2022 IL App (4th) 210716

NO. 4-21-0716

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 17, 2022
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MICHEAL D. CHATMAN, Defendant-Appellant.	))))))))	Appeal from the Circuit Court of Champaign County No. 20CF156 Honorable Randall B. Rosenbaum, Judge Presiding.

JUSTICE BRIDGES delivered the judgment of the court with opinion.
Presiding Justice Knecht and Justice Turner concurred in the judgment and opinion.

OPINION

¶ 1 Defendant Micheal Chatman appeals his conviction for felony murder (720 ILCS 5/9-1(a)(3) (West 2018)) in the shooting death of Ricky Green. On appeal defendant challenges the trial court's determination that Dominque ("Dee") Collins was an unavailable witness for the purpose of the forfeiture by wrongdoing exception to hearsay and the confrontation clause of the sixth amendment (U.S. Const., amend. VI). Particularly, defendant challenges whether the State made a good-faith reasonable effort to obtain Collins's presence at trial. The defendant also challenges the trial court's decisions not to exclude lead detective Jeremiah Christian from the courtroom during the State's case in chief and to permit him to sit at the prosecutor's table with counsel. For the following reasons, we affirm the judgment of the circuit court of Champaign County.

¶ 2 I. BACKGROUND

¶ 3 Green died in the early morning hours of March 23, 2018, as the result of two gunshot wounds: one to his pelvis, which perforated his right femoral artery, and one to his left shoulder, which perforated his subclavian artery and vein. On January 31, 2020, defendant was charged with four counts of first degree murder (720 ILCS 5/9-1(a)(1)-(3) (West 2018)). Count I alleged intent to do great bodily harm, count II alleged intent to kill, count III alleged knowing such acts created a strong probability of death or great bodily harm, and count IV alleged felony murder based on robbery.

¶ 4 A. Motion to Admit Collins's Statement

¶ 5 During the course of the investigation into Green's death, Christian made contact with Collins, who he believed might have information about the shooting. Collins was related to the Chatman family through marriage, and defendant referred to him as his cousin. On December 30, 2019, Christian interviewed Collins, and that interview was recorded on Christian's body camera and by a camera in a police interview room. Collins cooperated and told Christian that between around 7 a.m. and 9 a.m. on the morning after Green was shot, defendant was at his brother Devonte McCormick's apartment on Elm Street in Urbana. He was barefoot and looked like he had been running, and his feet looked like he had been in a cornfield. Collins asked what had happened, and defendant told him that he, Green, and Scrilla (Michael Simmons) were in the back seat of a car together in the trailer park near Market Street. Defendant and Simmons planned on taking Green's gun. Something happened that caused them to run from the car. Defendant snatched Green's gun and tried to run away. Green chased the defendant, who was afraid Green was going to "beat his a***." Defendant turned and fired twice at Green while he was running.

Collins stated that he had talked about the shooting with defendant on other occasions, and his story remained the same.

¶ 6 On October 15, 2020, the State filed a motion *in limine* to admit Collins's statements due to forfeiture by wrongdoing. Included with the motion were recordings of phone calls defendant made while he was in jail. The recordings showed defendant repeatedly attempting to determine who was working with the police. Defendant and his family narrowed in on Collins as providing a videotaped statement to the police. Although during defendant's numerous inmate conversations, often in times with incomprehensible argot, he is not heard giving specific orders to prevent Collins from testifying. Yet, after engaging in conversations with his father and McCormick, they both indicated that they would ensure Collins would not cooperate further with the police and not attend his court proceedings. Needless to say, those intimidating threats of violence made their way to Collins, causing him to leave the State.

¶ 7 Defendant's father told defendant he just needed to

> "get the word to the motherf*** street, is this motherf*** did this, and then motherf*** be able to take care of s*** on our end." He went on to say, "Just let me handle this s*** on this end. All I gotta find out, really for real is, who the main motherf*** they depending on to get on that motherf*** stand."

¶ 8 On February 16, 2020, Collins sent an officer a text message that read, "Everybody think I told on Mikey idk [(I don't know)] how they getting this information I've been getting threats from a lot of people." Collins then fled to Iowa. Christian and another detective went to Iowa to speak with Collins on March 12, 2020, and recorded their conversation. Collins told the detectives he had been receiving messages threatening his life and the lives of those close to him. He received these threats on his phone and through social media. There were Facebook posts from

defendant's aunt "Cookie" saying that Collins had given a recorded statement to police. There was also a post from an account named "Gtb Kilo," which Collins believed belonged to Simmons, in which Collins's picture was posted with the question, "Him?" to which Cookie responded, "Yep." Collins also received a phone call from his brother asking if he had been snitching and telling him that he had received word from defendant's father that he had been. Collins also knew defendant's father had gang affiliations and as an older member likely had the power to send people after him. As a result of these threats Collins fled to Iowa.

¶ 9 On October 9, 2020, Christian sent a text message to Collins's phone. He initially received no response, but then eventually was told he had the wrong number.

¶ 10 A hearing was held on the State's motion *in limine* on February 9, 2021. The court preliminarily found that defendant had caused Collins to be unavailable under the forfeiture by wrongdoing exception to the hearsay rule but reserved the issue of whether the State had made reasonable efforts to secure Collins's presence for the final pretrial hearing. Defendant's trial was initially to be held on May 10, 2021. A final pretrial hearing was held on May 6, 2021, in which Christian testified as to the efforts the State had made to procure Collins's presence, with the court ultimately finding that the State had made reasonable efforts to secure his presence. The trial was delayed until September 15, 2021. Another hearing was held on that date in which Christian again testified to the State's efforts to procure Collins's presence, and again the trial court found those efforts to be reasonable.

