No. 130110

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- OCHEIL D. KEYS, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 4-21-0630, 4-22-0017 & 4-22-0018 (Consolidated). There on appeal from the Circuit Court of the Fifth Judicial Circuit, Vermilion County, Illinois, No. 17-CF-725. Honorable Nancy S. Fahey, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS AND POINTS AND AUTHORITIES

NATURE OF THE CASE

Following a jury trial, Ocheil Keys was convicted of first degree murder and concealment of a homicidal death under Information Number 17-CF-725 (Appeal Number 4-21-0630), and sentenced to consecutive terms of 60 and two years in prison. Under Indictment Numbers 19-CF-732 and 19-CF-733 (Appeal Numbers 4-22-0017 and 4-22-0018), Keys was convicted of two additional counts of concealment and two counts of dismemberment of a human body, for which he received two additional consecutive two-year sentences for each concealment conviction, and two consecutive 15-year sentences for each dismemberment conviction. This is a direct appeal from the judgment below. No challenge is raised to the charging instrument.

ISSUES PRESENTED FOR REVIEW

I. Should this Court grant Ocheil Keys a new trial on his murder charge where defense counsel ineffectively failed to move to suppress a videotaped interrogation in which Keys invoked his right to silence, and where counsel also failed to redact from the video–which was presented without any limiting instructions–statements made by the police that their investigation had proven Keys killed Barbara Rose and that Keys's cousin told them Keys confessed to him, and discussions of Keys's involvement in other crimes?

II. Where the allowable units of prosecution of the concealment of a homicidal death and the dismemberment of a human body statutes only allow one conviction for concealment per homicidal death and one conviction for dismemberment per the same deceased body, should the multiple convictions that Ocheil Keys received under those statutes be vacated to only one conviction under each statute?

STATUTES INVOLVED

720 ILCS 5/12-20.5(a) (eff. July 1, 2011), states:

A person commits dismembering a human body when he or she knowingly dismembers, severs, separates, dissects, or mutilates any body part of a deceased's body.

720 ILCS 5/9-3.4 (eff. January 1, 2010), states, in relevant part:

(a) A person commits the offense of concealment of homicidal death when he or she knowingly conceals the death of any other person with knowledge that such other person has died by homicidal means.

(b-5) For purposes of this Section:

"Conceal" means the performing of some act or acts for the purpose of preventing or delaying the discovery of a death by homicidal means. "Conceal" means something more than simply withholding knowledge or failing to disclose information.

STATEMENT OF FACTS

The State charged Ocheil Keys, under three separate charging instruments in 2017 and 2018, with the first degree murder of Barbara Rose through the personal discharge of a firearm, three counts of concealing her homicidal death, and two counts of dismembering her body. (C. 32-34; 0017 C. 16-17; 0018 C. 16) At Keys's jury trial, the State played interrogation videos depicting offers repeatedly telling Keys that they possessed evidence proving his guilt, including an alleged statement from his own cousin that Keys confessed to him, all in an attempt to get Keys to confess. (Exh. 21 52:33-53:10, 2:46:54-2:47:54) The videos also included references to other crimes (Exh. 17 9:48-10:40; Exh. 21 36:50-37:39, 58:18-59:35), and they were admitted over no objection and without any limitation on their use by the jury.

The trial evidence showed that in October of 2017, Rose lived in Danville, Illinois, with her 18- and 8-year-old daughters, and her boyfriend, Keys. (R. 521-27, 540-43) On October 24th, Keys told Rose's sons that he had not seen Rose for two days, after she went to buy a car in Peru, Indiana. Keys showed them Facebook messages between Rose and the lady from Peru. (R. 519-29, 533, 544, 552) Rose's friend, Jennifer Veatch, testified she last spoke to Rose on Saturday, the 21st. Rose did not say anything about going to buy a car, and they had

plans on Sunday, the 22nd. (R. 558-64, 640-44) Another friend, Melissa Taylor, told police that Rose posted on Facebook on Monday morning. (R. 1159-61)

Ebonnie Bryant testified that Rose offered to watch Bryant's baby during the early morning on Sunday, the 22nd. When Bryant dropped off her baby around 2:30 or 3:00 a.m., Rose came out to get the baby, while Keys stood in the front door. Nothing seemed unusual, though Bryant saw a blue convertible in the driveway she had never seen before. (R. 570-76, 582-84) Later that morning, around 11:00, Keys asked Bryant to come get the baby; she arranged for her friend, Brytney, to do so. (R. 577-80) Brytney Harrier went to pick up the baby around 11:30 a.m. When Keys opened the door, Keys told her they had a vicious dog and handed her the baby. Harrier had seen the dog before and never knew it to be vicious. (R. 586-89)

Rhonda Crippin testified she dated Keys in October of 2017. He came to her house in the early morning hours on October 23rd and stayed with her every night that week except one night, when he asked her for a lighter. (R. 602-08)

Detectives T. J. Davis and Phillip Wilson spoke to Keys on October 26, 2017. (R. 671-75) During a recorded interview, Keys said he last saw Rose around 6:15 a.m. on Sunday, when he passed out due to low blood sugar. Rose planned to buy a car in Indiana, from a woman named Jacqueline. Asked about "the circumstances behind this car," Keys answered, "It was so we could both have a vehicle cause I'm fighting my cases. I need to be able to go back and forth to see my attorneys. Because at the moment, and I'm currently looking for new counsel because my counsel is not representing me like I think they should." (Exh. 17 9:48-10:40) Between 10:00 and 11:00 a.m., Rose texted that she was on her way to get the car. Keys never spoke with her again. Keys gave police consent to search the house. (Exh. 17 9:48-42:39)

After speaking to Nick Patton on October 28, 2017, police obtained surveillance video from various Danville establishments. (R. 658-60) Footage from a Circle K gas station at 5:23 a.m. on October 22, 2017, showed Patton make a purchase inside, while Keys pumped gas

into cans. (R. 620-22, 632-40, 660-61; Exhibits 13-14) Walmart surveillance footage from 5:37 a.m. showed Keys buy a comforter set and two rolls of 10 x 25 clear plastic. (R. 722-50; SUP E 359 V2; People's Exhibit 15-1) Later that day, Keys came back with another man, who bought fuel, a gas can, and a lighter. (R. 753, 758, 774-46; People's Exhibit 15-2)

Commander Joshua Webb testified that he and another officer questioned Keys again on October 29th. (R. 175-77) In the portions of that videotaped interview published to the jury, the officers provided Keys with his Miranda rights and told him they had new things to talk to him about. Keys responded, "I do have an attorney." He then signed a *Miranda* waiver. (Exh. 21 26:00-30:10) Keys said he did not remember going to the gas station or to Walmart, and could not explain any video of him at those locations with "Nick"; he did not remember things when his blood sugar got low. Asked why his blood sugar was low, Keys said it was the stress caused by "fighting three cases," and because someone had "slipped" something to his "aunty." (Exh. 21 32:45-37:39) Questioned on his actions Saturday night into early Sunday morning, Keys said everyone was at home. The kids were downstairs asleep when he got up at 6:00 a.m. He did not remember contacting Nick at 4:30 a.m., or having Nick come pick him up. Asked why he would put gas into a container, or buy a comforter and heavy duty bags, Keys said he planned to mow the lawn the next day, they needed a comforter for their bedroom, and the bags were for the house. (Exh. 21 32:45-40:30, 43:35-44:39, 48:19-49:20)

The officers told Keys that Nick described him as a favorite cousin and questioned why Nick "would tell us these things," especially when video corroborated what Nick was saying. They asked Keys, "How are we not going to believe what he's telling us you told him is also true?" Keys did not respond. (Exh. 21 49:20-50:46) The police said they needed to know if something happened to Rose, whether accidental or intentional. Keys shook his head no. (Exh. 21 50:46-52:20) An officer asserted, "To echo what he's saying, Nick is worried about you. *** He's worried that you did something that you didn't mean to do. That you're

not an evil guy and you planned on doing something. He thinks that it was a situation that you couldn't avoid based on the way you described things to him." Keys nodded and occasionally said "um-hmm." (Exh. 21 52:33-53:49)

The officers told Keys, "We've concluded our investigation up to this point and it's very clear that you caused the disappearance of Barbara, okay?" They hoped Nick got the right impression and this was not something Keys wanted to happen. Keys replied, "I said I didn't do anything, period, point blank. If that's the case, if you feel like based off your investigation, then do what you gotta do, ain't nothin' further for us to talk about." The officer noted Keys's surprise at not being handcuffed when first questioned, but said they had just been talking to him then. He continued, ". . . now it's starting to stack against ya," and that now was the time to tell his story. The detectives eventually said they would not beg Keys to make a statement; if he did not speak to them, "it is what it is." They asked Keys, "fair enough?" Keys responded, "Yeah." The officers then left the room. (Exh. 21 53:49-1:00:42)

Around an hour later, the officers returned. Without re-Mirandizing Keys, they told him they would try to jog his memory and placed various photos before him. Keys identified photos of himself getting out of Nick's car and at a cash register at Walmart. (Exh. 21 2:29:58-2:31:31) The police asked why Keys could not remember anything. Keys said his blood sugar had been low and that he passed out. The officer replied, "We've heard that part of it, but that's been–the problem with that is that that's been debunked." He knew Keys contacted someone at 4:30 a.m., and was then either talking to that person or with that person from 4:30 to 6:00 a.m. The officer asked if Keys understood that "this whole I don't remember thing is not painting you in a positive light." Keys responded, "Yeah." (Exh. 21 2:33:12-2:34:21) The officer asked if it was fair that Keys was not a monster or cold-blooded killer, and Keys said he was not a killer at all. (Exh. 21 2:34:21-2:35:21)

An officer said Nick was worried when he called the police and did not think Keys

did anything on purpose. By contrast, Keys did not "give a shit," and did not "feel any guilt, any remorse." He continued, ". . . we're past the point of that you didn't do it." The other officer echoed, "The evidence has done what it's done for us and it's going to continue to do what it's gonna do. The problem is for you right now. *** Cause you are sitting there telling us that you had nothing to do with this, and we do whatever we're gonna do. . . It paints you as a cold-hearted person. That you killed a mother in cold blood. And you sat here and you lied. You had no remorse for it. They're gonna play this in front of the jury and you're gonna sit here and tell us that you had nothing to do with this when everything up to this point and continuing past this is gonna prove otherwise." Keys stated, "Like I told you, I ain't did nothing. Period. So you gotta do what you gotta do." (Exh. 21 2:40:29-2:48:12)

An officer asked if everything Nick said was fabricated. Keys answered, "Yes." An officer said, "We're past the point of trying to figure out if this happened. So that's, that's what I'm trying to get across to ya. I'm not saying, hey, did something happen? I already know it happened." He reiterated, "You know that it's not because I need you to tell me so that I can prove my case that you did it. That's already been taken care of." Keys said, "Like I told you, if I did anything, I would have told you." An officer told Keys that he refused to believe Keys was "just a cold-hearted killer," but "the evidence is starting to show that [he] might be." He said they were not "trying to make the case" against Keys and were also not giving him everything, only enough "to lead [him] along and cause him to be honest." (Exh. 21 2:51:20-2:54:04) They asked if there was anything Keys wanted to say. Keys stated, "No, there's not." The interview then terminated. (Exh. 21 2:54:04-2:55:20). (Exh. 21 2:48:12-2:55:20)

On October 31, 2017, police obtained consent from Keys's mother, Alfreda Luster, to search her Grand Prix. (R. 185-88) Erin Bowers processed the car the next day, finding a charred body in a garbage bag in the backseat and a sock on the floor. The sock contained

a bag, which held tissues with a red blood-like stain and a torn shirt with human remains. (R. 307-29) The body matched Rose's DNA profile. (R. 199-202, 446-48) Portions were burned, separated, or missing; the right side of the face contained a gunshot injury and she had alcohol in her system. (R. 206-24) The medical examiner opined that Rose died from a single gunshot wound to the head; her body was burned and taken apart after she died. (R. 234-35)

Alfreda Luster testified that Keys borrowed her Grand Prix around 9:30 or 10:00 p.m. on the Saturday after Rose disappeared, returning it the next day. She noticed a bag in the back seat six hours later, after she gave another couple a ride. (R. 799-807, 819-21) In a videotaped interview on November 2, 2017, Luster said she saw the bag 15 or 20 minutes after Keys dropped it off. (R. 59-61; People's Exhibit 20 7:02-8:05) A forensic scientist identified a latent fingerprint on the bag, which matched Keys's prints. (R. 88-100)

Carroll Hamilton testified that he and Keys became friends when they were in jail in 2014 and 2015. In February of 2017, Hamilton paroled to the residence where Keys lived with Rose. (R. 118-19) Later in February, Hamilton returned to jail. (R. 122) In October of 2017, Keys was placed in the next cell. (R. 122-25, 156-64) According to Hamilton, Keys told him that he and Rose "were joking around and she pulled a pistol on him and he pulled a pistol and I believe it was the - - the fake pistol, the starter pistol went off and that's all he remembered. . ." Keys saw blood under Rose's right eye and watched her eyes go blank. He held Rose until he no longer heard a heartbeat, then wrapped her in a comforter and called his cousin, Patton, who helped move the body to the garage. Keys later moved Rose's body to an area near some abandoned houses off Cleveland Street, where he lit the body on fire. When the flames went high, Keys got scared and left. He returned another night, broke the body into smaller pieces, and stored the body in his mother's car. (R. 128-40) Hamilton acknowledged prior convictions and that he had attempted to obtain deals for providing information against other inmates in

the past. For his testimony in this case, he received three years on burglary charges, for which he had faced six to 30 years. (R. 114-18, 143-44)

Commander Webb testified that after Hamilton reached an agreement with the State's Attorney's Office for a medical release, he directed police to an area near Lyons Street with several abandoned houses and a large charred area. (R. 189-94) Police recovered physical evidence, charred bone, and a soil sample from the site. (R. 380-405) Some of the evidence had gasoline patterns; the soil sample tested positive for degraded gasoline. (R. 430-35)

Police found a starter pistol inside Rose's home, which functioned like a gun but could not fire bullets. The presumptive presence of blood was found on the bedroom and living room carpet, and in and around the detached garage. It was also found on the driver's floorboard and steering wheel of Rose's car, which had plant and charred material inside the trunk. Testing confirmed the presence of blood on some, but not all, of the swabs or evidence collected from Rose's home and car. DNA testing on a steering wheel swab from Rose's car and on a bedroom stain excluded Rose, but included Keys. Swabs of the sock and shirt recovered from Rose's car contained a DNA mixture from which Keys was excluded. (R. 259-82, 296-99, 305-07, 454-76 825-64; SUP3 R. 247-57)

The jury found Keys guilty of murder, two counts of dismemberment ("mutilation by fire" and "dismember/sever/separate"), and three counts of concealment ("moved the body from the bedroom," "moved the body to 1519 S. Lyons St.," and "moved the body to a Pontiac Grand Prix"). (0017 SUP C. 40-49) During closing arguments, the State separated the charges in the same fashion. (R. 1193-98) Prior to sentencing, the State requested convictions for every count of concealment and dismemberment. (C. 289-91) Defense counsel argued the counts should merge into a single concealment conviction and a single dismemberment conviction, arguing that everything Keys did to Rose's body after her death was part of the same course

of conduct. (C. 294; R. 929-30) The State responded that the course of conduct did not matter, even if the acts occurred in quick succession. (R. 931-32)

The trial court imposed a separate conviction and sentence for each conviction. (R. 934-35) It imposed an aggregate sentence of 96 years, including a 60-year sentence for murder, three consecutive two-year sentences for concealment, and two consecutive 15-year sentences for dismemberment. (C. 299; 0017 C. 105; 0018 C. 104; R. 934-37) Defense counsel filed a motion to reconsider sentence, arguing the court erred by failing to merge the dismemberment and concealment convictions. (C. 304-05) The court denied the motion. (R. 1334)

On appeal, Keys argued: (1) the evidence was insufficient to sustain his conviction for murder; (2) defense counsel was ineffective, *inter alia*, for failing to move to suppress the interrogation video that followed his invocation of the right to silence and failing to redact portions in which police referenced Key's purported confession to a non-testifying witness, stated their investigation had already proven his guilt, and described other crimes; and (3) the allowable units of prosecution of the concealment and dismemberment statutes only authorized one conviction each for concealing the same homicidal death and dismembering the same human body. The court affirmed Keys's convictions. *People v. Keys*, 2023 IL App (4th) 210630.

ARGUMENT

I. Defense counsel was ineffective in failing to suppress an interrogation video in which Ocheil Keys invoked his right to silence; failing to redact inadmissible statements by police officers during the interrogation that were not relevant to contextualize any statement made by Keys but in which they expressed their own conclusions regarding Keys's guilt and referenced double hearsay; and in failing to redact suggestions of other crimes.

At Ocheil Keys's jury trial, defense counsel vigorously maintained that he did not kill Barbara Rose at all, and the State's case provided some evidence that Keys only killed Rose accidentally. Yet defense counsel allowed the jury to view–without any limiting instructions–an un-redacted police interrogation video in which the investigating officers stated their conclusions that Keys killed Rose intentionally and further asserted that Keys's cousin, who did not testify at trial, told them that Keys had confessed his involvement to him. The video also contained discussions of Keys's involvement in other crimes. This video contained no admission from Keys, and none of the officers' interrogation tactics led Keys to change his story. What is more, the video showed that Keys clearly and unequivocally attempted to stop the interrogation by invoking his right to silence. Yet defense counsel neither moved to suppress the video as obtained in violation of Keys's Fifth Amendment rights, nor moved to redact any of the inflammatory statements within that video. Instead, she allowed the entire video to be considered as substantive evidence, with no limiting instructions. Counsel's omissions were ineffective and caused Keys great prejudice on his murder charge. Thus, this Court should reverse that conviction and grant Keys a new trial.

The United States and Illinois Constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. amends. VI, XIV; Ill. Const. (1970), art. I, § 8; *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984). A defendant is deprived of effective assistance when counsel's performance was deficient, and the deficient performance prejudiced him. *Strickland*, 466 U.S. at 687. Whether counsel was ineffective is a mixed question of fact

and law. *People v. Peterson*, 2015 IL App (3d) 130157, ¶222. "[T]he ultimate question of whether counsel's actions support a claim of ineffective assistance is a question of law that is subject to *de novo* review on appeal." *Id.* "Generally, what matters to object to and when to object are matters of trial strategy *** [b]ut an attorney is expected to use established rules of evidence and procedure to avoid, when possible, the admission of incriminating statements, harmful opinions, and prejudicial facts." *People v. Lucious*, 2016 IL App (1st) 141127, ¶32 (citations omitted); *accord People v. Royse*, 99 Ill. 2d 163, 171-73 (1983); *People v. Moore*, 356 Ill. App. 3d 117, 122 (1st Dist. 2005). Counsel should also file suppression motions that stand a reasonable chance of success. *People v. Nunez*, 325 Ill. App. 3d 35, 42 (2d Dist. 2001).

A. Counsel performed deficiently.

1. Failure to Suppress Interrogation Due to Fifth Amendment Violation

First, defense counsel failed to suppress a large portion of Keys's second interrogation as obtained in violation of Keys's right to silence. During that interrogation, the police told Keys they had concluded their investigation and that it was "very clear" that he caused Rose's disappearance. In response, Keys stated, "I said I didn't do anything, period, point blank. If that's the case, if you feel like based off your investigation, then do what you gotta do, there ain't nothin' further for us to talk about." *People v. Keys*, 2023 IL App (4th) 210630, ¶61; (Exh. 21 53:49-54:46) After that, the detectives pressed Keys, telling him various things about their investigation that might make him want to provide his own version and that now was his chance to say what happened. Yet Keys did not waver, confirming that he had "nothing" that he wanted to tell the officers and agreeing that it was "fair enough" that he was giving up his chance to talk to the police. (Exh. 21 54:46-59:39) Though the officers stopped the interrogation and left the room (Exh. 21 1:00:02-1:00:42), they came back around an hour later and resumed questioning, without providing Keys with any new *Miranda* warnings or

asking if he wanted to talk. (Exh. 21 2:29:45)

"No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amends. V, XIV; Ill. Const. (1970) art. I, §10; *Malloy v. Hogan*, 378 U.S. 1, 7-8 (1964). Statements made after a defendant is given *Miranda* warnings must be suppressed if the defendant indicates "in any manner and at any stage of the process" that he does not wish to be interrogated. *Miranda v. Arizona*, 384 U.S. 436, 445 (1966); *People v. Henenberg*, 55 Ill. 2d 5, 10 (1973). The failure to scrupulously honor that request renders any subsequent statements inadmissible. *Miranda*, 384 U.S. at 473-74; *People v. Nielson*, 187 Ill. 2d 271 (1999). Here, Keys unequivocally invoked his right to silence when he: (a) stated clearly that he had "nothin' further . . . to talk about;" and (b) confirmed he was giving up his right to tell his own side of the story. Indeed, (c) the lack of ambiguity in Keys's invocation was demonstrated by the officers stopping the interrogation. Yet (d), the police failed to scrupulously honor Keys's invocation. Thus, counsel was deficient in failing to move to suppress Keys's exercise of his constitutional rights as well as all the questions and answers that followed. *See People v. Hernandez*, 362 Ill. App. 3d 779, 784-89 (1st Dist. 2005) (counsel ineffective in failing to file a suppression motion where police failed to scrupulously honor defendant's right to silence).

a. "Ain't nothing further for us to talk about," constituted a clear and unambiguous invocation of the right to silence.

To invoke the right to silence, a defendant's statement must be clear and unequivocal. *Hernandez*, 362 Ill. App. 3d at 785. This standard is "not a demanding one." *Jones v. Harrington*, 829 F.3d 1128, 1138 (9th Cir 2016); *United States v. Abdallah*, 911 F. 3d 201, 210 (4th Cir. 2018). The statement need only be sufficiently clear that a reasonable police officer would understand it to be a request to stop talking to police. *See Davis v. United States*, 512 U.S. 452, 459 (1994) (addressing right to counsel); *Harrington*, 829 F.3d at 1139 (applying *Davis* in right to silence context). The defendant does not need to reference his constitutional rights

or "speak with the discrimination of an Oxford don." *Davis*, 512 U.S. at 459.

Keys clearly and unambiguously invoked his right to silence when he asserted, "I said I didn't do anything, period, point blank. If that's the case, if you feel like based off your investigation, then do what you gotta do, there ain't nothin' further for us to talk about." *Keys*, 2023 IL App (4th) 210630, ¶61; (Exh. 21 53:49-54:46) On this constitutional issue, a federal decision is directly on point. In *United States v. Nam Quoc Hong*, Case No. 1:16-cr-193, 2017 WL 1197243, *1 (U.S. Dist. Ct., E.D. Va. 2017),[1] the defendant–like Keys–initially agreed to speak to police. However, about 20 minutes into the interview, the police confronted him with incriminatory evidence. *Id*. at *3. He responded like Keys, *i.e.*, he: (1) denied involvement in the crime; (2) said, "If you already got everything, don't need nothing to talk about [*sic*];" and (3) told police they should arrest him. *Id*. The district court found that U.S. Supreme Court case law pointed "convincingly to the conclusion that defendant's statements constitute a sufficiently unambiguous and unequivocal invocation of the right to remain silent." *Id*. at *5.

The same holds true here. For the entire portion of the interrogation prior to when Keys invoked his right to silence, he maintained his innocence. (Exh. 21 00:00-53:49) When the officers told him they already knew he caused Rose's disappearance, he made it clear that they could do that they "gotta do," but there was "nothin' further for them "to talk about." (Exh. 21 53:49-54:46) This statement was unambiguous.

Indeed, federal courts have repeatedly emphasized that an interrogation must cease when the accused indicates "*in any manner*" that he does not wish to be interrogated. *See McGraw v. Holland*, 257 F.3d 513, 517-18 (6th Cir. 2001) (emphasis in original). For example, in *McGraw*,

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[1] Federal Rule of Appellate Procedure 32.1(a) indicates that courts may not prohibit or restrict the citation of unpublished federal judicial opinions, orders, judgments, or other written dispositions issued on or after January 1, 2007. (Eff. Dec. 1, 2006.) A copy of this decision and the two other unpublished decisions cited in this brief, *infra*, have been included in the appendix.

a state court determined that the defendant's statements to the effect of, "I don't want to talk about it," were ambiguous, in that the interrogating officers could believe the defendant only did not want to talk about the crime or questions asked, but was willing to talk about other topics. *Id*. at 516, 518. The Sixth Circuit found the State court's holding unreasonably applied federal law, explaining that "the Supreme Court has long held that 'no ritualistic formula or talismanic phrase is essential in order to invoke the privilege against self-incrimination.'" *Id*. at 518, *quoting Empsak v. United States*, 349 U.S. 190, 194 (1955). Any reasonable officer would have realized the defendant was stating she did not want talk about the charged offense, which invoked her right to silence. *McGraw*, 257 F.3d at 518-20.

Likewise, in *Tice v. Johnson*, 647 F.3d 87, 97 (4th Cir. 2011), the Fourth Circuit found a defense attorney ineffective for not filing a motion to suppress when a note from the detective's interview with the defendant stated, "He told he me decide[d] not to say any more, that he might decide to talk after he talks with a lawyer, or spends some time alone thinking about it. I told him he would be given time to think about it. He *did not* request a lawyer." (Emphasis in original.) Citing numerous decisions, the court found that, "[o]n its face," the defendant's declaration that he decided not to say anymore "ought to give pause to even the greenest of criminal lawyers." *Id*. at 104-07. Thus, counsel was deficient in not filing a suppression motion. *Id*. at 98-99, 104-06. *See also Harrington*, 829 F.3d at 1133-39 (defendant invoked right to silence after initially answering questions while maintaining his innocence, when after police told him they knew he was involved in a shooting, he said, "I don't want to talk no more, man").

Keys' statement, "ain't nothin' further for us to talk about," bears close resemblance to all these statements addressed by federal courts. So too does it fit within relevant Illinois case law. *See, e.g., People v. Ward*, 2023 IL App (1st) 190364, ¶¶117-19 (defendant invoked right to silence by stating, "I ain't got nothin' else to say;" "Got nothin' to say;" and "I don't

want to say anything else about it")[2]; *People v. Cox*, 2023 IL App (1st) 170761, ¶52 (defendant invoked right by stating, "I don't wanna answer no more questions, 'cause I can't help you. And I don't wanna dig myself into a hole."); *People v. Flores*, 2014 IL App (1st) 121786, ¶57 (police asked defendant if he wanted to talk to them, and he responded, "Not really. No.").

To find Keys's invocation ambiguous, the appellate court reasoned that he did not make that assertion immediately after receiving his *Miranda* warnings, but initially answered questions. *Keys*, 2023 IL App (4th) 210630, ¶65. This analysis violated established law, where both the U.S. Supreme Court and this Court have held that "even if a suspect initially waives his rights and agrees to talk to authorities, the interrogation *must* cease if he indicates 'in any manner' prior to or *during* questioning that he wishes to remain silent." *People v. R.C.*, 108 Ill. 2d 349, 353 (1984) (emphases added); *accord Miranda*, 384 U.S. at 473-74. *See also United States v. Reid*, 211 F.Supp. 2d 366, 372-74 (U.S. Dist. Ct., D. Mass. 2002) (rejecting government's argument that defendant's statement, "I have nothing else to say," was rendered ambiguous by the fact that he had earlier spoke "freely and eagerly" with the officers). In fact, the timing of Keys's invocation made his invocation less ambiguous. This was not a situation in which Keys voiced his desire not be questioned in response to a direct question in that regard. Rather, he affirmatively asserted his right to silence on his own accord, telling the officers he had nothing further to talk about when the officers were seeking the contrary goal of attempting to elicit statements from him. (Exh. 21 53:49-54:46)

Moreover, even Keys's initial decision to talk to police was not made without hesitation.

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[2]This Court granted leave to appeal this decision in *People v. Ward*, No. 129627. In the briefs before this Court, the State concedes that the third statement–"I don't want to say nothing else about it"–unambiguously invoked the right to silence. *See* https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/98517a30-3b9e-4bc0-a004-922898f3ee49/129627_ATB.pdf (Appellant's Brief, pp. 27-28) *See also In re Marcus S.*, 2022 IL App (3d) 170014, ¶46, n. 4 (courts may take judicial notice of public documents contained in records of other judicial proceedings).

When the police showed him a *Miranda* form and told him they had things to talk about, he responded, "cause I do have an attorney." (Exh. 21 26:25-29:21)Yet the officers did not acknowledge Keys's statement or ask if he was invoking his right to an attorney; they simply continued to show him where to sign the form and questioned him about the case. (Exh. 21 29:21-30:37) Where Keys only reluctantly acquiesced to the police questioning, he did not make any sort of strong waiver of his rights to render his later invocation ambiguous.

The appellate court also found Keys's invocation to be ambiguous because he made it after the officers told him they believed he was responsible for Rose's death. *Keys*, 2023 IL App (4th) 210630, ¶65. Yet that did not matter in *Nielson*, 187 Ill. 2d at 285, where the defendant invoked his right to silence after the police told him they knew that the bodies of murder victims were at his residence. This Court found "no question that defendant invoked his right to silence" by placing his hands over his ears and chanting "nah nah nah." *Id*. at 287. *See also People v. Strong*, 316 Ill. App. 3d 807, 811 (3d Dist. 2000) (defendant clearly invoked right to silence, despite initially answering questions and denying knowledge of gun and drugs found in apartment, when he stated later that he did not want to say anything more, after police began to discuss drugs with him). A suspect does not lose his Fifth Amendment rights once he realizes he is a suspect.

To the degree that the appellate court considered how Keys also stated *why* he no longer wanted to talk to the police, *i.e.*, because of their assertion that they already knew he was involved, that was also incorrect. As just noted, Keys was then trying to *stop* an interrogation on his own volition, switching the topic from what the officers were questioning him about to assert his own desire to end that questioning. In that context, his reference to the officers' own conclusions about his guilt is most properly viewed as a transitional statement, not a contingency. After stating that point, Keys made the clear point that he had nothing further to talk about.

See Reid, 211 F.Supp. 2d at 372 (defendant's statement that he had "nothing else to say" was an unambiguous assertion of his desire to stop talking to police, where "the word 'nothing' . . . hardly can be considered ambiguous," and "the word 'else' . . . means 'additional' or 'more") (*citing American Heritage Dictionary* 446 (2d college ed. 1985). Indeed, Keys remained reluctant to say anything to the officers throughout the rest of the interrogation. (Exh. 21 54:22-2:55:20) Once the interview re-resumed following Keys's invocation, it ended again when the officers asked him virtually the identical question they asked when Keys *first* invoked his right to silence: ". . . is there anything you wanna yell me?" Keys's reply remained the same: "No, there's not." (Exh 21 2:54:42-2:55:02)

For all these reasons, Keys's statement that he had nothing further to talk about clearly and unambiguously invoked his right to silence.

b. Clarifying questions solidified Keys's intent.

Keys's responses following that statement resolved any possible ambiguity. After Keys said he had nothing further to talk about, the detectives pressured him, stating, "Okay, so, I don't know if you understand, that when you're gonna wanna give this explanation later, cause you're gonna want to, when you see how everything's playing out for ya, that's not gonna be the time to try to come forward and say, okay wait a minute guys, . . . this didn't happen the way you guys think it happened, let me explain this. So we're giving you that opportunity now, okay?" Keys's responded, "Okay." (Exh. 21 54:46-55:46) When the detectives continued to press him by telling him that everything another witness had told the police about Keys had panned out, Keys said again, "Okay." The officers continued, asserting that "now" was "the time" to talk as they were "willing to listen right now," asking Keys if there was anything he wanted or needed to tell them. Keys responded, "No, there's nothing," repeating his answer when the officers asked him that question again. (Exh. 21 55:46-56:59) Still undeterred, the

police urged Keys not to "throw this opportunity away" and stated again that "now" was the "time to tell [his] story." (Exh. 21 56:59-58:53) When none of these tactics led Keys to cave, the officers said they were not "gonna beg" him to talk to them; it was Keys's "decision." They said, "it is what it is" and asked Keys, "Fair enough?" Keys responded, "Yeah." (Exh. 21 58:53-59:39) The officers then stopped the interrogation and left the room. (Exh. 21 1:00:02-1:00:42)

Defendants are not required to repeat themselves or be persistent in their demands to remain silent after making an initial invocation of the right. *Harrington*, 829 F. 3d. at 1141; *United States v. Lafferty*, 503 F. 3d 293, 304 (3d Cir. 2007). Yet Keys did repeat himself. Thus, even if there could be any disagreement as to the unequivocal nature of Keys's initial statement that he had nothing further to talk about, his invocation became crystal clear through his responses to the officers' pressing about why it was important to talk to them, and his ultimate agreement that it was "fair enough" that he was missing out on that opportunity.

In *Davis,* 512 U.S. at 460, the U.S. Supreme Court endorsed the "bright line" rule that police officers *must* halt an interrogation once a defendant requests a lawyer. *Id*. at 461. To that end, *Davi*s endorsed a "good police practice" in asking "[c]larifying questions" when the defendant's invocation might not be clear, though also declining to adopt a rule that *required* those questions. *Id*. In this case, the interrogating detectives' questions after Keys invoked his right to silence are more properly characterized as an attempt to overcome Keys's will, rather than to clarify whether Keys was invoking his right to silence. *See R.C.*, 108 Ill. 2d at 352-54 (continuing to present evidence against the defendant after he invoked his right to silence was an obvious effort to persuade him to confess). Even so, Keys withstood that pressure to make it clear that he understood he was giving up an opportunity to tell his side of the story and still did not want to talk to the police. It is difficult to imagine how Keys could have made himself any more clear, and any reasonable police officer would have understood that Keys

was invoking his right to silence. *See Flores*, 2014 IL App (1st) 121786, ¶55 (even if defendant was initially unclear in conveying that he no longer wished to speak to detectives, his later comments confirmed his unequivocal wish to remain silent).

c. The termination of the interview confirms Keys's invocation.

