No. 125722

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ANDREW SALAMON, Defendant-Appellant.	)	On Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-16-0986 There on Appeal from the Circuit Court of Cook County, Illinois, No. 12 CR 2706 The Honorable Erica L. Reddick, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE
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NATURE OF THE CASE

Defendant Andrew Salamon appeals from the appellate court's judgment affirming his convictions for first degree murder, armed robbery, and burglary. No question is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether defendant failed to preserve for review his claim that the admission of his confession violated the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 10 of the Illinois Constitution of 1970 by (a) affirmatively disavowing the claim in the circuit court and (b) neglecting to develop a record to support his arguments on appeal.

2. Whether defendant's confession was voluntary despite the fact that he was unable to make a phone call for approximately 24 hours after his arrest.

3. Whether, regardless of any potential error, the admission of defendant's confession was harmless in light of the other powerful evidence of defendant's guilt.

STATEMENT OF FACTS

In the early morning hours of October 4, 2009, police responded to a burglar alarm at O'Lanagan's bar on the north side of Chicago. R.TT71-72.[1]

[1] Citations to the reports of proceeding appear as "R.__"; the common law record as "C_;" defendant's brief as "Def. Br. __"; and the brief of Amicus Curiae as "Am. Br. __."

The responding officer found a trail of blood leading from the back door of the bar to the nearby parking lot, where he discovered the bar's owner, 69-year-old Robert Gonzalez, barely conscious and badly injured. R.TT77-80. Gonzalez later died from his injuries. R.UU66.

Police investigated the case for more than two years before they arrested defendant. R.KK30-31. After approximately 24 hours in custody, defendant confessed to his part in an aborted attempt to burglarize O'Lanagan's, during which his accomplice Raymond Jackson beat Gonzalez with a pipe. Peo. Exh. 38. The People charged defendant with first degree murder, armed robbery, and burglary. C39-48.

Motion to Suppress Confession

Defendant filed a motion to suppress his confession. C79-81. The three-page motion raised three arguments: (1) police violated defendant's constitutional rights by "re-initiating contact with [him]" after he asked to speak to an attorney; (2) police violated 725 ILCS 5/103-3(a) by refusing to permit defendant to make a phone call to his attorney and family members while in custody; and (3) police violated 725 ILCS 5/103-2.1(b) by failing to make an electronic recording of the interrogation. *Id.*

In December 2014, the circuit court held a hearing on the suppression motion. Before presenting testimony, defendant asked to strike the third allegation, that his interrogation was not recorded, and acknowledged that he

had been provided with the recording. R.KK4-5; *see also* R.EE2 (defendant acknowledging receipt of recordings).

Defendant and Detective Timothy Thompson testified. First, defendant testified that he initially spoke with police in November 2010. R.KK7-9. He voluntarily came to the police station with his friend, Apolonio Retama, to meet with Detectives John Gillespie and Thompson and answer their questions about an investigation. R.KK8-10, 17-20. The detectives asked questions about defendant's background and then about Jackson. R.KK10. Eventually, the officers told defendant that they were investigating a murder. *Id.* Defendant said he wanted to speak with a lawyer, at which point the detectives told him he was free to go. R.KK10-11. Defendant left the station with Retama. R.KK20.

A year later, in November 2011, the same detectives arrested defendant as he was leaving work. R.KK12-13. When the detectives identified themselves, defendant immediately requested a lawyer. R.KK14. He was taken to the police station and placed in an interview room. R.KK14-15. The detectives turned on a videorecording device and explained defendant's rights, as required by *Miranda v. Arizona*, 384 U.S. 436 (1966). R.KK14-15, 21. When defendant again requested a lawyer, the detectives ceased questioning and left the interview room. R.KK14-15, 21-22.

Defendant stayed in the interview room overnight and into the next day. R.KK15-16. He was not permitted to consult an attorney or to call his

family. R.KK15. According to defendant, during three or four visits to the bathroom (which were not videorecorded), the detectives urged him to speak with them without a lawyer. R.KK15-16. They told defendant that he should "cooperate with them and everything will be okay." *Id.* While defendant waited in the interview room, however, the detectives did not ask him any questions. R.KK22-24.

