judicial sale of the property").

In sum, it is clear — based on Illinois case law and simple commonsense — that when a defendant is alleged to have personally taken a complainant's car, a conviction for possession of a converted vehicle cannot be sustained absent proof beyond a reasonable doubt that the defendant took the car with the intention to permanently deprive the owner of its use. The State's position that it is only required to show an intent to permanently deprive when the defendant is charged with possession of a stolen, rather than a stolen or converted, vehicle is baseless. It simply cannot be the case that possession of a converted motor vehicle requires a lower burden of proof than possession of a stolen motor vehicle while carrying the same possible penalty. Accordingly, this Court should find that the State was required to show that Brand took Shannon's car with the intention of permanently depriving her of its use.

<u>The State failed to prove that Brand took Shannon's car with the intention of permanently depriving her of its use</u>

The State makes no argument regarding whether it proved beyond a reasonable doubt that Brand took Shannon's car with the intention of permanently

SUBMITTED - 13487703 - Marquita Harrison - 5/27/2021 1:01 PM

depriving her of its use. Consistent with its position that it was not required to show such an intent, the State asserts only that it proved that Brand wrongfully deprived Shannon of the use of her car. (St. Br. 40-41). As a result, the State has forfeited any claim that it proved beyond a reasonable doubt that Brand took Shannon's car with the intention of permanently depriving her of its use.

Moreover, as detailed in Brand's opening brief, the evidence presented at trial does not support a finding that Brand took Shannon's car with the intention of permanently depriving her of its use. (Def. Br. 44-45). According to the State's trial evidence, Brand only had Shannon's car for a few days, and he contacted her to tell her where she could find it. Accordingly, this Court should reverse Brand's conviction for PSMV.

CONCLUSION

For the foregoing reasons, Crosetti Brand, Defendant-Appellant, respectfully requests that this Court reverse his convictions for home invasion and possession of a stolen motor vehicle and remand for a new trial and/or reverse his conviction for possession of a stolen motor vehicle outright. Alternatively, this Court affirm the appellate court's ruling that this case be remanded for a *Krankel* hearing.

Respectfully submitted,

DOUGLAS R. HOFF
Deputy Defender

JOSEPH MICHAEL BENAK
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us
COUNSEL FOR DEFENDANT-APPELLANT

SUBMITTED - 13487703 - Marquita Harrison - 5/27/2021 1:01 PM

CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 20 pages.

/s/Joseph Michael Benak
JOSEPH MICHAEL BENAK
Assistant Appellate Defender

SUBMITTED - 13487703 - Marquita Harrison - 5/27/2021 1:01 PM

No. 125945

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- CROSETTI BRAND, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-17-1728. There on appeal from the Circuit Court of Cook County, Illinois , No. 15 CR 20441. Honorable Stanley J. Sacks, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, aagKatherineDoersch@gmail.com;

Ms. Kimberly M. Foxx, State's Attorney, Cook County State's Attorney Office, 300 Daley Center, Chicago, IL 60602, eserve.criminalappeals@cookcountyil.gov;

Mr. Crosetti Brand, Register No. M02369, Shawnee Correctional Center, 6665 State Route 146 East, Vienna, IL 62995

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On May 27, 2021, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

/s/Marquita S. Harrison
LEGAL SECRETARY
Office of the State Appellate Defender
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
Service via email is accepted at
1stdistrict.eserve@osad.state.il.us

SUBMITTED - 13487703 - Marquita Harrison - 5/27/2021 1:01 PM