The record contains objective proof that the officers understood Keys was invoking his right to silence. Immediately after Keys agreed that he was missing his chance to tell his side of the story, the detectives *stopped the interrogation and left the room*. (Exh. 21 1:00:02-1:00:42) When police respond to an invocation by leaving the room and ending the interrogation, it supports that the officers understood the defendant's statement to be an invocation. *See Nielson*, 187 Ill. 2d at 287 ("Our conclusion [that defendant invoked his right to silence] is bolstered by the fact that both [detectives] interpreted defendant's conduct as an expression of his desire to terminate the interview. More importantly, defendant's conduct *did* in fact terminate the interview," where detectives temporarily returned defendant to his cell); *accord Ward*, 2023 IL App (1st) 190364, ¶¶ 116, 119; *Cox*, 2023 IL App (1st) 170761, ¶¶45-46, 52, 54. Thus, the officers' objective actions in stopping the interrogation lend significant weight to the unequivocal nature of Keys's assertion.

d. The detectives failed to scrupulously honor Keys's right to remain silent.

Once a defendant invokes his right to silence, the failure to "scrupulously honor" that right renders his subsequent statements inadmissible. *Miranda*, 384 U.S. at 473-74. Here, the detectives failed to scrupulously honor Keys's right to remain silent. Though they halted the interrogation and left Keys alone after the exchange described above, they returned shortly over an hour later. Without providing Keys with any new *Miranda* warnings or asking if he wanted to talk, they placed photographs in front of Keys and asked him to describe what was in those photos and questioned him again about Rose's disappearance. (Exh. 21 2:29:58-2:55:20)

When deciding whether police have scrupulously honored a defendant's request to remain silent, courts consider whether: (1) the interrogator immediately halted the initial interrogation after the defendant invoked his right to remain silent; (2) a significant amount of time elapsed before interrogation resumed; (3) the defendant was re-*Mirandized*; and (4) the second interrogation addressed a different crime. *Hernandez*, 362 Ill. App. 3d at 786.

While the police here did eventually halt Keys's interrogation, they only did so after desperately trying to get him to change his mind by discussing the evidence against him and telling him how important it was to talk to him. (Exh. 21 54:46-59:39) *See Strong*, 316 Ill. App. 3d at 814 (officer's statement that "this would be the time to help himself," made after defendant invoked his right to silence, was inappropriate). Second, while the police did eventually end questioning, the break was not significant and lasted only 80 minutes. *Cf. People v. Savory*, 82 Ill. App. 3d 767, 771-74 (3d Dist. 1980) (even a 12-hour break was insufficient to scrupulously honor defendant's right to remain silent). Third, when the detectives resumed questioning, they did not give Keys new *Miranda* warnings. Instead, they showed their authority over him, demanding that he describe photos they placed before him. (Exh. 21 2:29:18-2:31:37) Those actions suggested that Keys had no choice but to talk to them, despite his prior assertions that he had nothing to say. Finally, the interrogation that followed the break continued to focus on the same crime. (Exh. 21 2:29:59-2:55:20) For these reasons, all the questions and answers that followed after Keys *first* invoked his right to silence were inadmissible, and counsel deficiently failed to move to suppress them. *See Hernandez*, 362 Ill. App. 3d at 784-89.

2. Counsel failed to redact inadmissible portions of Keys's interrogation videos.

Defense counsel was also deficient in failing to move to redact unduly prejudicial portions from Keys's interrogation videos, occurring primarily after, but also before Keys invoked his right to remain silent, including: (a) statements from police that their investigation had already

proven that Keys killed Rose, and that his denials were lies; (b) double hearsay references to an alleged confession that Keys allegedly made to his cousin, Nick, who did not testify at trial; and (c) suggestions of other criminal conduct from Keys. None of these inflammatory statements led to any relevant statements or conduct from Keys.

"[W]hen a recording or transcript of an interrogation includes [inflammatory police statements], the risk of unfair prejudice is high, and defense counsel should object on these grounds. If the objection is overruled, counsel should request an immediate limiting instruction that the jury should not accept the officers' statements are true or accurate, but should consider them only in evaluating what weight, if any, to give to the witness' or suspect's answers." Jones on Evidence, Ch. 40, §40:44, *Police statement of belief or disbelief, or repeating others' statements, during an interrogation* (Nov. 2023 Update). Yet counsel deficiently took neither step here. *See People v. Hardimon*, 2017 IL App (3d) 160279, ¶¶21-24 (counsel ineffective for failing to move to redact similar statements from interrogation video).

a. The officers' conclusions and references to double hearsay were inadmissible, along with discussions of other crimes.

The First, Second, Third, and Fifth Districts of the Appellate Court of Illinois have held that police statements during an interrogation are relevant if "necessary to demonstrate the effect of the statement on the defendant or to explain the defendant's responses," but lack relevance when they cause no relevant responses or incriminating information. *Hardimon*, 2017 IL App (3d) 120772, ¶35; *People v. Davila*, 2022 IL App (1st) 190882, ¶61; *People v. Theis*, 2011 IL App (2d) 091080, ¶33; *People v. McCallum*, 2018 IL App (5th) 160279, ¶66. Even relevant statements must be excluded where their probative value is outweighed by its prejudicial effect. *Hardimon*, 2017 IL App (3d) 120772, ¶35; *Davila*, 2022 IL App (1st) 190882, ¶61; *Theis*, 2011 IL App (2d) 091080, ¶33; *McCallum*, 2018 IL App (5th) 160279, ¶66.

Thus, in *Hardimon*, 2017 IL App (3d) 160279, ¶¶21-24, and *Davila*, 2022 IL App (1st)

190882, ¶64, the courts granted the defendant a new trial upon finding error in allowing the juries to see portions of interrogation videos where the police told the defendant they knew he committed the offense or referenced statements made by other witnesses, because those comments did not lead the defendants to change their statements or admit to the offenses.

This analysis is similar to that used by most other states. *See State v. Gaudreau*, 139 A.3d 433, 446 (R.I. 2016) (only a "small minority of states" find probative value in police statements during interrogation when defendant "made no inculpatory statements and had not changed his story during the interrogation"); Jones on Evidence, Ch. 40, §40:44, *Police statement of belief or disbelief, or repeating others' statements, during an interrogation* (Nov. 2023 Update) ("where an interrogator's accusations, assertions and statements of disbelief fail to shake the defendant into confessing or changing his answers, the interrogator's statements cannot be categorized as non-hearsay context; rather, they are 'commentary' with virtually no legitimate probative value and must be excluded"). For example, in *State v. Cordova*, 51 P.3d 449, 455 (Ct. App. Idaho 2002), the Idaho appellate court held that a statement from a police officer that he was an expert in detecting deception should have been redacted because it was "not necessary to give context to [Defendant's] answers"; the defendant did not respond to that question, and the officer's statement could have been "easily redacted without harming the context of the defendant's later admissions." *Accord State v. Rocha*, 890 N.W.2d 178, 199-200 (Neb. 2017) (statements from police during interrogation only admissible to provide "necessary context to a defendant's statements in the interview which are themselves admissible."

Similarly, in *People v. Musser*, 835 N.W.2d 319, 343-47 (Mich. 2013), the State published at a sexual assault trial a videotaped interrogation video in which the detectives commented favorably on the credibility of children who are victimized by sexual assault. The Michigan Supreme Court reversed the defendant's conviction, finding the statements had minimal relevance

because the defendant had not responded to one of the detective's prejudicial statements; for the remainder of the statements, the defendant had responded, but the detective's own contextual statements could have been redacted to remove the prejudicial portions therein. *Id*. at 359-65.

The Court also explained that due to the risk of undue prejudice, courts should not allow "a mechanical recitation by a party that an interrogator's statements are necessary to provide 'context' for a defendant's statements. . ." *Musser*, 835 N.W.2d at 354-55. Courts should "vigilantly weed out" statements that are not "necessary" to accomplish their purpose. *Id*. at 330, 355-56. Courts should also "be particularly mindful" of statements that would be inadmissible if a witness testified to the same at the defendant's trial, which create a greater danger that the jury might have difficulty limiting its consideration of the statements to their proper purpose. *Id*. at 357. *Accord Sweet v. State*, 234 P.3d 1193, 1204-05 (Wyo. 2010) (plain error in admission of interrogation video that contained opinions about accused's mendacity and guilt because they invaded the province of jury). Other states also preclude the admission of inflammatory statements during an interrogation when they do not lead the defendant to incriminate himself or alter his account. *See, e.g., Jackson v. State*,107 F.3d 328, 340-42 (Fla. 2012); *State v. Clevinger*, 791 S.E.2d 248, 254 (Ct. App. N.C. 2016); and *Walter v. State*, 196 A.3d 49, 60-63 (Ct. Spec. App. Md. 2018).

Multiple statements made by the officers during Keys's interrogation were prejudicial, while also leading to no relevant statement or other change in demeanor or story from Keys. First, the officers repeatedly expressed their confidence in Keys's guilt, based off of their own investigation, told Keys that his denials of involvement were not believable, and made statements about how his conduct showed he killed Barbara Rose intentionally:

1. I mean, we're kinda past the point of saying, hey, we don't know what happened. We've concluded our investigation up to this point and it's very clear that you caused the disappearance of Barbara [Rose], okay? (Exh. 21 53:49-54:22)

2. I know that Barb didn't ask you to make breakfast at six in the morning 'cause Barb wasn't with us anymore at six in the morning. Okay, so that didn't happen. So I don't know why you're saying that you remember that.(Exh. 21 54:46-55:25)

3. . . . it's starting to stack against ya. Now's your time to tell your story. And if that's the story you're gonna stick with, the other side of that story is going to continue to stack higher than the story you're giving us. (Exh. 21 58:18-59:35)

4. That's already been debunked, okay. I know that you told us that, but that has already been proved to be false. (Exh. 21 2:33:12-2:34:10)

5. So even if you had one of those episodes afterwards, you still would have had some things you needed to take care of to finish up, okay? And you did those things. *** And now you're gonna have to explain why you did those things and it's not gonna be that you had low blood sugar. (Exh. 21 2:40:54-2:42:20)

6. So when we go back and we show that you did all these things, and we show all this stuff, what's it gonna look like for you? How's it gonna play out for you? When we–we go back and we do all this and I'm gonna be like man, he sat there and looked me dead in my eye and said he didn't do nothing. That doesn't sound like it was an accident. That doesn't sound like you give a shit. That doesn't sound like you feel any guilt, any remorse, that you don't care. That you've been out doing whatever you wanna do, and now you're free, and you can do whatever you want. That's what that looks like. (Exh. 21 2:42:20-2:43:24)

7. There's–we're past the point of – this shit happened. There ain't no, there ain't no denying it. I mean you can sit there and say that, but it happened. We gotta deal with it. (Exh. 21 2:43:41-2:44:09)

8. I need you to tell me what happened. I need you to help me get her back. 'Cause we're past the point of that you didn't do it. We're . . . not there anymore. (Exh. 21 2:44:09-2:45:05)

9. This sitting here and being like, man, I didn't do it, hey, like this is not gonna fly. It's not gonna work for you. (Exh. 21 2:46:22-2:46:54)

10. You're not doing this for us. At this point you're doing this for you, man. The evidence has done what it's done for us and it's going to continue to do what it's gonna do. The problem is for you right now. Right now. 'Cause you are sitting there telling us that you had nothing to do with this. . . It paints you as a cold-hearted person. That you killed a mother in cold blood. And you sat here and you lied. You had no remorse for it. They're gonna play this in front of the jury and you're gonna sit here and tell us that you had nothing to do with this when everything up to this point and continuing past this is gonna prove otherwise. And you, you sat here and had no remorse. None. None. You did it out of cold blood. (Exh. 21 2:46:54-2:47:54)

11. We're past the point of trying to figure out if this happened. So that's, that's what I'm trying to get across to ya. I'm not saying, hey, did something happen? I already know it happened. I'm just asking you why because I want you to explain, I want to, I want to feel what you're feeling. *** And I know the only way is for you to tell me. But that's why I'm sittin' here doing that. You know that it's not because I need you to tell me so that I can prove my case that you did it. That's already been taken care of. (Exh 21 2:49:01-2:50:07)

12. ... if I gotta go and tell them, like, man, he wouldn't tell us why he did it. And he was like, man, it wasn't me, I don't know. So that just doesn't look good for you whatsoever down the road. (Exh. 21 2:50:25-2:51:08)

13. I'm just, umm, I'm just trying to make you understand that I'm, I'm not in here trying to make the case against ya. Okay. I think you understand that . . . the stuff we're presenting to ya, and I'm not giving you everything. I'm giving you enough, because I want you to be honest with me, I'm just giving you enough to lead you along, okay. I'm just giving you the stuff so that maybe you will find it in your heart to say, okay, since these guys are being straight with me, they're telling me these things, they know what's up, maybe I'll help them out with this other stuff . . .(Exh. 21 2:52:02-2:53:00)

In *Hardimon*, the State played for the jury an interrogation video in which, *inter alia*, the officers similarly stated: (1) "the facts is [*sic*] the facts," and that showing remorse would go "a long way;" (2) the State would take this to trial because "it is easy;" and (3) they "knew the defendant committed the offense and he needed to tell the detective why he fired the shots." 2017 IL App (3d) 160279, ¶¶21-24. Since "the defendant did not change his statement or admit to the offenses," the officers' statements "were more prejudicial than probative," in that they "removed the finding of guilt from the province of the jury as the detectives conclusively stated that the defendant was guilty of murder." *Id.* ¶37. Accordingly, the court found counsel ineffective for failing to redact them from the video. *Id.* ¶38. *See also Wilkes v. State*, 917 N.E.2d 675, 686-87 (Ind. 2009) (officer's statement to defendant during interrogation that "it happened" was akin to opinion evidence and should have been excluded).

Just like in *Hardimon* and all the out-of-state cases cited above, none of the statements quoted above led Keys to make any confessions, change his story, or make any other relevant comments. He maintained from the beginning to the end of his interrogation that he was not

involved. (Exh. 21 26:25-2:55:20)

In fact, almost all these statements were made as assertions, not questions, with Keys *offering no response at all* to the first, second, third, fifth, sixth, seventh, eighth, ninth, and eleventh statements quoted above, aside from occasionally saying "um-hmm" or "okay." (Exh. 21 53:49-54:22, 54:46-55:25, 58:18-59:35, 2:40:54-2:42:20, 2:42:20-2:43:24, 2:43:41-2:44:09, 2:44:09-2:45:05, 2:46:22-2:46:54, 2:49:01-2:50:07) The occasions when Keys *did* offer responses were similarly innocuous. After an officer made the fourth statement, asking if Keys understood that "this whole 'I don't remember thing'" was not "painting him in a positive light, Keys simply replied, "Yeah." (Exh. 21 2:33:12-2:34:10) When the police told Keys in the tenth quote that his refusal to admit that he killed Rose would prove to the jury that he killed her in cold blood, Keys responded, "So you're saying I did something to Barb out of cold blood." The officer said that was what it looked like, and Keys shook his head. He then asserted, as he stated throughout the entirety of his interrogation, "Like I told you, I ain't did nothing. Period. So you gotta do what you gotta do." (Exh. 21 2:47:39-2:48:12) When the officers continued to assert in the final two quotes that Keys's failure to admit that he killed Rose would not help him down the road, Keys initially remained silent, but when pressed to answer if he understood what the police were saying, Keys asserted, "Yeah, I get what you're saying." He then reiterated, "Like I told you, if I did anything, I would have told you." (Exh. 21 2:51:08-2:51:20) The interview then terminated *entirely* shortly thereafter. (Exh. 21 2:55:02)

In stark contrast to the non-existent or minimal probative value served by these statements, they carried an astronomical risk of prejudice. The repeated statements from the officers who investigated this case that they had determined Keys was responsible for Rose's disappearance, and that his denials were not only worthless, but also proved he killed Rose in cold blood, would have been highly persuasive to the jury. A "police officer's opinion or statement regarding

the ultimate question of fact possesses significant prejudice as the officer is a recognized authority figure." *Hardimon*, 2017 IL App (3d) 120772, ¶35. *See also United States v. Jett*, 908 F.3d 252, 267 (7th Cir. 2018) (noting that it had "repeatedly warned" of the dangers in allowing police opinion testimony, including risk that jury might unduly credit opinion of police officer due to perception that officer was privy to facts about defendant not presented at trial). *See also* Jones on Evidence, Ch. 40, §40:44, *Police statement of belief or disbelief, or repeating others' statements, during an interrogation* (Nov. 2023 Update) (even when a limiting instruction is given, jurors may still reasonably yet improperly credit an officer's apparent opinions during its deliberations). Since the prejudice from the statements far outweighed their probative value, they were inadmissible and counsel was deficient for failing to redact them.

Defense counsel also deficiently allowed the jury to hear throughout Keys's second interrogation video that "Nick," a non-testifying witness who was identified as Keys's cousin and whom Keys never had a chance to confront, told police that Keys confessed involvement in Rose's death to him. Specifically, the officers stated:

1. Somebody who says that you are one of his favorite cousins, um, would tell us these things. Only you two would know that. We don't know your relationship. So that's something that we would have to clarify, why he would say that you guys did these things, and then we come and we find the video that corroborates the things that he's telling us. How are we not to believe what he's telling us you told him is also true? (Exh 21 49:50-50:46)

2. To echo what he's saying, Nick is worried about you. * * * He's worried that you did something that you didn't mean to do. That you're not an evil guy and you planned on doing something. He thinks that it was a situation that you couldn't avoid based on the way you described things to him. And he's worried and didn't want things to do too far to the point where you can't explain yourself. (Exh 21 52:33-53:10)

3. . . . I'm hoping that Nick got the right impression and that this was not something that you wanted to happen." (Exh. 21 54:00-54:22)

4. Okay, obviously we've kinda talked to everybody. * * * And things are a problem for you right now. * * * Like I said before, Nick was worried about ya when he called us. * * * And when we talked to him and went through this whole

thing, he said the impression he got from you was that this wasn't something you did on purpose. (Exh. 21 2:40:29-2:40:54)

5. You called Nick. You were freaking out. You talked to him. You told him what happened. You told him it was an accident. You told him you didn't mean to do it. He believes you. I believe what he's saying that he believes it. Right? But then I'm sitting here man to man with you, and you're telling me no. (Exh 21 2:41:52-2:42:39)

6. So everything that Nick is telling us is fabricated? (Exh. 21 2:48:20-2:48:50)

In *Davila*, 2022 IL App (1st) 190882, the appellate court held that the trial court erred in failing to redact from an interrogation video, *inter alia*, repeated statements from the police that a witness who had known the defendant since they "were pups" would not "just put a case" on his friend. *Id*. ¶¶54-55. The court explained that when an officer vouches for the credibility of a States witness, "such conduct usurps the jury's role in a manner that can be simply devastating." *Id*. ¶61. *See also Crawford v. State*, 404 A.2d 244, 246, 249, 254-56 (Ct. App. Md. 1979) (allowing jury to hear tape recording of interrogation in which defendant maintained she acted in self-defense, even when police expressed disbelief by stating "I don't buy it" and recounted what other named and unnamed persons had told them, "did not meet the civilized standards for a fair and impartial trial" and "fatally infected the trial").

Like *Davila*, the police here also bolstered the credibility of Nick's alleged statement by referencing how Keys was one of Nick's "favorite cousins" (Exh. 21 49:20-50:46), and by asserting that, since surveillance tape showed Nick and Keys engaged in *other* activity, the police believed what Nick said about what Keys *told* him, *i.e.*, that Keys was responsible for Rose's death. (Exh. 21 55:52-56:59) Yet substantially worse than *Davila*, Nick did not testify; there was no actual evidence that Keys ever made *any* statement to Nick about Rose's death; or if he did, what he said to Nick. In other words, the police could have completely fabricated this statement to try to obtain a statement from Keys. *See People v. Patterson*, 2014 IL 115102, ¶76 (police may use deception during interrogation). Thus, even more prejudicial

than in *Davila*, the statements here bolstered *inadmissible and possibly entirely false hearsay*.

To ensure a fair trial secured only by competent evidence, the hearsay rule prohibits the admission of an out-of-court statement offered to prove the truth of the matter asserted. Ill. R. Evid. 802 (2018); *People v. Williams*, 238 Ill. 2d 125, 143 (2010); *People v. Boling*, 2014 IL App (4th) 120634, ¶118. In that regard, statements made by non-testifying witnesses during the course of an investigation are testimonial and inadmissible under the Confrontation Clause. *Davis v. Washington*, 547 U.S. 813, 822 (2006); *Crawford v. Washington*, 541 U.S. 36, 52-69 (2004); U.S. Const. amends. VI, XIV. Police may not testify to the substance of statements given during an investigation, only to the steps they took after speaking to witness. *People v. Gacho*, 122 Ill. 2d 221, 248-49 (1988).

Moreover, like the first set of statements from the officers discussing the evidence of Keys's guilt, their references to Nick's hearsay statement neither produced a confession from Keys nor led him to change his story. The first, second, fourth, and fifth time that the police mentioned Nick's supposed statement to them, they discussed that Nick suggested Rose's death may have been accidental, but those statements were also not followed by any question to Keys. (Exh. 21 49:20-50:46, 53:10-54:22, 2:40:29-2:40:54, 2:41:00-2:46:54)

With respect to the sixth quote above, *i.e.*, the question about whether everything Nick had "said" was "fabricated," Keys answered affirmatively and said he did not tell Nick anything. (Exh. 21 2:48:20-2:48:50) Yet this line of questioning was itself problematic. At a criminal trial, the State is not permitted to ask a witness–particularly a criminal defendant–to comment on the credibility of another witness. *People v. Becker*, 239 Ill. 2d 215, 236 (2010). In *United States v. Schmitz*, 634 F.3d 1247, 1269 (11th Cir. 2011), the federal court explained that these questions not only undermine the jury's function in making credibility assessments, but they are especially prejudicial "because the predominate purpose of such questions is to make the

defendant look bad." *Id*. In this case, Keys suffered even worse prejudice because the jury never got to see Nick testify to judge his credibility itself. It only heard the police tell Keys that *they* believed what Nick told them, and only their own description of what Nick told them, as well as the officers' professed faith in Nick's credibility. (Exh 21 49:50-50:46) Thus, this question in and of itself was more prejudicial than probative.

Ultimately, there was only *one* time when the officers' references to Nick's alleged statement resulted in an actual and proper question to Keys. Specifically, the third time Nick's name came up, an officer stated that he hoped Nick got the right impression in that Keys did not mean for this to happen, which the detective followed by stating, ". . . this was kinda something that just happened, and [ ] you didn't know what to do afterwards." He then asked Keys, "Is that what we're talking about here?" (Exh. 21 54:00-54:46) Yet it was this very question that resulted in Keys invoking his right to silence, as explained in the prior section, *supra*. (Exh. 21 54:00-54:46) Thus, this question and answer should not have been shown to the jury. *See Grunwald v. United States*, 353 U.S. 391, 416 (1957) (State cannot cross-examine defendant on exercise of constitutional rights).

Yet even if this Court disagrees that this was a clear invocation of the right to silence, the exchange could have been easily redacted to remove the reference to Nick. At trial, the State argued in rebuttal that the jury should not believe Rose's death was an accident, since Keys denied involvement in Rose's death, even when the police repeatedly asked him if Rose's death was accidental. (R. 1246) To that end, only the latter part of the question cited above–whether Keys agreed that this was something he did not want to happen and that he had not known what to do afterwards–was needed to show that Keys declined a chance to tell police that Rose's death was an accident.

Moreover, the interview was riddled with other instances where Keys declined

opportunities to say that Rose's death was an accident when the police told Keys *directly* that they were giving him an opportunity to say if something accidental happened, without referencing Nick at all. (Exh. 21 41:50-42:15, 50:46-52:33 53:30-53:49, 55:42-56:59, 2:44:09-2:44:41, 2:45:45-2:46:22) All of this was enough to show that Keys declined multiple opportunities to tell the police that Rose's death was an accident. *See Davila*, 2022 IL App (1st) 190882, ¶53 (courts should look to entire interrogation video when determining admissibility of prejudicial statements at issue); *Musser*, 835 N.W.2d at 359-62 (even prejudicial statements made by police to which defendant offered *relevant* responses should have been redacted because it would not have caused defendant's statements to lose their value); *State v. Elnicki*, 105 P.3d 1222, 1226-27 (Kan. 2005) ("the State could have safely achieved its goal simply by having [detective] testify and point out the progression of Elnicki's various stories as the tape was played–minus [the detective's] numerous negative comments on Elnicki's credibility").

Finally, counsel also failed to redact instances from Keys's first and second interrogation videos where either he or the police made statements that suggested his involvement in other crimes, none of which were relevant to any material matter. Evidence of other crimes are inadmissible, absent a lawful purpose to prove the charged offense. *People v. Manning*, 182 Ill. 2d 193, 213 (1998). Such evidence persuades the jury to find the defendant guilty because he is a bad person or has a propensity to commit crime. *People v. Robinson*, 167 Ill. 2d 53, 62 (1992). Thus, when "evidence of other offenses unrelated to the crime for which a defendant is on trial . . . is contained in an otherwise competent statement. . ., it must be deleted before the statement or confession is read to the jury, unless to do so would seriously impair its evidentiary value." *People v. Lampkin*, 98 Ill. 2d 418, 430 (1983) (internal citation omitted).

Here, during Keys's first interview, he stated that on the day Rose went missing, she went to buy a car in Indiana. (Exh. 17 9:48-10:20) When asked about "the circumstances behind

this car," Keys answered, "it was so we could both have a vehicle cause I'm fighting my cases. I need to be able to go back and forth to see my attorneys. Because at the moment, and I'm currently looking for new counsel because my counsel is not representing me like I think they should." (Exh. 17 10:12-10:40) Similarly, during Keys's second interrogation, the police asked why his blood sugar was low. Keys said it was caused by stress. Through further questioning, Keys said he was stressed because he was "fighting" three cases. (Exh. 21 36:50-37:39)

The reference to Keys "fighting" his cases allowed the jury to infer that he was facing additional charges at the time of Rose's death. These statements could have been redacted, without impairing the evidentiary value of the video. *See Lampkin*, 98 Ill. 2d at 430. The reference to those other cases came up first when discussing why Rose went to get a car from Indiana. In that regard, Keys's assertion that she was buying a second car "so [they] could both have a vehicle" was sufficient to show Keys's explanation. (Exh. 17 9:48-10:20) That Keys planned to use the vehicle to go back and forth to see his attorneys was surplusage. Similarly, the likely point in asking Keys in the second interrogation why he was stressed was to see if Keys would disclose any stress that could be linked to Rose's disappearance. Since Keys did not provide any such answer, but instead said he was stressed because of his own cases, nothing about that question and answer made Keys's guilt any more likely.

Next, in Keys's second interrogation, a detective told him, ". . . I remember you telling me yesterday, two days ago, that you're not used to coming in here and talking to the police without being handcuffed. You were surprised that we didn't handcuff you. We were just talking to you cause we hadn't talked to you yet. But now it's starting to stack against ya." (Exh. 21 58:18-59:35) The obvious implication from Keys being used to talking to the police in handcuffs was that he was in frequent trouble with the criminal justice system. Further implication could be made that his prior arrests were serious enough that additional questioning was warranted

and that police believed he was violent and needed to be restrained. Thus, this statement painted Keys as a violent criminal with a long history of police involvement. *See People v. Miller*, 311 Ill. App. 3d 772, 786 (5th Dist. 2000) (allowing jury to see defendant's statement that he had "done a lot of bad things" was reversible error). There was no conceivable reason why the jury needed to hear this statement, and it could have also been removed without impairing the video's evidentiary value. Counsel was deficient in failing to move to have *all* these statements redacted.

b. The Fourth District improperly found the officers' statements admissible because it believed they were "helpful."

The Fourth District found no problem in the jury's viewing of all these prejudicial statements. It expressly disagreed with the "imposition of a 'necessary' standard for determining whether officers' statements and questions are probative." *Keys*, 2023 IL App (4th) 210630, ¶¶71-72, *citing People v. Whitfield*, 2018 IL App (4th) 150948, ¶¶48-49. Instead, it held that officers' statements need only be "helpful" to place the defendant's "statements" or "silence" into context. *Keys*, 2023 IL App (4th) 210630, ¶71. Thus, the Fourth District allows highly inflammatory statements from police officers that would clearly be inadmissible at trial to be admitted through an interrogation video, even if they have no effect on the defendant and cause him to say nothing, and even if they are *unnecessary* even to put his silence into context. This decision makes Illinois a true outlier in its unique unfairness to criminal defendants and should be rejected. *See Gaudreau*, 139 A.3d at 446 (only a "small minority of states" find probative value in statements from police when defendant "made no inculpatory statements and had not changed his story during the interrogation").

The flaws in this lenient standard are borne out by the Fourth District's analysis in this case. The court found the statements here relevant because they were "helpful and useful in explaining (1) defendant's complete lack of affect when discussing his paramour's

disappearance and demise and (2) defendant's far-fetched explanations for Rose's disappearance, [and] his presence at the gas stations and Walmart . . ." *Keys*, 2023 IL App (4th) 210630, ¶71. Yet, the so-called "far-fetched explanations for Rose's disappearance,"and Key's explanation for his presence at the gas stations and Walmart, all occurred *before* the challenged statements from the police officers were made.[3] More specifically, Keys discussed his low blood sugar as well as Rose's plan to buy a car in Indiana in the first interrogation, and between minutes 32 and 37 of the second interrogation. (Exh. 17 9:48-42:39, Exh. 21 32:45-37:39) For the next 12 minutes of the second interrogation, Keys talked further about his actions during the hours leading to Rose's disappearance, and why he would have gone to gas stations and Walmart. (Exh. 21 37:39-49:20) Only *after* this did the officers make the statements challenged in this appeal. Thus, not even one of those statements was "useful" or "helpful" in explaining the statements made by Keys about Rose's disappearance and his own presence at Walmart.

The degree to which the appellate court found Keys's silence "useful" or "helpful" in the face of the officers' increasingly hostile behavior has constitutional implications. In *Commonwealth v. Kitchen*, 730 A.2d 513, 522 (Penn. 1999), the Pennsylvania Supreme Court held that the jury could not see portions of an interrogation video wherein the defendant sat silently when the interrogating officers told her: (1) she failed to come forward with the true story; (2) there were a lot of things she said that they knew were not true; and (3) she knew another suspect was going to kill the victim. The Court found that showing the jury this video would involve showing the jury an improper reference to pre-arrest sentence, in violation of the defendant's right against self-incrimination. *Id. See also Doyle v. Ohio*, 426 U.S. 610, 617-20

[3] Some of the references to other crimes occurred prior to Keys's explanations for Rose's disappearance (at least during his second interrogation) and his presence at Walmart. (Exh. 17 9:48-10:40, Exh. 21 36:50-37:39) Yet *those* statements were made by Keys, not the police officers, and thus they do not impact whether any statement from *the police officers* during the interrogation was relevant.

(1976) (defendant's silence after being provided with *Miranda* warnings is inadmissible because it: (1) may be nothing more than the "exercise of . . . *Miranda* rights;" and (2) is "fundamentally unfair and a deprivation of due process" because *Miranda* warnings contain an implicit "assurance that silence will carry no penalty"); *People v. Nitz*, 143 Ill. 2d 82, 105-08 (1991) (State's argument in summation about what defendant did *not* say during a post-*Miranda* interrogation"struck at the heart of defendant's right to remain silent after being read his *Miranda* warnings").

To allow these statements to be admissible also when they have *no* impact on the defendant is quite simply to hold that inflammatory police statements like these are *always* relevant. It also encourages police to make whatever sort of inflammatory statements they want during an interrogation video–whether true or false–in order to be able to place those statements before a jury, simply because the non-reaction from the defendant is itself deemed relevant. *See People v. Hughes*, 2013 IL App (1st) 110237, ¶4, *aff'd in part, rev'd on alternate grounds*, 2015 IL 117242 ("detectives' claims of having nonexistent evidence is a common police strategy" during interrogations). Indeed, in this case, the officers specifically noted during the interrogation that the State "was gonna play this in front of the jury," and then immediately added their own commentary that Keys's demeanor during the interrogation proved he "did it out of cold blood." (Exh. 21 2:46:54-2:47:54)

Crucially, the fact that Keys did not flinch in the face of the officers' accusations did not make his guilt more or less likely. Keys may have known–as he told the officers specifically during the interrogation (Exh. 21 2:48:20-2:48:50)–that he did not confess anything about his involvement in Rose's disappearance to Nick. Keys may also not have felt the need to repeat himself when the police said the evidence against him proved he killed Rose, since he may have known that he did not kill Rose and also knew had already told the police that fact. Or, even if Keys did kill Rose and did so accidentally, his decision not to tell the police that *particular*

fact has very little probative value, since he had told the police he did not want to talk to them *at all*. Indeed, even if this Court finds that Keys did not *clearly* invoke his right to silence, he did at least *assert* that right. Thus, particularly in this case, his silence in the face of all of these interrogation tactics had even less probative value to prove any relevant point at issue in his trial. It was not even *helpful* or *useful* for the jury to see the officers' statements; it merely added confusion, potentially false claims and evidence, and undue prejudice into the trial. These statements should have been redacted, and defense counsel was ineffective in failing to do so. *See* Ill. R.Evid. 403; *Hardimon*, 2017 IL App (3d) 160279, ¶¶21-24, 37-38.

3. Counsel failed to request limiting instructions.

Whether or not the interrogation videos were properly admitted in full, no limiting instructions were given on how the jury could consider the officers' statements during the interrogations. (SUP CI. 32-58; R. 55-58, 175-77) Because such instructions were vital to a fair resolution of this case, the failure of defense counsel to request them was objectively unreasonable and "cannot be excused as trial strategy." *People v. Lowry*, 354 Ill. App. 3d 760, 766-68 (1st Dist. 2004) (counsel ineffective where defendant's knowledge was at issue at trial, but counsel failed to offer instruction on definition of knowing behavior). *See also People v. Hooker*, 253 Ill. App. 3d 1075, 1085 (2d Dist. 1993) (failure to seek limiting instruction on other-crimes evidence was ineffective).