¶ 11 Christian testified on May 6, 2021, that, in an effort to locate Collins, a post was made on February 16, 2021, seeking assistance in locating Collins to I-Board, an intel-based software program which disseminates information to local agencies and officers. The posting was resubmitted on April 28 and May 5, 2021, to ensure the listing would remain visible. As of May

6, the posting had been viewed 119 times. Prior to the February 9, 2021, hearing, Christian and another detective traveled to Davenport, Iowa, to visit Collins. In attempting to relocate Collins he spoke with detectives in Davenport, asking if they had any contacts with Collins, and they indicated their most recent contact was from 2016. Within the last 30 days he had served defendant's mother with a subpoena and asked her if she had any contact with Collins, and she advised that she had not. Christian also listened to recent phone calls made by defendant from jail, in which he described how he and his attorney had been attempting to contact Collins using a text application called TextNow but were unsuccessful. The only other information Christian received was that Collins may have been in Indianapolis to attend a show but had no further details on which he could follow up.

¶ 12 On September 15, 2021, Christian testified that the I-Board posting had been viewed 250 times, but no authorities had located Collins. On August 21, 2021, he searched various databases to try and locate an address for Collins. He discovered an address at 101 East Green Street, Unit 32, in Champaign, which Collins had recently listed as his address. He went to the unit on August 24. No one answered the door, and no noise came from inside. That building was generally inhabited by university students and seemed to be undergoing maintenance. He also attempted to locate Collins at an address on Springfield Avenue which he had used from August 4, 2018, to November 30, 2018, but when he went there the house appeared to be vacant. He also tried to locate Collins at a home on Dale Drive where he had previously made contact with Collins's brother. When he went to that home, there were vehicles in the driveway, and he suspected people were home, but no one answered the door. On August 25, 2021, he once again traveled to Davenport to attempt to locate Collins. He went to the home where he had last spoken with Collins, but there were no vehicles and no one at home, and Christian had no reason to believe

Collins still lived there. He also tried to locate Collins at two addresses in Kendall County but received no answer at the door. On cross-examination, defense counsel asked if Christian had put out a notice on any multistate boards or the Illinois Law Enforcement Agencies Data System (LEADS). Christian testified that he was unaware of any multistate system for issuing a BOLO (be on the lookout) notice for subpoena service and that LEADS could only be used for people who had warrants and missing persons.

¶ 13 B. Motion to Permit Witness to Remain in Courtroom

¶ 14 On January 25, 2021, the State filed a motion *in limine* to permit Christian to remain in the courtroom during the trial. A hearing was held on the State's motion on February 9, 2021. The court granted the State's motion, noting that although it had no recollection of anyone asking for such an accommodation in the last 20 years, the caselaw supported allowing Christian to remain. The court further noted that defendant had not shown any particularized prejudice in allowing him to remain in the courtroom. On February 10, 2021, the State designated Christian as its representative under Illinois Rule of Evidence 615(2) (eff. Jan. 1, 2011).

¶ 15 C. Jury Trial

¶ 16 The matter proceeded to jury trial on September 15, 2021. We summarize the evidence adduced at trial.

¶ 17 On March 22, 2018, Calvin Wilson was dating defendant's mother, Demetria Chatman. That night defendant and his mother had been over to Wilson's home in the Shadowwood trailer park in Champaign. Defendant left in a gray Chevy Malibu with Simmons and Christian Dixon. Wilson and Demetria later got into an argument, and he asked her to leave. She initially refused, but Wilson went outside to flag down police officers who were responding to another call in the area. By the time the police finished the other call, Demetria had left. Wilson

gave a description of the vehicle defendant had left in, believing it might be helpful in their investigation of his domestic dispute with Demetria.

¶ 18 Defendant, Dixon, and Simmons met up with Green, and the four proceeded to ride around drinking and smoking. Eventually Dixon left the group, and the rest went to pick up Kotia Fairman from her job at a nearby hospital. Defendant had received a text message from Demetria asking him to come and pick her up. Defendant, Simmons, Green, and Fairman returned to Shadowwood trailer park shortly before midnight. When they arrived, they saw that there were police in the area, so they proceeded to park on Lemon Tree Drive near the entrance to the park. The park had two subdivisions which bordered each other, one to the north and one to the south. Lemon Tree Drive was in the southern subdivision.

¶ 19 Shortly after midnight, a police vehicle with Officers Isidro Garcia and Nathaniel Epling passed the Malibu, heading southwest on Lemon Tree Drive. Garcia, having received a description of the vehicle from Wilson, slowed as they passed the vehicle and shone his spotlight through the windows. He made a U-turn and got behind the Malibu. As he and Epling got out of the squad car, the brake lights went on as if the car was being put into gear. Epling turned on the squad lights and the Malibu drove off northeast on Lemon Tree Drive.

¶ 20 The officers did not pursue the Malibu, but instead maneuvered to try and head the vehicle off if it tried to leave the park. The officers reencountered the vehicle in the northeast section of the southern subdivision where Lemon Tree Drive becomes Apricot Drive. The Malibu was parked in the middle of the street with its front doors open. Fairman was captured in the squad car's camera shutting the front passenger door and walking around the back of the Malibu toward the driver door. Defendant, Green, and Simmons had fled the scene. As the officers exited their

squad car, Garcia heard two gunshots along with voices screaming or yelling coming from the northeast.