Defendant eventually agreed to speak with the detectives. Prior to that time, he was "screaming" and "banging on the door, kicking the door saying I want a phone call." R.KK16. A third officer, Detective Moriarty, came into the interview room, and defendant told Moriarty that he wanted to speak with Detectives Gillespie and Thompson. R.KK24. Gillespie and Thompson returned to the interview room and repeated the *Miranda* warnings. R.KK24-25. Defendant confirmed that he wanted to voluntarily reinitiate the interview and proceeded to make a statement. R.KK25. After speaking with the detectives, Assistant State's Attorney (ASA) Mikki Miller entered the room and provided defendant with *Miranda* warnings. *Id.* Defendant then repeated his statement for Miller. R.KK26.

During defendant's testimony, the prosecutor objected to certain evidence as outside the scope of the suppression hearing because defendant's written motion did not raise an involuntariness claim. As the prosecutor explained, the written motion was "all about reinitiating *Miranda*. There is nothing about coercion or anything else." R.KK13-14; *see also* R.KK44

(prosecutor objecting to defendant's questions to Detective Thompson because "[t]his is not a motion alleging coercion"). Defendant did not dispute the prosecutor's characterization of his suppression motion; indeed, he agreed that his testimony was not being offered to show police coercion. R.KK14.

The second witness, Detective Thompson, testified that in November 2010, defendant came to the police station with a friend to speak with him and Detective Gillespie. R.KK28-29. They had a conversation, after which Thompson asked if defendant would consent to a polygraph test. R.KK29-30. Defendant said he wanted to have a lawyer present before doing so and left the station. R.KK30.

Thompson next saw defendant a year later, on November 9, 2011. *Id.* The police arrested defendant at around 6:00 p.m. and brought him to the station. R.KK31. The detectives escorted defendant to an interview room, turned on the videorecording equipment, and gave defendant *Miranda* warnings. R.KK31-32. When defendant asked for an attorney, the detectives stopped the interview and left the room. R.KK32. Defendant remained in the interview room until 5:15 p.m. the following day. *Id.* During that time, the officers provided defendant with food, water, and contact lens solution. R.KK32-33. Thompson escorted defendant to the bathroom, but neither urged defendant to speak with him nor asked any questions about the murder investigation during that time. R.KK33-34.

Shortly after 5:00 p.m. on November 10, Detective Moriarty informed Gillespie and Thompson that defendant had been kicking the door. R.KK34. Gillespie entered the interview room, and defendant said, "I'm ready to talk." R.KK35. Gillespie told defendant that "because you have invoked your right [to an attorney] initially, we would have to advise you of your rights again," and the detectives repeated the *Miranda* warnings. *Id.* Defendant waived his right to have an attorney present and proceeded to give a statement, first to the detectives, and then to ASA Miller. R.KK35-36.

Thompson testified that the video recording equipment recorded the entire time defendant was in the interview room. *Id.* The People played for the trial judge a portion of the video, which was marked People's Exhibit 1. R.KK37-38. Although defendant has not included the exhibit in the record on appeal, the transcript of the suppression hearing suggests that Exhibit 1 showed defendant kicking the door to get the detectives' attention and the detectives repeating the *Miranda* warnings after defendant reinitiated the interview. R.KK38.

The People then asked Thompson, "What is the procedure at Area North [the police station] to allow for phone calls?" R.KK39. Thompson responded, "[i]t is normally after the completion of the booking process." *Id.* Defendant was booked sometime after giving a statement to ASA Miller. *Id.* Thompson did not recall whether defendant requested the use of a telephone between his arrival at the station on the evening November 9 and the

afternoon of November 10. R.KK43-44. But according to Thompson, defendant would not have been permitted to make calls during that time. R.KK43. The record is silent about whether defendant eventually made any phone calls.

At the conclusion of the testimony, defendant argued only that he should have been given a phone call because his invocation of his right to an attorney was effectively "meaningless" without the ability to call an attorney. R.KK45-46, 50. He never argued that his confession was involuntary.

In denying the suppression motion, the trial judge summarized the evidence and concluded that police did not engage in any "improper conduct." R.KK50-55. Defendant's confession was "not taken in violation of [his] rights as to *Miranda* warnings." R.KK54-55. The court found that defendant — and not the detectives — reinitiated the interview. R.KK55. The detectives provided renewed *Miranda* warnings, which defendant understood and waived. *Id.* Although police were slow to provide access to a phone call, their conduct did not violate defendant's rights. *Id.*

Defendant's Trial

At defendant's jury trial, the People's theory of the case was that Jackson had been injured in a fight at O'Lanagan's and sought revenge against the bar's owner, Gonzalez, as well as money to pay his resulting medical bills. Jackson enlisted defendant in a plan to burglarize the bar, and Gonzalez was killed during the commission of the crime.