Illinois requires a limiting instruction whenever evidence like hearsay is admitted for a limited purpose. *See* 1 Illinois Pattern Jury Instructions - Criminal 1.01 ("Any evidence that was received for a limited purpose should not be considered by you for any other purpose."); *People v. Bradford*, 106 Ill. 2d 492, 501-02 (1985) (emphasizing importance of limiting instructions due to risk that jury might consider limited evidence as "independent evidence with substantive character"). In *People v. Armstead*, 322 Ill. App. 3d 1, 12 (1st Dist. 2001),

the State elicited from a detective that a witness told him the defendant–on trial for aggravated battery with a firearm–was the shooter. While the court found the testimony admissible for the limited purpose of explaining how the police conducted their investigation, it also found plain error from the fact that the jury was not instructed that the statement was only introduced for that purpose and that the jury was not to accept the statement for its truth. *Id*. *See also People v. Boling*, 2014 IL App (4th) 120634, ¶135 (improper hearsay was "especially troubling because the trial court never issued a limiting instruction," which allowed jury to rely on hearsay as substantive evidence of defendant's guilt).

Here as well, without any limiting instruction that the statements made by the police during Keys's interrogation video were admissible *solely* to show their effect on Keys, and could *not* be considered for their truth or even assumed to be truthful, the jury could rely on all those statements for their substance, *i.e.*, that the officers determined that Keys killed Rose and believed he did so intentionally, and that Keys had in fact told his cousin, Nick, that he killed Rose. *See People v. Jura*, 352 Ill. App. 3d 1080, 1093 (1st Dist. 2004) (without instruction to consider hearsay only for limited purpose, courts will presume jury considered evidence for truth of the matter asserted). Indeed, the jury likely put great stock into that evidence. *See Davila*, 2022 IL App (1st) 190882, ¶¶71-72 (without a limiting instruction, jury could mistake statements from officers during interrogation as their present opinion of guilt); *United States v. Gutierrez*, 995 F.2d 169, 172 (9th Cir. 1993) (expert testimony from law enforcement officer carries "an aura of special reliability and trustworthiness").

The appellate court dismissed the need for any such limiting instruction on the ground that "no Illinois court has addressed the need for such instructions." *Keys*, 2023 IL App (4th) 210630, ¶ 74. Yet as just explained, Illinois law requires a limiting instruction *any* time hearsay is given. *See Armstead*, 322 Ill. App. 3d at 12. Moreover, there is no specific pattern jury

instruction for *any* type of hearsay in Illinois; I.P.I. 1.01 instead states generally that *any* evidence offered for any limiting purpose must be accompanied by a limiting instruction.

Indeed, other states who similarly lack a *specific* jury instruction for police interrogation statements routinely give limiting instructions in those cases and reverse convictions when such instruction is not given. For example, in *Cordova*, 51 P.3d at 455, the Idaho appellate court found that comments made by police officers during an interrogation were admissible because they provided context for the defendant's inculpatory responses. Yet it also held that the trial court erred in not providing a limiting instruction for that evidence because an Idaho Rule of Evidence required that "a court shall give, upon request, a limiting instruction restricting evidence that is admissible for one purpose but not admissible for another purpose to its proper scope." *Id*. This rule is nearly identical to Illinois's own rule of evidence. *See* Ill. R. Evid. 105 ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper purpose or scope and instruct the jury accordingly."). Given that rule of evidence, the Idaho appellate court looked to other state and federal case law to assess how the specific instruction should have read, determining that the jury should have been instructed, *prior to viewing the interrogation video*, "that the police questioning they [we]re about to observe [wa]s relevant only for the limited purpose of providing context to the defendant's answers and should not be considered for the truth of the officers' statements made therein." *Cordova*, 51 P.3d at 455-56, *citing Dubria v. Smith*, 224 F.3d 995, 1002 (9th Cir. 2000) (judge told jury twice they were "not to assume as true" anything said by detective during interrogation, but his questions "were only pertinent as they give meaning to the answers").

Likewise, in *Musser*, 835 N.W.2d at 333-34, the Michigan Supreme Court found this instruction so important that it was reversible error not to provide it *before* the police interrogation

video was viewed; a belated curative instruction was not enough because it had allowed the jury to review the recording under the belief that statements made by officers therein were evidence. *See also Elnicki*, 105 P.3d at 1228-29 (absence of limiting instruction "misle[d] the jury into believing that [officer's] negative comments carried the weight of testimony"); *State v. Esse*, No. 03-1739, 2005 WL 2367779, at *3-4 (Iowa Ct. App. 2005)[4] (reversing defendant's convictions because trial court refused to provide limiting instruction that statements made by police officers were not evidence); Jones on Evidence, Ch. 40, §40:44, *Police statement of belief or disbelief, or repeating others' statements, during an interrogation* (Nov. 2023 Update) (discussing need to "swiftly, emphatically and repeatedly" instruct jurors on statements made by police during interrogation, including statements disbelieving the suspect's denial, because *even when a limiting instruction is given*, jurors may still reasonably yet improperly credit the officer's apparent opinions during its deliberations).

States have also relied on limiting instructions to cure prejudice, even when the admission of police hearsay in videotaped interviews was error. *See, e.g., Clevinger*, 791 S.E.2d at 390-91 (error in admission of interrogation video containing prejudicial police statements was harmless because trial court twice instructed jury that it was not to consider those statements for their truth); *State v. Parker*, 334 P.3d 806, 814-15 (Idaho 2014) (trial court provided lengthy instruction, prior to jury's viewing of interrogation, that statements made by police were not evidence and were only relevant to place defendant's statements in context, that officers were permitted to make statements that "may even be totally false," and that jury could not base its verdict on any statements made by police); *State v. Pennington*, 464 S.W.3d 292, 295-96 (Mo. Ct. App. 2015) (jury instructed that statements "may be considered by you only for the purpose

[4] Under Iowa Rule of Appellate Procedure 6.904(a)(2) (2024), unpublished decisions "do not constitute controlling legal authority, but they may be cited as providing persuasive reasoning."

of giving context and meaning to the defendant's responses and shall not be considered by you for any other purpose"); *State v. Miller*, 816 N.W.2d 331, 335 (Ct. App. Wis. 2012) ("at the time the video was played, the court made a point to instruct the jury that [detective's] statements to [defendant] were not being offered as true but to provide continuity for the entire interview); *State v. Ralios*, 783 N.W.2d 647, 660 (S.D. 2010) (jury instructed that questions and statements by police are not evidence); *Lanham v. Commonwealth*, 171 S.W.3d 14, 28 (Ken. 2005) (jury should be admonished *before* viewing interrogation that officer's comments are offered solely to provide context to defendant's relevant responses).

Notably, without similar instructions in this case, the manner in which the statements made by the police took on a substantive role rendered them inadmissible, even if they were properly offered to contextualize Keys's responses. For example, in *State v. Grant*, No. A-1401-18, 2022 WL 453562, *5, 8 (Sup. Ct. N.J., App. Div. 2022),[5] the jury viewed a videotaped interrogation–without any limiting instruction–in which a police officer said he knew the defendant was lying, that video recordings contradicted his story, that the defendant had a gun on him just before the shooting, and that a jury would not believe his story and would want to know why he killed the victim. The appellate court found plain error in the admission of this evidence, noting that without any instruction, the officer's statements amounted to improper opinion testimony, which invaded the province of the jury. *Id*. at *9. The court explained that while the statements were certainly proper interrogation techniques, the absence of a limiting instruction gave them full evidentiary value, which was "highly inflammatory" and "invaded the province of the jury." *Id*; *accord Davila*, 2022 IL App (1st) 190882, ¶72 (absence of limiting instruction left jury to decipher what statements of police during interrogation could be true

[5] New Jersey allows for unpublished opinions to be cited as non-binding authority when counsel provides the court and the parties with a copy of the opinion. N.J. Rules of Court, R. 1:36-3 (2022).

or false, which allowed jury to improperly view any statements made by officers during interrogation as present opinions).

Illinois also forbids testimony from a police officer that he believed either currently or during his investigation that the defendant committed the charged offense. *People v. Crump*, 319 Ill. App. 3d 538, 541-44 (3d Dist. 2001); *People v. Munoz*, 398 Ill. App. 3d 455, 489 (1st Dist. 2010). Yet without any limiting instruction, the officers' repeated statements to Keys that they already knew he was responsible for Rose's disappearance, and that his denials proved he killed her intentionally, served substantively as police opinion testimony that Illinois forbids. Like in *Grant*, this evidence was highly inflammatory and invaded the province of the jury.

Similarly, the degree to which the officers repeatedly discussed statements allegedly made by cousin Nick during the interrogation video also impacted Keys's constitutional rights under the confrontation clause, given the absence of a limiting instruction. In this case, there can be no doubt that–if Nick actually ever did tell police that Keys told him that he was responsible for Rose's death–Nick's statement would amount to testimonial hearsay. *See Crawford*, 541 U.S. at 52 (statement is testimonial when made under circumstances that would lead an objective witness reasonably to believe that statement would be available for later use at trial). Thus, the State could not admit that statement at trial, without providing Keys an opportunity to cross-examine Nick, and without proof that Nick was unavailable and that Keys had a prior opportunity to cross-examine him. *Id*. at 54-56. Without the requisite limiting instruction, however, that is exactly what the State did. Thus, Keys's constitutional right to confront the witnesses against him was violated. *See Orlando v. Nassau County District Attorney's Office*, 915 F.3d 113, 116-19, 123-24 (2d Cir. 2019) (detective's discussion during testimony of co-defendant's admission–which was properly offered to show how it led defendant to change his own statement–violated defendant's right to confrontation, even though jury *was* instructed

on its limited purpose, because prosecution never disavowed that co-defendant actually made that statement and instead recounted the statement during summation). Counsel's failure to request the instruction that would have cured this constitutional problem was deficient.

For all these reasons, defense counsel deficiently failed to request limiting instructions on how the jury could consider the statements made by the detectives during Keys's interrogation.

B. Keys was prejudiced.

Keys was prejudiced by the jury's receipt of all this improper and inflammatory evidence, without any limiting instructions. To prove prejudice, the defendant must show that counsel's errors undermine confidence in the outcome of the proceedings or denied him a fair trial. *Strickland*, 466 U.S. at 687-89. He "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." *Id*. at 694. The question is whether the "decision reached would reasonably likely have been different absent the errors," and "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id*. at 696. *See also Thomas v. Clements*, 789 F.3d 760, 767-68 (7th Cir. 2015), *cert. denied*, 136 S.Ct. 1454 (2016) (state court erred by holding that defendant had not shown testimony omitted by counsel "*would have* led to a different result at trial") (emphasis added). Courts must consider *all* the evidence offered at trial, not just that which supports a conviction. *Elmore v. Ozmint*, 661 F.3d 783, 868-72 (4th Cir. 2011) (reversing state court decision where, *inter alia*, the only evidence it cited when analyzing prejudice was "the evidence incriminating" defendant).

At its core, a trial that includes evidence of Keys's failure to respond to questions despite his invocation of his right to remain silent; testimonial hearsay that the jury was allowed to consider substantively, which Keys had no chance to cross-examine, and which may not have even been true; assertions from the investigating police officers that Keys intentionally killed

Rose; and evidence that Keys was used to being in handcuffs and was fighting additional charges when Rose died, is not even close to the type of reliable trial that the U.S. Supreme Court has envisioned effective counsel will ensure her client receives. *See Strickland*, 466 U.S. at 694.

It is also reasonably likely that the jury could have reached a different outcome other than finding Keys guilty of first-degree murder, but for the mountain of improper evidence that counsel allowed. First, the State's evidence was far from overwhelming to prove that Keys killed Rose. There were no eyewitnesses to her death; the State offered no motive for Keys to kill her; Keys did not confess his involvement to the police; and no gun was recovered or linked to Keys. The *only* direct evidence that Keys killed Rose came from Hamilton, a jailhouse informant who testified that Keys admitted his involvement to him. (R. 130-34) Yet Hamilton was a career criminal who had provided testimony against other defendants in the past in exchange for his own benefits, and he obtained *two* benefits in this case, first getting out of jail on medical recognizance after taking the police to the location where he said Keys burned Rose's body, and also getting a Class X charge reduced to a charge with a three-year sentence in exchange for his additional testimony at trial. (R. 114-16, 142-44)

Hamilton's ability to show the police a burn site was not enough to render him reliable, as counsel argued persuasively at trial that Hamilton could have simply guessed that location, since he had lived with Keys and Rose, and the burnsite was an abandoned area close to their house. (R. 118-19, 1220-22) Hamilton's knowledge of the burn site also showed only that he knew about Keys's actions *after* Rose's death. In terms of her actual death, Hamilton was contradicted. For example, he claimed Keys said he held Rose for "probably like 30 minutes" until she died (R. 133), which was directly refuted by the forensic examiner who performed Rose's autopsy and confirmed she "died within minutes." (R. 236) Nor did Hamilton know a fundamentally important fact that he could *not* guess, *i.e.*, the location of the gun that killed

Rose. In fact, most of his knowledge focused only on what police already knew from surveillance video before they spoke to him, such as the fact that Keys went to various gas stations and to Walmart after Rose's death, and what he intended to purchase there. (R. 135-36) Such details seem unlikely to have come from Keys in the context that Hamilton said Keys talked to him, *i.e.*, having woken up from a nightmare and needing to get things off of his chest. (R. 126,131-35)

Indeed, the State acknowledged during summation that Hamilton's testimony alone would not be enough to prove its case, and that the jury should view his testimony with caution. (R. 1199, 1241) And again, without Hamilton's testimony, *there was no direct evidence that Keys killed Rose*. Yet because of counsel's deficiencies, the jury *also* heard that Keys confessed to his own cousin, Nick, who would seemingly have no motive to make a claim against Keys falsely. A "confession is the most powerful piece of evidence the State can offer, and its effect on a jury is incalculable." *R.C.*, 108 Ill. 2d at 356. Thus, it is nearly certain that the jury relied on the officers' discussions of Nick's supposed description of Keys's alleged confession to him when deliberating Keys's guilt. The jury also watched the police tell Keys–over and over again–that their investigation had already proven that Keys killed Rose, and that the *only* thing they needed to hear from him was *why* he killed her. *See* Arg. I(A)(2)(b), *supra*.

To be sure, the State presented sufficient evidence from which a rational trier of fact could conclude that Keys *hid* Rose's death. Yet this evidence only proved that Keys tried to cover up Rose's death, not that he murdered her. Notably, Ebbonie Bryant testified that she saw an unusual car in Rose's driveway when she dropped her baby off prior to Rose's death. (R. 582-84) One of Rose's friends also said Rose posted on Facebook the day after Keys was alleged to have killed her, and Keys's assertion to police that Rose left the house that morning to get a car in Indiana was partially corroborated by one of Rose's sons, who saw the Facebook messages between Rose and the Indiana woman who was selling a car. (R. 529) Between all

this evidence, and the absence of any motive whatsoever for Keys to kill Rose, the jury could have found that someone else killed Rose, or that Rose killed herself, and either Keys was potentially covering for someone else or believed he would be presumed to be her killer.

Yet even if the jury believed Keys *did* kill Rose, the State's evidence was downright weak to prove he did so intentionally. The *only* direct evidence offered by the State that Keys killed Rose–Hamilton's testimony–specifically described a situation in which Rose's death was accidental. According to Hamilton, Keys said he and Rose had been "joking around," when Rose pointed a starter pistol at him. Keys then pulled out a .22-caliber revolver, and at some point thereafter Rose's starter pistol went off. The next thing Keys knew, Rose was bleeding and died. (R. 130-34) The jury could reasonably infer from this testimony that Rose's starter pistol may have startled Keys, resulting in him accidentally or unknowingly firing his revolver, or causing him to stumble and discharge the gun. A jury could have also reasonably inferred that Keys intentionally or knowingly fired his gun in response, perhaps due to forgetting in that moment that Rose's gun was only a starter pistol, or not paying attention to his aim or intending to strike Rose, and thus having more of a reckless state of mind.

Additional evidence presented at trial also supports an accidental rather than intentional death. A starter pistol was in fact found in Rose's bedroom. (R. 853-56) Further, under Hamilton's version, Rose's death occurred when other people were in the home, including Rose's 18-year-old daughter. (R. 526-27; Exh. 17 12:43-12:51) Yet the State presented no evidence that anyone heard any fighting between Keys and Rose prior to her death. Moreover, had Keys intended to harm Rose, it defies common sense that he would perform that action when he could so easily be discovered by others present at the time.

Surveillance video presented by the State also confirmed that Keys was outside the home buying supplies to conceal Rose's death at 5:14 a.m. (R. 660; Exh. 13) Only a few hours

earlier, Rose had agreed to babysit Bryant's infant daughter, who dropped off her baby around 2:30 or 3:00 a.m. (R. 572-74) Rose likely would not have offered to bring an infant into her home, had she been arguing with Keys or felt any threat from him. Even more tellingly, when Bryant dropped off her baby, she saw both Keys and Rose, and noticed nothing unusual. (R. 573-76, 582-83) Thus, the State's evidence allowed for multiple interpretations: Keys *may* have voluntarily pulled the trigger, but the evidence at least equally allowed the possibility that the discharge was accidental, particularly where Keys and Rose were joking around when the event occurred. *See People v. Smith*, 185 Ill. 2d 532, 546 (1999) (no conviction can rest in whole or in part on speculation or guesswork).

Yet due to counsel's deficiency, the jury heard the officers who investigated this case state incessantly that Keys's failure to admit that he killed Rose proved he was a cold-blooded killer who intended to kill Rose. (Exh. 21 55:42-56:53, 2:42:40-2:43:24, 2:45:00-2:46:54, 2:47:16-2:48:03, 2:50:07-2:41:20, 2:52:02-2:54:04) And, again, this jury was never instructed that it could not consider the purported opinions of the officers when inferring Keys's mental state themselves. Thus, the officers' statements would have been highly compelling evidence upon which the jury could rely to find Keys's guilt. *See Hardimon*, 2017 IL App (3d) 120772, ¶35 ("a police officer's opinion or statement regarding the ultimate question of fact possesses significant prejudice, as the officer is a recognized authority figure").

The Florida Supreme Court's decision in *Jackson*, 107 So. 3d 328, keenly explained the type of prejudice that occurred here. There, the defendant was convicted of murder and sexual battery. *Id*. at 330. On appeal, the Court found "strong evidence" of his guilt, including his DNA inside the victim's vagina and rectum, his opportunity to commit the crimes, and his incredible testimony at trial. *Id*. at 342-43. Yet there were no eyewitnesses to the crime, and the State stopped its investigation once it found the DNA match. *Id*. at 343. In that context,

the detectives had expressed an "ardent" belief in the defendant's guilt during his interrogation, and their questions to him focused only on how to resolve why he killed the victim, not whether he was the correct suspect. *Id.* The Court found the jury would give "great weight" to the officers' statements that Jackson was guilty and that his denials lacked credibility, which "could have augmented the value of the State's circumstantial evidence" and "validated the credibility of State witnesses," *inter alia*. *Id*. at 341-44. "Any chance the jury would have reasonable doubt regarding Jackson's guilt would have been obviated by quickly recalling the detectives' adamant belief in Jackson's guilt." *Id*. at 344. Thus, the Court granted the defendant a new trial. *Id*. at 344. *See also Hardimon*, 2017 IL App (3d) 120772, ¶¶38-39 (officers' interrogation statements painting defendant as cold-blooded murderer bolstered State's case and disparaged defendant in case where evidence did not "directly" connect him to crime).

Here as well, allowing the jury to hear the interrogating detectives' own opinions and discussion of hearsay caused Keys sufficient prejudice to require a new trial, since that evidence "removed the finding of guilt from the jury." *Hardimon*, 2017 IL App (3d) 120772, ¶37. Yet counsel *also* allowed evidence that Keys was frequently involved in crime. Other-crimes evidence "is not considered irrelevant; instead, it is objectionable because such evidence has 'too much' probative value." *People v. Donoho*, 204 Ill. 2d 159, 170 (2003), *quoting Manning*, 182 Ill. 2d at 213. Evidence that Keys was "fighting" other cases at the time of Rose's death (Exh 17 10:12-10:40), and that he was used to talking to the police in handcuffs (Exh. 21 58:18-59:35), allowed the jury to assess his mental state believing he lived a life of crime, making it easier to conclude he killed Rose intentionally. The vague manner in which these other crimes were referenced was especially prejudicial, as it invited speculation that Keys's other crimes could have been violent. *See People v. Atkinson*, 186 Ill. 2d 450, 458-59 (1999) (rejecting "mere fact" impeachment since it "invites jury speculation" and allows "danger that jury would speculate

that the defendant was previously convicted of a more serious crime").

Ultimately, there can be no confidence in the outcome of a trial that risked so many different ways for the jury to convict Keys improperly. Counsel could have prevented this inadmissible evidence by moving to suppress the portion of the video during which and after Keys invoked his right to silence, and/or by moving to redact the specifically inflammatory statements at issue. At the very least, counsel could have sought to minimize the risk that the jury relied on those statements improperly by requesting limiting instructions. Her failure to take any of these steps undermines confidence in the outcome of Keys's murder conviction, and Keys should receive a new trial on that charge.

II. This Court should vacate one of Ocheil Keys's dismemberment convictions and two of his concealment convictions.

The trial court imposed two separate convictions for dismemberment of a human body against Ocheil Keys for the actions he took to dismember the body of Barbara Rose, and three separate convictions for the actions he took to conceal Rose's death. (C. 299; 0017 C. 105, 0018 C. 104; R. 934-37)Yet neither the dismemberment nor the concealment statute authorize more than one conviction for acts taken to dismember the same body or to conceal the same homicide. Accordingly, this Court should vacate one of Keys's convictions for dismembering Rose's body, and two of his three concealment convictions.

The interpretation of a statute is a question of law, reviewed *de novo*. *People v. Torres*, 2024 IL 129289, ¶31. To that end, Illinois courts define "unit of prosecution" and "one-act, one-crime" issues differently. Before reaching a one-act, one-crime analysis, the unit of prosecution of a statute must be determined. *People v. Hartfield*, 2022 IL 126729, ¶67; *People v. Carter*, 213 Ill. 2d 295, 300-01 (2004) ("One-act, one-crime principles apply only if the statute is [first] construed as permitting multiple convictions. . ."). Courts must ascertain and give effect to the intent of the legislature. *People v. Latona*, 184 Ill. 2d 260, 269 (1998). The

best indicator is the plain meaning of the words in the statute. *People v. Garcia*, 241 Ill. 2d 416, 421 (2011). If there is no clear language to authorize multiple convictions for different acts, the statute is construed in the defendant's favor. *Id.* ¶69; *United States v. C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952).

For example, in *Carter*, this Court interpreted the allowable unit of prosecution of a former version of the unlawful use of a weapon ("UUW") by a felon statute, which made it unlawful for a convicted felon to knowingly possess on or about his person, or in other locations, "any firearm or firearm ammunition." 213 Ill. 2d at 302, *citing* 720 ILCS 5/24-1.1(a) (1996). This Court found the statute ambiguous because it "neither prohibit[ed] nor permit[ted] the State to bring separate charges for the simultaneous possession of firearms and firearm ammunition." *Id.* at 301. Specifically, "any" firearm could be construed as meaning "some," "one out of many," or "an indefinite number." *Id.*, *citing* BLACKS LAW DICTIONARY 94 (6th ed. 1990)). *See also People v. Cox*, 53 Ill. 2d 101, 106 (1972) (*overruled on other grounds* in *People v. Davis*, 156 Ill. 2d 149 (1993)) (only one conviction could be entered against defendant for two distinct acts of indecent liberties committed against same child victim, since there was no statutory provision permitting multiple convictions).

Following *Carter* and *Cox*, the legislature amended the UUW by a felon statute, and created a new statute addressing the conduct in the indecent liberties with a child statute. *See* 720 ILCS 5/24-1.1(e) (2008) (adding language to UUW by a felon statute that "[t]he possession of each firearm or firearm ammunition in violation of this Section constitutes a single and separate violation"); and 720 ILCS 5/11-1.50(a) (eff. 2011) (stating that offense of criminal sexual abuse–which punishes the same conduct previously proscribed by the indecent liberties with a child statute–occurs when defendant commits "an" act described in the statute). Thus, the legislature knows how to draft statutes to make its intent for multiple prosecutions known.

A. The concealment statute only allows for one conviction for acts taken to conceal the same homicidal death.

Keys was convicted of three counts of concealing a homicidal death for acts he took to conceal Barbara Rose's homicidal death, specifically for (1) transporting her body to the property near 1519 Lyons Street, in Danville, Illinois on or about October 23 to 26, 2017; (2) placing her body parts into a sock and bag on or about October 27 to 29, 2017; and (3) placing them into a 2000 Pontiac Grand Prix. (0017 C. 16-17, 0018 C. 18) Yet the concealment statute only allows for one conviction for acts taken to conceal the same homicidal death.

Under the plain language of the statute, "a person commits the offense of concealment of homicidal death when he or she knowingly conceals the death of any other person with knowledge that such other person has died by homicidal means." 720 ILCS 5/9-3.4(a) (eff. Jan. 1, 2010). Within the statute, "conceal" is defined as "the performing of *some* act *or acts* for the purpose of preventing or delaying the discovery of a death by homicidal means." 720 ILCS 5/9-3.4(b-5) (emphases added). Thus, to avoid any doubt, the legislature was intentional in including language that a single offense of concealment will include "some act *or acts*" taken to prevent or delay the discovery of "*a*" homicidal death. *Id.* (emphases added). The legislature's use of the word "some" solidified that intent. *See* THE MERRIAM-WEBSTER DICTIONARY, "some" (https://www.merriam-webster.com/dictionary/some) (defining "some" as, *inter alia*, "being one, a part, or an unspecified number of something (such as a class or group) named or implied," or "being of an unspecified amount or number").

Legislative history further clarifies the legislature's intent. *See In re J.R.*, 342 Ill. App. 3d 310, 318 (4th Dist. 2003) (legislative history and transcripts of debates are important evidence of statute's meaning). Prior to 2010, a statutory definition of "conceal" did not exist. The statute was amended to include that definition through Public Act 96-710. *See* P.A. 96-710, §25, effective Jan. 1, 2010. Public Act 96-710, in turn, was initiated by Senate Bill 1300, promulgated by

the CLEAR Commission, "an independent commission," who through "detailed analysis and unanimous decision . . . crafted a body of criminal laws that is logically organized, and free from redundancies and archaic and unconstitutional language." Gov. Thompson, J.R., Justice DiVito, G., Baroni, P., Saltmarsh, K., and Mayerfield, D., *The Illinois Criminal Code of 2009: Providing Clarity in the Law*, 41 J. Marshall L. Rev. 815, 817 (Spring 2008). The CLEAR Commission meant to "bring[] more clarity" to the Criminal Code, *particularly in "trying to figure out what charges one should bring against an individual*," IL H.R. Tran., 2009 Reg. Session, 64th Leg. Day, May 29, 2009, p. 38 (statement of Rep. Turner), and "*to look at the inequities in some of [the] charging*." *Id*., p. 50 (statement of Rep. Reboletti). (Emphases added.) Imposing a different conviction for each act of concealment taken by the defendant thus violates the deliberate intent of the legislature to punish "*some act or acts*" taken to conceal the same homicidal death. 720 ILCS 5/9-3.4 (emphasis added).

Allowing multiple convictions for concealing the same homicidal death would also lead to unjust results. *See Garcia*, 241 Ill. 2d at 421 (courts must presume legislature did not intend absurd or unjust results). A defendant's conviction for concealment requires consecutive sentencing, likely to make sure a defendant who both killed someone and concealed their death would receive separate punishments for each distinct offense. 730 ILCS 5/5-8-4(d)(5) (2023). Yet the number of "acts" taken by a defendant to conceal the same homicidal death could be endless. For example, a prosecutor even more zealous than those who prosecuted this case could have charged Keys with even more counts of concealment for the different ways he tried to clean up evidence of Rose's death, each conversation in which he said Rose drove to Indiana to buy a car, or each purchase he made of supplies used to hide her death. (R. 529, 723-50, 1120-23; SUP E 359 V2) Thus, a defendant could end up spending more time in prison for concealing a homicidal death than for an actual homicide. *See Hartfield*, 2022 IL 126729,

¶86 (courts must consider "far-reaching effect any holding . . . might have"). Here, the maximum sentence for concealment, a Class 3 felony, was five years. 720 ILCS 5/9-3.4(c); 730 ILCS 5/5-4.5-40(a) (2017). Yet by charging Keys with three offenses for the same course of conduct (in violation of the plain language of the statute), for which Keys received the minimum two-year terms, the zeal of the prosecution in this case allowed Keys to receive a sentence over the statutory maximum.

In short, both the plain language and the legislative history behind the concealment statute lead to the unmistakable conclusion that Keys should have only received one conviction for the "acts" he took to conceal the same homicidal death. *See* 720 ILCS 5/9-3.4(a).

B. The dismemberment statute only allows for one conviction for acts taken to dismember the same deceased human body.

Keys received two convictions for the dismemberment of Rose's deceased body. Under indictment number 19-CF-732, he was convicted of dismemberment for knowingly mutilating Rose's body by the use of fire between October 23 and October 26, 2017. (0017 C. 16) Under indictment number 19-CF-733, he was convicted of the same offense for knowingly dismembering, severing and separating Rose's body parts between October 27 and October 29, 2017. (0018 C. 16) Yet the dismemberment statute does not reveal a clear intent to authorize multiple acts of dismemberment of the same body, and thus lenity requires this statute to be construed in Keys's favor. *See Hartfield*, 2022 IL 126729, ¶90.

Under 720 ILCS 5/12-20.5(a) (eff. July 24, 2003), "[a] person commits dismembering a human body when he or she knowingly dismembers, severs, separates, dissects, or mutilates *any* body part of a deceased's body." (Emphasis added.) The language that the offense occurs when "any" body part is impacted, as opposed to "a" body part, bears close resemblance to the *pre-amended* version of the UUW by a felon statute this Court evaluated in *Carter* and found to authorize only a *single* conviction, *i.e.*, for the possession of *any* firearm or *any* firearm

ammunition. *See Carter*, 213 Ill. 2d 295 at 302 ("The use of the term 'any' in the statute does not adequately define the 'allowable unit of prosecution.' Consequently, we find the statute to be ambiguous, and we must adopt a construction that favors the defendant."). *See also United States v. Davis*, 588 U.S. 445, 464 (2019) (under the rule of lenity, "ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor").

The legislative history behind the dismemberment statute further supports that result. The dismemberment statute was created in 2003, introduced as House Bill 2654. *See* P.A. 93-339 (eff. July 24, 2003). Senate transcripts reveal the bill was initiated by the Cook County State's Attorney, after it had a difficult time prosecuting a murder defendant because the body had been "chopped up." IL Sen. Tran. 2003 Reg. Sess., 43rd Leg. Day, May 12, 2003, p. 54 (statement of Sen. Haine). The bill's proponent, Senator Haine, indicated that desecration of human remains had been a Class 1 felony, but dismembering a human body would be a Class X felony to punish any member "of the group which is dismembering the human body in order to prevent the - the necessary proof for first-degree murder or murder . . ." *Id.* He stated further that the penalty would be "a step down, far down, from first-degree murder, the minimum of - of which is twenty years." *Id.*, p. 56. He "presume[d]" the State's Attorney's office: (1) did not want to make the penalty so high that the bill might not be passed; and (2) "w[as] attempting to be reasonable and not ratchet it up near murder or second-degree murder." *Id.*

Where the dismemberment statute was promulgated to curb murderers from avoiding homicide prosecution, the allowable unit of prosecution would justly focus on the number of homicide prosecutions sought to be avoided by the dismemberment, not the number of actions taken to dismember the same body. Moreover, the idea for this statute came into existence following an incident where a body had been "chopped up," a phrase that implies more than one act. IL Sen. Tran. 2003 Reg. Sess., 43rd Leg. Day, May 12, 2003, p. 54 (statement of Sen.

Haine). Yet, apparently, neither the prosecuting agency who requested the bill nor the legislators who passed that bill proposed that each act of dismemberment be prosecuted separately.

An interpretation of the statute allowing for more than one conviction also impermissibly leads to absurd and unjust results. Dismemberment is a Class X felony, 720 ILCS 5/12-20.5(d), which carries a sentencing range of between six and 30 years. 730 ILCS 5/5-4.5-25(a) (2017). The sentence must be served consecutively to any other sentence imposed, again likely to ensure that defendants who murder then dismember a person suffer punishment for both distinct offenses. 730 ILCS 5/5-8-4(d)(5) (2017). Yet also like the concealment statute, allowing defendants to receive multiple convictions for dismembering the same human body makes their punishment too dependent on the assigned prosecutor and also allows for an aggregate sentence for dismemberment that is much higher than the murder sentence. That result runs counter to the intent of the legislature to "not ratchet" the penalty for dismemberment up "near murder or second-degree murder." *See* IL Sen. Tran. 2003 Reg. Session, 43rd Leg. Day, May 12, 2003, p. 56 (statement of Sen. Haine).

In this case, each act committed by Keys was geared toward the same result of the dismemberment of a single body. According to Carroll Hamilton, Keys: (1) set fire to Rose's body; (2) left when the flames shot high because he was afraid; and (3) returned to break up the body. (R. 136-40) As the State acknowledged in its motion to join *all* the charges in this case into a single trial, Keys took "different *steps* . . . to evade detection and capture for the murder . . . ." (C. 130-131) (emphasis added). *See Universal C.I.T. Credit Corp.*, 344 U.S. at 221-24 (even though defendant breached Fair Labor Standards Act on several occasions by making multiple underpayments to employees during multiple pay periods, Congress only intended one punishment for the single decision to engage in that course of conduct, and therefore only one criminal punishment could stand). Yet Keys received two separate convictions for

his actions and consecutive 15-year sentences for each conviction, resulting in a 30-year aggregate sentence for his dismemberment charges alone.

For all these reasons, Keys's multiple convictions for the dismemberment of a single body are also improper, and only one conviction should stand.