¶ 21 Teresa Parada Viante lived at 32 Juniper Drive, which is in the southwestern portion of Shadowwood's northern subdivision. Viante testified that shortly after midnight she heard enraged male voices coming from outside, followed by two gunshots. She then saw a man run past her window heading west on Juniper Drive. She could not see the man's face, only his legs. At approximately 12:11 a.m., Officer Justin Prosser was responding to a call of shots fired in the area near 32 Juniper Drive. When Prosser arrived at the area, he discovered Green lying on the south side of the street near 32 Juniper Drive. Officers rendered first aid until paramedics arrived. Green died at the hospital.

¶ 22 Police collected several items of evidence from the crime scene. On the floor of the Malibu's passenger side rear seat, police recovered an unloaded Dan Wesson .357 Magnum revolver. Near Green's body police found two spent .40 Smith & Wesson shell casings and a .40 Smith & Wesson live round in the area of Green's body. A deformed projectile was also located in the area under Green's body. These items were sent to the Illinois State Police Crime Laboratory for testing. The shell casings were compared against shell casings discovered at the scene of a previous incident that involved Green firing a gun into the air hitting some power lines. The shell casings were all determined to have been fired by the same weapon. The deformed projectile was found to have been a .40 Smith & Wesson bullet, which was fired from either a Glock, Bersa, Heckler, or Koch firearm. As there was no firearm to compare against, it could not be determined whether the projectile had been fired by the same gun as the shell casings. Neither the shell casings nor the projectile could have been fired by the .357 revolver. Two bullet fragments were recovered from Green's pelvis but were not tested.

¶ 23 A size 9½ black Lugz right boot was found in the yard between 28 and 30 Apricot Drive. The corresponding left boot was found near a van parked on the North side of Juniper Drive near Green's body. A size 9 brown Timberland left boot was found near where Green was shot at the end of the driveway of 32 Juniper Drive. The corresponding right boot was found under a car parked in front of 39 Sycamore Drive. The Timberland boots were sent for DNA testing, and a DNA profile consistent with defendant's profile was discovered on the left boot. The Lugz boots were later determined to belong to Green.

¶ 24 Officers recovered an ID belonging to Simmons in the driver's door of the Malibu. Defendant's iPhone was also discovered in the vehicle.

¶ 25 On March 23, 2018, around 6 p.m., police arrested Simmons. His cellphone was taken into evidence. Simmons's phone was examined, and police were able to recover a series of deleted text messages between defendant and Simmons's phones. Those messages were as follows:

> "DEFENDANT [March 22, 2018, 1:37:15 p.m. CST]: You got the 357?
>
> SIMMONS [1:41:44 p.m.]: Smh been telling u this
>
> DEFENDANT [1:43:25 p.m.]: All we need is a car and I'm hoping out
>
> DEFENDANT [1:46:15 p.m.]: F*** Ricky bro that's petty stains [(slang for theft)] we need bucks
>
> SIMMONS [1:47:20 p.m.]: Bro that pipe is a key factor that can lead to bands period n*** we need pipes period u can die with that cash on you but ain't no dying wit that glizzy period
>
> SIMMONS [2:36:38 p.m.]: Say less shorty
>
> SIMMONS [3:11:05 p.m.]: [unknown emoji]

DEFENDANT [3:11:10 p.m.]: If u not gone be around she dropping me off in Danville

SIMMONS [3:11:25 p.m.]: I am

DEFENDANT [3:12:01 p.m.]: Bet

DEFENDANT [3:19:27 p.m.]: [unknown emoji]

DEFENDANT [5:29:10 p.m.]: H*** yeah told u it's hop out time

DEFENDANT [5:29:14 p.m.]: [unknown emoji]

SIMMONS [8:51:17 p.m.]: He ready

SIMMONS, [8:57:02 p.m.]: I'm on my way

DEFENDANT [8:58:02 p.m.]: Cool

SIMMONS [10:03:02 p.m.]: Dude

SIMMONS [10:21:15 p.m.]: I am

SIMMONS [10:21:24 p.m.]: Ima say my bm [(baby mama)] ain't here yet

SIMMONS [10:32:43 p.m.]: I got the 7 on me

DEFENDANT [10:47:26 p.m.]: Be smooth I got this

DEFENDANT [10:47:33 p.m.]: That's why I'm not texting u

DEFENDANT [10:50:28 p.m.]: His s*** so nice stop texting me though he can see my phone

DEFENDANT [11:14:03 p.m.]: Bump that music roll up so he can not wanna go home ofn on Zach I got this

SIMMONS [March 23, 2018, 12:56:30 a.m.]: Clooney

SIMMONS [1:26:23 a.m.]: Yo."

Christian testified that the word "stains" is a street name for a robbery and that "pipes" and "glizzy" are street names for guns. He also testified that "bm" was likely short for baby mama. With the exception of the last two messages, each message was marked as read. The final two messages, "Clooney" and "Yo," were also discovered on defendant's phone, but the rest of the conversation was not.

¶ 26 Police discovered several Facebook accounts belonging to defendant including a "Guac Chatman" account. Subpoenaed records from this account included a conversation between Chatman and Green. That conversation showed defendant inviting Green to go out at around 8:52 p.m. on March 22, 2018. It also showed that defendant picked Green up at around 9:55 p.m.

¶ 27 Wilson testified that around 2 a.m. he heard a knock at his door, and a voice on the other side saying it was the defendant and he needed help. Wilson did not open the door or let him in.