Gonzalez's friend, Sam Kelfino, who was helping remodel O'Lanagan's exterior, testified that he had a confrontation with Jackson in September 2009, about a month before the murder. R.TT27-32. Kelfino was standing near the bar's entrance when Jackson, whom Kelfino described as the "neighborhood bully," approached and ordered Kelfino to move. R.TT29-31, 35-36. When Kelfino ignored the command, Jackson issued a threat and then punched Kelfino in the mouth. R.TT31-32. Kelfino, a former professional boxer, punched back and knocked Jackson out. R.TT32, 36. When Jackson regained consciousness, he attempted to enter O'Lanagan's, but Gonzalez laughed at him and refused him entry. R.TT33. Jackson eventually had to be taken away in an ambulance. *Id.* About a week later, Jackson called Kelfino and asked that Kelfino "go in cahoots with him" and falsely claim that the fight occurred inside the bar, so that Jackson could file a lawsuit and recover money. R.TT33-34. Kelfino declined to help Jackson. *Id.*

Jose Santos, an acquaintance of Jackson's for 10 years, testified that, on an evening in late September 2009, the two men went to a bar near O'Lanagan's. R.TT40-42. Jackson was looking for Kelfino and had concealed a pipe with tape wrapped around the handle in his shirt sleeve. R.TT42-43.

Santos saw Jackson again on the evening of the murder. R.TT43. Jackson arrived at Santos's house in a car driven by one of Jackson's friends, "Andrew," whom Santos identified at trial as defendant. R.TT43-45. Santos got in the backseat, and the three men discussed a plan to burglarize

O'Lanagan's. R.TT45-46. The men agreed that Santos would "watch out," while Jackson took a box of money from the bar's basement, and defendant broke into the slot machines. R.TT48-49. Defendant told Santos that he had a crowbar to assist with the crime. *Id.* They expected to recover around $5,000 from the robbery. *Id.* Although he initially agreed to participate, Santos ultimately begged off and did not accompany the other two men to O'Lanagan's. R.TT49-50.

When initially questioned in November 2009, Santos told police that a white male in his early 20's had been driving the car with Jackson on the night of the murder. R.UU16-18. After police spoke with defendant, they questioned Santos again in February 2010 and showed him a photo array containing pictures of six different men, including defendant. R.TT50-52; R.UU18-19; Peo. Exh. 4. Santos identified defendant's photo as the man driving the car. *Id.*

Retama, defendant's friend of 15 years, testified that defendant called him in the fall of 2010, saying that he (defendant) had done "something bad." R.TT138. Retama invited defendant over to discuss the matter further. R.TT139. When defendant arrived, he was visibly upset and said he thought he was "going down for murder." R.TT140. Defendant recounted that he had agreed to help Jackson rob a bar. R.TT141. Jackson had gotten into a fight at the bar and wanted to get even with the bar's owner, who had thrown Jackson out. *Id.* During the course of the burglary, the men encountered the

bar's owner, who grabbed defendant's shoulder. R.TT142. Defendant then punched the owner in the head, and Jackson proceeded to beat the owner to death with a pipe, R.TT142-43.

Retama encouraged defendant to turn himself in. *Id.* Retama accompanied defendant to the police station, where Retama waited for several hours while defendant spoke with police. R.TT143-44. When defendant finished speaking with police, he looked scared, and his hands were shaking. R.TT145. Retama then drove them home. *Id.*

Other evidence established that Gonzalez was last seen alive around 3:30 a.m. on October 4, 2009; at that time, Gonzalez was still inside the bar. R.TT61. The bar's burglar alarm was activated at 4:23 a.m., indicating that Gonzalez left the bar at that time. R.TT125. But just three minutes later, the rear door was breached, and the alarm triggered. *Id.* The alarm company notified the police. R.TT129.