C. The appellate court held incorrectly that Keys could receive multiple convictions for each act he took to conceal the same death and to dismember the same body.

Despite the plain language of the concealment and dismemberment statutes, the appellate court relied on Colorado law to hold that regardless of the plain language, multiple convictions can still be proper if they are based on multiple, discrete acts. *People v. Keys*, 2023 IL App (4th) 210630, ¶126, *citing Friend v. People*, 429 P.3d 1191 (Colo. 2018). This was error: "Only in the absence of Illinois authority on the point of law in question are [Illinois courts] to look to other jurisdictions for persuasive authority." *Racky v. Belfor USA Group, Inc*., 2017 IL App (1st) 153446, ¶112.

This Court has been clear and consistent in its analysis of the allowable unit of prosecution of an Illinois statute: ". . . in determining the unit of prosecution, this [C]ourt looks to the language of the statute to determine what precisely has been prohibited by the legislature and in what unit of time, actions, or instances that crime is committed once." *Hartfield*, 2022 IL 126729, ¶83; *accord Cox*, 53 Ill. 2d at 105. This Court has been equally clear and consistent on what courts should do when the language of the statute is ambiguous: they must apply the "doctrine of lenity," as the Court has "repeatedly" done itself. *Hartfield*, 2022 IL 126729, ¶94; *accord Carter*, 213 Ill. 2d at 302. Moreover and notably, this analysis applies even when the defendant committed multiple acts. *See Cox*, 53 Ill. 2d at 105-06 (defendant committed *multiple* acts of indecent liberties with a child, including "an act of sexual intercourse and then an act involving oral-genital contact," but only one conviction could stand, since statute only defined what

acts constituted the offense and not the allowable unit of the prosecution); *Universal C.I.T. Credit Corp.*, 344 U.S. at 220-25 (inexplicitness of statute on whether an employer's failure to properly pay 11 different employees over different weeks could be punished as multiple violations of the statute weighed against allowing multiple convictions).

Yet rather than applying this well-settled framework, the appellate court allowed multiple convictions based on discrete acts. *Keys*, 2023 IL App (4th) 210630, ¶126. Such an analysis renders the allowable unit of prosecution of an Illinois statute to be meaningless. Regardless of how the Illinois legislature has chosen to establish or punish a particular offense, in the end it will still only boil down to whether one, or more than one, act occurred. This cannot be reconciled with this Court's holding in *Carter*, 213 Ill. 2d at 300-01, that the one-act, one-crime doctrine cannot be "mixe[d]" with statutory construction principles, and that before a court can even get to one-act, one crime principles, it must "determine whether the statute permits separate offenses" for the conduct charged against the defendant.

In short, the plain language of the concealment and dismemberments statutes, along with the legislative history, unmistakably show that Keys should have only received one conviction for acts taken to conceal the same homicidal death and one conviction for acts take to dismember the same human body. Thus, this Court should reverse two of Keys's three convictions for concealment and one of his two convictions for dismemberment.

CONCLUSION

For the foregoing reasons, Defendant-Appellant Ocheil Keys respectfully requests that this Court reverse his murder conviction and grant him a new trial under Argument I. Under Argument II, this Court should vacate one dismemberment conviction and two concealment convictions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 57 pages.[6]

/s/Caroline E. Bourland
CAROLINE E. BOURLAND
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[6] On July 23, 2024, this Court entered an order permitting an extension of the brief page limit to not more than 57 pages.

APPENDIX TO THE BRIEF

Ocheil Keys No. 130110

INDEX TO THE RECORD

Common Law Record, Appeal No. 4-21-0630 ("C.")

Supplemental Impounded Record, Appeal No. 4-21-0630 ("SUP CI.")

Report of Proceedings, Appeal No. 4-21-0630 ("R.")

July 22, 2021
Jury Trial

July 23, 2021
Jury Trial

July 26, 2021
Jury Trial

Report of Proceedings, Appeal No. 4-22-0017 ("0017 R.")

July 22, 2021
Jury Trial

Common Law Record, Appeal No. 4-22-0018 ("0018 C.")

2023 IL App (4th) 210630

NOS. 4-21-0630, 4-22-0017, 4-22-0018 cons.

FILED
August 14, 2023
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
OCHEIL D. KEYS,	)	Nos. 17CF725
Defendant-Appellant.	)	19CF732
	)	19CF733
	)	
	)	Honorable
	)	Nancy S. Fahey,
	)	Judge Presiding.

JUSTICE ZENOFF delivered the judgment of the court, with opinion.
Justices Lannerd and Knecht concurred in the judgment and opinion.

OPINION

¶ 1 Following a jury trial, defendant, Ocheil D. Keys, was convicted of the following offenses: first degree murder (720 ILCS 5/9-1(a)(1) (West 2016)) and concealment of a homicidal death (720 ILCS 5/9-3.4(a) (West 2016)) in case No. 17-CF-725, dismembering a human body (720 ILCS 5/12-20.5(a) (West 2016)) and concealment of a homicidal death (720 ILCS 5/9-3.4(a) (West 2016)) in case No. 19-CF-732, and dismembering a human body (720 ILCS 5/12-20.5(a) (West 2016)) and concealment of a homicidal death (720 ILCS 5/9-3.4(a) (West 2016)) in case No. 19-CF-733. Defendant was sentenced to an aggregate of 96 years' imprisonment. The cases were consolidated for appeal. On appeal, defendant argues (1) he was not proved guilty of first

A-7

degree murder beyond a reasonable doubt, (2) numerous instances of ineffective assistance of trial counsel, (3) a violation of his right to a speedy trial as to the charges brought in 2019, and (4) one conviction for dismembering a human body and two convictions for concealment of a homicidal death must be vacated because the legislature did not permit multiple convictions under the relevant statutes. We affirm.

¶ 2 I. BACKGROUND

¶ 3 On October 22, 2017, defendant and the victim, Barbara Rose, shared a romantic relationship. Rose lived with her two daughters, ages 18 and 8, in a single-family home in Danville. Rose's adult sons, Trent and Trai, lived in their own homes but visited Rose frequently. Though defendant maintained his own residence, he stayed with Rose. On October 24, 2017, Trent reported Rose missing to the police. No one had seen or heard from Rose since October 22, 2017. On October 29, 2017, the police arrested defendant for Rose's murder.

¶ 4 A. The 2017 Information

¶ 5 On October 31, 2017, the State charged defendant by information with six counts of first degree murder (alleging various theories of murder and that defendant personally discharged the firearm that caused Rose's death) and one count of concealment of a homicidal death in case No. 17-CF-725. The concealment charge alleged as follows:

> "[Defendant] on or about the 22 day of October, 2017, with knowledge that [Rose] had died by homicidal means, knowingly concealed the death of [Rose] by transporting her body from the place of her death and hid or otherwise disposed of her remains, in violation of 720 ILCS 5/9-3.4 (a)."

¶ 6 B. The 2019 Indictments

¶ 7 On December 20, 2019, a Vermilion County grand jury indicted defendant on one count of dismembering a human body and one count of concealment of a homicidal death in case No. 19-CF-732. The dismembering count alleged that defendant, "on or about" the twenty-third to the twenty-sixth day of October 2017, "knowingly mutilated the deceased body of [Rose], by use of fire." The concealment count alleged that defendant, "on or about" the twenty-third to the twenty-sixth day of October, 2017, "knowingly concealed the death of [Rose] by moving her body to the property near 1519 Lyons St. Danville, IL, with knowledge that [Rose] had died by homicidal means."

¶ 8 On December 20, 2019, a Vermilion County grand jury also charged defendant with one count of dismembering a human body and one count of concealment of a homicidal death in case No. 19-CF-733. The dismembering count alleged that, "on or about the 27th to the 29th day of October 2017," defendant knowingly "dismembered, severed, and separated body parts from the deceased body of [Rose]." The concealment count alleged that, "on or about the 27th to the 29th day of October 2017," defendant knowingly concealed Rose's death by "placing [Rose's] body parts in a sock and bag and placed them into a 2000 Pontiac Grand Prix, with knowledge that [Rose] had died by homicidal means."

¶ 9 On the State's motion, the 2017 and 2019 charges were tried together. The jury trial commenced on July 19, 2021.

¶ 10 C. The Evidence at Trial

¶ 11 1. *Rose Vanishes*

¶ 12 We will include additional facts as necessary in the analysis section of this opinion. On October 24, 2017, defendant informed Trent and Trai that Rose had been missing for two days. Defendant said Rose went to Peru, Indiana, with a friend on Sunday, October 22, to buy a car and

never returned home. On the evening of October 24, 2017, Trent reported Rose missing to the police. In the ensuing days, Rose's family searched for her. Defendant did not participate in those searches.

¶ 13 Jennifer Veatch testified that at about 11 p.m. on Saturday, October 21, 2017, she and Rose agreed to meet the next day. According to Veatch, Rose said nothing about going to Indiana to buy a car. The next day—Sunday—Veatch began texting Rose at about noon, but Rose never responded.

¶ 14 Ebonnie Bryant testified she saw Rose on October 22, 2017, at approximately 3 a.m. when she dropped her baby off at Rose's house for Rose to babysit while Bryant went out. Bryant testified defendant contacted her around 11 a.m. and asked her to pick up her baby. Brytney Harrier testified she went to Rose's house at about 11:30 a.m. to pick up Bryant's baby. According to Harrier, defendant handed her the baby through the front door without "welcoming" Harrier inside the house. Harrier testified that defendant said they had a "vicious" dog. Harrier testified she was familiar with Rose's dog and never knew it to be vicious.

¶ 15 Rhonda Crippin testified she was defendant's girlfriend in October 2017. Crippin testified she did not know about Rose until she learned the woman was missing. According to Crippin, defendant came to her home on the evening of Sunday October 22, 2017. Crippin described defendant's behavior as normal. Crippin testified defendant spent most of the following week with her. Crippin testified that on the only night defendant did not spend with her, he asked her for a lighter. Crippin testified she thought that request was odd because defendant did not smoke.

¶ 16 Defendant's cousin, Lennie Strader, testified that on Monday, October 23, 2017, defendant wanted to borrow Strader's truck. Strader refused to loan the truck to defendant. Alfreda

Luster, defendant's mother, testified defendant borrowed her 2000 Pontiac Grand Prix on the Saturday after Rose disappeared and returned it on Sunday. Luster testified there was "nothing unusual" in the car when defendant took it. According to Luster, she discovered a black plastic bag in the back seat of her car on Sunday after defendant returned the car. Luster testified she had a "bad feeling" as soon as she saw the bag. On cross-examination, Luster testified the bag gave her an "eerie" feeling.

¶ 17 The police first interviewed defendant on October 26, 2017. At the beginning of the video-recorded interview, defendant stated Rose went to Indiana to buy a car. Defendant explained he and Rose needed separate cars because he was "fighting" his "cases" and needed to see his attorneys. Defendant also mentioned he disagreed with how his attorneys were handling his cases. Defendant stated he last saw Rose on Sunday, October 22, 2017, at about 6 a.m. Defendant stated he passed out from low blood sugar (defendant has type 1 diabetes) on Sunday morning and then went out that afternoon. Defendant stated when he returned to Rose's house at about 3 p.m., she was not there. Defendant described meeting with Trent and Trai on October 24, 2017, and telling them Rose was missing.

¶ 18 2. *The Police and Forensic Investigations*

¶ 19 Various prosecution witnesses described the police investigation following Trent's missing person report. On October 29, 2017, a crime scene investigator found presumptive blood in Rose's bedroom, living room, kitchen, backyard, and garage. In the bedroom, the investigator found a damp, stained area of carpet. The padding and subfloor beneath the carpet were also stained. The stained portion of the carpet appeared to have been cut and cleaned. The investigator found a starter pistol incapable of firing bullets in a closet. The investigator also found presumptive blood inside Rose's car, as well as pieces of charred material in the trunk.

¶ 20 On November 1, 2017, the investigator processed Luster's 2000 Pontiac Grand Prix, which was in a garage at the Danville Public Safety Building. The investigator noted a foul odor coming from the car mixed with a "detergent-type" smell, like a deodorizer. The investigator located a black plastic bag on the back seat and a sock on the back floorboard. The investigator discovered a foul-smelling comforter, more bedding, and a charred body inside the plastic bag. Inside the sock, the investigator found a human palate containing teeth. The investigator then notified the coroner. The crime laboratory confirmed the remains were Rose's. The crime laboratory also confirmed that defendant's fingerprint was on the plastic bag.

¶ 21 On November 8, 2017, another crime scene investigator processed a "burn area" he described as smelling of gasoline (the crime laboratory confirmed the substance was gasoline) at an abandoned house at 1519 Lyons Street in Danville (the burn site). At the burn site, the investigator found melted plastic, carpet, burned rubber, and bones.

¶ 22 After speaking with defendant's cousin, Nick Patton, the police obtained surveillance videos showing the following. At a little after 5 a.m. on October 22, 2017, the day Rose disappeared, defendant and Patton visited two Circle K gas stations in Danville. Defendant filled a can with gasoline. Defendant then went to Walmart with Patton, where defendant purchased plastic tarps, a comforter, and garbage bags. That evening, defendant returned to Walmart with a companion and together they purchased a gas can, fuel, and a lighter.

¶ 23 On November 2, 2017, Dr. Scott Denton, a forensic pathologist, performed an autopsy on Rose's remains. Dr. Denton testified Rose's body had been burned postmortem and desiccated so that it weighed only 31 pounds at autopsy. Dr. Denton testified there was a gunshot injury to the right side of Rose's face. He recovered a bullet from the skull. Dr. Denton noted Rose's arms were amputated at the forearms, and both legs were "traumatically" amputated above

the knees. Toxicology results showed alcohol in Rose's liver. Dr. Denton opined that Rose died of the gunshot wound to the head. Dr. Denton also opined that bone fragments from the burn site were human and consistent with parts missing from Rose's body.

¶ 24 3. *The Informant*

¶ 25 Carroll Hamilton was housed in the cell next to defendant as defendant awaited trial in the county jail. Hamilton testified to prior convictions going back to the 1990s for burglary, theft, and deceptive practices. At the time of trial, Hamilton was facing charges of "criminal trespass and auto burglary." Hamilton testified he was also charged with being accountable "for somebody using a stolen credit card." Hamilton admitted he had previously sought to "trade" information to the authorities, hoping to obtain leniency.

¶ 26 Hamilton testified he was incarcerated in the same cell block of the county jail as defendant in October 2017. According to Hamilton, he knew defendant because he (Hamilton) had been paroled to live with defendant and Rose at Rose's residence for nine days in 2017. Hamilton stated he learned on the news about Rose's disappearance.

¶ 27 According to Hamilton, defendant told him the following concerning Rose's disappearance. Defendant and Rose were "joking around" when Rose "pulled a pistol" on him. Defendant said the pistol was a "starter pistol" that was "fake." Then, defendant "pulled" a .22-caliber revolver on Rose. Defendant heard the starter pistol fire, and then defendant saw blood on the right side of Rose's face. Defendant checked Rose and found she had a heartbeat. Defendant did not call 911. Instead, defendant held Rose for 30 minutes until she "passed." Then, defendant called Patton for help moving Rose's body out of the house to the garage. After they wrapped Rose in a comforter, defendant and Patton went to "several" gas stations, where they filled gas cans, and to Walmart to buy "plastic." During that day, "other people" told defendant and Patton to get more

A-13

gas and camper fuel. Then, at night, defendant moved the body to an abandoned house and set it on fire using gasoline and Coleman fuel. Either the next night or the night after that, defendant went back to the burn site. Rain had put out the fire, and animals were eating Rose's corpse, so defendant cut her hands, feet, and jawbone into "smaller pieces and bag[ged] it up." Defendant then "stored" the body parts in the back of his mother's car.

¶ 28 Hamilton testified he wrote down verbatim what defendant told him as defendant told him the story, hoping to gain leniency from the authorities in exchange for his information. Hamilton sent a copy of his notes to the police. The police then obtained a "medical recognizance" for Hamilton, allowing him to leave jail in the company of a police officer. Hamilton testified he led the police to the burn site, using the description defendant gave him. Hamilton testified he was facing 6 to 30 years in the penitentiary on a pending burglary charge, but because of his cooperation, he was given a sentence of 3 years' imprisonment.

¶ 29 4. *Defendant's Statements to the Police*

¶ 30 As noted, the police first interviewed defendant on October 26, 2017. The police conducted a second video interview with defendant on October 29, 2017. This interview occurred after the police interviewed Patton, obtained surveillance videos from the gas stations and Walmart, and procured search warrants for Rose's house and garage. The State introduced the video of this interview into evidence.

¶ 31 The video showed the following. The police read *Miranda* warnings (see *Miranda v. Arizona*, 384 U.S. 436 (1966)) to defendant off a printed sheet of paper. Defendant stated he understood each of his rights. As defendant picked up the pen to sign the waiver of rights, he also stated: "When I normally did this I was being charged or accused of something, so." The officers then stated they were six days into their investigation and things they needed to speak about with

A-14

defendant had "popped up." As defendant signed the waiver of his rights, he said, "Okay, 'cause I do have an attorney."

¶ 32 The officers informed defendant Rose's phone was at her house all day Sunday, October 22, 2017. The officers stated they had talked to "somebody" who told them defendant shot Rose at her house. Defendant stated he saw Rose early on Sunday morning, October 22, 2017, and gave her $600 to buy a car. Defendant stated he then passed out from low blood sugar and awoke at 6:30 a.m. or 6:40 a.m. Defendant stated he walked wherever he went on that Sunday. Defendant stated he had dinner with his mother, and the only other family members he saw that Sunday were his two grandmothers. Defendant denied having any conversations or meeting with Patton on that Sunday. Defendant stated he did not remember going to a gas station at about 5 a.m. on Sunday, but he stated he might have gone to Walmart early that morning. Defendant added he did not remember doing so. Defendant stated he knew he needed gas so he could mow the lawn.

¶ 33 When told there were videos showing defendant at a gas station and at Walmart with Patton early on Sunday morning, defendant stated low blood sugar caused him not to remember things or to be aware of "what's going on." Defendant stated his low blood sugar was caused by the stress of "fighting three cases" and something that had happened to his "aunty" that caused her to "go a little crazy."

¶ 34 Defendant said he and Rose were up all night on Saturday, October 21, 2017. According to defendant, he and Rose did not argue. Defendant stated he last saw Rose at 6 a.m. on Sunday when she offered to make him breakfast. Defendant denied waking up from his low blood sugar episode to discover something had happened to Rose. Defendant then stated his low blood sugar episode started around 2 a.m. that Sunday. When the officers asked defendant about going to Walmart early Sunday morning to buy garbage bags and a comforter, defendant

A-15

maintained he did not remember going there. However, defendant stated he needed a comforter for the bedroom, and he used garbage bags for household garbage.

¶ 35 The officers explained to defendant that if something bad happened to Rose, they needed to know so they could give her family closure. Defendant denied anything happened between him and Rose that Saturday night into Sunday morning. Then, the officers said Patton was worried that defendant did "something" he did not "mean to do." The officers stated they needed defendant to explain what happened because they were "past the point" of saying they did not know what happened. The officers stated it was "clear" defendant caused Rose's disappearance. Defendant then stated: "I said I didn't do anything, period, point blank." Defendant added: "If that's the case, if you feel like based off your investigation, then do what you gotta [*sic*] do, there ain't nothin' further for us to talk about."

¶ 36 The officers told defendant Rose did not offer to make him breakfast at 6 a.m. on Sunday, because "[Rose] wasn't with us at 6 a.m." The officers explained Rose's body was already in her garage by then and they knew what her car was "used for." The officers stated they knew what Patton told them, but this was defendant's opportunity to say what happened. When the officers asked if defendant wanted or needed to "get something off his chest," defendant replied: "No, there's nothin'." The officers then said, "It's stacking up against you." The officers mentioned that in defendant's October 26, 2017, interview, he said he was used to talking to the police in handcuffs and was "surprised when we didn't handcuff you." The officers explained they were just talking to defendant then, "but now it's starting to stack against you." Defendant maintained he had nothing to do with Rose's disappearance and death. At this point, the officers left defendant alone in the interview room for an extended break.

A-16

¶ 37 When the interview resumed, defendant acknowledged photographs of himself in Patton's car and at Walmart on Sunday, October 22, 2017—including one of himself grinning as he left Walmart—but defendant denied the photos jogged his memory of the events of that morning. Defendant stated he called his cousin Strader and asked to borrow Strader's truck on the Monday following Rose's disappearance. Then, defendant stated he did not remember exactly when he wanted to borrow Strader's truck. When the officers stated defendant's memory seemed selective, defendant reverted to his earlier statement about his low blood sugar and Rose offering to make him breakfast. Then, the officers informed defendant that story had been "debunked" and "proved to be false." The officers told defendant he did not seem like a "cold-hearted killer." Defendant stated: "I'm not a killer at all." The officers said the case was starting to build up against defendant.

¶ 38 Defendant explained the cut carpet in Rose's bedroom by saying he cut out sections of the carpet in that room in various places, such as the closet. Defendant said he stashed his cousin's drugs and money under the loose squares of carpet. When the police asked about a burned area of carpet at the foot of the bed, defendant said he did that playing with a lighter and a deodorant can. Defendant denied the cut square of carpet at the foot of the bed was presently "soaked with cleaner." Defendant said the wet area was all-purpose purple Listerine he spilled two weeks prior when he had a hard time opening the cap on the bottle. The officers asked if it was "reasonable" to believe the Listerine would still be wet after two weeks. Defendant shrugged and stated he did not know how long it takes for carpeting to dry.

¶ 39 The officers stated they had "talked to everybody," and "things are a problem for you [defendant] right now." The police told defendant that if had he passed out from low blood sugar, he would have been too ill to go to the gas stations and Walmart. The officers said Patton

believed what defendant did was an accident, but defendant's denials looked bad for him. The officers added, "[T]hat sounds like you don't feel any remorse, you don't care." The officers stated they were past defendant's denials, as they needed to get Rose "back" for her family. When the officers asked, "Do you have anything to say to this?" Defendant shook his head and said, "I told you." The police said his denials, which would be played for a jury, made defendant look like a "cold-hearted killer of a mother." Defendant said: "I ain't did nothin' [*sic*] so do what you gotta [*sic*] do." The police asked: "Did something happen in the house?" Defendant replied: "No, it did not."

¶ 40 Defendant stated he did not tell Patton that anything happened and that Patton "fabricated" what he told the police. The officers told defendant they did not need him to tell them what happened so they could prove their case, as "that's already been taken care of." The officers said they needed to know what happened to Rose so they could tell her family what happened. Defendant stated: "If I did anything, I would've told you." The officers stated they wanted to believe him, but the evidence was "piling up" against him. One of the officers said, "If [the evidence] buries you, it buries you, I guess." When the officers said the evidence portrayed defendant as a cold-hearted killer, defendant stated: "Everybody got [*sic*] their opinion about people, whether it's false or whether it's true." The officers said they would tell the jury defendant sat across from them and "didn't care." The officers asked defendant to be "decent." Defendant stated there was nothing he wanted to tell them.

¶ 41 Then, they took another break while defendant stayed alone in the interview room with what appeared to be a sack lunch sitting untouched on the table. Then, someone popped inside the doorway and asked defendant for permission to search his phone. Defendant said, "Yeah, you can search my phone." Next, a police officer offered to bring defendant's medication to him, but

defendant stated his mother would bring it. The remainder of the video consisted of defendant with his head in his arms on a table or lying prone on the floor of the interview room.

¶ 42 After the State rested, defendant called Danville police commander Joshua Webb as a witness. Webb testified a witness told him Rose made a post on Facebook on Monday, October 23, 2017. Webb testified that he did not see the posting, as the witness had deleted it. Defendant then rested, and the State presented no rebuttal.

¶ 43 5. *The Verdicts and Sentence*

¶ 44 The jury found defendant guilty of first degree murder and of personally discharging a firearm that proximately caused Rose's death. The jury also found defendant guilty of three counts of concealment of a homicidal death for moving Rose's body (1) from the bedroom, (2) to the burn site, and (3) to a Pontiac Grand Prix. In addition, the jury found defendant guilty of two counts of dismembering a human body: (1) "mutilation by fire" and (2) "dismember, sever, separate." The trial court sentenced defendant to 60 years' imprisonment for first degree murder, 15 years' imprisonment for each conviction of dismembering a human body, and 2 years' imprisonment for each conviction of concealment of a homicidal death, to be served consecutively, for an aggregate sentence of 96 years' imprisonment.

¶ 45 This appeal followed.

¶ 46 II. ANALYSIS

¶ 47 Defendant raises the following issues: (1) his conviction of first degree murder must be reversed or reduced to involuntary manslaughter because the evidence failed to prove he intentionally or knowingly killed Rose; (2) his trial counsel was ineffective for failing to move to suppress, redact, or object to "inadmissible and inflammatory" evidence; (3) the convictions based on the 2019 indictments must be vacated because those charges violated defendant's right to a

speedy trial; and (4) multiple convictions of dismembering a human body and concealment of a homicidal death were improper.

¶ 48 A. Intentional or Knowing Murder

¶ 49 Defendant contends the only evidence of how Rose was killed consisted of his statements to Hamilton. Hamilton testified defendant said he (defendant) and Rose were "joking around" when Rose "pulled" a starter pistol on defendant. Then, defendant "pulled" a .22-caliber revolver on Rose. Defendant concedes the evidence shows he fired the revolver (the starter pistol was incapable of firing bullets), but he contends what he told Hamilton shows he did so "accidentally or unconsciously." Defendant asks us to reverse outright his first degree murder conviction or, in the alternative, to reduce the conviction to involuntary manslaughter.

¶ 50 The 2017 information charged defendant with (1) intentionally killing Rose, (2) knowing his acts would cause her death, and (3) knowing his acts created a strong probability of death or great bodily harm to Rose. The offense of first degree murder is set forth in section 9-1(a) of the Criminal Code of 2012 (Code) (720 ILCS 5/9-1(a) (West 2016)), which provides:

> "A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:
>
> (1) he [or she] either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
>
> (2) he [or she] knows that such acts create a strong probability of death or great bodily harm to that individual or another[.]"

¶ 51 Although the statute describes different theories of murder, first degree murder is a single offense. *People v. Smith*, 233 Ill. 2d 1, 16 (2009). "[I]ntentional" and "knowing" murder

delineate "only the mental state or conduct that must accompany" the acts causing death. (Internal quotation marks omitted.) *Smith*, 233 Ill. 2d at 16. To prove first degree murder, it is not necessary to show the accused formed an intent to kill, but only that he or she "voluntarily and willfully committed an act, the natural tendency of which was to destroy another's life, with the intent being implied from the character of the act." *People v. Latimer*, 35 Ill. 2d 178, 182-83 (1966).

¶ 52 Section 9-3(a) of the Code defines involuntary manslaughter:

> "A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly ***." 720 ILCS 5/9-3(a) (West 2016).

A person acts recklessly when he "consciously disregards a substantial and unjustifiable risk that his acts are likely to cause death or great bodily harm to another." *People v. Elizondo*, 2021 IL App (1st) 161699, ¶ 69. Involuntary manslaughter is a lesser-included offense of first degree murder. *Elizondo*, 2021 IL App (1st) 161699, ¶ 70. The mental state required for recklessness can be inferred from the character of the defendant's acts and from the circumstances surrounding the commission of the offense. *Elizondo*, 2021 IL App (1st) 161699, ¶ 69.

¶ 53 When presented with a challenge to the sufficiency of the evidence, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Mimms*, 312 Ill. App. 3d 226, 228 (2000).

¶ 54 Defendant posits the following demonstrate the accidental or unintentional nature of the killing: (1) defendant "might" have been "startled" when Rose's starter pistol "went off," causing defendant to "stumble and discharge" the revolver; (2) Rose was shot only once;

(3) Rose's children were present in the home, making it illogical defendant would have intentionally shot Rose with witnesses nearby; (4) when Bryant saw Rose at 3 a.m. on Sunday, everything appeared "normal," meaning it was unlikely Rose and defendant were arguing; and (5) Rose had alcohol in her system, making it likely she engaged in risky behavior with the starter pistol. Defendant argues the evidence allowed for the possibility defendant's revolver accidentally discharged while he and Rose were "joking around."

¶ 55 Defendant relies on *People v. Cunningham*, 2019 IL App (1st) 160709, ¶ 33, where the court held the evidence insufficient to show the defendant acted recklessly in shooting himself in the leg where there was no evidence of when the shot was fired or that anyone was present in the apartment when the defendant shot himself. The court noted the defendant might have "purposely and voluntarily" pulled the trigger, or he might have been trying to unload the gun, making the discharge accidental. *Cunningham*, 2019 IL App (1st) 160709, ¶ 32. *Cunningham* is inapposite because in our case we have clear evidence of defendant's mental state. Defendant shot Rose in the face. According to defendant's statement to Hamilton, as soon as defendant saw the blood on Rose's face, he detected she had a heartbeat. Yet, defendant did nothing for the next 30 minutes except watch Rose die. Then, defendant concealed the homicide and Rose's body. The attempt to dispose of a victim's body is evidence of consciousness of guilt. See *People v. Bounds*, 171 Ill. 2d 1, 49 (1995).

¶ 56 Defendant argues what occurred after he shot Rose is irrelevant. However, as the State notes, determination of a defendant's mental state can be inferred by circumstantial evidence. *People v. Garcia*, 407 Ill. App. 3d 195, 201-02 (2011). The jury's function is to draw inferences based on the evidence, and the jury is not required to accept any possible explanation compatible with the defendant's innocence and raise that explanation to the level of reasonable doubt. *People*

v. Moore, 358 Ill. App. 3d 683, 688 (2005). Here, in light of the evidence that defendant willed Rose's death by doing nothing to save her and then disposed of her remains in the most heinous ways possible, the jury could have reasonably disbelieved defendant's self-serving statement to Hamilton that Rose was shot while they were "joking around." Accordingly, we reject defendant's argument that he was not proved guilty beyond a reasonable doubt of intentional or knowing murder. Because we hold that any rational trier of fact could have found the elements of intentional or knowing murder beyond a reasonable doubt, we also reject defendant's contention we should reduce his conviction to involuntary manslaughter.

¶ 57 B. Ineffective Assistance of Counsel

¶ 58 Defendant argues his trial counsel was ineffective for failing to (1) move to suppress defendant's statements after he invoked his right to remain silent, (2) move to redact inadmissible portions of the interrogation videos, (3) request limiting instructions regarding the jury's use of the officers' statements during the interrogations of defendant, and (4) object to the prosecution's misstatements of the evidence during closing argument.

¶ 59 A defendant has a constitutional right to the effective assistance of counsel. *People v. Tayborn*, 2016 IL App (3d) 130594, ¶ 16. To establish ineffective assistance of counsel, the defendant must show both (1) his counsel's representation fell below an objective standard of reasonableness and (2) prejudice. *Tayborn*, 2016 IL App (3d) 130594, ¶ 16. The failure to establish either prong is fatal. *People v. Jones*, 371 Ill. App. 3d 303, 307 (2007). Our review is *de novo*. *Tayborn*, 2016 IL App (3d) 130594, ¶ 16.

¶ 60 1. *Invocation of the Right to Remain Silent*

¶ 61 Defendant argues his counsel was ineffective for not moving to suppress his October 29, 2017, statements to the police after defendant stated: "I said I didn't do anything,

A-23

period, point blank. If that's the case, if you feel like based off your investigation, then do what you gotta [*sic*] do, there ain't nothin' further for us to talk about." Defendant contends this statement was sufficiently clear and unequivocal to invoke his right to remain silent.

¶ 62 Statements a defendant makes after he or she properly invokes the right to remain silent are admissible only if the defendant's right to cut off questioning is "scrupulously honor[ed]." *Jones*, 371 Ill. App. 3d at 307. The general rule is "once an individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *People v. Pierce*, 223 Ill. App. 3d 423, 429 (1991). However, the "demand to end the interview must be specific." *Pierce*, 223 Ill. App. 3d at 429. The right to end an interrogation is not invoked where the defendant merely resists answering questions concerning particular details of the offense. *People v. Aldridge*, 79 Ill. 2d 87, 95 (1980).

¶ 63 The decision whether to file a motion to suppress is generally considered to be a matter of trial strategy, which is entitled to great deference. *Jones*, 371 Ill. App. 3d at 307. To demonstrate ineffective assistance of counsel, the defendant must show the outcome of the trial would have been different if the evidence was suppressed. *Jones*, 371 Ill. App. 3d at 307.

¶ 64 Here, on October 29, 2017, defendant signed the waiver of rights and initially claimed he did not see or speak to Patton on the Sunday Rose disappeared. Before the officers revealed their knowledge of what happened, defendant reiterated and embellished his earlier statements about Rose purchasing a car and his passing out that morning from low blood sugar. It was only after the officers confronted defendant with details of their investigation—which showed defendant's story to be false—that defendant stated: "I said I didn't do anything, period, point blank." Defendant added: "If that's the case, if you feel like based off your investigation, then do what you gotta [*sic*] do, there ain't nothin' further for us to talk about." In context, rather than

A-24

invoking his right to remain silent, defendant was expressing his belief the officers had made up their minds he was guilty based on their investigation. That explains why defendant added, "[D]o what you gotta [*sic*] do," meaning arrest him.

¶ 65 Defendant relies on *People v. Flores*, 2014 IL App (1st) 121786. In *Flores*, immediately after the detective read the defendant his rights and the defendant stated he understood each of them, the detective stated " 'Robert' " was saying things about the defendant. *Flores*, 2014 IL App (1st) 121786, ¶ 31. When the detective asked the defendant, " 'You want to talk to us about that?' ", the defendant responded, " 'Not really. No.' " *Flores*, 2014 IL App (1st) 121786, ¶ 31. The court held the defendant's response was "clear and unequivocal *** that [the] defendant did not wish to waive his right to remain silent." *Flores*, 2014 IL App (1st) 121786, ¶ 57. The court relied on the fact the defendant's response "was given immediately following the giving of *Miranda* rights." *Flores*, 2014 IL App (1st) 121786, ¶ 55. Here, defendant—who was familiar with the process and knew how to invoke his rights—signed the waiver and agreed to speak with the officers. Only after the officers exposed defendant's lies did defendant say the officers believed he was responsible for Rose's disappearance so there was nothing further to talk about.