¶ 28 Sometime in the early morning hours before 5 a.m., defendant knocked on the door of Alexandrinique Anderson (Alexandrinique) who lived at 1203 West Bradley Avenue in Champaign. Alexandrinique testified that he had no shoes or shirt on and his jeans were dirty. Defendant told Alexandrinique that he had come from Shadowwood, that he had gotten into an altercation with some Mexicans who tried to attack him, and that he was trying to defend himself and shot back at them but did not know if he had hit anyone. He asked to use her phone, and she let him. He then left.

¶ 29 Ferianan Anderson (Alexandrinique's sister) testified that she received a call from the defendant asking her to tell the police that she was with him during the night of Green's death. She refused.

¶ 30 Defendant was arrested in Kendall County on February 4, 2020.[1] While in jail, he met a man named Dennis Griham, who testified as follows. Griham had been arrested on January 29, 2020, in relation to driving under the influence (DUI) and was incarcerated in the Champaign County jail. During the first week of February, defendant was brought into his cellblock. Defendant had initially been placed on a different block but was transferred due to a fight. For the first couple of days, the two made casual conversation. Then around February 6 or 7, defendant opened up to him about why he was in jail.

¶ 31 Defendant told Griham that Simmons had called him to tell him that he had a "lick," which meant something had come up. Defendant and Simmons picked up Green from Lincoln Square Mall and drove around for a little while. They went and got a bottle of Hennessey, went to the gas station, took some pictures, got some soda, and drove around for a while more. This was corroborated by the Facebook messages sent between defendant and Green. They ended up in Shadowwood, where defendant's mom was staying with her friend. There was a female in the vehicle, but defendant did not tell Griham her name. By that point it was dark, and that was when the incident occurred. Defendant and Green began "tussling" over a Glock firearm, and defendant accidentally shot Green twice. At that point, Simmons took off running. Defendant had lost one of his boots in the struggle and took off running. He lost the other boot while running and hid from police under a trailer. Defendant told him the boots were Timberlands. Defendant had to take his shirt off to wrap his feet because they were getting cold. He left the trailer park the following morning and made his way to a friend's house in Garden Hills on either Williamsburg Drive or Holly Hill Drive. Defendant said that he had dismantled the gun and hid it but would not tell

[1] Prior to being charged and arrested in this matter he was in custody here for the possession of the .357 revolver and was released.

Griham where. Defendant said that if Griham got out, he would tell him where the gun was so he could get it for him.

¶ 32 Griham called Christian to tell him what he had learned in hopes that he might receive favorable treatment in his DUI case. Christian asked him if he would be willing to wear a wire, and he agreed, but that was called off. He was ultimately removed from the cell block after five other prisoners accused him of working with the police and threatened to fight him.

¶ 33 Christian was the last to testify in the State's case in chief. His testimony consisted of explaining some of the slang present in the text messages sent between Simmons and defendant. He explained that the neighborhood Alexandrinique lived in was commonly known as Garden Hills. He laid the foundation for a recording of an interview he had with defendant, which was then played.

¶ 34 Christian also testified about how, as part of his investigation, he spoke with Collins. He had gotten Collins's name from someone else and approached him. Collins was initially cooperative with the investigation, going so far as to wear a wire, though nothing came of it. Then Collins's level of cooperation changed. Christian testified about jail calls made by the defendant regarding Collins (the actual calls themselves were not played for the jury).

> "Q. In those jail calls, what, if anything, did you hear the defendant say related to Dee Collins?
>
> A. *** During several phone calls there was conversation between Micheal Chatman and his dad, Darren (phonetic) Green or Darion (phonetic) Green—I'm not sure of the pronunciation, I've never dealt with him specifically—and Devonte McCormick. Devonte McCormick is in fact Dominique Collins' brother, and there's conversation about Dee being a snitch.

Q. Can you describe the general tone of those conversations as it relates to the defendant's statements?

* * *

A. Yes. They were trying to determine his willingness to continued participation in the prosecution, if in fact it led to that. There was [*sic*] attempts to try and figure out where he was at. There was mention from his father that he just needs to figure out who the prosecution needs to come to court, he would take care of it. And ultimately it led to me not being able to find Dominique Collins.

Q. And you do not have to get into the substance of these, but were you aware of other threats that were made to Mr. Collins?

A. Yes."

¶ 35 After which the December 30, 2019, interview with Collins was then played for the jury.

¶ 36 Christian then laid the foundation for several other jail calls made by defendant that were played for the jury. These calls did not relate to the threats made to Collins but instead showed defendant brainstorming and rejecting several contradictory defenses from March 29, 2018, through March 19, 2021.

¶ 37 Christian also testified about how Griham approached him with information regarding the defendant. He testified about how several of the details Griham included were not publicized.

¶ 38 Defendant testified that the text messages between him and Simmons were not about robbing Green. He asked Simmons if he had the .357 revolver because defendant always got shot at when he was in Champaign. When he said, "F*** Ricky bro that's petty stains we need

bucks[,]" he was talking about a robbery of one of Green's friends that Green had proposed, explaining that the messages with Green were missing. Defendant explained that they had all gone to a party held by people they did not know well, and when Simmons messaged about having the "7" on him, he was nervous about the situation and let defendant know he had the .357 revolver on him. When defendant texted Simmons, "His s*** so nice stop texting me though he can see my phone[,]" he was talking about a man at the party who had nice jewelry. Finally, the message about playing music to make sure "he" would not want to go home was referencing Dixon, who had been driving them.