Officer Emmert Gouthier responded to the scene and found the bar's front door locked and secured but the back door unlocked, with no sign of forced entry. R.TT71-74. Gouthier and another officer searched the bar and found no one inside. R.TT74-75. When they exited the rear door, they heard a noise and followed a trail of blood to Gonzalez, who lay bloody and unresponsive in the nearby parking lot. R.TT77-79. Gonzalez was transported to the hospital, where he later died from his injuries. R.UU66.

A medical examiner testified that Gonzalez's injuries included three large lacerations on the back of his head and a recent bruise on his forehead, which "was a discreet impact though not as hard as the ones on the back of the head." R.UU56-58. The lacerations had been made with a heavy but narrow object, such as a pipe. R.UU60. The object fractured Gonzalez's skull and injured his brain, resulting in his death. R.UU59-60, 66.

On the day of the murder, detectives spoke with Kelfino, who identified Jackson as someone who had been angry with Gonzalez and was looking for reimbursement for his hospital bills. R.UU15-16. The detectives spoke with Santos shortly thereafter. R.UU16-17. In January 2010, detectives obtained Jackson's phone records. R.UU17-18. Cell phone data placed Jackson's phone in the vicinity of O'Lanagan's around the time of the murder. R.UU100-01. Jackson's phone records led police to a number of potential witnesses, and they interviewed more than 50 over the course of their investigation. R.UU19-20.

One of the phone numbers in Jackson's records belonged to defendant. R.UU18. After Santos identified defendant's photo, the detectives sought to interview defendant in November 2010. R.UU18-21. At their request, defendant came to the police station and spoke with the detectives. R.UU35-36. Retama accompanied defendant to the station but was not interviewed at that time. R.UU21. About a year later, the detectives arrested defendant

and brought him back to the police station. R.UU22, 40. He eventually gave a videorecorded confession to ASA Miller. Peo. Exh. 38.

In the video, which was played for the jury, defendant stated that he met Jackson through friends, and they had spoken only five or six times before October 2009. *Id.* at 10:18:07-18:40. On the night of murder, the two men went out for drinks. *Id.* at 10:18:54-25:10. When defendant picked up Jackson, he saw Jackson wrapping a metal pipe with black tape, which Jackson said was needed "for protection." *Id.* at 10:25:10-26:52. Jackson told defendant that he was angry at Gonzalez for laughing at him after the altercation at O'Lanagan's. *Id.* Jackson proposed breaking into the bar after it closed that evening. *Id.* at 10:18:54-25:10. Defendant would act as a lookout while Jackson went inside and took money from the bar's poker machines. *Id.* Jackson estimated that they would walk away with $50,000, and defendant agreed to participate because he needed the money. *Id.*

In preparation for the burglary, defendant went to O'Lanagan's, had a drink, and looked around for cameras. *Id.* at 10:29:20-32:50. Jackson suggested that he knew someone who could help with the crime, and he directed defendant to drive to Santos's house. *Id.* at 10:32:50-34:45. Santos entered the backseat of the car, and they explained the burglary plan to him, although Santos ultimately decided not to participate. *Id.*

Defendant and Jackson waited outside O'Lanagan's, watching patrons depart. *Id.* at 10:38:10-39:15. After closing, Jackson approached the bar's

locked, rear door and saw Gonzalez inside. *Id.* at 10:39:15-40:14. Jackson told defendant that he could "persuade" Gonzalez to give them the keys to the bar. *Id.* When Gonzalez came out, Jackson approached and began attacking him with the pipe. *Id.* at 10:40:14-46:50. From the ferocity of the attack, defendant could tell that Jackson had a personal grudge against Gonzalez. *Id.* After Jackson stopped beating Gonzalez, he dragged him in between two cars in the parking lot and took the keys from Gonzalez's pocket. *Id.* at 10:46:50-47:20.

Defendant used the keys to open the rear door of the bar. *Id.* at 10:47:20-48:20. He immediately noticed the burglar alarm and decided not to enter. *Id.* As they drove away, Jackson warned defendant to keep quiet about the crime. *Id.* at 10:48:40-51:20. Jackson disposed of the keys and the pipe, and defendant cleaned his car to eliminate any evidence. *Id.* at 10:53:00-53:35, 10:58:03-58:20. Defendant last spoke to Jackson two days later, when Jackson called to make sure that defendant was "keeping his mouth shut." *Id.* at 10:55:15-55:35, 10:58:25-58:38.