¶ 66 We believe this case is more like *Pierce* than *Flores*. In *Pierce*, upon being given his *Miranda* rights, the defendant asked what would happen if he desired not to answer any more questions. *Pierce*, 223 Ill. App. 3d at 430. The police told the defendant he did not have to talk if he decided not to answer any questions. *Pierce*, 223 Ill. App. 3d at 430. The defendant then stated: " 'You got all the stuff there right now. You don't need no more really.' " *Pierce*, 223 Ill. App. 3d at 430. The court held the defendant "failed to use language sufficiently strong to invoke his constitutional right to remain silent." *Pierce*, 223 Ill. App. 3d at 431. Accordingly, the court held the defendant's counsel was not ineffective for failing to file a motion to suppress the defendant's

statements. *Pierce*, 223 Ill. App. 3d at 431. Here, as in *Pierce*, defendant was commenting that the police had what they thought was sufficient evidence so that nothing further was required.

¶ 67 We also find *People v. Aldridge*, 68 Ill. App. 3d 181 (1979), instructive. In *Aldridge*, the defendant stated during questioning, " 'I think you got enough, you got the story now.' " *Aldridge*, 68 Ill. App. 3d at 186-87. The court held these comments did not "show a desire for all questioning to cease but rather indicate[d] [the] defendant's reluctance to convey to the officers all the details of the offense." *Aldridge*, 68 Ill. App. 3d at 187

¶ 68 In any event, defendant cannot demonstrate the outcome of his trial would have been different had the remainder of the interview been suppressed. Veatch's testimony cast doubt on defendant's story that Rose went to Indiana to buy a car because Veatch and Rose had agreed to meet that Sunday and Rose had not said anything about going to Indiana. Harrier thought it unusual when defendant handed her the baby through the door without inviting her inside the house. Harrier disbelieved defendant's story about a vicious dog because Harrier knew the dog was not vicious. When Rose's family mounted searches, defendant did not participate. Defendant was captured on video filling a gas can and buying paraphernalia at Walmart to dispose of Rose's body when he said he was having a low blood sugar episode at home. Defendant spent the night of Rose's disappearance and the week following with his girlfriend, Crippin, who thought it odd defendant asked her for a lighter. Defendant asked his cousin, Strader, to loan him his truck on the Monday after Rose disappeared, leading to the inference defendant needed the truck to move Rose's body from the garage to the burn site. Then, defendant borrowed his mother's car, in which Rose's remains were found wrapped in a comforter and stuffed in a plastic bag. The plastic bag contained defendant's fingerprint. Finally, defendant confessed to killing Rose and burning and dismembering her body when he confessed to Hamilton. Hamilton's testimony was corroborated

by the physical evidence at the burn site and Rose's autopsy. Accordingly, we hold that defense counsel did not render ineffective assistance in failing to file a motion to suppress.

¶ 69 2. *Defendant's Remaining Allegations of Ineffective Assistance of Counsel*

¶ 70 Defendant argues his counsel was ineffective for failing to move to redact portions of the October 26 and 29, 2017, video interviews where (1) the officers stated their belief defendant killed Rose (October 29), (2) Patton's statements to the police about defendant's involvement in Rose's death were hearsay (October 29), and (3) defendant's statements implicated himself in other crimes when he stated he was stressed from "fighting three cases" and usually was in handcuffs when he talked to the police (October 26 and October 29).

¶ 71 Questions and statements made by the police during a defendant's interrogation are probative if (1) they are "helpful" and (2) the probative value of the officers' questions and statements is not substantially outweighed by their prejudicial effect. *People v. Whitfield*, 2018 IL App (4th) 150948, ¶ 48. Officers' questions and statements during an interrogation are helpful where they place the defendant's statements and silence into context. *Whitfield*, 2018 IL App (4th) 150948, ¶ 59. Hearsay is not involved where the challenged statements are offered to prove their effect on a listener's mind or to show why the listener subsequently acted as he did. *Whitfield*, 2018 IL App (4th) 150948, ¶ 47. Officers' statements during an interrogation are not hearsay where they are "useful" in explaining the defendant's statements and admissions. *Whitfield*, 2018 IL App (4th) 150948, ¶ 49. Here, the officers' statements during the October 29, 2017, interrogation were helpful and useful in explaining (1) defendant's complete lack of affect when discussing his paramour's disappearance and demise and (2) defendant's far-fetched explanations for Rose's disappearance, his presence at the gas stations and Walmart, and his cutting up the wet bedroom rug.

¶ 72 Defendant's reliance on *People v. Hardimon*, 2017 IL App (3d) 120772, is misplaced. In *Whitfield*, we disagreed with the *Hardimon* court's imposition of a " 'necessary' " standard for determining whether officers' statements and questions are probative. *Whitfield*, 2018 IL App (4th) 150948, ¶ 48. Moreover, in *Hardimon*, the officers' statements to the defendant were truly inflammatory, rather than helpful. In *Hardimon*, the officers told the defendant the media would use the word " 'execute' " next to the defendant's picture and the defendant's failure to implicate himself would prevent the defendant from seeing his son. *Hardimon*, 2017 IL App (3d) 120772, ¶ 36. Also, in *Hardimon*, the court noted there was no eyewitness identification, the defendant made no admissions, and the physical evidence did not directly implicate the defendant. *Hardimon*, 2017 IL App (3d) 120772, ¶ 39. In our case, the evidence against defendant was overwhelming.

¶ 73 Defendant's reliance on *People v. Davila*, 2022 IL App (1st) 190882, is also misplaced. In *Davila*, the court found the complained-of interrogation of the defendant to be prejudicial where the State's case rested on witness credibility with "minimal circumstantial evidence tying [the] defendant's gang activity" to the shooting. *Davila*, 2022 IL App (1st) 190882, ¶ 69. Here, as noted, the evidence against defendant was overwhelming.

¶ 74 Defendant also asserts his counsel's ineffectiveness for not requesting limiting instructions as to how the jury should consider the officers' statements during the interviews, particularly those related to what Patton told the police. However, defendant concedes no Illinois court has addressed the need for such instructions.

¶ 75 Additionally, defendant argues counsel was ineffective when she failed to object to the prosecution's closing argument implying defendant failed to tell the police about his low blood sugar until after the officers confronted defendant with the evidence against him, when, in fact,

defendant first volunteered his statement about low blood sugar. In context, the prosecutor's argument was based on the evidence. After defendant was confronted with the gas station and Walmart surveillance videos, defendant changed his story to claim the low-blood-sugar episode began at 2 a.m. rather than 6 a.m. After the officers confronted defendant with the evidence, defendant blamed his low blood sugar for why he did not remember being at the gas stations and Walmart. Defendant earlier denied being at those places.

¶ 76 Likewise, we reject defendant's assertion that counsel was ineffective for not moving to redact the references to defendant usually being in handcuffs or under arrest when he spoke with the police and statements defendant was "fighting" his cases. Those references were made in passing, unlike the sustained and concentrated questioning about the defendant's involvement in other crimes that occurred during an interrogation in *People v. Moore*, 2012 IL App (1st) 100857, ¶¶ 49-51. Also, defendant's references to fighting his cases explained why Rose went to Indiana to buy a car. Defendant stated they needed a second car so defendant could see his attorneys. Respecting defendant's statements he stashed his cousin's drugs and money under the bedroom carpeting, those statements were helpful in explaining why defendant cut the square of carpet and in showing the farcicality of his explanation.

¶ 77 Even if defense counsel's performance were deficient, defendant cannot establish prejudice. If an ineffective-assistance-of-counsel claim can be disposed of on the prejudice prong, we need not decide whether counsel's performance was deficient. *People v. Evans*, 186 Ill. 2d 83, 94 (1999). To demonstrate prejudice, the defendant must show there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different. *People v. Pulliam*, 206 Ill. 2d 218, 249 (2002). The defendant must show that counsel's deficient performance rendered the trial "unreliable or the proceeding fundamentally unfair." *People v.*

Simms, 192 Ill. 2d 348, 362 (2000). Here, there is no reasonable probability that, but for counsel's claimed errors, the guilty verdicts would have been different.

¶ 78 Without the video interviews, the circumstantial evidence against defendant was compelling. Defendant's explanation to Trent and Trai that Rose went to Indiana to buy a car and never returned was refuted by Veatch, who testified she and Rose made plans to be together that Sunday and Rose said nothing about buying a car. Bryant saw Rose at 3 a.m. on Sunday but at 11 a.m., defendant, not Rose, told Bryant to pick up her baby. At 11:30 a.m., defendant handed the baby through the door to Harrier, who noted he did not welcome her inside the house. Defendant did not participate in searches to find Rose. Defendant spent Sunday night and all but one night the week following with Crippin. On the one night defendant did not spend with Crippin, he asked her for a lighter, which she found odd because defendant did not smoke. Defendant wanted to borrow Strader's truck on the Monday after Rose disappeared. Defendant borrowed his mother's car, in which Rose's remains were found. Defendant's fingerprint was on the plastic bag containing Rose's remains wrapped in a comforter. Video surveillance established that defendant was at a gas station at about 5 a.m. on Sunday, October 22, 2017, the day Rose disappeared, filling a gas can. Video surveillance placed defendant at Walmart on Sunday showing him purchasing plastic tarps, a comforter, fuel, garbage bags, and a lighter. Rose's body was burned. Charred material was found in the trunk of Rose's car. Presumptive blood was found in the bedroom Rose shared with defendant. The burned bedroom carpet had a square cut out of it and was damp with a cleaning agent. The State's direct evidence consisted of defendant's admissions to Hamilton, which were corroborated by the physical evidence. Taken together, the direct and circumstantial evidence of defendant's guilt were overwhelming. Accordingly, we reject defendant's claims that his counsel

A-30

was ineffective for failing to move to suppress the October 26 and 29, 2017, videos in whole or in part.

¶ 79 C. The Convictions Relating to the 2019 Indictments

¶ 80 Defendant contends the 2019 charges of concealment of a homicidal death and dismembering a human body were subject to compulsory joinder with the concealment of a homicidal death charge in the 2017 information. Defendant argues the State's failure to charge him with the 2019 allegations until after his speedy-trial term ran on the 2017 charge (defendant remained in custody after his October 29, 2017, arrest and the State does not dispute that the term expired) requires that we vacate his convictions of the 2019 charges. Defendant also claims his counsel was ineffective for failing to move to dismiss the 2019 charges on speedy-trial grounds. The State maintains the 2019 charges were not subject to compulsory joinder.

¶ 81 As an aid to understanding these issues, we briefly recap the facts with particular attention to the dates of events. Defendant was arrested on October 29, 2017. On October 31, 2017, the State charged defendant by information with six counts of first degree murder and one count of concealment of a homicidal death. The concealment charge alleged defendant committed the offense "on or about October 22, 2017," by "transporting [Rose's] body from the place of her death and hid or otherwise disposed of her remains." According to defendant, his speedy-trial term on the 2017 charges expired on November 10, 2018.

¶ 82 On December 20, 2019, the State brought additional charges in two separate indictments. In case No. 19-CF-732, the State charged defendant with (1) dismembering a human body in that defendant, "on or about" the twenty-third to the twenty-sixth day of October 2017, "knowingly mutilated the deceased body of [Rose] by use of fire" and (2) concealing a homicidal death in that defendant, "on or about" the twenty-third to the twenty-sixth day of October 2017,

A-31

"knowingly concealed the death of [Rose] by moving her body to the property near 1519 Lyons St. Danville, IL, with knowledge that [Rose] had died by homicidal means." In case No. 19-CF-733, the State charged defendant with (1) dismembering a human body in that, "on or about the 27th to the 29th day of October, 2017" defendant knowingly "dismembered, severed, and separated body parts from the deceased body of [Rose]" and (2) concealing a homicidal death in that, "on or about the 27th to the 29th day of October, 2017," defendant knowingly concealed Rose's death by "placing [Rose's] body parts in a sock and bag and placed them into a 2000 Pontiac Grand Prix, with knowledge that [Rose] had died by homicidal means."

¶ 83 At trial, the evidence established the following. Defendant killed Rose between 3 a.m. and 5 a.m. on Sunday, October 22, 2017. At 3 a.m., Bryant saw Rose when she dropped her baby at Rose's house. Video evidence placed defendant at a gas station filling a gas can at 5 a.m. and then at Walmart purchasing items used to burn and conceal Rose's body. On Monday, October 23, 2017, defendant asked Strader to loan him a truck.

¶ 84 On November 1, 2017, the forensic investigator processed Luster's Grand Prix and found Rose's remains in the plastic bag and the sock. On November 2, 2017, Dr. Denton performed the autopsy on Rose's remains and found (1) the cause of death was a gunshot wound to the face, (2) Rose's arms and legs were traumatically amputated postmortem, and (3) Rose's remains had been burned.

¶ 85 On November 7, 2017, the police obtained Hamilton's account. Hamilton's testimony established (1) defendant and Patton moved Rose's body from the house to her garage on October 22, 2017, (2) defendant moved the body from the garage to an abandoned house and set it on fire, and (3) either the next night, or the night after that, defendant went back to the burn site where he dissected Rose's body into smaller pieces. Defendant then bagged the remains and

stored the body parts in the back of his mother's car. On November 8, 2017, the police discovered the burn site.

¶ 86 Luster's testimony established defendant borrowed her Pontiac Grand Prix the weekend of October 27, 2017. According to Luster, when defendant returned the car to her on Sunday, October 29, 2017, the "eerie" plastic bag was in the backseat. The police and forensic investigations were completed around November 8, 2017.

¶ 87 1. *The Compulsory Joinder Statute*

¶ 88 Section 3-3(b) of the Code (720 ILCS 5/3-3(b) (West 2016)) provides:

> "If *** several offenses are known to the proper prosecuting officer *at the time of commencing the prosecution* and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution *** *if they are based on the same act*." (Emphases added.)

"Compulsory joinder requires the State to bring multiple charges in a single prosecution." (Internal quotation marks omitted.) *People v. Williams*, 204 Ill. 2d 191, 200 (2003). This rule is subject to three conditions: (1) the several charges are known to the prosecution when the prosecution begins, (2) the charges are within the jurisdiction of a single court, and (3) the charges are based on the same act. *People v. McGee*, 2015 IL App (1st) 130367, ¶ 28.

¶ 89 The compulsory joinder statute was enacted to " 'prevent the prosecution of multiple offenses in a piecemeal fashion and to forestall, in effect, abuse of the prosecutorial process.' " *People v. Hunter*, 2013 IL 114100, ¶ 18. In *Hunter*, our supreme court cautioned that whether later charges are based on the same act as the earlier charge is not to be given a "hypertechnical" interpretation. *Hunter*, 2013 IL 114100, ¶ 18. However, the court also held that joinder is required where the defendant engaged in " 'only one continuous and uninterrupted act.' "

Hunter, 2013 IL 114100, ¶ 18. In *People v. Mueller*, 109 Ill. 2d 378, 385 (1985), our supreme court held the fact that the acts of shooting the victim and concealing the homicidal death were related was "irrelevant" for purposes of compulsory joinder. "There is no requirement of joinder where multiple offenses arise from a series of related acts." *Mueller*, 109 Ill. 2d at 385.

¶ 90 2. *The Speedy Trial Statute*

¶ 91 "Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he or she was taken into custody unless delay is occasioned by the defendant ***." 725 ILCS 5/103-5(a) (West 2016). The 120-day term begins to run automatically if the defendant remains in custody pending trial. *People v. McBride*, 2022 IL App (4th) 220301, ¶ 38. If the defendant is not tried within that period, he or she shall be discharged from custody. *McBride*, 2022 IL App (4th) 220301, ¶ 38.

¶ 92 3. *The Interplay Between the Compulsory Joinder and Speedy Trial Statutes*

¶ 93 In *People v. Gooden*, 189 Ill. 2d 209, 218 (2000), our supreme court recognized the "important interaction" between the speedy-trial provisions and the compulsory joinder provision when "additional charges are brought against a defendant who had been previously charged." In *Gooden*, the court held that once a defendant has been *prosecuted* for an offense, the State is "barred from prosecuting him or her for any other offense" which, pursuant to the compulsory joinder provision, should have been joined with the original prosecution. *Gooden*, 189 Ill. 2d at 219. Once a defendant files a speedy-trial demand, even if the State brings some of the charges later, the speedy-trial period begins to run on all of the charges when the demand is filed. *Williams*, 204 Ill. 2d at 200. However, it is "irrelevant" for purposes of compulsory joinder that multiple offenses arise from "distinct, but related, acts in the course of a single incident." *Gooden*, 189 Ill.

A-34

2d at 219. In other words, the defendant cannot "enlarge the reach of the compulsory-joinder statute by way of the speedy-trial statute." *Gooden*, 189 Ill. 2d at 220.

¶ 94 4. *Compulsory Joinder in This Case*

¶ 95 The State argues the 2019 charges were not subject to compulsory joinder with the 2017 concealment charge because they (1) were not known to the prosecution when the prosecution began in 2017 and (2) were not based on the same act as the 2017 charge. As noted, defendant was charged by information with first degree murder and concealment of a homicidal death on October 31, 2017. The State maintains that is the date the prosecution began. Defendant asserts the prosecution began on November 16, 2017, when he waived his right to a preliminary hearing. Defendant also asserts the prosecution knew of the 2019 charges as of November 16, 2017, and that the 2019 indictments charged the same acts as the 2017 information, albeit in more detail. Our review is *de novo*. See *Hunter*, 2013 IL 114100, ¶ 12.

¶ 96 a. When the Prosecution Began

¶ 97 The first condition for compulsory joinder is that the later charges were known to the prosecution when the prosecution began. *McGee*, 2015 IL App (1st) 130367, ¶ 28. "[K]nowledge" means the "conscious awareness of evidence that is sufficient to give the State a reasonable chance to secure a conviction." (Internal quotation marks omitted.) *McBride*, 2022 IL App (4th) 220301, ¶ 41. If, as defendant posits, the prosecution began on November 16, 2017, the prosecution had the benefit of the full police and forensic investigations and therefore knew about the facts that formed the 2019 charges. However, if the prosecution began on October 31, 2017, as the State suggests, the prosecution did not know of (1) the autopsy results and Dr. Denton's opinions, (2) the presence of the burn site and its contents, (3) the grisly contents of the plastic bag

and sock found in Luster's Grand Prix, and (4) Hamilton's information detailing how and when defendant moved, burned, and severed Rose's body.

¶ 98 In arguing the prosecution began when he waived the preliminary hearing on November 16, 2017, defendant relies in part on section 111-2(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/111-2(a) (West 2016)), which provides that "[n]o prosecution may be *pursued* by information unless a preliminary hearing has been held or waived *** and at that hearing probable cause to believe the defendant committed an offense was found." (Emphasis added.) Defendant cites *People v. Clarke*, 231 Ill. App. 3d 504 (1992), in support of his argument. In *Clarke*, the court said the "purpose of the right to a prompt preliminary hearing is to ensure that a defendant will not be held in custody or to bail, that is, that his freedom will not be restricted, without a prompt showing of evidence that a crime has been committed." *Clarke*, 231 Ill. App. 3d at 508. *Clarke* did not hold that a preliminary hearing begins the prosecution. Defendant's reliance on *People v. Macon*, 396 Ill. App. 3d 451 (2009), is also unavailing, as it supports the State's position. In *Macon*, the court held a felony prosecution commences on the date the indictment is returned or the information is filed. *Macon*, 396 Ill. App. 3d at 456. This accords with section 2-16 of the Code (720 ILCS 5/2-16 (West 2016)), which provides that " '[p]rosecution' means all legal proceedings by which a person's liability for an offense is determined, *commencing with the return of the indictment or the issuance of the information*, and including the final disposition of the case upon appeal." (Emphasis added.) It is "established" Illinois law that the " 'date the indictment is found or the information is filed marks the commencement of the felony prosecution.' " *People v. Leavitt*, 2014 IL App (1st) 121323, ¶ 40.

¶ 99 Despite the clear mandate of statutory and case authority that a prosecution begins with the charging instrument, defendant urges that section 2-16 of the Code is only a *general* statute

A-36

that must yield to the more specific statute (section 111-2(a) of the Code of Criminal Procedure of 1963) providing that no prosecution can be *pursued* unless probable cause is found at a preliminary hearing. This is not a chicken-or-the-egg proposition. Unless a defendant is charged with an offense, the need for a preliminary hearing does not even arise. See *People v. Howell*, 60 Ill. 2d 117, 119 (1975) (stating a defendant *held on a criminal charge* punishable by imprisonment in the penitentiary is entitled to a prompt probable-cause determination *of the validity of the charge* either at a preliminary hearing or by indictment by a grand jury).

¶ 100 We also reject as patently erroneous defendant's argument that a prosecution is commenced with an indictment but when initiated by information, the prosecution commences only with a preliminary hearing. Our legislature provided unequivocally that a prosecution commences with the "return of the indictment *or the issuance of the information*." (Emphasis added.) 720 ILCS 5/2-16 (West 2016). Accordingly, we hold the prosecution in the present case began with the filing of the information on October 31, 2017.

¶ 101 b. Whether the 2017 and 2019 Concealment Charges Alleged the Same Acts

¶ 102 The 2017 information charged:

> "[Defendant] on or about the 22 day of October, 2017, with knowledge that [Rose] had died by homicidal means, knowingly concealed the death of [Rose] by transporting her body from the place of her death and hid or otherwise disposed of her remains, in violation of 720 ILCS 5/9-3.4 (a)."

¶ 103 In 2019, the prosecution added two more concealment charges: (1) "on or about" the twenty-third to the twenty-sixth day of October 2017, defendant "knowingly concealed the death of [Rose] by moving her body to the property near 1519 Lyons St. Danville, IL, with knowledge that [Rose] had died by homicidal means" and (2) "on or about the 27th to the 29th day

A-37

of October 2017" defendant knowingly concealed Rose's death by "placing [Rose's] body parts in a sock and bag and placed them into a 2000 Pontiac Grand Prix, with knowledge that [Rose] had died by homicidal means."

¶ 104 To establish the offense of concealment of a homicidal death, the evidence must show (1) a homicide has occurred, (2) the defendant knew both the fact and cause of death, and (3) the defendant took affirmative steps to conceal the homicide with the specific purpose of preventing or delaying its discovery. *People v. Kirkman*, 170 Ill. App. 3d 106, 110 (1988). "Concealment of a homicidal death includes situations where the homicidal nature of the death *or the body itself* is concealed." (Emphasis added.) *Kirkman*, 170 Ill. App. 3d at 110.

¶ 105 Defendant relies on *People v. Smith*, 2017 IL App (1st) 161231. In *Smith*, the police discovered marijuana, counterfeit currency, and equipment for making the currency in the defendant's home during a search. *Smith*, 2017 IL App (1st) 161231, ¶ 1. The State charged the defendant with possession of marijuana but not with counterfeiting. *Smith*, 2017 IL App (1st) 161231, ¶ 4. After the defendant pleaded guilty to the marijuana charge, the Illinois Attorney General charged the defendant with counterfeiting based on the items found during the search that led to the marijuana charge. *Smith*, 2017 IL App (1st) 161231, ¶ 4. The appellate court upheld the trial court's dismissal of the counterfeiting charges because the defendant committed a " 'single physical act' " in simultaneously possessing the marijuana and the counterfeiting paraphernalia. *Smith*, 2017 IL App (1st) 161231, ¶¶ 13, 17. *Smith* is inapposite because after defendant shot Rose, he moved her body to different locations at different times. Thus, in our case, there was more than one "physical act."

¶ 106 Our decision in *People v. Mueller*, 130 Ill. App. 3d 385 (1985), is instructive. In *Mueller*, the defendant killed two men and put their bodies in a hog pen in Scott County. *Mueller*,

130 Ill. App. 3d at 386. That night, the defendant loaded the bodies in his truck and drove them to Cass County, where he dumped them off a bridge. *Mueller*, 130 Ill. App. 3d at 386. Both bodies were eventually recovered. *Mueller*, 130 Ill. App. 3d at 386. After the defendant was acquitted of the Scott County murders, he was charged in Cass County with concealment of the homicidal deaths. *Mueller*, 130 Ill. App. 3d at 386. The defendant moved to dismiss the concealment charges on the ground the Scott County State's Attorney had agreed not to charge him with that offense. *Mueller*, 130 Ill. App. 3d at 386-87. Defendant argued that as to each body, there was only one offense that originated in Scott County and continued into Cass County. *Mueller*, 130 Ill. App. 3d at 387. We held the defendant's acts of dumping the bodies in Cass County constituted a distinct offense from placing the bodies in the hog pen in Scott County. *Mueller*, 130 Ill. App. 3d at 389. Our supreme court affirmed, holding that the compulsory joinder statute is not intended to cover the situation where several offenses arise from a "series of acts which are closely related with respect to the offender's single purpose or plan." (Internal quotation marks omitted.) *Mueller*, 109 Ill. 2d at 385. Consequently, we hold the 2019 indictments in our case charged different acts from those alleged in the 2017 information.

¶ 107 Nevertheless, defendant contends the 2017 charge was so broadly worded it encompassed all of the acts defendant engaged in to conceal Rose's death, including those charged in 2019. The short answer is the 2017 charge could not have encompassed the 2019 charges because the acts charged in 2019 were not known to the prosecution when the information was filed on October 31, 2017. Also, the 2019 charges alleged discrete acts on different dates.

¶ 108 Defendant argues the prosecution for concealment of a homicidal death was brought in a "piecemeal" fashion that constituted an abuse of the prosecutorial process, as the State waited more than two years to bring charges it could have added in 2017. Defendant asserts he

A-39

was led to believe for those two years that the 2017 concealment charge was the only one he needed to defend. One of the purposes of the compulsory joinder statute is to prevent a prosecutor from harassing a defendant through successive prosecutions of multiple offenses. *McGee*, 2015 IL App (1st) 130367, ¶ 41. Because we determine the compulsory joinder statute was not violated, defendant's argument is misplaced. See *Mueller*, 130 Ill. App. 3d at 389 (the compulsory joinder statute did not bar Cass County's prosecution; however, we noted we did not condone the State's lying-in-the-weeds tactics.)

¶ 109 c. The 2017 Information and the 2019 Dismembering Charges

¶ 110 Defendant makes the same compulsory joinder arguments concerning the dismembering charges as he made regarding concealment of a homicidal death. Although the 2017 concealment charge alleged defendant "otherwise disposed of [Rose's] remains," that was attendant to concealing her murder. Prosecution for concealing a homicidal death is restricted to situations where the body itself is concealed or the homicidal nature of the death is concealed, as in making the death appear accidental. *People v. Vath*, 38 Ill. App. 3d 389, 395 (1976). Disposing of Rose's remains by hiding them would conceal the body. This is different from the crime of dismembering a human body, which requires severing, dissection, or mutilation of a deceased body. 720 ILCS 5/12-20.5(a) (West 2016). To be sure, defendant severed and burned Rose's remains to conceal the homicide and her body, but the legislature has determined those are separate offenses from concealment. Accordingly, we reject defendant's arguments that the 2019 dismembering charges were subject to compulsory joinder with the 2017 concealment charge.

¶ 111 d. Ineffective Assistance of Counsel

A-40

¶ 112 Because we hold the 2019 indictments were not subject to compulsory joinder with the 2017 information, we also hold defendant's counsel was not ineffective for failing to move to dismiss the 2019 charges on speedy-trial grounds.

¶ 113 D. Multiple Convictions for Concealing a Homicidal Death and Dismembering a Human Body

¶ 114 Defendant was convicted of two counts of dismembering a human body and three counts of concealment of a homicidal death. Defendant argues we must vacate one of the dismembering convictions and two of the concealment convictions because the relevant statutes do not authorize multiple convictions for the different acts in which defendant engaged to conceal and disjoin Rose's body.

¶ 115 The one-act, one-crime rule prohibits multiple convictions if they are based on the *exact same physical act*. *People v. King*, 66 Ill. 2d 551, 566 (1977). In *People v. Hartfield*, 2022 IL 126729, ¶ 67, our supreme court held that a "threshold" to reaching a "one-act, one-crime" issue is to determine the "unit of prosecution" of the offense at issue. In other words, whether a defendant's multiple convictions for violation of a statute can stand under the one-act, one-crime rule depends upon the legislature's prescription of the "allowable unit of prosecution." (Internal quotation marks omitted.) *People v. Sedelsky*, 2013 IL App (2d) 111042, ¶¶ 18-19. For instance, in *People v. Almond*, 2015 IL 113817, ¶ 45, our supreme court proceeded to a one-act, one-crime analysis only after determining the statute at issue authorized separate convictions for the *simultaneous* possession of a firearm and ammunition *in a single loaded firearm*. "[U]nit of prosecution" refers to "what act or course of conduct the legislature has prohibited for purposes of a single conviction and sentence." *Hartfield*, 2022 IL 126729, ¶ 67.

A-41

¶ 116 To illustrate: the issue in *Hartfield* was whether a "single discharge in the direction of multiple peace officers can support multiple convictions of aggravated discharge of a firearm." *Hartfield*, 2022 IL 126729, ¶ 66. In *Hartfield*, the defendant fired a gun once at four police officers and was convicted of four counts of aggravated discharge of a firearm. *Hartfield*, 2022 IL 126729, ¶ 1. In a unit-of-prosecution analysis, the number of victims does not control. *Hartfield*, 2022 IL 126729, ¶ 83. Rather, the court looks to the statutory language to determine what the legislature has prohibited and in "what unit of time, actions, or instances that crime is committed once." *Hartfield*, 2022 IL 126729, ¶ 83. "[I]t is the unambiguous intent of the legislature that controls." *Hartfield*, 2022 IL 126729, ¶ 83. If the legislature does not indicate the unit of prosecution, "doubt will be resolved against construing the statute as supporting *multiple instances of the same offense based on the exact same act*." (Emphasis added.) *Hartfield*, 2022 IL 126729, ¶ 83.

¶ 117 Determining the unit of prosecution involves statutory interpretation. *Hartfield*, 2022 IL 126729, ¶ 68. The principal aim of statutory interpretation is to ascertain and give effect to the intent of the legislature. *People v. Slover*, 323 Ill. App. 3d 620, 623 (2001). To determine legislative intent, we first look to the statute's language. *Slover*, 323 Ill. App. 3d at 623. We must give statutory language its plain and ordinary meaning. *Slover*, 323 Ill. App. 3d at 623. Statutory interpretation is a question of law we review *de novo*. *Slover*, 323 Ill. App. 3d at 623.

¶ 118 In *Hartfield* and *Almond*, a unit-of-prosecution analysis was appropriate as a *threshold* to a one-act, one-crime analysis because multiple convictions were based on the same physical act (shooting once at four police officers and possessing one loaded firearm). Here, defendant concedes he committed multiple different physical acts resulting in the dismemberment and concealment of Rose's body. Nonetheless, defendant insists a unit-of-prosecution analysis is

pertinent because there was only one deceased body that was dismembered and one homicidal death that was concealed.

¶ 119 1. *Dismembering a Human Body*

¶ 120 A person commits the offense of dismembering a human body when he or she knowingly "dismembers, severs, separates, dissects, or mutilates any body part of a deceased body." 720 ILCS 5/12-20.5(a) (West 2016). Defendant contends this statute sets forth the types of conduct constituting the offense without specifying the allowable unit of prosecution. Therefore, defendant argues, the legislature did not authorize multiple convictions for different acts constituting dismembering the same body. Defendant's argument proceeds as if the State prosecuted defendant for each act of dismembering. Defendant asserts this interpretation of the statute would allow dozens of prosecutions depending on a prosecutor's zeal. Yet, this is not what occurred. The State charged defendant with offenses committed on different days and by different acts. Mutilation by fire was committed and charged separately from severing and separating the body's appendages. Although defendant committed the separate acts of severing the arms and legs and disarticulating the jaw, the State charged only one count of dismembering because those acts occurred at the same time in the same location.

¶ 121 Defendant also erroneously compares the dismembering statute to murder, where there can be only one conviction for murdering one person. See *People v. Cardona*, 158 Ill. 2d 403, 411 (1994) (stating "[w]here but one person has been murdered, there can be but one conviction of murder"). Obviously, once a person has been killed, he or she cannot be killed again. Here, though, Rose's body could be and was subjected to different acts of dismembering.

¶ 122 Defendant argues interpreting the dismembering statute to allow multiple convictions leads to absurd results because the offense of dismembering a human body is a Class

A-43

X felony (720 ILCS 5/12-20.5(d) (West 2016)), which is required to be served consecutively to any other sentence. 730 ILCS 5/5-8-4(d)(5) (West 2016). Defendant posits this could lead to an "endless number" of consecutive Class X sentences adding up to sentences exceeding those for first degree murder. In support of his argument, defendant cites *Rutledge v. United States*, 517 U.S. 292, 297 (1996). However, *Rutledge* involved the issue of whether the defendant could be sentenced under two different statutes for the *same offense*. *Rutledge*, 517 U.S. at 297. Here, defendant was sentenced for different offenses committed on different dates. The trial court sentenced defendant to 15 years' imprisonment on each dismembering conviction, which did not come close to exceeding the 60-year sentence of incarceration the court imposed for first degree murder.

¶ 123 2. *Concealment of a Homicidal Death*

¶ 124 For purposes of concealment of a homicidal death, "conceal" means the "performing of some act or acts for the purpose of preventing or delaying the discovery of a death by homicidal means." 720 ILCS 5/9-3.4(b-5) (West 2016). Defendant maintains the word "acts" means that a "single offense" of concealment can include more than one act. If, for instance, defendant had, in one uninterrupted, continuous course of conduct moved Rose's body from the bedroom to the garage and then to the burn site and then to the plastic bag and then to his mother's car, these "acts" would constitute one offense of concealment. However, the evidence showed the separate acts of concealment occurred on different dates. Nothing in the statutory language prohibits multiple convictions for multiple different violations of the statute. Concealment of a homicidal death includes situations where the body itself is concealed. *Kirkman*, 170 Ill. App. 3d at 110. That there is but one body does not mean it cannot be concealed more than once. A body

A-44

can be hidden in one place and then on another occasion moved to a different hiding place, which is what happened here.