¶ 39 Defendant went on to testify that when they returned to Shadowwood there were a lot of police around. They pulled over because they had been drinking and had guns and drugs. When the police car pulled behind them, they told Fairman to drive off. Simmons and Green had initially placed their guns under the seats to try and hide them, but they all decided instead it would be a better plan to grab the guns and run. As they were leaving the car, he grabbed Green's gun, which was by his foot, and they all ran. He stopped when he got near Juniper Drive, and Green came up behind him. Green said he forgot his gun, and defendant told him he had grabbed it. Green demanded the gun, but defendant told him to wait until they had gotten away from the police. Green then became aggressive and grabbed his shoulder, demanding the gun. Green was bigger than him, and at that point, defendant feared that if he gave him the gun, Green would shoot him. He then cocked the gun back to try and scare Green, which did not work, and in the process ejected a live round. Defendant then fired the gun in an attempt to scare Green, but Green was still grabbing him. Defendant did not know Green had been hit, and after 5 or 10 seconds, he fired a second shot, at which point Green stopped grabbing him. In the struggle one of defendant's boots came off. He then ran over to a red car, hid underneath it, and removed his other boot. After 10 minutes, he

heard someone scream for help. He then left his hiding spot and went to Wilson's house, but Wilson did not let him in. About an hour later, he left Shadowwood and made his way to Alexandrinique's house. He slept there until sunrise and then left to go to his mom's house. He denied going to McCormick's apartment or speaking with Collins.

¶ 40 The jury returned a verdict of guilty on count IV, the felony murder charge. The remaining verdict forms were left blank, and neither the State nor defendant objected at the time. The court would later enter judgment in favor of defendant on those counts.

¶ 41 On November 1, 2021, defendant filed a motion for a new trial, which was denied. The trial court initially sentenced defendant to 60 years' imprisonment, but after considering defendant's motion to reconsider sentence, it sentenced defendant to 55 years' imprisonment.

¶ 42 This appeal followed.

¶ 43 II. ANALYSIS

¶ 44 Defendant raises two issues on appeal: whether the trial court erred in finding that the State made reasonable efforts to locate Collins and whether the trial court abused its discretion in allowing Christian to remain in the courtroom throughout the State's case in chief and allowing him to sit at the prosecutor's table.

¶ 45 A. Forfeiture by Wrongdoing

¶ 46 Defendant argues that the trial court erred in finding that the State had made good-faith reasonable efforts to procure Collins's attendance at trial, resulting in a violation of his confrontation rights under the sixth amendment (U.S. Const., amend. VI). Defendant is not otherwise challenging the trial court's finding that defendant engaged or acquiesced in the wrongdoing that caused Collins's unavailability.

¶ 47 Forfeiture by wrongdoing is a common law doctrine that serves both as a hearsay exception and an exception to the confrontation clause of the sixth amendment. *People v. Nixon*, 2016 IL App (2d) 130514, ¶ 48. The doctrine is codified in Illinois Rule of Evidence 804(b)(5) (eff. Jan. 1, 2011) and Federal Rule of Evidence 804(b)(6). The forfeiture by wrongdoing hearsay exception provides that "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness" is not excluded by the hearsay rule. Ill. R. Evid. 804(b)(5) (eff. Jan. 1, 2011). "[T]he State's burden of proof in a hearing on forfeiture by wrongdoing is a preponderance of the evidence." *People v. Stechly*, 225 Ill. 2d 246, 278 (2007). Where the trial court makes a finding by a preponderance of the evidence, we will reverse only if that finding is against the manifest weight of the evidence. *People v. Peterson*, 2017 IL 120331, ¶ 39. A finding is against the manifest weight of the evidence if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented. *Id.*

¶ 48 As a predicate for application of Rule 804(b)(5), the witness must actually be unavailable. Illinois Rule of Evidence 804(a) (eff. Jan. 1, 2011) lists five situations in which a witness may be considered unavailable. In discussing the analogous Federal Rule of Evidence 804(a), our supreme court has made it clear that while that list is not exhaustive, unavailability is a narrow concept subject to a rigorous standard. *People v. Caffey*, 205 Ill. 2d 52, 101 (2001). In the instant case the trial court found that Collins was an unavailable witness under Illinois Rule of Evidence Rule 804(a)(5) (eff. Jan. 1, 2011) in that he was absent from the hearing and the State was unable to procure his attendance by process or other reasonable means. Because Illinois Rule of Evidence 804 is modeled off of Federal Rule of Evidence 804, we may look to federal law for guidance. *People v. Thompson*, 2016 IL 118667, ¶¶ 40, 49. For the purposes of an exception to the

confrontation clause, a declarant will not be deemed unavailable unless a good-faith effort has been made to procure their presence at trial. *Ohio v. Roberts*, 448 U.S. 56, 74 (1980).

¶ 49 In *People v. Golden*, 2021 IL App (2d) 200207, the Second District held that in instances where a witness is unavailable due to the opposing party's wrongdoing, the proponent of the hearsay statement need not demonstrate an inability to procure the declarant's attendance by process or other reasonable means. Defendant urges us to reject the Second District's holding in *Golden*, whereas the State maintains *Golden* was correctly decided. Though we are one appellate court, "the opinion of one district, division, or panel of the appellate court is not binding on other districts, divisions, or panels." *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 440 (2008). The *Golden* court expressed two bases for its holding. The first was based upon the plain language of Rule 804(a)(5), and the second was based on the elements of forfeiture by wrongdoing as expressed by our supreme court in *Peterson*, 2017 IL 120331, ¶ 32, and this court in *People v. Zimmerman*, 2018 IL App (4th) 170695, ¶ 98.