About a year later, defendant learned that the police wanted to speak with him. *Id.* at 10:55:35-58:03. He confessed to Retama, and Retama accompanied him to the police station. *Id.* Defendant insisted to ASA Miller that he never touched Gonzalez. *Id.* He told her that he did not recall telling Retama that he punched Gonzalez. *Id.* But if he did tell Retama this, defendant said, it must have been to avoid looking "like a bitch." *Id.*

Defendant presented no witnesses. In closing argument, he conceded that he had participated in the scheme to burglarize O'Lanagan's. R.VV35-36. But, he argued, he was not accountable for Gonzalez's murder because it was not committed in furtherance of the burglary plan. R.VV36-37 Rather, though Jackson had planned to murder Gonzalez to get revenge, defendant did not know about Jackson's murder plan because he did not know Jackson very well when he agreed to take part in a burglary. R.VV34.

Following deliberations, the jury found defendant guilty of first degree murder, armed robbery, and burglary. R.VV71; C143-45. The circuit court sentenced defendant to a total of 33 years in prison. R.ZZ28-29 C185.

Defendant's Appeal

Defendant appealed, arguing that the police obtained his confession in violation of 725 ILCS 5/103-3(a) and his constitutional rights because he was not permitted to make a phone call while in custody. *People v. Salamon*, 2019 IL App (1st) 160986-U, ¶ 48. Without deciding whether police violated § 103-3(a), the court held that suppression of defendant's confession was not an available remedy under the statute. *Id.* ¶ 61. The court considered the inability to make phone calls as one factor among the totality of the circumstances in determining the voluntariness of the confession but ultimately concluded that defendant voluntarily waived his *Miranda* rights after reinitiating contact with police. *Id.* ¶¶ 61-62.

ARGUMENT

Defendant asks this Court to decide a single issue: whether the circumstances of his post-arrest detention, particularly his inability to make a phone call for approximately 24 hours, "renders [defendant's] statement involuntary." Def. Br. 1. But defendant did not press an involuntariness argument at his suppression hearing in the circuit court — indeed, he affirmatively disavowed making one, preventing the parties from developing a full record on the issue. As a result, the claim is unpreserved for review, and this Court should not consider it.

Putting aside whether defendant has preserved his involuntariness claim, based on the limited record below, the appellate court correctly held that defendant's confession was voluntary. There is no evidence that the detectives — who immediately ceased the interrogation when defendant requested counsel — caused defendant to confess. Moreover, any error was harmless in light of the powerful, and essentially unrebutted, evidence of defendant's guilt. Accordingly, this Court should affirm his conviction.

I. Defendant Did Not Preserve His Involuntary Confession Claim Because He Disavowed It at the Suppression Hearing and Failed to Develop a Proper Record.

The Court should affirm defendant's conviction because he did not preserve for appellate review the involuntary confession claim he now presses. In *People v. Hughes*, 2015 IL 117242, ¶¶ 33, 37-46, this Court refused to consider a challenge to the admissibility of a confession where defendant did not present the same factual and legal theories supporting

suppression to the trial court. Although review of unpreserved claims often turns on distinctions between waiver ("the voluntary relinquishment of a known right"), forfeiture ("failure to timely comply with procedural requirements"), or invited error ("error that [a party] brought about or participated in"), *Hughes* explained that the failure to preserve suppression arguments prevents a reviewing court from reaching them for reasons of fairness, regardless of how the error is characterized. *Id.* A defendant who switches theories or relies on different facts on appeal, "deprive[s] the State of the opportunity to challenge [the new claims] with evidence of its own, [ ] deprive[s] the trial court of the opportunity to decide the issue on those bases, and [ ] deprive[s] the appellate court of an adequate record to make these determinations." *Id.* ¶ 46. *See also People v. White*, 2011 IL 109689, ¶ 143 (defendant's failure to raise suppression argument in circuit court prevented State from "adduc[ing] all available evidence bearing on defendant's current constitutional contentions").