¶ 125 Defendant criticizes the State for citing *Friend v. People*, 2018 CO 90, ¶ 21, but the court in *Friend* aptly noted that even where a statute prescribes a single unit of prosecution, it does not immunize the defendant from being punished separately for successive commissions of the same offense. The court in *Friend* looked at all of the trial evidence to determine whether it supported distinct and separate offenses of child abuse. *Friend*, 2018 CO 90, ¶ 22. To that end, the court considered (1) whether the acts occurred at different locations, (2) whether the acts were the product of "new volitional departures" or were separated by intervening events, (3) whether each legally distinct offense was charged with sufficient specificity to distinguish it from other offenses, and (4) whether the evidence at trial supported convictions on each count. *Friend*, 2018 CO 90, ¶ 22.

¶ 126 We find the analysis in *Friend* persuasive. Assuming, without deciding, that the concealment statute prescribes a single unit of prosecution, the factors enumerated in *Friend* are present in our case. Defendant's acts occurred at different locations. Defendant moved Rose's body from the bedroom to the garage and then from the garage to the burn site and then to the Grand Prix. These acts were separated by intervening events. After defendant shot Rose, he waited 30 minutes for her to die. Then, according to Hamilton, defendant enlisted Patton's aid in moving Rose's body to the garage. Then, defendant went to two gas stations and to Walmart twice that Sunday buying supplies to get rid of the body. The next day, defendant asked to borrow Strader's truck. Strader refused, but defendant somehow transported Rose's body to the burn site. Then, a day or two later, defendant returned to the burn site where he disjoined the body. On the weekend following Rose's murder, defendant borrowed his mother's car in which he placed the plastic bag

and sock containing Rose's body parts. Each legally distinct offense was sufficiently charged by alleging separate dates and discrete acts. Finally, the evidence at trial amply supported the convictions on each count.

¶ 127 Nor are we persuaded by defendant's argument that the requirement of consecutive sentences (730 ILCS 5/5-8-4(d)(5) (West 2016)) prohibits construing the statute to allow multiple convictions for different offenses. Here, defendant was sentenced to an aggregate of 6 years' imprisonment on the concealment convictions. These convictions and sentences were not "endless," leading to "absurd results," as defendant argues. We likewise reject defendant's assertion the State's motion to join the separate cases for trial demonstrated each act constituted the same offense. To the contrary, the State's motion to join the cases for trial alleged defendant took "multiple, separate steps" to escape accountability for Rose's murder but the evidence would be admissible in each case. For reasons of judicial economy, and in fairness to defendant, all three cases were tried at once. For these reasons, we conclude a unit-of-prosecution analysis is not applicable, but if it were to be applied, the concealment statute does not prohibit the separate prosecutions and convictions in this case.

¶ 128 III. CONCLUSION

¶ 129 For the reasons stated, we affirm the trial court's judgment.

¶ 130 Affirmed.

A-46

People v. Keys, 2023 IL App (4th) 210630

Decision Under Review:	Appeal from the Circuit Court of Vermilion County, Nos. 17-CF-725, 19-CF-732, 19-CF-733; the Hon. Nancy S. Fahey, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Douglas R. Hoff, and Caroline E. Bourland, of State Appellate Defender's Office, of Chicago, for appellant.
Attorneys for Appellee:	Kwame Raoul, Attorney General, of Chicago (Jane Elinor Notz, Solicitor General, and Katherine M. Doersch and Eric M. Levin, Assistant Attorneys General, of counsel), for the People.

A-47

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
201 W. MONROE STREET
SPRINGFIELD, IL 62704

CLERK OF THE COURT
(217) 782-2586

RESEARCH DIRECTOR
(217) 782-3528

September 8, 2023

RE: People v. Keys, Ocheil D.
General No.: 4-21-0630, 4-22-0017, 4-22-0018
Vermilion County
Case No.: 19CF733, 19CF732, 17CF725

The Court today denied the petition for rehearing filed in the above entitled cause. The mandate of this Court will issue 35 days from today unless a petition for leave to appeal is filed in the Illinois Supreme Court.

If the decision is an opinion, it is hereby released today for publication.

Carla Bender
Clerk of the Appellate Court

c: Caroline Ellis Bourland
Eric Michael Levin
Michael Marc Glick

A-48

130110

APPEAL TO THE 4th DISTRICT COURT

FROM THE CIRCUIT COURT OF VERMILION COUNTY

People of the State of Illinois, (Appellee)	)	Trial Court No. 2017CF725
v.	)	
Defendant- Ocheil D. Keys (Appellant)	)	Trial Judge Nancy Fahey

Notice of Appeal

An appeal is taken from the order or judgment described below.

(1) Court to which appeal is taken: 5th Judicial Circuit Court, Vermilion County, Danville, IL

(2) Name of appellant and address to which notices shall be sent. Use additional sheet of paper if necessary.

Name: Ocheil D. Keys

Address: Email address: N/A

(3) Name and address of appellant's attorney on appeal.

Name:

Address: Email address:

In criminal appeals only, if appellant is indigent, does he/she request appointment of counsel? YES NO

(4) Date of judgment or order: 10/19/2021

(5) Offense of which convicted: 1 Count First Degree Murder/7 Counts Concealment of Homicidal Death

(6) Sentence: 60 Year in IDOC.

(7) If appeal is not from a criminal conviction, nature of order appealed from: Conviction & Sentenced

(8) If appeal is from a judgment of a circuit court holding unconstitutional a statute of the United States or of this state, a copy of the court's findings made in compliance with Rule 18 shall be appended to this Notice of Appeal.

(Signed) _____
(Clerk of Circuit Court.)

EFILED
11/10/2021 1:54 PM
Melissa Quick
Clerk of the Circuit Court
Vermilion County, Illinois
MF, Deputy Clerk

No. 4-21-0630

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- OCHEIL D. KEYS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of the Fifth Judicial Circuit, Vermilion County, Illinois No. 17-CF-725 Honorable Nancy S. Fahey, Judge Presiding.

AMENDED NOTICE OF APPEAL

An appeal is taken to the Appellate Court, Fourth Judicial District:

Appellant(s) Name:	Mr. Ocheil Keys
Appellant's Address:	Menard Correctional Center P.O. Box 1000 Menard, IL 62259
Appellant(s) Attorney:	Office of the State Appellate Defender
Address:	400 West Monroe Street, Suite 303 Springfield, IL 62704
Offense of which convicted:	First Degree Murder and Concealment of a Homicidal Death
Date of Judgment or Order:	October 19, 2021
Sentence:	60 years and 2 years
Nature of Order Appealed:	Conviction, Sentence and Denial of Motion to Reconsider

/s/ Catherine K. Hart
CATHERINE K. HART
ARDC No. 6230973
Deputy Defender

E-FILED
Transaction ID: 4-22-0017
File Date: 1/11/2022 3:40 PM
Carla Bender, Clerk of the Court
APPELLATE COURT 4TH DISTRICT

No. 4-22-0017

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- OCHEIL D. KEYS, Defendant-Appellant.	)	Appeal from the Circuit Court of the Fifth Judicial Circuit, Vermilion County, Illinois No. 19-CF-732 Honorable Nancy S. Fahey, Judge Presiding.

LATE NOTICE OF APPEAL

An appeal is taken to the Appellate Court, Fourth Judicial District:

Appellant(s) Name:	Mr. Ocheil Keys
Appellant's Address:	Menard Correctional Center P.O. Box 1000 Menard, IL 62259
Appellant(s) Attorney:	Office of the State Appellate Defender
Address:	400 West Monroe Street, Suite 303 Springfield, IL 62704
Offense of which convicted:	Dismemberment of a Human Body and Concealment of a Homicidal Death
Date of Judgment or Order:	October 19, 2021
Sentence:	15 years and 2 years in prison
Nature of Order Appealed:	Conviction, Sentence, and Denial of Motion to Reconsider Sentence

/s/ Catherine K. Hart
CATHERINE K. HART
ARDC No. 6230973
Deputy Defender

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
201 W. MONROE STREET
SPRINGFIELD, IL 62704

CLERK OF THE COURT
(217) 782-2586

RESEARCH DIRECTOR
(217) 782-3528

FILED
January 11, 2022
APPELLATE
COURT CLERK

4-22-0017

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. OCHEIL D. KEYS, Defendant-Appellant.	Vermilion County Case No.: 19CF732	FILED JAN 11 2022 Melissa Quick Clerk of the Circuit Court Vermilion County, Illinois

ORDER

This cause coming to be heard with proper notice having been served, and the Court being fully advised in the premises:

IT IS ORDERED that appellant's Motion for Leave to File Late Notice of Appeal is allowed. The Circuit Clerk is directed to file stamp the attached Late Notice of Appeal and efile it to the Fourth District Appellate Clerk.

Order entered by the court.

E-FILED
Transaction ID: 4-22-0018
File Date: 1/11/2022 3:48 PM
Carla Bender, Clerk of the Court
APPELLATE COURT 4TH DISTRICT

No. 4-22-0018

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of
	)	the Fifth Judicial Circuit,
Plaintiff-Appellee,	)	Vermilion County, Illinois
	)	
-vs-	)	No. 19-CF-733
	)	
OCHEIL D. KEYS,	)	
	)	Honorable
Defendant-Appellant.	)	Nancy S. Fahey,
	)	Judge Presiding.

LATE NOTICE OF APPEAL

FILED
JAN 11 2022
Melissa Quick
Clerk of the Circuit Court
Vermilion County, Illinois

An appeal is taken to the Appellate Court, Fourth Judicial District:

Appellant(s) Name:	Mr. Ocheil Keys
Appellant's Address:	Menard Correctional Center P.O. Box 1000 Menard, IL 62259
Appellant(s) Attorney:	Office of the State Appellate Defender
Address:	400 West Monroe Street, Suite 303 Springfield, IL 62704
Offense of which convicted:	Dismemberment of a Human Body and Concealment of a Homicidal Death
Date of Judgment or Order:	October 19, 2021
Sentence:	15 years and 2 years in prison
Nature of Order Appealed:	Conviction, Sentence, and Denial of Motion to Reconsider Sentence

/s/ Catherine K. Hart
CATHERINE K. HART
ARDC No. 6230973
Deputy Defender

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
201 W. MONROE STREET
SPRINGFIELD, IL 62704

CLERK OF THE COURT
(217) 782-2586

RESEARCH DIRECTOR
(217) 782-3528

FILED
January 11, 2022
APPELLATE
COURT CLERK

4-22-0018

FILED
JAN 11 2022
Melissa Quick
Clerk of the Circuit Court
Vermilion County, Illinois

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
OCHEIL D. KEYS,
Defendant-Appellant.

Vermilion County
Case No.: 19CF733

ORDER

This cause coming to be heard with proper notice having been served, and the Court being fully advised in the premises:

IT IS ORDERED that appellant's Motion for Leave to File Late Notice of Appeal is allowed. The Circuit Clerk is directed to file stamp the attached Late Notice of Appeal and efile it to the Fourth District Appellate Clerk.

Order entered by the court.

2017 WL 1197243
Only the Westlaw citation is currently available.
United States District Court, E.D. Virginia,
Alexandria Division.

UNITED STATES of America,
v.
NAM QUOC HOANG, Defendant.

Case No. 1:16-cr-193
|
Signed 03/31/2017

Attorneys and Law Firms

Elita C. Amato, Elita Ceta Amato Attorney at Law, Arlington, VA, for Defendant.

MEMORANDUM OPINION

T. S. Ellis, III, United States District Judge

***1** At issue pretrial in this prosecution for interstate stalking and domestic violence is whether defendant's statements during a video-recorded, custodial interview with law enforcement must be suppressed on the ground that defendant, despite initially waiving his *Miranda* [1] rights, adequately invoked his right to remain silent sometime after his waiver and the commencement of the interview.

1 *Miranda v. Arizona*, 384 U.S. 436 (1966).

An Eastern District of Virginia grand jury has indicted defendant Nam Quoc Hoang on the following eight counts: (1) transmitting communications with the intent to extort, in violation of 18 U.S.C. § 875; (2) cyberstalking, in violation of 18 U.S.C. § 2261A(2)(B); (3) stalking, in violation of 18 U.S.C. § 2261A(1); (4) conspiracy to commit stalking, in violation of 18 U.S.C. § 371; (5) interstate domestic violence, in violation of 18 U.S.C. § 2261; (6) using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c); (7) possessing a firearm as a felon, in violation of 18 U.S.C. § 922(g)(1); and (8) possessing ammunition as a felon, in violation of 18 U.S.C. § 922(g)(1). [2]

2 *See United States v. Hoang*, No. 1:16-cr-193 (E.D. Va. Nov. 17, 2016) (Second Superseding Indictment) (Doc. 32). The second superseding indictment named a co-defendant and co-conspirator, Khoa Dang Vu Hoang ("co-conspirator Khoa"), on Counts III and IV. Defendant's trial was severed from co-conspirator Khoa's trial because Khoa made admissions during a custodial interview that implicated defendant. *See Bruton v. United States*, 391 U.S. 123 (1968); *United States v. Hoang*, No. 1-16-cr-193 (E.D. Va. Feb. 10, 2017) (Order). On March 24, 2017, a jury convicted co-conspirator Khoa on both Counts III and IV.

On June 29, 2016, law enforcement officers arrested defendant and conducted a recorded, custodial interview that lasted approximately three and a half hours. Although defendant explicitly concedes that he knowingly, intelligently, and voluntarily waived his *Miranda* rights at the beginning of the interview, he contends that approximately 20 minutes into the interview he unambiguously and unequivocally invoked his right to remain silent. Accordingly, defendant has moved to suppress any statements he made in the course of that custodial interview following his invocation of the right to silence. In response, the government contends that defendant's invocation was ambiguous and equivocal, and that therefore the motion to suppress must be denied.

Thus, the question presented is whether defendant unambiguously and unequivocally invoked his right to remain silent following his initial waiver of his *Miranda* rights. As the matter has been fully briefed and argued orally, it is now ripe for disposition. For the reasons that follow, defendant's motion to suppress must be granted.

I. [3]

3 The facts recited here are derived from the second superseding indictment, and thus they are alleged, not proven.

In May 2013, defendant, a resident of Fairfax County, Virginia, began dating a woman ("the Victim") who lives in Montgomery County, Maryland. During their relationship, which progressed to intimacy, defendant allegedly took sexually explicit photos of the Victim with his cellphone. Defendant and the Victim also allegedly used crack cocaine

together. In December 2013, defendant and the Victim ended their relationship, and shortly thereafter defendant began harassing the Victim. As part of this harassment, defendant and his alleged co-conspirator, Khoa, drove to the Victim's house to stalk her. The Victim also allegedly talked to co-conspirator Khoa and stated that she was afraid of defendant. In late December 2013, defendant threatened the Victim that he would publish the sexually explicit photos of her on the internet unless she paid him money. [4]

4 The second superseding indictment does not disclose the amount of money defendant is accused of having demanded.

***2** In January 2014, defendant drove with co-conspirator Khoa to the Victim's house to stalk the Victim. After they determined that the Victim was not at home, defendant broke into her home and stole some of the Victim's personal belongings. Thereafter, on January 25, 2014, defendant published the sexually explicit photos of the Victim on defendant's Facebook page, which a number of people viewed.

That same day, the Victim posted on her Facebook page that she planned to accompany her friends that night to a club in the District of Columbia. Defendant saw the Victim's Facebook post and, together with co-conspirator Khoa, drove to the club to stalk the Victim. In the course of stalking the Victim, Defendant and co-conspirator Khoa parked outside the club and waited for the Victim to emerge from the club. When the Victim left the club and retrieved her valet-parked car, defendant instructed co-conspirator Khoa to follow the Victim, and Khoa did so. Thereafter, the Victim stopped her car at a traffic light and defendant and co-conspirator Khoa stopped their car immediately behind her. Defendant then left co-conspirator Khoa's car, walked to the Victim's car, displayed a handgun to the Victim, and demanded that she let him into her car. She complied. Defendant then entered the Victim's car, struck her in the face, and forced her at gunpoint to drive to Maryland. While defendant was in the Victim's car, defendant maintained contact with co-conspirator Khoa via cellphone. Defendant directed co-conspirator Khoa to follow the Victim to Maryland, and Khoa did so. Defendant released the Victim in Maryland.

II. [5]

5 The following facts are derived from the video recording of defendant's June 29, 2016 custodial interview, and the transcript of that interview. It is also worth noting that the interview transcript, on the top of page 2, reads, "July 29, 2016–Nam Hoang Interview." *See United States v. Hoang*, No. 1:16-cr-193 (E.D. Va. Feb. 17, 2017) (Gov't Ex. 2B) (Interview Tr.) at 2. This is presumably a typographical error, as the interview date—as time-stamped on the video recording and represented in the government's brief—was June 29, 2016.

Defendant, a 41 year-old Vietnamese citizen with permanent legal status in the United States, was arrested on June 29, 2016 by Fairfax County Police officers. Defendant was transported to the Franconia District Police Station where two detectives —Detective Sergeant Robert Grims and Detective Joseph Pittman [6] —and FBI Special Agent Joseph Hoang, a fluent and FBI-certified Vietnamese speaker, interviewed defendant for approximately three and a half hours. As reflected in the video recording, no more than two officers were in the room with defendant at any one time during the course of the interview. Indeed, for substantial portions of the interview, defendant and Special Agent Hoang were alone in the interview room.

6 Sergeant Grims is employed by the Montgomery County Police Department in Maryland. Detective Pittman is employed by the Fairfax County Police Department in Virginia.

Defendant's communications with the detectives were in English, whereas defendant's conversation with Special Agent Hoang was predominantly in Vietnamese. [7] Although defendant is not a native English-speaker, he has lived in the United States for the past 25 years and appeared capable of speaking and understanding English, albeit with occasional grammatical errors. Notably, during the custodial interview, defendant represented to Sergeant Grims that defendant could understand the Sergeant's statements. Furthermore, when Sergeant Grims informed defendant of his *Miranda* rights and explained those rights in English, defendant confirmed that he understood his rights, and thereafter defendant knowingly, intelligently, and voluntarily waived those rights, signing a waiver form and agreeing to speak with the detectives. [8] *See United States v. Hoang*, No. 1:16-cr-193 (E.D. Va. Feb. 17, 2017) (Gov't Ex. 2B) (Interview Tr.) at 6.

7 In preparing the interview transcript, FBI linguists Phuong Ngo and Chris Vu translated any Vietnamese into English.

8 In this regard, it is worth repeating that defendant does not contest that his initial waiver of his *Miranda* rights was knowing, intelligent, and voluntary. *See, e.g.*, *United States v. Hoang*, No. 1:16-cr-193 (E.D. Va. Feb. 17, 2017) (Hr'g Tr.) at 69:7-15.

***3** Shortly after defendant waived his rights, Sergeant Grims left the interview room and Detective Pittman engaged in small talk with defendant, in English, for approximately five minutes. Sergeant Grims then returned and began to read English-translated transcripts of incriminating statements defendant had made in jail telephone calls. Sergeant Grims informed defendant that the jail calls reflected that defendant had admitted to a crime, at which point defendant and Sergeant Grims engaged in the following exchange:

> Defendant: Whatever if you think that I did, [sic] you arrest me."
>
> Sergeant Grims: That's what, that's what I'm doing.
>
> Defendant: Yeah, and nothing to talk about.
>
> Sergeant Grims: What's that?
>
> Defendant: There's nothing to talk about.
>
> Sergeant Grims: There's another guy involved in it.
>
> Defendant: I have no idea, like I said, nothing involve [sic]. I don't steal, I don't go to [the Victim's] house, that's all I say. Whatever you ... ah ... CD whatever ah ... in here ... If you already got everything, don't need nothing to talk about [sic]. But for me, I know I don't do nothing.

Interview Tr. at 20. Thereafter, Sergeant Grims stated, "I'm going to read you some of the calls ok," and defendant responded, "I am gonna listen, sir." *Id.* at 22. After Sergeant Grims read another call transcript, defendant laughed and explained what he meant by some of his statements in the phone calls. *Id.* at 23-24. At that point, the following exchange occurred:

> Sergeant Grims: Let me show you what ... there's a couple of calls that you said that aren't very good, okay? So just listen a minute.
>
> Defendant: Okay, go ahead, you read and I don't talk no more.

Id. at 24. After saying that he would "talk no more," defendant crossed his arms on the table and put his head down. The conversation continued:

> Sergeant Grims: You don't want to talk no more?
>
> Defendant: No, no, because it make [sic] me laugh. I don't want to talk no more. I said make me laugh, that's all.
>
> Sergeant Grims: Can I read you what's—what's in here?
>
> Defendant: Sure. You do that, yeah. But I don't want—yeah, you—you can read.
>
> Sergeant Grims: Oh! This is a good one right here. [Reads jail call transcript.] Anyway, I got to read you one more.
>
> Defendant: Okay, why we [sic] talking about it? Put me in jail.
>
> Sergeant Grims: Huh?
>
> Defendant: Put me in jail. We don't have to talk about it.
>
> Sergeant Grims: Just hear me out, okay?
>
> Defendant: Yeah. [Brief pause.] I am ready to go to jail.

Id. at 24-25. In other words, defendant stated that he did not mind if the police continued reading statements to him, but defendant did not wish to speak further. And after Detective Grims read another call transcript, defendant stated that he wished to cease talking and to be taken to jail.

Immediately after defendant stated that he was ready to go to jail, someone knocked on the door to the interview room, Detective Pittman left the room, and the conversation paused. Following approximately 90 seconds of silence, Sergeant Grims asked defendant to give Grims "five more minutes," announced that the FBI had arrived, and insisted that defendant "Let me just finish this one up." *Id.* Defendant answered, "Crazy." *Id.* Thereafter, Sergeant Grims read some more phone calls to defendant. Special Agent Hoang then joined the interview. Once Special Agent Hoang, who is fluent in Vietnamese, entered the room, most of the interview was conducted in Vietnamese. Special Agent Hoang also orally translated defendants' statements from Vietnamese to English for Sergeant Grims.

Shortly after he entered the interview room, Special Agent Hoang asked if defendant had admitted to having stolen the Victim's personal belongings to teach her a lesson. Defendant responded, predominantly in Vietnamese, as follows. [9]

> ***4** Defendant: I don't remember that but now that you have prompted me, let me recount a story. Let me shine light on this story. I did not say I was going to teach a lesson or anything like that. *You know*, because that girl, she's crazy.
>
> Special Agent Hoang: Hmm ...
>
> Defendant: I only know, it's suppose[d] to be that, I don't have to, *I—I have to be silent.*
>
> Special Agent Hoang: Hmm.
>
> Defendant: It's suppose[d] to be that *I have to be silent* because the more I talk, it can't be good for me. But reality is the reality. Because the truth is that, those, the reason why when [Sergeant Grims] read it and I laughed
>
> Special Agent Hoang: Uh-huh
>
> Defendant: He read it and I laughed ... That's right, those things I said but I laughed because I was playing *mind* [games] with *she* [sic] because....

Id. at 31-32.

9 The italics in the subsequent quotation identify the few words that defendant uttered in English, as opposed to Vietnamese.

Despite these and earlier statements by defendant, the interview continued for another three hours, during which defendant made some admissions. Thus, the question presented is whether defendant unambiguously and unequivocally invoked his right to remain silent. In short, defendant's clear statements, "Put me in jail. We don't have to talk about it," and "Yeah. I am ready to go to jail," *id.* at 25, were unambiguous and unequivocal assertions of the right to silence.

III.

In its landmark *Miranda* decision the Supreme Court held that a person who has waived his right to silence during a custodial interview may subsequently invoke that right to halt further questioning. *See* 384 U.S. at 473-74. As the Supreme Court in *Miranda* put it, "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time ... during questioning, that he wishes to remain silent, the interrogation must cease." *Id.* The Supreme Court has since clarified that "an accused who wants to invoke his or her right to remain silent"—and by extension, to invoke the "right to cut off questioning"—must "do so unambiguously." *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010) (holding that defendant did not unambiguously invoke his right to silence because he "did not say that he wanted to remain silent or that he did not want to talk with the police" (quotation marks omitted)). [10]

10 In so holding, the Supreme Court adopted the same standard governing the *Miranda* right to counsel. *Compare United States v. Davis*, 512 U.S. 452, 459 (1994) (holding that a "suspect must unambiguously request counsel" to invoke the *Miranda* right to counsel and the right to halt further questioning), *with Thompkins*, 560 U.S. at 381 ("[T]here is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*.").

Of course, this rule—that an unambiguous and unequivocal invocation of the right to silence requires officers to cut off questioning—is a "critical safeguard" that "counteracts the coercive pressures of the custodial setting." *Michigan v. Mosley*, 423 U.S. 96, 104 (1975); *see also Thompkins*, 560 U.S. at 381 (observing that requiring an interrogation to cease upon the suspect's unambiguous invocation of the right to silence "protect[s] the privilege against compulsory self-incrimination" (citing *Mosley*, 423 U.S. at 103)). Put differently, *Miranda* established a prophylactic rule to prevent persistent and skilled police interrogators from convincing suspects to change their minds after an unambiguous invocation of the right not to speak in a custodial interview. *See Campaneria v. Reid*, 891 F.2d 1014, 1021 (2d Cir. 1989) (noting that a police officer's statement aimed "at changing [defendant]'s mind" following a *Miranda* invocation is "precisely the sort of conduct the prophylactic rule [announced in *Miranda*] seeks to prevent"). Indeed, once a suspect unambiguously and unequivocally invokes the right to silence—i.e., the "right to cut off questioning"—the interrogators must "scrupulously honor[ ]" that invocation. *See Mosley*, 423 U.S. at 103-04.

***5** Importantly, however, if the suspect's invocation is merely "ambiguous or equivocal"—that is, if "a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the [*Miranda*] right"—then the officer need not end the interview. *Davis v. United States*, 512 U.S. 452, 459 (1994) (requiring an invocation of the right to counsel to be "unambiguous" in order for police officers to cease questioning); *see also Thompkins*, 560 U.S. at 381 (adopting the *Davis* standard for invocations of the right to remain silent). Yet, in articulating a sufficiently unambiguous desire to remain silent, a suspect "need not speak with the discrimination of an Oxford don." *Davis*, 512 U.S. at 459 (quotation marks omitted). Moreover, "an accused's *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial [*Miranda*] request itself." *Smith v. Illinois*, 469 U.S. 91, 100 (1984) (addressing whether the state court had properly analyzed whether a defendant had invoked his *Miranda* right to counsel);[11] *see also United States v. Hamidullin*, 114 F. Supp. 3d 388, 392 (E.D. Va. 2015) ("Determining whether an invocation is ambiguous or unequivocal is contextual.... [C]ourts [should] focus only on events prior, not subsequent, to the putative invocation." (citations omitted)).

11 Of course, the Supreme Court in *Smith* noted that "[s]uch subsequent statements are relevant ... to the distinct question of waiver." *Smith*, 469 U.S. at 100.

These principles, applied here, point convincingly to the conclusion that defendant's statements constitute a sufficiently unambiguous and unequivocal invocation of the right to remain silent. Specifically, defendant invoked his right to silence (1) by stating, "I don't talk no more," (2) by declaring, "Put me in jail. We don't have to talk about it," and (3) by answering Sergeant Grims's plea to "hear me out," with the statement, "Yeah. I'm ready to go to jail." Interview Tr. at 24-25. Here, defendant, a non-native English speaker, declared that he wished not to speak further and that he wanted to be transported out of the interview room and to jail. *See Davis*, 512 U.S. at 459 (noting that a suspect "need not speak with the discrimination of an Oxford don" to invoke a *Miranda* right unambiguously (quotation marks omitted)).

Defendant's earlier statements offer further context and confirm that defendant's declarations—"Put me in jail. We don't have to talk about it," and "Yeah. I'm ready to go to jail"—comprised a sufficiently unambiguous invocation of the right to remain silent. Indeed, defendant thrice stated that he had "nothing to talk about." Interview Tr. at 20. And Sergeant Grims, instead of clarifying what defendant meant by those statements, proceeded to read jail phone calls to defendant. Subsequently, defendant stated, "Okay, go ahead, you read and I don't talk no more," and placed his head on the table—another contextual clue that defendant wished to end the interview. *Id.* at 24. To be sure, Sergeant Grims sought to clarify whether defendant did not "want to talk no more," and defendant replied, "No, no, because it make [sic] me laugh. I don't want to talk no more. I said make me laugh, that's all." *Id.* And Sergeant Grims then asked if he could continue reading jail calls, at which point defendant stated "You do that, yeah. But I don't want—yeah, you—you can read." *Id.* But once Sergeant Grims finished reading, defendant insisted, "Okay, why we [sic] talking about it? Put me in jail," and "Put me in jail. We don't have to talk about it." *Id.* at 24-25. In other words, defendant said that he did not mind the police officers reading things to defendant, but defendant did not wish to speak further.

Thus, taken in proper context, defendant's repeated and final protestations—"Put me in jail. We don't have to talk about it," and "Yeah. I'm ready to go to jail"—constitute a sufficiently unambiguous and unequivocal assertion of the right to remain silent. *See, e.g.*, *Tice v. Johnson*, 647 F.3d 87, 107-08 (4th Cir. 2011) (holding that the defendant unambiguously and unequivocally invoked his right to remain silent by telling the interrogator that he "decided not to say any more" during the interview).[12] Indeed, no reasonable officer, in light of the relevant circumstances, could have "understood only that the suspect *might* be invoking the [*Miranda*] right[.]" *Davis*, 512 U.S. at 459. Rather, Sergeant Grims's response, "Just hear me out, okay?" reflects an understanding that defendant wished to end the interview and cease answering questions. And defendant's answer, "Yeah. I am ready to go to jail," dispels any ambiguity. Interview Tr. at 25.

12 *See also Jones v. Harrington*, 829 F.3d 1128, 1139-40 (9th Cir. 2016) ("No fairminded jurist could determine that [defendant]'s invocation was ambiguous [because defendant] stated 'I don't want to talk no more'; in other words, *he did not want to talk anymore* .... [T]he fact that [defendant] spoke to officers for a while before invoking his right to remain silent makes no difference." (citations omitted)); *Campaneria*, 891 F.2d at 1021 (concluding that defendant unambiguously and unequivocally invoked his

right to remain silent when he stated, "No, I don't want to talk to you now, maybe come back later" and the interrogator's response "was not aimed at resolving any ambiguity ... but rather at changing [defendant]'s mind"); *United States v. Reid*, 211 F. Supp. 2d 366 (D. Mass. 2002) (holding that defendant's statement, "I have nothing else to say" was an unambiguous invocation of the right to silence), *cited favorably by Tice*, 647 F.3d at 107.

***6** To be sure, defendant's subsequent statements to Special Agent Hoang, "I have to be silent," are ambiguous, as it is unclear whether those words refer to defendant's *Miranda* rights or to the "story" defendant claimed to be recounting to Special Agent Hoang. *See id.* at 31-32. But this point is immaterial, as any statements defendant offered during the interview following his declaration, "Put me in jail. We don't have to talk about it," and "I am ready to go to jail," must be suppressed.

In opposition to this conclusion, the government offers three arguments. First, the government contends that defendant's statement, "I don't want to talk no more," is ambiguous, and that after defendant repeatedly asked to be taken to jail, defendant told the detectives to "go ahead" with further questioning. This argument is unpersuasive. Indeed, defendant reiterated that there was "nothing to talk about," [13] that he would "talk no more," [14] and that he wanted the investigators to "put [him] in jail." [15] And a close review of the transcript and original recording of the interview reveals that his third request to be taken to jail was followed by 90 seconds of silence, after which detective Grims insisted that defendant give the detective "five minutes" to "finish this one up." *Id.* at 25. Defendant then responded, "Crazy." To be sure, Detective Grims replied, "And we're going to talk to you about something else," to which defendant answered, "Alright, sir." *Id.* But none of these statements affects defendant's clear indication that he wished to stop talking and instead be taken to jail. *See, e.g.*, *Smith*, 469 U.S, at 100 ("[A]n accused's *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself."). Indeed, defendant's assertion that he wished to be taken to jail, considered in context with his prior statements, is an unambiguous invocation of the right to silence, which the police did not honor. *Thompkins*, 560 U.S. at 382 (holding that an unambiguous invocation of the right to silence invokes the "right to cut off questioning" (quoting *Mosley*, 423 U.S. at 103)). [16]

13 Interview Tr. at 20, 24.

14 Interview Tr. at 24.

15 Interview Tr. at 24-25.

16 *See also Mosley*, 423 U.S. at 104 ("[T]he admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.' ").

Next, the government points to *United States v. Adams*, a case in which the Eighth Circuit concluded that a district court did not commit clear error in concluding that a suspect's statement, "I don't want to talk, man," was equivocal. *See* 820 F.3d 317, 322–23 (8th Cir. 2016). Yet, *Adams* is factually inapposite, as there the suspect "never clarif[ied] his earlier statement or otherwise unequivocally invok[ed] his right to remain silent." *Id.* Here, by contrast, defendant repeatedly stated (1) that there was nothing to talk about, (2) that he did not want to talk, and (3) that he wished to be taken to jail. That Detective Grims successfully convinced defendant to keep speaking is of no moment because, as previously stated, *Miranda* created a prophylactic rule to prevent relentless and skilled police interrogators from attempting to change a suspect's mind after an unambiguous and unequivocal assertion of the right to remain silent. *See Campaneria*, 891 F.2d at 1021. [17]

17 The government also relies on several cases in which courts found that suspects unsuccessfully invoked their *Miranda* rights. But those cases are also inapposite. Unlike here, where defendant plainly stated that he did not want to talk anymore and instructed, "Put me in jail. We don't have to talk about it ... I am ready to go to jail," the cases on which the government relies included truly equivocal or ambiguous statements. *Compare* Interview Tr. at 25, *with Burket v. Angelone*, 208 F.3d 172, 197-98 (4th Cir. 2000) (defendant's statement, "I think I need a lawyer," held insufficient to invoke *Miranda* rights), *United States v. Zamora*, 222 F.3d 756, 765-66 (5th Cir. 2000) (defendant's statement, "I might want to talk to an attorney," held insufficient), *Mueller v. Angelone*, 181 F.3d 557, 573-74 (4th Cir. 1999) (defendant's question, "Do you think I need an attorney here?" held insufficient), *and United States v. Mir*, —— F. Supp. 3d ——, 2016

WL 7489102, at *1 (S.D.N.Y. Dec. 13, 2016) (defendant's statement, "Yeah, I don't know," when asked if he wished to speak to FBI agents held insufficient).