¶ 50 The primary goal of statutory interpretation is to ascertain and give effect to the intent of the legislature. *Ryan v. Board of Trustees of the General Assembly Retirement System*, 236 Ill. 2d 315, 319 (2010). The best indication of the legislature's intent is the plain language of the statute itself. *Id.* In determining the plain meaning of statutory language, the court looks to the statute as a whole, the subject it addresses, and the apparent intent of the legislature. *People v. Perry*, 224 Ill. 2d 312, 323 (2007). We interpret supreme court rules in the same manner as statutes. *Atlantic Coast Airlines Holdings v. Bloomington-Normal Airport Authority*, 357 Ill. App. 3d 929, 933 (2005).

¶ 51 We must respectfully reject the *Golden* court's reasoning as it relates to the plain language of Rule 804(a)(5). The *Golden* court's reasoning was as follows:

> "Rule 804 governs exceptions to the rule against hearsay where the declarant is unavailable. Ill. R. Evid. 804 (eff. Jan. 1, 2011). Rule 804(a)(5) expressly encompasses situations in which the declarant 'is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.' Ill. R. Evid. 804(a)(5) (eff. Jan. 1, 2011). By its very terms, then, Rule 804(a)(5) does not apply to the doctrine of forfeiture by wrongdoing as codified in Rule 804(b)(5)." *Golden*, 2021 IL App (2d) 200207, ¶ 71.

The reasoning of the court appears to be that because Rule 804(a)(5) discusses hearsay exceptions under subdivisions (b)(2), (3), and (4), the section must not apply to subdivision (b)(5), which pertains to forfeiture by wrongdoing. This reasoning appears to be based on a misreading of the rule's language. From the plain language it is clear that Rule 804(a)(5) applies to instances where "the proponent of a statement has been unable to procure the declarant's *attendance*" and in the case of subdivisions (b)(2), (3), or (4) to instances where the proponent is unable to secure "the declarant's *attendance or testimony*." (Emphases added.) Ill. R. Evid. 804(a)(5) (eff. Jan. 1, 2011). Put another way, subdivision (a)(5) applies to subdivisions (b)(1) and (5) when the declarant's attendance cannot be procured and to subdivisions (b)(2), (3), and (4) when either the declarant's attendance or testimony cannot be procured.[2] Our reading is consistent with Federal Rule 804(a)(5), which reads,

[2]Advisory committee notes to the 1974 enactment of the Federal Rule 804 indicate that the purpose of this distinction is to require a proponent of a hearsay statement to not only make reasonable efforts to procure attendance but also testimony (such as by deposition of interrogatories) before a declarant will be deemed unavailable in the case of dying declarations, statements against interest, and statements of personal or family history. Fed. R. Evid. 804, 1974 Enactment Note to Subdivision (a)(5).

"(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

* * *

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6)[3]; or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4)." Fed. R. Evid. 804(a)(5).

As such Rule 804(a)(5) *does* by its very terms apply to the doctrine of forfeiture by wrongdoing.

¶ 52 We likewise reject the *Golden* court's reasoning based on the holdings in *Peterson* and *Zimmerman*. Neither *Peterson* nor *Zimmerman* addressed the interaction between subdivisions (a)(5) and (b)(5) of Rule 804. *Peterson* addressed whether additional *indicia* of reliability were required to introduce a hearsay statement where the defendant procured the declarant's unavailability by killing them and *Zimmerman* addressed what types of statements were admissible under Rule 804(b)(5). *Peterson*, 2017 IL 120331, ¶ 33; *Zimmerman*, 2018 IL App (4th) 170695, ¶ 110.

¶ 53 In *Peterson*, our supreme court held that "Rule 804(b)(5) identifies only two criteria or factors that must be satisfied for the admission of hearsay statements under the rule: (1) that the party against whom the statement is offered 'has engaged or acquiesced in wrongdoing' and (2) that such wrongdoing 'was intended to, and did, procure the unavailability of the declarant as a witness.' " *Peterson*, 2017 IL 120331, ¶ 32 (quoting Ill. R. Evid. 804(b)(5) (eff. Jan. 1, 2011)).

[3]Federal Rule 804(b)(6) contains the federal forfeiture by wrongdoing hearsay exception.

Based on this, the *Golden* court reasoned that "the interpretation given Rule 804(b)(5) by Illinois courts does not require the State to demonstrate in any particular manner that the witness was unavailable despite its best efforts to procure the witness's attendance." We agree only to the extent that there is no requirement under the doctrine of forfeiture by wrongdoing that the proponent of the statement demonstrate unavailability in any particular manner. However, because a witness must be unavailable as a prerequisite to forfeiture by wrongdoing, it falls on the proponent of the statement to demonstrate unavailability by a preponderance of the evidence in some manner under Rule 804(a).

¶ 54 Any of the five methods enumerated by Rule 804(a) would be satisfactory. In the instant case and in *Golden*, the factual basis for the witnesses' unavailability was that the witnesses could not be located and thus could not be served or otherwise compelled to come to court. The State provided no alternative basis for unavailability. Therefore, it falls within the purview of Rule 804(a)(5) and requires the State to show that good-faith reasonable efforts were made to procure the witnesses' attendance by a preponderance of the evidence.

¶ 55 We now consider whether the State's efforts to locate Collins were reasonable. For the purposes of an exception to the confrontation clause, a declarant will not be deemed unavailable unless a good-faith effort has been made to procure their presence at trial. *Roberts*, 448 U.S. at 74. The State must show not only that it acted in good faith, but that reasonable and competent efforts were made. *People v. Payne*, 30 Ill. App. 3d 624, 628 (1975). It is not enough to act with a pure heart and an empty head. *United States v. Yida*, 498 F.3d 945, 952 (9th Cir. 2007).

¶ 56 What constitutes good-faith reasonable efforts will depend on the facts of each case. *Payne*, 30 Ill. App. 3d at 628. In some instances, such as the death of the declarant, good faith may demand nothing of the prosecution. *Roberts*, 448 U.S. at 74. "But if there is a possibility, albeit

remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation." (Emphasis in original.) *Id.* "[W]hen a witness disappears before trial, it is always possible to think of additional steps that the prosecution might have taken to secure the witness' presence, [citation], but the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising." *Hardy v. Cross*, 565 U.S. 65, 71-72 (2011) (*per curiam*). "A good-faith effort, is not an ends-of-the-earth effort ***." *United States v. Chun Ya Cheung*, 350 Fed. App'x 19, 23 (6th Cir. 2009).

¶ 57 *People v. Brown*, 47 Ill. App. 3d 616, 622 (1977), provides some guidance on what efforts are reasonable in instances where a witness has fled the State:

> "(1)*** [W]e would not require the State to make an effort to contact a witness that has moved to a foreign country if the State is powerless to compel his attendance at trial; (2) we would require the State to make an effort to contact a witness located within the United States, its territories and possessions, and to request his attendance at trial if the effort is successful, when it learns of his new location in sufficient time before trial to reasonably permit such an effort; and, (3) what will constitute a sufficient effort to contact out-of-state witnesses must be determined on a case by case basis ***."

¶ 58 In the course of Christian's efforts to locate Collins, he placed a notice on the local I-Board system. He attempted to contact Collins on his phone but either received no answer or someone replying that he had the wrong number. He attempted to locate Collins at several potential addresses, including several addresses in Champaign, an address in Iowa, and two addresses in Kendall County. He attempted to find Collins's location from known family members, including

defendant's mother, who could not provide any information, and Collins's brother, who he could not locate and was avoiding police due to a shooting incident he was involved in.

¶ 59 Defendant compares the facts in the instant case to those in *Payne*, 30 Ill. App. 3d at 624. In *Payne* the defendant was tried for robbery, a mistrial was declared when the jury failed to reach a verdict, and the defendant was convicted at his second trial. *Id.* at 625. The robbery victim testified at the first trial but could not be located to testify at the second. *Id.* Prior to the second trial, the trial court held a hearing to determine whether the victim was an unavailable witness. *Id.* A police officer testified about the efforts that had been made to locate the victim. He made 20 to 25 attempts to locate the victim, with the latest attempt being made three days before trial. *Id.* His attempts were focused primarily on visiting the victim's last known address, gas stations where the victim had previously worked, and questioning people who happened to be hanging around the gas stations. *Id.* at 625-26. The reviewing court found that these efforts were numerically impressive but qualitatively weak; the officer kept no records of his efforts, he could not remember dates or the name of the victim's common law wife, and when he received subpoenas to be served to the victim, he continued to look for the victim at the same places he had before. *Id.* at 630. The court also emphasized the failure of the prosecutor to coordinate with the police officer regarding his efforts, highlighting several pieces of information that could have potentially led to the victim, including that he had been the manager of a Standard service station, that he had married his wife at city hall in 1962 or 1963, and that he was with a man name Anderson on the night of the robbery. *Id.* at 629. In light of these considerations, the court found that the State failed to maintain its burden of showing due diligence in procuring the witness's presence. *Id.* at 631.

¶ 60 Defendant maintains that, like the officer's efforts in *Payne*, Christian's efforts were numerically impressive but qualitatively weak. We disagree and find that the facts of the instant case are distinguishable. There is no indication that the witness in *Payne* was attempting to hide from police. The officer in *Payne* took no notes and could provide little detail as to his efforts to locate the witness. There was little coordination between the prosecution and the officer, and the prosecution had leads which could have reasonably been pursued and which might have led to locating the witness.

¶ 61 Under the circumstances, Christian and the State were limited in what they could do to locate Collins. When Christian last spoke to Collins, he had moved to Davenport in order to hide from the various people who were threatening him. Before Collins disappeared, he gave no indication to law enforcement that he no longer intended to cooperate with them or planned on leaving his current location. When Christian spoke with Collins in Iowa, he indicated that he had deactivated his social media accounts as a result of the threats he was receiving and had also gotten a new phone. So, efforts to contact him were difficult. People who were likely to have information on his location were unlikely to cooperate with law enforcement, either because of their allegiance to defendant and Simmons or because they wanted to protect Collins. There is no indication that Christian or the State failed to follow up on any leads about Collins's location.

¶ 62 Defendant cites to a number of cases which are likewise inapposite to the facts of the instant case. In *Brown*, 47 Ill. App. 3d at 621-22, the State was found not to have exercised good-faith reasonable efforts in locating a witness when it learned two months prior to trial that a witness had moved to Ripley, Tennessee, and made no efforts to locate or contact him there. In *People v. Kent*, 2020 IL App (2d) 180887, ¶¶ 103-06, the State failed to establish the unavailability of the witness, where the only evidence of such efforts was that the State had attempted to serve

the witness at his father's residence on two occasions and where the witness had an unrelated misdemeanor charge for which he had been appearing in court and could have been served then. In *People v. Torres*, 2012 IL 111302, our supreme court indicated that simply establishing that a witness had been deported may not be sufficient to establish a witness's unavailability. *Torres* is inapplicable as this case does not involve deportation, whereas *Payne*, *Brown*, and *Kent* are distinguishable in that they all involved instances where promising leads were available and ignored.