***7** Last, the government argues that defendant's attitude is inconsistent with a scenario in which law enforcement forced defendant to speak against his will. But *Miranda* "is a prophylactic safeguard whose application does not turn on whether coercion in fact was employed." *Smith*, 469 U.S. at 99 n.8. Thus, although defendant may have appeared at ease during parts of the custodial interview, *Miranda* still operates to protect defendant's unambiguous and unequivocal invocation of the right to remain silent.

In sum, none of the government's arguments is persuasive.

IV.

For the foregoing reasons, defendant's motion to suppress must be granted, and any statements defendant made after he said, "Yeah. I am ready to go to jail," must be suppressed.

An appropriate order will issue.

All Citations

Not Reported in Fed. Supp., 2017 WL 1197243

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2005 WL 2367779
Only the Westlaw citation is currently available.
NOTICE: FINAL PUBLICATION DECISION PENDING
Court of Appeals of Iowa.

STATE of Iowa, Plaintiff-Appellee,
v.
Eric Douglas ESSE, Defendant-Appellant.

No. 03-1739.
|
Sept. 28, 2005.

Appeal from the Iowa District Court for Cerro Gordo, Paul W. Riffel, Judge.
The defendant appeals following judgment and sentence for murder in the first degree and robbery in the first degree. REVERSED AND REMANDED.

Attorneys and Law Firms

Heather Wood and Dean Stowers of Rosenberg, Stowers & Morse, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Robert Ewald, Assistant Attorney General, Paul L. Martin, County Attorney, and Carlyle D. Dalen, Assistant County Attorney, for appellee-State.

Heard by SACKETT, C.J., VOGEL, ZIMMER, and HECHT, JJ., and NELSON, S.J. *

* Senior Judge assigned by order pursuant to Iowa Code section 602 .9206 (2003).

Opinion

ZIMMER, J.

***1** Eric Esse appeals from a judgment and sentence entered after a jury found him guilty of the crimes of murder in the first degree and robbery in the first degree. Esse asserts the evidence was insufficient to support his convictions. He also contends the district court committed legal errors and abused its discretion in several respects. We conclude the district court erred when it refused to give a limiting instruction and that Esse was prejudiced by this refusal. Accordingly, we reverse his convictions and remand for a new trial. For the purposes of retrial, we also note two additional errors by the district court: (1) the court's refusal to give a requested corroboration instruction, and (2) the court's exclusion of a prior inconsistent statement by the victim's girlfriend.

I. Background Facts and Proceedings.

On January 15, 2003, Eric Esse was charged with murder in the first degree and robbery in the first degree in relation to the death of Timothy Mammen. Viewed in the light most favorable to the State, the jury could have found the following facts.

At approximately 5:00 p.m. on November 28, 2002, Thanksgiving Day, Mammen was discovered dead in the upper level of his home, near his computer, with four gunshot wounds to the back of his head. Mammen's time of death was placed sometime between 1:30 a.m. that morning-the last time Mammen was known to be alive [1] -and the discovery of the body. However, rigor and body temperature were consistent with the conclusion that Mammen had been dead several hours before his body was discovered.

1 Teana Massee, a friend of Mammens, testified she and another woman were at Mammens home between 12:30 or 1:00 a.m. and 1:30 a.m. on November 28, that Mammen was alive when they left, and that while they were at Mammens home no other person, or vehicle, was present.

Mammen's friend, Mildred Carolus, discovered Mammen's body. Carolus had a set of keys to Mammen's home. When she first arrived at Mammen's home, [2] both the inner and screen door where shut, but the deadbolt to the inner door was not locked. Carolus recalled inserting her key into the lock on the screen door, and thus "just assumed it was locked." However, she did not attempt to open the screen door before inserting her key, and admitted that she did not know if the screen door was in fact locked. According to Mammen's girlfriend, Courtney Askvig, Mammen kept a key hidden on the property.

2 Carolus and her husband stopped at Mammen's home at 2:30 or 3:00 p.m. on November 28, at Mammen's prior request, to feed his animals. Noticing that Mammen's truck was at his home, the couple looked for, but did not locate Mammen. Carolus returned to the home later that day, at the request of Mammen's girlfriend, Courtney Askvig. It was during this second visit that Carolus discovered Mammen's body.

Esse, a friend of Mammen's, was voluntarily interviewed by police on December 2 and 3, 2002. The interviews were prompted by Askvig's statement that Esse had been in Mammen's home at 1:00 a.m. on November 28; a statement Askvig later amended to assert that Esse had in fact left Mammen's home by 11:38 p.m. on November 27. [3]

3 Askvig initially told police that during her last phone call with Mammen, at approximately 1:00 a.m. on November 28, Mammen stated Esse was at his house. However, at trial Askvig testified this statement had occurred during an 11:20 p.m. phone conversation on November 27, and that during her last phone conversation with Mammen, which occurred at 11:38 p.m. that same night, Mammen stated Esse had already left the home.

Police interviewed Esse three times over the course of two days. The interviews lasted about nine hours. Recordings of all three interviews were introduced into evidence and played for the jury during Esse's trial. During the interviews Esse never admitted to killing Mammen. He did, however, give conflicting and incriminating statements.

During the first interview Esse claimed he had last been at Mammen's home at approximately 4:30 to 5:00 p.m. on November 27, and had returned to his own home by 7:30 or 8:00 or perhaps 9:00 p.m. He also stated that as he was leaving Mammen's home he passed a truck going to the residence. Esse admitted that he had previously purchased drugs from Mammen and that he owed Mammen $600. However, he denied receiving any drugs from Mammen for at least a month. [4]

4 There was abundant evidence that Mammen sold drugs from his home.

***2** During the second interview Esse admitted he might have been at Mammen's home as late as 11:30 p.m. or 1:00 a.m., but claimed to be confused as to the time because he had taken drugs while at Mammen's home. After insisting Mammen was fine when he left around 12:00 to 12:30 a.m., Esse then implicated another individual, Scott Peterson, in Mammen's death. While giving multiple versions of how Peterson had killed Mammen and obtained Esse's silence by bribing him with money and drugs, Esse revealed unpublished details of the crime.

During the third interview Esse retracted claims made during his second interview, stating he had just told investigators what he thought they wanted to hear. When asked how he knew details that would have been known only by the murderer, Esse stated he had reconstructed events based on a phone conversation with Peterson two days after the murder. Esse reverted to his original statement-that he had gone to Mammen's home on November 27, taken drugs, and left-with the addition that he had stolen drugs from Mammen. He also claimed that he returned to Mammen's at 1:30 or 2:00 p.m. the afternoon of November 28, discovered Mammen's body, stole a "stack" of money, and left.

Various statements which Esse made during the course of the three interviews conflicted with other evidence admitted at trial. Scott Peterson, who had an alibi during pertinent times, testified at trial and denied involvement in the shooting. In addition, Esse's wife asserted she was using the family's only functioning car during the afternoon of November 28, when Esse claimed to have returned to Mammen's home and discovered his body. Esse also stated that he would not know where to get a gun if he wanted one. However, there was evidence Esse borrowed a .22 caliber Rohm revolver and Remington Thunderbolt .22 caliber long rifle ammunition from a Phil Petersen shortly before Thanksgiving.

Prior to learning about Phil Petersen and his weapon and ammunition, a weapons expert with the Iowa Department of Criminal Investigations (DCI) had identified the slugs removed from Mammen's brain as Remington .22 caliber long rifle ammunition, which may have been shot from a Rohm revolver. After comparing test bullets from the Petersen gun with one of the bullets retrieved from Mammen's body, [5] the expert testified that certain characteristics of the test bullets were consistent with those on the retrieved bullet.

5 Only one of the bullets retrieved from Mammen was useful for comparison purposes.

When turned over to police, Phil Petersen's gun contained four spent casings consistent with Remington Thunderbolt .22 caliber long rifle ammunition. Peterson, who had an alibi for much of the relevant time frame and who had no connection to Mammen, testified that the gun's ejector rod did not work, and that Esse had returned the gun with the spent casings still in the revolver. [6] Although Petersen thought Esse had returned the gun before Thanksgiving, he was not positive, and admitted it could have been returned after Thanksgiving. The State introduced a note written by Esse that was dated

December 12, the day after his arrest. The note stated that on November 28 Esse had gone to Phil Petersen's home, was shown a revolver with a missing ejector rod and four out of six spent rounds, and had used a nail to clear the rounds.

6 According to Petersen the gun had been returned with six spent casings, but he had managed to remove two casings before turning the gun over to the police.

***3** None of the weapons or shell casings located in Mammen's home were consistent with the long-rifle ammunition or potential murder weapons. While there was testimony indicating Mammen had bought a .22 caliber long-rifle revolver prior to his death, no such gun was ever found.

The matter was submitted to the jury, which found Esse guilty of murder in the first degree and robbery in the first degree. Following imposition of judgment and sentence, Esse appealed. He asserts that insufficient evidence supports his convictions; that the district court abused its discretion when it refused to allow him to use a prior inconsistent statement for impeachment purposes, refused to reopen the record to admit evidence to impeach his own witness, and allowed a State's expert to testify as to individual characteristics of the bullets recovered from Mammen; and that the court erred in refusing to give nine requested jury instructions, and in giving three others.

II. Scope of Review.

Our review of this matter is for the correction of errors at law. *See* Iowa R.App. P. 6.4. However, to the extent Esse's arguments rest on constitutional grounds, we conduct a de novo review in light of the totality of the circumstances. *See In re Detention of Williams,* 628 N.W.2d 447, 451 (Iowa 2001).

III. Discussion.

We begin by considering Esse's claims of instructional error. Esse submitted numerous proposed jury instructions and raised objections to the court's jury instructions that addressed reasonable doubt, witness credibility, and direct and circumstantial evidence. The court declined to give Esse's requested instructions and entered a general denial of all instructional exceptions. The court determined its own instructions correctly stated the law and expressed its reluctance to "tinker" with the uniform instructions. The court also concluded that many of Esse's objections were "really argument."

In assessing Esse's claims, we note the district court has a duty to instruct fully and fairly on the law regarding all issues raised by the evidence. Iowa R.Crim. P. 2.19(5)(*f*); *State v. Liggins,* 557 N.W.2d 263, 267 (Iowa 1996). The court may phrase the instructions in its own words, provided the instructions given fully and fairly advise the jury of the issues it is to decide and the law which is applicable. *Liggins,* 557 N.W.2d at 267. We do not view each instruction separately, but consider the jury instructions as a whole. *State v. Fintel,* 689 N.W.2d 95, 104 (Iowa 2004). If the court erred in giving or refusing to give a jury instruction, any error must be prejudicial to warrant reversal. *State v. Hartsfield,* 681 N.W.2d 626, 633 (Iowa 2004). "Prejudice exists when the rights of the defendant have been injuriously affected' or the defendant has suffered a miscarriage of justice.' " *Id.* (citations omitted).

A. Limiting Instruction. Esse's interviews with law enforcement lasted about nine hours. Playing the recordings for the jury consumed approximately two days of trial. The district court refused to give the following limiting instruction, requested by Esse, regarding the proper use of the recorded interrogations: "Statements and questions by law enforcement officers during interviews with the Defendant are not evidence to be considered for their truth. The Defendant's answers and responses to those questions and statements are evidence." Esse concedes the agents' questions and statements were admissible to place his answers in context, *see* Iowa R. Evid. 5.106, but asserts the questions and statements were nevertheless hearsay, and thus a limiting instruction should have been given. We agree.

***4** Pursuant to Iowa Rule of Evidence 5.105, when evidence is admissible for one purpose, but not for another, the district court shall, upon request, restrict the evidence to its proper scope and give a limiting instruction. The State offers no basis, and we are not aware of a basis in the context of this case, for admitting the agents' statements as evidence to be considered for their truth. *See* Iowa Rs. Evid. 5.801-.804 (defining hearsay and providing that hearsay is inadmissible, with certain limited exceptions). The requested instruction was a proper statement of the law, has application to the case at hand, and was not stated elsewhere in the instructions. Under rule 5.105, and prevailing case law, we believe the instruction should have been given. *See State v. Kellogg,* 542 N.W.2d 514, 516 (Iowa 1996).

As we have previously noted, this error does not require reversal unless it resulted in prejudice to Esse. *Hartsfield,* 681 N.W.2d at 633. The State contends common sense adequately informed the jury that they could not take the agents' statements and questions at face value. The fact remains, however, that the instructions given by the court allowed the jury to consider the statements and questions for any purpose, including evidence of Esse's guilt. [7] Because we presume the jury followed the court's instructions, *State v. Piper,* 663 N.W.2d 894, 915 (Iowa 2003), and because we cannot know the mind of the jury, we must proceed as if the jury did, in fact, consider the statements and questions as evidence. We accordingly look to the nature of the evidence to determine if its consideration by the jury would "injuriously affect[ ]" Esse's rights or result in "a miscarriage of justice." *Hartsfield,* 681 N.W.2d at 633.

7 Jury Instruction No. 5 stated, in relevant part, that the jury "must determine the Defendant's guilt or innocence from the evidence and the law in these instructions." Jury Instruction No. 8 stated, in relevant part, that evidence included "[e]xhibits received by the court." The jury was further instructed that the following was not evidence:

> 1. Statements, arguments, questions and comments by the lawyers.
> 2. Objections and rulings on objections.
> 3. Testimony I told you to disregard.
> 4. Anything you saw or heard about this case outside the courtroom.

Esse asserts that "throughout ... [the] interviews ... the agents asserted [Esse] was lying, told him they knew he was involved, and told him that they had substantial evidence and information that he was involved in this murder." Our review of the interviews indicates that many of the officers' statements and questions are neutral in implication. Other statements-such as "[w]e just need to know the truth" and "tell us the truth"-fall short of accusing Esse of lying. Still others-such as statements that Esse was at Mammen's home later than Esse had originally stated or had in fact been in the upstairs bedroom with Mammen-were clarified, discredited, or verified by other evidence, including Esse's own statements during the interviews. We cannot conclude that any of these statements or questions by the agents, even if considered as evidence, would have deprived Esse of a fair trial.

The interviews do, however, contain several statements that, if viewed as evidence, indicate Esse was lying or the agents had unspecified evidence of Esse's involvement beyond that which was introduced at trial. For example, the agents repeatedly stated that there was "no doubt" Esse was involved in the murder, and that "[i]t's either you or you know who did it." The State points out one of the interviewing agents, Jeff Jacobson, testified during trial and clarified that indicating or implying the existence of evidence implicating Esse in the murder, or knowledge of Esse's involvement, were common interrogation techniques. While Agent Jacobson's testimony does somewhat mitigate the impact of the agents' statements, those statements nevertheless indicate that the agents possessed information or evidence of Esse's involvement in Mammen's murder.

***5** A defendant is entitled to have his guilt or innocence determined solely upon the evidence, and not upon nonevidentiary assertions regarding his guilt or credibility. *See State v. Graves,* 668 N.W.2d 860, 874 (Iowa 2003). Because the jury was entitled to give whatever weight to the evidence that it saw fit, and because we cannot know what weight it may have placed on the agents' statements, we conclude Esse was prejudiced by the court's refusal to give a limiting instruction. Accordingly, Esse's convictions must be reversed. However, we may remand this matter for retrial only if all the evidence admitting during Esse's trial provides substantial support for his convictions. *See State v. Dullard,* 668 N.W.2d 585, 597 (Iowa 2003). We conclude that it does.

B. Sufficiency of the Evidence. This court is bound by the jury's verdict so long as the record contains substantial evidence of guilt. *See State v. Button,* 622 N.W.2d 480, 483 (Iowa 2001). Substantial evidence means evidence which is sufficient to convince a rational trier of fact, beyond a reasonable doubt, of the defendant's guilt. *State v. Turner,* 630 N.W.2d 601, 610 (Iowa 2001). In assessing whether the record contains substantial evidence of guilt, we view the totality of the record in the light most favorable to the State, drawing any and all legitimate inferences that can be reasonably deduced from the evidence. *State v. Williams,* 574 N.W.2d 293, 296 (Iowa 1998).

Esse points out that no direct evidence ties him to the crime. However, circumstantial evidence is as probative as direct evidence. Iowa R.App. P. 6.14(6)(*p*). The jury's verdict can rest on circumstantial evidence alone, so long as the evidence raises a fair inference of guilt as to each essential element of the crime charged. *State v. Kirchner,* 600 N.W.2d 330, 334 (Iowa Ct.App.1999).

Esse points to conflicts and gaps in the evidence, as well as the possibility that a number of other individuals could have murdered Mammen, and asserts his conviction was based on pure speculation. We agree the evidence of Esse's guilt was not overwhelming. However, this case turned largely on the credibility of various witnesses, as well as Esse's own recorded statements, and it is the jury's duty to sort out the credibility of witnesses and to assign the evidence presented whatever weight it deems proper. *State v. Thornton,* 498 N.W.2d 670, 673 (Iowa 1993). The jury may believe or disbelieve the testimony of witnesses as it chooses, *id.,* and it was free to accept or reject the defendant's version of events, *State v. Garr,* 461 N.W.2d 171, 174 (Iowa 1990). Given these principles, there was evidence from which the jury could conclude that Esse had the means, motive, and opportunity to commit, and in fact did commit, the crimes charged.

Based upon the evidence the jury could conclude that Esse borrowed a gun and ammunition consistent with the weapon and ammunition used to kill Mammen, and that he was in possession of the weapon and ammunition at the time of the murder. Although the gun borrowed by Esse was not directly linked to the murder, the test bullets from that gun did share certain characteristics with the bullet retrieved from Mammen's brain, and the non-ejected casings were consistent with the absence of long rifle casings at the murder scene.

***6** While Esse had a partial alibi, the evidence left open the possibility that Esse had returned to Mammen's home sometime after Mammen was last known to be alive. Although Esse asserts he did not have the necessary access to Mammen's home, the evidence that Mammen's screen door was locked after Mammen had been killed (raising an inference that the crime was committed by someone with a key to the home) was not conclusive. Moreover, Askvig testified that Mammen kept a hidden key on the property.

Evidence that Esse and his wife were experiencing financial difficulties and that Esse used drugs, as well as Esse's own admissions regarding stealing money and drugs from Mammen's home, indicate a motive for the crimes. In addition, there was evidence Esse had knowledge of unpublished details of the murder. The jury need not believe Esse's assertion that he obtained the details from another individual, particularly in light of his ever changing and self-contradictory version of events. *See State v. Odem,* 322 N.W.2d 43, 47 (Iowa 1982) ("A false story told by a defendant to explain or deny a material fact against him is by itself an indication of guilt.").

The question before us is not whether the evidence in the record unequivocally mandates a conviction, but whether the evidence was sufficient to allow a rational jury to find the defendant guilty beyond a reasonable doubt. *Turner,* 630 N.W.2d at 610. Given that the jury was charged with assessing the credibility of the evidence, and was free to accept or reject evidence as it saw fit, we find the record contains substantial evidence in support of the guilty verdicts. *See* Iowa Code §§ 707.1-.2 (defining murder in the first degree); *id.* §§ 711.1-.2 (defining robbery in the first degree).

Accordingly, it is appropriate to remand this matter for a retrial. We therefore turn to those issues that Esse has raised on appeal and which may reoccur during a subsequent trial.

C. Remaining Jury Instruction Issues. Esse raises a number of alleged errors, in both the giving of instructions and in the refusal of his proposed instructions. With one exception, we conclude all his claims of instructional error are without merit. Esse challenges the instructions given by the court that addressed reasonable doubt, witness credibility, and direct and circumstantial evidence. Those instructions, which mirror the uniform jury instructions, were correct statements of the law, and did not mislead or misdirect the jury. Accordingly, we find no error in the giving of those instructions. *See Kellogg,* 542 N.W.2d at 516. In addition, nearly all of the instructions requested by Esse were adequately encompassed by the instructions the court did submit to the jury. Accordingly, the court did not err in refusing to give those proposed instructions. *See Hubbell Commercial Brokers, L.C. v. Fountain Three,* 652 N.W.2d 151, 158 (Iowa 2002). The same cannot be said, however, regarding Esse's requested corroboration instruction.

***7** The district court refused to give the following proposed instruction: "The Defendant cannot be convicted by his own prior statements alone. There must be other evidence the Defendant committed the crime."[8] Instead, the court instructed the jury, over Esse's objection, "Evidence has been offered to show the Defendant made statements at an earlier time and place while not under oath. You may consider the prior statements for any purpose." Esse asserts the court erred because his statements during the interrogations were tantamount to a confession, and thus required corroboration. While we believe Esse overstates the nature of his responses during the interrogations, we agree that a corroboration instruction should have been given.

8 Esse also objects to the court's refusal to give the remainder of this proposed instruction, which states: "Furthermore, it is for you to determine the believability and weight to be given to any prior statement that you find the Defendant made. In making this determination you should consider all the circumstances at the time of the statements, as well as factors bearing on the credibility of witnesses mentioned elsewhere in these instructions." However, this portion of the instruction was adequately addressed by Jury Instructions Nos. 9 and 10. Thus it was not error for the court to refuse to give that portion of the instruction. *Hubbell Commercial Brokers,* 652 N.W.2d at 158.

As Esse correctly notes, like a confession of guilt to the crime charged, "admissions made after the crime must also be supported with sufficient corroborating evidence." *State v. Polly,* 657 N.W.2d 462, 466 n. 1 (Iowa 2003). While an admission of facts immaterial to guilt or innocence requires no corroboration, "statements of the accused out of court that show essential [facts or] elements of the crime, ... necessary to supplement an otherwise inadequate basis for a verdict of conviction, stand differently. Such admissions have the same possibilities for error as confessions. They, too, must be corroborated." *Opper v. U.S.,* 348 U.S. 84, 91, 75 S.Ct. 158, 163, 99 L.Ed. 101, 106 (1954). Corroboration is required for exculpatory, as well as inculpatory, admissions. *Id.*

Unfortunately, Esse fails to point this court to any specific prior statement that was an admission of an essential fact or element of the crime. Rather, he refers us to the entire nine hours of audio taped interviews. Clearly, under the standards of *Opper,* not every statement made by Esse during those nine hours would require corroboration. Thus, Esse has not referred this court to the *pertinent* parts of the record, as required by our rules of appellate procedure. *See* Iowa R.App. P. 6.14(1)(*f*).

However, the totality of Esse's argument does indicate that, at a minimum, he sought the instruction regarding his statements which revealed unpublished details of the murder. We conclude such statements are material to the question of guilt or innocence, and thus require corroboration. *See Opper,* 348 U.S. at 91, 75 S.Ct. at 163, 99 L.Ed. at 106. Upon remand, if the State again introduces Esse's statements which reveal details of the crimes charged, a corroboration instruction should be given as to those statements.

D. Evidentiary Issues. Although Esse raises three alleged evidentiary errors on appeal, only two are likely to recur upon a retrial. Esse contends the court erred when it excluded as hearsay testimony from a DCI agent regarding a statement allegedly made by Courtney Askvig. He further contends the court erred when it allowed the DCI weapons expert to testify regarding bullet characteristics. These evidentiary rulings were matters within the district court's discretion, and are reviewed for an abuse of that discretion. *State v. Dullard,* 668 N.W.2d 585, 589 (Iowa 2003). Abuse occurs when the court exercises its discretion on grounds or for reasons clearly untenable, or to a clearly unreasonable extent. *State v. Teeters,* 487 N.W.2d 346, 348 (Iowa 1992).

8** ***1. Statement of Courtney Askvig. During cross-examination by Esse, Courtney Askvig denied telling DCI agents that a man named Marcos was Mammen's drug supplier. Subsequent to Askvig's testimony, Esse asked another State's witness, DCI agent William Basler, if Askvig had told agents that Marcos was Mammen's drug supplier. The answer-that Agent Basler "belive[d]" Askvig had "indicated that Marcos was the source"-was excluded on the basis that it was hearsay. We agree with Esse that the district court abused its discretion in excluding the statement.

It is clear that the excluded testimony was hearsay. *See* Iowa R. Evid. 5.801. However, a prior inconsistent statement that constitutes hearsay may be admissible for impeachment purposes when it is admitted to demonstrate, not the truth of the matter asserted, but the fact that the witness is not reliable. *State v. Berry,* 549 N.W.2d 316, 318 (Iowa Ct.App.1996). To be admissible the statement must be both material and not collateral to the facts of the case. *State v. Fowler,* 248 N.W.2d 511, 520 (Iowa 1976). Evidence is material where it is admissible independent of the contradiction itself. *State v. Blackford,* 335 N.W.2d 173, 176 (Iowa 1983). Evidence is material where it (1) relates to the merits of the criminal charge, or (2) "discredit[s] the witness in respect to bias, corruption, skill, knowledge or motive to falsify." *Id.*

We believe Askvig's prior inconsistent statement falls into the former category. As Esse points out, the evidence clearly demonstrated that Mammen was a drug dealer, and that the State's theory of the case was that Mammen's death was drug related. In addition, Askvig's behavior and statements following the murder suggested that she may have had additional knowledge of or involvement in Mammen's criminal activities. Under the circumstances, Askvig's knowledge regarding the identity of another

participant in the violent enterprise of drug trafficking was material. The district court erred in excluding her prior inconsistent statement.

2. DCI Weapons Expert. The DCI weapons expert who testified at trial could not opine that a bullet recovered from Mammen's body was a positive match to test bullets filed from Phil Pertersen's gun. The expert did testify, however, that the recovered bullet and test bullets shared both class characteristics as well as "some individual characteristics," and that the presence of these shared individual characteristics increased the probability that the recovered bullet was fired from the Petersen gun. The testimony regarding the shared individual characteristics was admitted over Esse's objection. Esse asserts this was error. He contends the testimony lacked foundation because the expert could not describe the similar shared individual characteristics, and thus could not adequately explain the basis for his opinion. [9]

9 There is no suggestion the expert, who had twenty-nine years of criminalistic laboratory experience and specialized in ballistics, was unqualified to render the opinion. *See Hyler v. Garner,* 548 N.W.2d 864, 868 (Iowa 1996) (providing witness must be qualified to answer the particular question propounded).

Iowa is committed to a liberal rule on admission of opinion testimony, and "only in clear cases of abuse would the admission of such evidence be found to be prejudicial." *Leaf v. Goodyear Tire & Rubber Co.,* 590 N.W.2d 525, 531 (Iowa 1999) (citation omitted). Expert testimony is admissible if it is reliable, and will assist the jury in resolving a disputed issue. *See* Iowa R. Evid. 5.702; *Heinz v. Heinz,* 653 N.W.2d 334, 342 (Iowa 2002). "[T]he amount of foundation necessary to establish reliability depends on the complexity of the testimony and the likely impact of the testimony on the fact-finding process." *Johnson v. Knoxville Cmty. Sch. Dist.,* 570 N.W.2d 633, 637 (Iowa 1997). Reliability determinations are necessarily case specific, and are influenced by "the complexity of the subject matter." *Id.* (citations omitted).

***9** Esse points out that the expert was unable to describe the shared individual characteristics with any specificity or detail, and was unable to support his opinion with notes or photographs. However, the expert explained that his opinion was based on microscopic observations of stria that were too small to measure, but which will be, to a trained examiner, "noticeably different from one gun to another." The expert explained that he did not have any notes regarding the differences because "it's a visual thing," and he did not take photographs because he did not make a positive identification. Moreover, the expert testified that he had his findings reviewed by another examiner.

Given Iowa's liberal rule on the admission of expert opinion, *Leaf,* 590 N.W.2d at 531, and the fact that ballistics comparison is not a highly complex subject, see *Johnson,* 570 N.W.2d at 637, we conclude the expert's opinion was sufficiently reliable and thus admissible. The district court did not abuse its discretion by overruling Esse's objection.

IV. Conclusion.

The district court erred when it refused to given an instruction limiting the admissibility of the agents' statements and questions, and Esse was prejudiced by this error. We accordingly remand Esse's convictions and sentences, and remand this matter for a new trial.

REVERSED AND REMANDED.

All Citations

Slip Copy, 2005 WL 2367779 (Table)

2022 WL 453562
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,
v.
Charles M. GRANT, a/k/a Charles M. Grant Dumas, Charles Grant, III, and Charles Dumas, Defendant-Appellant.

DOCKET NO. A-1401-18
|
Argued January 12, 2022
|
Decided February 15, 2022

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 15-12-1007.

Attorneys and Law Firms

Zachary G. Markarian, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Zachary G. Markarian, of counsel and on the briefs).

Ali Y. Ozbek, Assistant Prosecutor, argued the cause for respondent (Camelia M. Valdes, Passaic County Prosecutor, attorney; Ali Y. Ozbek, of counsel and on the brief).

Before Judges Hoffman, Whipple and Geiger.

Opinion

PER CURIAM

***1** Defendant Charles M. Grant was found guilty by a jury of first-degree purposeful or knowing murder, N.J.S.A. 2C:11-3(a)(1) and (2), second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a), and unlawful possession of a firearm, N.J.S.A. 2C:39-5(b). He appeals from his conviction and life sentence.

Isaac "Blaze" Tucker was fatally shot at close range in the middle of the night on a street in Paterson. There were no witnesses. The only direct evidence presented against defendant was surveillance videos that recorded the shooting and tracked Tucker with another person walking to the location of the shooting, and the testimony of Tucker's friend, Demetrius Robinson, who claimed that defendant admitted to the murder days after it occurred.

On appeal, defendant claims that he was denied a fair trial because the court permitted the jury to view his videotaped interrogation, which included various statements from the interrogating officer that improperly opined on his credibility and guilt and that included other bad acts evidence (the murder of John Doe [1]), which was inadmissible hearsay and violated defendant's confrontation clause rights. He also claims that he was denied a fair trial because after the jury advised the court that it was unable to reach a verdict, the court instructed it to continue deliberating without instructing the jurors that they should not compromise simply to reach a verdict. He claims that these errors standing alone, or cumulatively, require a new trial. He also challenges his sentence as manifestly excessive. We reverse and remand for retrial.

1 The record does not reflect whether "John Doe" was the victim's street name, a phonetic spelling of his surname, a pseudonym, or used because the victim had not been identified.

I.

We derive the following facts from the record. Shortly after 2:00 a.m. on February 23, 2015, Officer John Kelly of the Paterson Police Department (PPD) was dispatched to the residential area of Warren Street and East 16th Street in Paterson in response to an alert from a "ShotSpot" device that detects gun fire and alarms the police.

When Kelly arrived, he saw the body of a man, later identified as Isaac "Blaze" Tucker, lying in the middle of East 16th Street, just north of Warren and East 16th Streets. A broken bottle of Patron Tequila was lying next to him. Kelly approached to administer aid, but the man had already died. He found five shell casings nearby.

PPD Detective James Maldonado collected surveillance video recordings from the area, which were played for the jury. [2] Maldonado testified that based on those videos, he was able to determine where Tucker was and the route he traveled before he was shot. Maps of the area, which are also not part

of the record on appeal, were shown to the jury with markers designating the locations of the various cameras.

2 The surveillance videos are not part of the record on appeal.

Maldonado testified that surveillance cameras at the Alto Rango Lounge and Liquor Store (the liquor store) located on 12th Avenue, recorded an image of the victim between 1:45 and 1:58 a.m. The recording showed a man who wore a blue coat, a black hoodie, black pants, and a scarf inside the store. During his interview, defendant identified himself as that man. Defendant was unable to identify anyone else in the liquor store.

***2** At 1:55 a.m., a video showed Tucker in the liquor store holding a bottle presumably of Patron Tequila. At 1:58 a.m., he left the liquor store, walked west on 12th Avenue for approximately one block, and turned right onto East 16th Street. While Maldonado did not describe in detail the images in the recordings, his testimony revealed that in at least one of the videos, Tucker was seen walking behind another person on 12th Avenue.

A surveillance video obtained from an electric company on East 16th Street, which was roughly a block past the corner of 12th Avenue and East 16th Street, showed Tucker and at least one other person walking north on East 16th Street, just past Governor Street. Another camera showed Tucker with a person beyond Governor Street. According to Maldonado, none of the videos showed Tucker talking to occupants of a car at Governor Street, or anyone turning onto Governor Street.

Another surveillance camera was located at a moving company further north on 16th Street, just before the corner of East 16th and Lafayette Streets. The camera depicted two individuals walking north on East 16th Street. A camera at East 16th and Lafayette Streets showed the same two individuals walking north on East 16th Street then stopping to talk to occupants in a vehicle that was heading south on East 16th Street. Apparently, another person appeared in the video, as the prosecutor asked Maldonado if he also saw "somebody approaching ... from that direction," and Maldonado answered in the affirmative.

Approximately one block south of the shooting, a camera located on East 16th Street showed individuals walking north towards Warren Street. A camera at Beef Town, located at the corner of East 16th and Putnam Streets, approximately one block north of the shooting, showed two individuals walking north on East 16th Street followed by "some flashes." Then one person, believed to be the shooter, walked north on East 16th Street and turned onto Putnam Street towards East 18th Street. One recording showed "the front" of the shooter.

On cross-examination of Maldonado, defense counsel displayed a "zoomed-in" still image of the gunman obtained from the camera at Beef Town and a still image of defendant from the liquor store, apparently to show that defendant's image did not match the gunman. Counsel also showed the image of a third person from the liquor store who wore a grey sweat suit. Maldonado testified that police had not identified the third person. Maldonado also agreed that the recording from the electric company near Governor Street showed "individuals" and that the camera at Beef Town recorded in color. During summation, defense counsel argued that the shooter wore "what appears to be gray, black and white" and that his pants were "wider" and his jacket "comes up higher" than the one defendant was wearing at the liquor store.

Demetrius Robinson identified defendant as "Charlie Wu" and said they had known each other for about a year. Robinson testified that on March 5, 2015, he and defendant were drinking at the location of the shooting, which had been turned into a shrine for Tucker, who Robinson said had been his best friend. At one point, defendant spat on the shrine and kicked it. Robinson asked defendant what he was doing, and defendant told him to mind his own business, shoved him, pulled out a black "Glock," and pointed it at Robinson's face. Robinson swatted it away and ran down the street. As he ran, he heard defendant say that "he was going to kill [him] like he had killed Blaze."

***3** Immediately thereafter, Robinson obtained a gun to protect himself. He was arrested with the gun the following day and, at the time of trial, serving a sentence of five years' imprisonment with a forty-two-month parole bar for unlawful possession of that gun. Robinson had prior drug offenses and was scheduled to "max out" on March 11th.

On cross-examination, Robinson stated that he pleaded guilty to the gun charge and faced a maximum prison term of ten years. He served half of his five-year term in prison and was then transferred to a half-way house. Robinson denied that he requested to speak with police after his arrest, claiming that police approached him while he was detained.

Maldonado testified that Robinson asked to speak with investigators after he was arrested. Maldonado denied making Robinson any promises but told Robinson that he would "see if [he] could help him out in any kind of way." He then allowed Robinson to make a phone call to try to obtain bail money.

Defendant was arrested in Maryland on April 14, 2015. On April 16, 2015, PPD Detective Audrey Adams and Maldonado interviewed defendant after he waived his Miranda[3] rights.

3 Miranda v. Arizona, 384 U.S. 436 (1966).

Defendant told Maldonado and Adams that he had gone to Maryland to visit his children and he had known Tucker for about ten years. The last time he saw Tucker was on the night of the shooting when they were at the liquor store. A "few" others were also inside the liquor store. Maldonado showed defendant still images from the liquor store and asked him to identify various people, but he was only able to identify himself and Tucker.

Defendant said he and Tucker left the liquor store and walked "down 12th Ave towards" East 16th Street. Defendant turned left onto Governor Street and Tucker continued on East 16th Street, stopping to speak with someone in a car. The following day, defendant heard that Tucker had been shot and killed. Defendant denied that he had anything to do with the murder or carried a gun that night. When asked if he had shot Tucker to avenge the murder of his friend John Doe, who, according to rumors, Tucker had killed, defendant denied knowing who killed John Doe and denied that he had killed Tucker to avenge Doe's death.

A medical examiner testified that Tucker had four gunshot wounds, three to his chest and back, and one above his right eyelid. The bullet that entered his head was fired at close range, about one to two inches from his head.

Detective Sergeant Robert Sloma of the Bergen County Sheriff's Office, the State's expert in ballistics, testified that the shell casings found at the crime scene were fired from a 9 mm Glock. Detective Mike Cossari from Crime Scene Investigation (CSI) testified on cross-examination that defendant's fingerprints were not detected on the casings, or the Patron Tequila bottle found near Tucker's body. On redirect, he stated that in his fifteen years at CSI, he had never detected fingerprints on shell casings. Adams testified that defendant did not have a permit to carry a firearm.

A Passaic County grand jury indicted defendant on charges of knowing or purposeful murder of Isaac Tucker (count one), possession of a firearm for an unlawful purpose (count two), unlawful possession of a firearm without a permit (count three), and second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(b) (count four).

***4** By order dated July 19, 2018, the court denied defendant's motion to suppress his videotaped statement. The court directed counsel to resolve transcript redaction issues and to contact the court with any unresolved disputes.

During trial, defendant objected to the playing of his interview, claiming it included other bad acts evidence on "the shooting of John Doe." Without ruling on the admissibility of that evidence, the court stated that it would provide a limiting instruction, but then failed to do so.

During deliberations, the jury requested several playbacks of the interview and surveillance videos, and one juror was excused for illness after deliberating for one day. Less than two hours after the newly sworn jury began deliberating, it notified the court that it was unable to agree on a verdict. The court directed the jury to continue deliberations without instructing the jurors that they could reconsider their opinions so long as they did not surrender their honest convictions solely for the purpose of returning a verdict. Shortly thereafter, the jury found defendant guilty of counts one, two, and three. Count four charging the certain persons offense was dismissed.

Defendant filed a motion for a new trial based on the admission of Robinson's testimony, which is not an issue on appeal, and the insufficient instruction provided to the jury after it said it was unable to agree on a verdict. The court denied the motion, believing that the jury had voluntarily reached a unanimous verdict after considering all the evidence.

On November 2, 2018, the court sentenced defendant to an aggregate term of life imprisonment with an eighty-five percent period of parole ineligibility pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. This appeal followed.

Defendant raises the following points for our consideration:

POINT I

GRANT WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL BY THE ADMISSION OF PORTIONS OF HIS INTERVIEW IN WHICH DETECTIVE MALDONADO REPEATEDLY INSISTED HE KNEW GRANT WAS LYING, EXPRESSED HIS LAY OPINION THAT VIDEO FOOTAGE CONTRADICTED GRANT, AND SPECULATED HOW A JURY WOULD PERCEIVE GRANT'S DEMEANOR AND THE STRENGTH OF THE STATE'S CASE.

A. The Interrogation Video Played For the Jury.

B. Detective Maldonado's Statements Throughout the Interrogation Were Inadmissible and Highly Prejudicial Lay Opinion.

C. The Trial Court Failed to Provide the Jury With a Limiting Instruction That It Should Not Consider Detective Maldonado's Statements as Evidence of the Truth of the Matter Asserted.

D. The Erroneous Admission of Detective Maldonado's Extensive Lay Opinion Statements Was Not Harmless Because the State's Case Was Far From Overwhelming.

POINT II

THE TRIAL COURT ERRED IN ADMITTING PORTIONS OF GRANT'S INTERVIEW IN WHICH HE WAS QUESTIONED REGARDING A MURDER NOT BEFORE THE JURY.

POINT III

GRANT WAS DENIED THE RIGHT TO A FAIR TRIAL BY THE COURT'S COERCIVE INSTRUCTIONS IN RESPONSE TO THE JURY'S NOTE STATING THAT IS WAS UNABLE TO REACH A VERDICT.

POINT IV

THE CUMULATIVE EFFECT OF THE AFOREMENTIONED ERRORS DENIED MR. GRANT A FAIR TRIAL.

POINT V

GRANT'S SENTENCE IS EXCESSIVE BECAUSE THE COURT IMPROPERLY DOUBLE-COUNTED ELEMENTS OF THE OFFENSE IN AGGRAVATION AND FAILED TO FIND A PLAINLY APPLICABLE MITIGATING FACTOR.

***5** A. The Court Double-Counted Elements of the Offense in Finding Aggravating Factor [One] and Giving It "Heavy Weight."

B. The Court Erred in Refusing to Find Mitigating Factor Eleven Solely Due to Grant's Outstanding Child Support Obligations.

II.

We first address defendant's argument, raised for the first time on appeal, that he was denied a fair trial because the trial court admitted portions of his interview where Maldonado offered lay opinions that infringed upon the jury's duty to decide credibility and guilt by saying: (1) he knew defendant was lying; (2) video recordings from the area contradicted defendant's story; (3) defendant had a gun on him just before the shooting; and (4) a jury would not believe his story and would want to know why he killed Tucker.

An evidential error that defendant did not object to at trial is reviewed for plain error. State v. Trinidad, 241 N.J. 425, 445 (2020). That standard requires reversal only if the testimony was "clearly capable of producing an unjust result." R. 2:10-2. The "possibility of an injustice" must be " 'real' and 'sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.' " Trinidad, 241 N.J. at 445 (quoting State v. Macon, 57 N.J. 325, 336 (1971)). In deciding whether an error amounts to plain error, it "must be evaluated 'in light of the overall strength of the State's case.' " State v. Sanchez-Medina, 231 N.J. 452, 468 (2018) (quoting State v. Galicia, 210 N.J. 364, 388 (2012)).

N.J.R.E. 701 provides that "[i]f a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it: (a) is rationally based on the witness' perception; and (b) will assist in understanding the witness' testimony or in determining a fact in issue."

Significantly, Rule 701 "does not permit a witness to offer a lay opinion on a matter 'not within [the witness's] direct ken ... and as to which the jury is as competent as he to form a conclusion[.]' " State v. McLean, 205 N.J. 438, 459 (2011) (alterations in original) (quoting Brindley v. Firemen's Ins. Co., 35 N.J. Super. 1, 8 (App. Div. 1955)). Stated another way, lay opinion testimony "is not a vehicle for offering the

view of the witness about a series of facts that the jury can evaluate for itself or an opportunity to express a view on guilt or innocence." McLean, 205 N.J. at 462. In the context of police testimony, an officer may provide testimony about facts observed firsthand, but may not "convey information about what the officer 'believed,' 'thought' or 'suspected.' " Id. at 460 (citing State v. Nesbitt, 185 N.J. 504, 514-16 (2006)).

Here, defendant claims the State offered improper lay opinion testimony through Maldonado's statements during the interview, the first of which occurred after Maldonado asked defendant if he had "a piece on" him at the liquor store, and defendant denied carrying a gun, including on the night of the shooting. Maldonado responded: "you had a gun on you[,] ... you probably had a gun on you. Maybe you got a gun." [4]

4 We note that the transcript of the interview contains many indiscernible references at this point.

***6** After defendant stated that he and Tucker left the liquor store together then parted ways at Governor Street, Maldonado questioned defendant's story, telling him: "That's it. I'll get straight to the point. You don't stop at Governor Street, you know. We got you going past Governor Street. We got you going past Lafayette Street. And that's when the car pulls up to you guys. Who was in that car?" Defendant said he did not know. Maldonado continued:

> That's not -- and you told me you didn't go past -- why you didn't go past Governor Street for whatever reason. But you say -- (indiscernible) Lafayette Street in the city here and -- (indiscernible), you know. You see Blaze walk. And you tracked him down ... there. As you're tracking past, we look to see that a car pulls up to you guys. And you guys start talking to some people in the car. And so for some reason, you went past. So either something happened right there, or, you know, for some reason you're holding back on -- (indiscernible). Come on, dude. Let's do the right thing here.

Defendant replied that he was trying to do the right thing.

Maldonado insisted that defendant "had a problem with" Tucker and told defendant: "You thought he was going to do something to you." Defendant disputed both contentions. Maldonado persisted: "Were you talking some smack about him? ... Thinking he was going to do something to you? Was he trying to lure you somewhere?" Defendant denied having any problem with Tucker.

Maldonado then asked: "So what happened when you go past Lafayette Street?" Defendant replied: "I wasn't on Lafayette Street."

> DETECTIVE MALDONADO: Uh-huh. So you remember -- (indiscernible) Governor Street?
>
> GRANT: No.
>
> DETECTIVE MALDONADO: No? But it's the same two guys walking. Same two guys leave the bar. The same two guys walking all the way down. You know, two things. You either shot Blaze.
>
> GRANT: I didn't kill him.
>
> DETECTIVE MALDONADO: Or with a gun[,] shot Blaze, or you know something else that happened that you're not telling us. So two -- two things that could have happened.

Defendant's reply was indiscernible.

Maldonado continued: "Something could have been triggered --" and defendant replied: "No." Maldonado then said: "I know something happened and you're telling us that you don't want to tell us." Maldonado asked if defendant had been motivated by greed or money. Maldonado urged defendant to help himself by confessing and explaining his motive. Maldonado then claimed the jury would not believe his denials and said:

> And then they [the jury] look at those videos of you walking all the way to almost to where you got there. And then what are you hiding? I mean, not just if you killed him or something else. It's what are you hiding? That alone, what are you hiding -- (indiscernible), you know.
>
> You know a jury's not made up of people from the hood and be like, you know. You know, people want reasons ... And if you said no -- (indiscernible) deceiving like that, and that

they're hiding something. You know, got a stone cold killer, somebody that he calls buddy, he just fucking blasted him and left him there. Left him there to die, you know.

... The jury wants to know. People want to know. That's their thing to know why something happened. I mean, you gave us the truth to a certain point. Which I understand -- (indiscernible) .... But, you know, I'm not -- (indiscernible) that last part of the story. And that's where you said the part -- (indiscernible) a stone cold killer that's what that this ...

***7** I know -- (indiscernible) -- blast something for something, you know. But (indiscernible) there's a reason behind it. And when you carry a gun -- (indiscernible) -- you see the frigging gun. You got to think about it. (Indiscernible).

Defendant's reply was indiscernible.

Maldonado continued:

You can tell by the videos of the park you had a gun on you.... You can see the imprint on your jacket.... You definitely see the imprint of the gun.... It can't be anything else.... [W]e know you had a gun that night. And we know you carried a gun before.

....

And I know you walked away all the way down. We've got proof. I know that. We've got you right on video walking -- (indiscernible). There's cameras there, man. You know about the city camera and you see everything ....

Like I know about the car. I know about the car that pulls up -- (indiscernible) passing. (Indiscernible) and you keep walking on 16th, a car pulls up, and you guys talking on the street. And we see the car pull off, and we see you guys walk away. (Indiscernible) just go about your way.

....

I'm not going to make something up that's not true for you and (indiscernible) full of sh**, you know. (Indiscernible) park over there, you know. So how would I know that? There's cameras there, you know. We tracked everything down from the bar all the way around, you know. We know you walked out of the building. You went out to the street.

So you're going to tell us it wasn't you that passed Governor Street. (Indiscernible) -- clothes is very, you know, very distinguished, you know. You didn't have just all black, you know. You had a little thing with pockets, with a -- (indiscernible) and a scarf over your face and over your head, you know. It's not like it wasn't distinct anything that, you know, like say it could be anybody in that bar, you know. You had something on, and the video shows everything you had on -- (indiscernible) to that. Okay? So everybody don't dress alike, and, you know.

You got with him. You're the one who walked with him. And farther, we see the car up on -- (indiscernible) you guys start talking to some people in the car. And the car goes off and keep going up. And what happened?

Defendant replied: "That's all I know ... I told you I went up Governor Street." Maldonado continued:

You didn't go up Governor Street.... We know you did it, because that day at the bar you walked out with Blaze.... The day Blaze died you walked out with him, and you walked all the way to -- (indiscernible). Yeah. You can tell (indiscernible) Governor Street, but I'm telling you we know you did. A hundred percent.

Defendant replied: "So are you going to charge me for something I didn't do?" Maldonado said: "You're not giving me nothing else other tha[n] we know you went back to Governor Street with him, you know. We see the car pull up. A couple blocks already -- (indiscernible)." Defendant replied: "That's all I know." Maldonado responded:

Okay. So when all that evidence is in front of you, and then you see all that -- you see yourself walking with him all the way -- (indiscernible). Then you went on Governor Street. Knowing that it's all there, everything is there. Everybody's seen you continue to walk up. You're going to say what? You're going to lie to the jury to their face and the Judge right there while they're looking at everything you're doing and say that's not me? You're going to -- (indiscernible) on their face that

> they're stupid, and say that wasn't me. I can tell if you're lying. I -- (indiscernible) look at you.

***8** Defendant denied involvement, and Maldonado asked if he knew "how people look at [him]." Then Maldonado said:

> When I see pictures of Blaze, and the way he's f**king [blasted] and -- (indiscernible). What do you think they're going to say? He didn't even have an open casket, did he? And to be done dirty the way he done -- he was, that sounds really bad right now. But you can't even explain why this happened, you know. It looks like a hit with the way it happened.
>
> It wasn't one of those where you were in the bar, and you shot. And, you know, you shot somebody by mistake. Somebody died. And people are going to look at that, and they're going to think it's f**ked up, you know. Not even looking at, you know, there was this, it's personal, you know. And they see that. And you can see it as personal the way it happened. And the last person with him is you.
>
> When they see all that evidence, the video and all that stuff -- (indiscernible) all that evidence they have there's no[ ] way -- happen to you. And that whether it was right or it was wrong, the way he [was] shot from beside close range -- (indiscernible). (Indiscernible) -- bounce this off of you to see -- (indiscernible) yourself.
>
> ...
>
> That's the whole thing is why? Not if you killed him. But why did you kill him?
>
> ...
>
> But once everything comes out, they're going to know you killed him.

After the questioning briefly turned to the subject of the John Doe murder, which we address infra, Maldonado asked: "So who killed Blaze? Dude, you were there?" Defendant said: "I don't know" and Maldonado responded:

> You were there. I know 100 percent you were there -- (indiscernible). I'm telling you. I'm not buying or I'm not tricking you into telling me that you were there. I know you were there. That's the whole point. I knew you were there when Blaze got killed. I know you had a gun. The gun -- (indiscernible).

Defendant insisted that he did not have a gun, and Maldonado replied: "I don't think there's a phone that big that looks like a gun." The interview concluded with Maldonado's saying that defendant's story was "bulls**t" and "You know I understand."

At the end of Adams's testimony, which was the vehicle by which the entire unredacted interview was offered in evidence, the court instructed the jury on assessing the credibility of defendant's statement, but it provided no curative instruction regarding Maldonado's statements during the interrogation.

On appeal, defendant argues he was denied a fair trial because Maldonado stated: he knew defendant was lying and that he carried a gun and did not turn onto Governor Street; surveillance recordings contradicted defendant's story; and the jury would not believe his denials and would want to know why he killed Tucker. Defendant contends the State would not have been permitted to offer this information through Maldonado's direct testimony and that it was not admissible by playing the interview to the jury. Defendant asserts that the lay opinions Maldonado expressed during the interview should have been redacted.

Defendant underscores that the court gave no instruction, at any time, explaining that Maldonado's opinions were not sworn statements and were not offered for the truth of the matters asserted. Defendant highlights that during deliberations the jury requested multiple playbacks of the interview. He contends that there is a strong chance the jury improperly credited Maldonado's statements based on his status as a police officer, particularly since Maldonado said he was "100 percent" sure that defendant committed the crime and that the jury would wonder what defendant was hiding after they viewed all the evidence.

***9** Defendant also claims the prosecutor's summation compounded the error when the prosecutor argued that Maldonado knew defendant was lying.

Defendant contends these errors were not harmless because the State's evidence was not overwhelming, but rather, turned on Robinson's credibility and the surveillance videos. He argues that Robinson's story was self-serving since he had a prior record and was facing gun charges when he requested to speak with police and implicated defendant. And he notes that the jury requested multiple playbacks of the surveillance videos and claimed it had been unable to reach a verdict before the court urged it to continue deliberating without providing an appropriate instruction.

The State responds that Maldonado's statements were proper interrogation techniques, and argues that because no New Jersey decision directly precluded his statements from being presented to the jury in the form of interrogation statements, the court did not err in permitting them.

Maldonado's disputed statements should have been redacted. They constituted improper lay opinions that invaded the jury's sole responsibility to decide the facts and guilt and improperly suggested that defendant had an obligation to explain himself.

Opinion testimony "is not a vehicle for offering the view of the witness about a series of facts that the jury can evaluate for itself or an opportunity to express a view on guilt or innocence." McLean, 205 N.J. at 462. As we explained in State v. Tung:

> Police testimony concerning a defendant's guilt or veracity is particularly prejudicial because "[a] jury may be inclined to accord special respect to such a witness," and where that witness's testimony goes "to the heart of the case," deference by the jury could lead it to "ascribe[ ] almost determinative significance to [the officer's] opinion."
>
> [460 N.J. Super. 75, 102 (App. Div. 2019) (internal citations omitted).]

Maldonado's statements that defendant could be seen in the videos carrying a gun and that the image of the shooter matched the image of defendant were lay opinions interpreting the evidence, a function solely entrusted to the jury. As our Supreme Court has explained:

> We go to extraordinary lengths in ordinary criminal cases to preserve the integrity and neutrality of jury deliberations, to avoid inadvertently encouraging a jury prematurely to think of a defendant as guilty, to assure the complete opportunity of the jury alone to determine guilt, to prevent the court or the State from expressing an opinion of defendant's guilt, and to require the jury to determine under proper charges no matter how obvious guilt may be. A failure to abide by and honor these strictures fatally weakens the role of the jury, depriving a defendant of the right to trial by jury.
>
> [State v. Frisby, 174 N.J. 583, 594 (2002) (quoting State v. Hightower, 120 N.J. 378, 427-28 (1990) (Handler, J., concurring in part and dissenting in part)).]

Maldonado opined during the interview that the videos clearly showed defendant had a gun and was the shooter. These were questions for the jury to decide. They should have been redacted. Had the State offered these statements on direct examination, they would have been excluded as improper lay opinion testimony because they amounted to "an expression of a belief in defendant's guilt" and they gave "an opinion on matters that were not beyond the understanding of the jury[,]" as the jury could view the evidence itself and determine whether defendant had a gun and was the shooter. McLean, 205 N.J. at 463; see also Tung, 460 N.J. Super. at 101 (explaining that a police officer's opinion testimony "as to defendant's truthfulness and guilt ... were not admissible as either demeanor evidence or lay opinion" and invaded the jury's "exclusive responsibility" to determine credibility and guilt).

***10** While these statements may be viewed as proper interrogation techniques, they were not proper statements to present to the jury. Although police may use psychological methods such as trickery and deception in attempting to obtain a confession, to be admissible at trial, statements by an interrogating detective must still comply with the rules of evidence and not deny the defendant the right to a fair trial. State v. Patton, 362 N.J. Super. 16, 31-36, 38-39 (App. Div. 2003). In Patton, we discussed the risk of a fabricated document used during interrogation making its way into the record, jeopardizing the right to a fair trial, and the requirement that hearsay embedded in an interrogation be excluded from evidence. Id. at 33-35, 38-39.

Maldonado's statements were particularly troublesome because they interpreted what was depicted on the videos as undeniable proof that defendant had a gun and was guilty of fatally shooting Tucker. Maldonado's statements included that he was "100 percent sure" defendant killed Tucker. He called defendant a "stone cold killer" and said that he could tell that defendant was lying. These highly inflammatory statements invaded the province of the jury and improperly suggested that no jury would return a not guilty verdict. They also

impinged on defendant's Fifth Amendment right to avoid self-incrimination.

Moreover, Maldonado's statements suggested that he had some superior knowledge of what occurred. "There is no provision in our legal system for a 'truth-teller' who is authorized to advise the jury on the basis of ex parte investigations what the facts are and that the defendant's story is a lie." State v. Pasterick, 285 N.J. Super. 607, 620 (App. Div. 1995). Similarly, a police officer may not claim or imply that he has "specialized training [that] enabled him to determine that defendant was lying." State v. C.W.H., 465 N.J. Super. 574, 594 (App. Div. 2021) (quoting Tung, 460 N.J. Super. at 103). Maldonado's opinions did just that. The error was compounded by the prosecutor's summation, which asserted that Maldonado knew that defendant was lying based on the evidence he saw.

Adding to the risk that Maldonado's statements led the jury to returning a verdict it may not have otherwise reached is the lack of any limiting instruction on the use of Maldonado's statements. "Our Supreme Court 'has consistently stressed the importance of immediacy and specificity when trial judges provide curative instructions to alleviate potential prejudice to a defendant from inadmissible evidence that has seeped into a trial.' " C.W.H., 465 N.J. Super. at 595 (quoting State v. Vallejo, 198 N.J. 122, 135 (2009)). Here, the court provided no guidance on Maldonado's lay opinions, particularly his claims that he knew defendant had a gun and shot Tucker, the ultimate issues in the case.

Considered collectively, Maldonado's statements denied defendant a fair trial by invading the province of the jury to determine credibility and decide guilt, and improperly suggested that defendant had an obligation to explain himself to the jury. Because the evidence against defendant was not overwhelming and hinged on Robinson's credibility, which was subject to attack, and the poor quality of the surveillance videos, the errors were not harmless and denied defendant a fair trial. We reverse defendant's conviction and remand for a new trial.

III.

Defendant further contends that the failure to redact Maldonado's questioning during the interview about the John Doe murder denied him a fair trial because: (1) it was inadmissible prior bad acts evidence that should have been excluded under N.J.R.E. 404(b); and (2) referred to "rumors" and claims by others, in violation of the Confrontation Clause. Defendant claims that the court's instruction on assessing the credibility of his interview statements exacerbated the error because it did not instruct the jury on the impermissible uses of the John Doe murder. [5]

5 Defendant partially raised this claim at trial by arguing that references to the John Doe murder should have been redacted. The court did not decide this issue.

***11** A court reviews an evidentiary ruling under the abuse of discretion standard but affords no deference to questions of law, including those that involve constitutional rights. State v. McInerney, 450 N.J. Super. 509, 512 (App. Div. 2017). Under the abuse of discretion standard, the reviewing court will not disturb the trial court's ruling unless it "was so wide of the mark that a manifest denial of justice resulted." State v. Perry, 225 N.J. 222, 232 (2016) (quoting State v. Marrero, 148 N.J. 469, 484 (1997)). Where admission of evidence under a hearsay exception violates the Confrontation Clause, the evidence must be excluded. State v. Branch, 182 N.J. 338, 369-70 (2005).

N.J.R.E. 404(b), which governs the admissibility of other crimes or bad acts evidence, provides:

> (1) Prohibited Uses. Except as otherwise provided by Rule 608(b), evidence of other crimes, wrongs, or acts is not admissible to prove a person's disposition in order to show that on a particular occasion the person acted in conformity with such disposition.
>
> (2) Permitted Uses. This evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident when such matters are relevant to a material issue in dispute.

When evidence is admitted for a permissible use under N.J.R.E. 404(b), such as to establish motive, it "must be appropriately sanitized," so that the harmful evidence is limited to that which is necessary to establish the point. State v. Gillispie, 208 N.J. 59, 92 (2011). Further, the court must provide "a firm and clear jury instruction" on the permissible use of the evidence. Ibid.

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution afford

an accused in a criminal case the right "to be confronted with the witnesses against him." U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10. These provisions "express a clear preference for the taking of testimony subject to cross-examination." State v. Cabbell, 207 N.J. 311, 328 (2011).

> "One of the essential purposes of cross-examination is to test the reliability of testimony given on direct-examination." State v. Feaster, 184 N.J. 235, 248 (2005) (citations omitted). Indeed, "[w]hen a witness's direct testimony concerns a matter at the heart of a defendant's case, the court should strike that testimony if the witness" is unavailable for cross-examination before the same factfinder. See ibid. (citations omitted).
>
> [Id. at 328-29 (alterations in original).]

The Confrontation Clause prohibits the use of out-of-court testimonial statements when the defendant did not have the opportunity to cross-examine the witness on the statement. In the Interest of J.A., 195 N.J. 324, 336, 351 (2008) (discussing Crawford v. Washington, 541 U.S. 36, 51-52 (2004)). Statements obtained by police for the purpose of furthering a criminal investigation are testimonial for purposes of the Confrontation Clause. Id. at 345 (discussing Davis v. Washington, 547 U.S. 813, 822 (2006)). "The government bears the burden of proving the constitutional admissibility of a statement in response to a Confrontation Clause challenge." State v. Basil, 202 N.J. 570, 596 (2010).

Shortly after the interview began, Maldonado asked defendant: "Back when ... John Doe was killed, did you and him have [some] kind of a discussion --." Defendant replied: "No.... [He] was feeling like he had something to do with it, but I don't know what the f**k was going on." Maldonado responded: "You weren't there? ... Because a lot of people say you and him had kind of a discussion, that you were a little upset with him, and then –[.]"

***12** Defense counsel objected, stating that he believed the references to the John Doe murder were going to be redacted. The prosecutor contended the police were "exploring motive." "[T]he questioning is not about the defendant having to do anything with that shooting or anything. But having a problem with the victim over John Doe --."

The court asked defense counsel what he wanted the court to do and defense counsel requested a limiting instruction as to the John Doe murder reference. The court said it would give one, but the instruction was not given until the end of Adams's testimony, and the instruction only discussed assessing the credibility of defendant's statement while noting that defendant had denied any knowledge of John Doe's murder. The instruction did not provide any guidance on motive or on the prohibited and permissible use of Maldonado's interview statements and questions.

After the objection, the interrogation video began with the following question on the John Doe murder: "[T]he rumor was that supposedly they were saying he gave the dude the gun to shoot John Doe or something?" Defendant denied knowing anything about it. The questioning continued:

> DETECTIVE MALDONADO: You never heard?
>
> GRANT: I don't know the --
>
> DETECTIVE MALDONADO: Not that he purchased it. He gave him the gun. But there was a problem, and he squashed it, then he gave the dude the gun back.
>
> GRANT: No. I never heard that.
>
> ....
>
> DETECTIVE MALDONADO: You're not really helpful. Anything you want to tell me since you and John Doe was tight?
>
> GRANT: I wasn't tight with him. I knew him. I knew his father. I didn't really hang out with him.

Later, Maldonado asked: "Were you avenging John Doe's death?" Defendant answered: "No." The interrogation continued:

> DETECTIVE MALDONADO: (Indiscernible) -- so mad inside that he's dead, you think he did something to John Doe, and he didn't want to give up who it was, and that was -- (indiscernible) block?
>
> GRANT: No.
>
> DETECTIVE MALDONADO: Because the guy that killed John Doe was somebody that he knew out there?
>
> GRANT: No.
>
> DETECTIVE MALDONADO: And you heard the story that he gave Blue (phonetic) back the gun, and you were in a fight?

> GRANT: You telling me I killed Blue?
>
> DETECTIVE MALDONADO: You know about that. That ain't nothing to know. If I know -- if I know, you must have heard that story 20 times. Trust me, the street told you who....
>
> GRANT: I hear –
>
> DETECTIVE MALDONADO: There's no way possible that -- (indiscernible).
>
> ....
>
> DETECTIVE MALDONADO: Especially if he from there. And you (indiscernible) what happened there and all (indiscernible). There's no way you didn't hear that. Okay? And that -- (indiscernible) stress -- (indiscernible). I know you knew that. And I know you guys were upset. I was reading, you know. So this boy he think he did something that he should have done another way. And I think he had to. So f**k it. It is what it is, you know. So that's the reason why they do.

After Adams completed her direct testimony, the court provided instruction on assessing the credibility of defendant's statements. With respect to the John Doe murder, the court stated:

> During the interview, there was a discussion with regard to another incident of a shooting involving John Doe and the victim Isaac Tucker or Blaze. And defendant denied any knowledge of that incident.
>
> In considering whether or not the statements -- statement is credible, you should take into ... consideration the circumstances and the facts as to how the statement was made, as well as all other evidence in this case relating to this case.
>
> ***13** If, after consideration of all of these factors, you determine that the statements were ... not actually made, or that the statements are not credible, then you must disregard the statement completely. If you find the statement was made, and that part or all of the statements are credible, you may give what weight you think appropriate to the portion of the statements you find to be truthful and credible.

The State now contends that the reference to rumors did not amount to hearsay because it was not offered for the truth of the matter asserted, but rather to test defendant's denials. Moreover, it claims that because the prosecutor argued in summation that motive was not known and was only a secondary issue that the State had no burden to prove, the summation "served as the ultimate in curative instructions."

The court issued no decision on the admissibility of Maldonado's reference to the John Doe murder as evidence of motive. As defendant argues, the State did not make motive part of its case. The State made no mention of motive in its opening statement, presented no other evidence of motive during trial, and claimed in summation that motive was unknown and not a matter that the State had to prove. Thus, even if the statements related to motive, this theory was not presented to the jury by the State.

In addition, even if the references to the John Doe murder were admissible under Rule 404(b), the court did not inform the jury of the limited permitted use of such evidence.

Further, based on the current record, it is unclear whether Maldonado's reference to rumors and information he heard from the street about the John Doe murder were testimonial. If they were made to further a police investigation, they would qualify as testimonial, In the Interest of J.A., 195 N.J. at 345, and be subject to the Confrontation Clause.

Maldonado's statements relating to the John Doe murder denied defendant a fair trial because they amounted to prior bad acts evidence that were admitted without any jury instruction on their limited permissible use and included imbedded hearsay that arguably infringed on defendant's right to confront witnesses. The court should have conducted a Rule 104(a) hearing to determine the admissibility of the references to the John Doe murder under Rule 404(b) and the Confrontation Clause. If it determined the statements were admissible, it should have instructed the jury on their limited permissible use. It did neither. This too was reversible error.

IV.

For sake of completeness, we briefly address defendant's additional argument that the cumulative impact of trial court's errors raised in Points I and II warrant a new trial. Cumulative error occurs when errors that would not require reversal by themselves, together "cast doubt on [the] verdict and call for a new trial." Sanchez-Medina, 231 N.J. at 469. While we have found those errors independently warrant a new trial, considered cumulatively, they certainly "undermined

defendant's right to a fair trial" and "raise serious questions about whether the outcome was just, particularly in light of the strength of the evidence presented." Ibid.

V.

Finally, defendant argues that he was denied a fair trial because the court's instruction to the jury to continue deliberating was inadequate. When the jury indicated it was deadlocked, the court did not provide Model Jury Charge, "Judge's Instructions on Further Jury Deliberations" (Jan. 14, 2013).[6] We note that initially, two jurors disagreed with the other ten. Only one of those two was excused from the jury. While we do not reach the merits of defendant's argument, we provide the following guidance to the court on remand. If the jury indicates that it is unable to reach a unanimous verdict, the court shall instruct the jury in accordance with State v. Czachor and consider "such factors as the length and complexity of trial and the quality and duration of the jury's deliberations." 82 N.J. 392, 407 (1980). If the court deems it appropriate to instruct the jurors to continue deliberating, it shall administer the model jury charge.

6 The model charge states:

> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous but do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict. You are not partisans. You are judges–judges of the facts.

***14** We also do not reach defendant's excessive sentence argument.

Reversed and remanded for retrial. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2022 WL 453562

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No. 130110

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- OCHEIL D. KEYS, Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-21-0630, 4-22-0017 & 4-22-0018 (Consolidated). There on appeal from the Circuit Court of the Fifth Judicial Circuit, Vermilion County, Illinois, No. 17-CF-725. Honorable Nancy S. Fahey, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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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 July 29, 2024, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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