¶ 63 Defendant suggests that a warrant should have been issued against Collins, but as he was never served, and thus never failed to appear, no basis existed for issuing a warrant. Defendant also suggests that Collins's information should have been placed on the statewide LEADS or an unspecified "FBI list." Because Collins was only going to be served with a subpoena, Christian testified that he could not place a notice on the statewide LEADS. As for the unspecified Federal Bureau of Investigation (FBI) list, Christian testified that he was unaware of any FBI list for subpoena service. In his reply brief, defendant suggests that the State should have issued a subpoena to Collins via mail and then, when he failed to appear, issue a warrant for his arrest. However, there is no indication that Collins was actually living at any of the addresses Christian visited. As such, even if a subpoena had mailed, there would be no way of showing that the defendant had actually received the subpoena and therefore no basis for the issuance of a warrant. See *People v. Allen*, 268 Ill. App. 3d 279, 287 (1994) (stating that a subpoena left in a witness's mailbox was insufficient to establish service for the purposes of trial court's contempt powers).

¶ 64 As there was evidence that Christian and the State made continuing efforts to locate Collins, and no evidence of any leads which Christian and the State failed to follow up on, we cannot say that the trial court's finding that the State had made good-faith reasonable efforts to

locate Collins was against the manifest weight of the evidence. See *People v. Smith*, 275 Ill. App. 3d 207, 215 (1995) (finding there was a good-faith effort to locate the witness where the State had no leads to follow in locating witness and no investigative leads that investigators failed to check).

¶ 65 B. Lead Investigator at Counsel's Table

¶ 66 Defendant maintains that the trial court abused its discretion in allowing Christian to sit at counsel's table and to remain in the courtroom throughout the jury trial.

¶ 67 Illinois Rule of Evidence 615 (eff. Jan. 1, 2011) provides, "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." While some jurisdictions, including the federal courts, consider the exclusion of witnesses to be a matter of right, in Illinois exclusion of witnesses is a matter within the sound judicial discretion of the trial court. *People v. Mack*, 25 Ill. 2d 416, 422 (1962).

¶ 68 "[A]n abuse of discretion occurs where the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *People v. McDonald*, 2016 IL 118882, ¶ 32. Further, our supreme court has made it clear that motions to exclude witness should normally be allowed, and in order to uphold a trial court's denial of a motion to exclude, the record should disclose a sound basis for the denial. *People v. Dixon*, 23 Ill. 2d 136, 140 (1961). So long as a trial judge is exercising sound judicial discretion, it is not reversible error for a trial judge to exempt a witness from an order excluding all witnesses in the absence of a showing of prejudice to the defendant. *People v. Miller*, 26 Ill. 2d 305, 307 (1962).

¶ 69 It is well settled under Illinois law that a testifying police officer may be present at trial during other witnesses' testimony and sit at the prosecutor's table with counsel. See *People v. Leemon*, 66 Ill. 2d 170, 174 (1977); *Miller*, 26 Ill. 2d at 307; *People v. Chennault*, 24 Ill. 2d 185,

188 (1962); *Dixon*, 23 Ill. 2d at 138; *People v. Strader*, 23 Ill. 2d 13, 23 (1961); *People v. Townsend*, 11 Ill. 2d 30, 47 (1957).

¶ 70 Additionally, as lead detective in the case, Christian was designated as the State's representative. Ill. R. Evid. 615 (eff. Jan. 1, 2011) ("This rule does not authorize exclusion of*** (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney ***."); see Fed. R. Evid. 615, Advisory Committee Notes to the 1974 Enactment (stating that investigative agents are within the group specified under the second exception under analogous federal rule).

¶ 71 Furthermore, defendant has failed to establish that he was prejudiced by Christian's presence. "Exclusion of witnesses from the courtroom during trial is a time-honored practice designed to preclude one witness from shaping his testimony to conform to that of those who preceded him on the stand." *People v. Johnson*, 47 Ill. App. 3d 362, 369 (1977). The sole issue raised by the defense regarding Christian's presence was that he testified to unmemorialized threats made to Collins. Even assuming *arguendo* that this testimony was prejudicial, defendant does nothing to link that testimony to the fact that Christian was present for the presentation of other testimony and evidence. None of the State's other witnesses testified about Collins. Further, those threats *were* memorialized in the recorded interview between Collins and Christian after Collins had fled to Iowa. Therefore, defendant has failed to show that he was prejudiced by Christian's presence or that the trial court abused its discretion in permitting Christian to remain in the courtroom.

¶ 72 III. CONCLUSION

¶ 73 For the reasons stated, we affirm the judgment of the Champaign County circuit court.

¶ 74 Affirmed.

***People v. Chatman*, 2022 IL App (4th) 210716**

Decision Under Review:	Appeal from the Circuit Court of Champaign County, No. 20-CF-156; the Hon. Randall B. Rosenbaum, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Douglas R. Hoff, and Christofer R. Bendik, of State Appellate Defender's Office, of Chicago, for appellant.
Attorneys for Appellee:	Julia Rietz, State's Attorney, of Urbana (Patrick Delfino, David J. Robinson, John M. Zimmerman, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.