Defendant's claim here, as in *Hughes*, is factually and legally distinct from the arguments he pursued in the circuit court. As discussed, defendant's motion to suppress ultimately raised two arguments: that police (1) improperly reinitiated an interrogation after defendant invoked his right to counsel, and (2) violated defendant's statutory right to make phone calls. After the parties presented testimony, defendant further narrowed his argument to focus on his contention that he had not been permitted to call a

lawyer. *See* R.KK46, 50. And in his post-trial motion, defendant made only a perfunctory argument that the circuit court "erred in denying [his] Motion to Suppress Statements." C151; *see also* R.ZZ3 (declining opportunity to orally argue post-trial motion).

Defendant's first argument, that the detectives reinitiated interrogation, was premised on the prophylactic rule of *Edwards v. Arizona*, 451 U.S. 477 (1981). Under *Edwards*, police must immediately cease interrogation once a suspect invokes his right to a lawyer, and the interrogation cannot resume "unless the accused himself initiates further communication, exchanges, or conversation with the police." 451 U.S. at 484-85; *see also Maryland v. Shatzer*, 559 U.S. 98, 103-05 (2010) (describing *Miranda*/*Edwards* framework). If police violate the *Edwards* rule by reinitiating an interrogation after the defendant asks for counsel, a court will presume that any subsequent confession was involuntary, without the necessity of examining any other circumstances of the interrogation. *Shatzer*, 559 U.S. at 104-05.

Defendant's second argument, that police failed to provide him with a phone call, similarly did not require the circuit court to examine the totality of the circumstances. His motion alleged only a violation of his "statutory right" under 725 ILCS 5/103-3(a) and never suggested, as he does here, that such a violation should be considered as merely one factor in the totality-of-the-circumstances analysis applicable to an involuntary confession claim.

Compare C80 (suppression motion), *with* Def. Br. 22 (arguing that statutory violation "must be given significant weight within the traditional 'totality of the circumstances' test"). And during oral argument at the suppression hearing, defendant neither asserted that his confession was involuntary nor that the court should consider all the surrounding circumstances. He focused only on a narrow factual issue: that defendant invoked his right to counsel but was never permitted to call a lawyer. *See* R.KK45-46, 50.

And if there was any doubt based on defendant's written and oral arguments, he repeatedly acquiesced during the suppression hearing when the prosecutor objected to the relevance of certain evidence because "[t]his is not a motion alleging coercion." R.KK44; *see also* R.KK13-14. Thus, as far as the circuit court could tell, defendant had affirmatively disavowed an involuntariness claim. *See People v. Haynes*, 174 Ill. 2d 204, 248 (1996) (where defendant "acquiesced" in procedure employed by the trial court, he could not later complain about it, although procedure was "clearly in violation" of statute).

Because *Hughes* rested on a fairness rationale and not a forfeiture analysis, this Court did not consider the question of plain error. *See* 2015 IL 117242, ¶ 46 (court of review "ought not" consider suppression argument in light of inadequate record); *see also id.* ¶ 71 (Burke, J., concurring) (noting that defendant raised, but majority did not reach, plain error argument). Plain error review is similarly unavailable here; indeed, defendant does not

even request it. *See also People v. Villarreal*, 198 Ill. 2d 209, 227-28 (2001) (to consider overturning conviction after "party acquiesces in proceeding in a given manner" would "offend all notions of fair play").

Even if plain error review were available, it would not apply on the present facts. "The plain-error doctrine is a limited and narrow exception" that applies only to correct a "clear or obvious error," when the trial evidence was closely balanced, or the error was so serious as to affect the fairness of the defendant's trial. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). This case meets none of those requirements. First, any error in admitting defendant's confession is not "clear or obvious," in light of the undeveloped record. Second, the trial evidence was not closely balanced. *See* Part III, below. And third, even if erroneously admitted, the confession did not seriously affect the fairness of the trial. *Cf. Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) ("The admission of an involuntary confession is a 'trial error,' similar in both degree and kind to the erroneous admission of other types of evidence.").

Although the People did not press an argument that defendant failed to preserve his involuntary confession claim before the appellate court, as appellee, the People may request that this Court affirm on any ground that is clear from the record. *Beahringer v. Page*, 204 Ill. 2d 363, 370 (2003); *see also People v. Johnson*, 208 Ill. 2d 118, 129 (2003) ("The rule that a lower court decision may be sustained on any ground of record is both

universally recognized and long established."). Accordingly, this Court should affirm because defendant did not preserve his involuntariness claim.

II. Based on the Limited Record Before This Court, Defendant's Confession Was Not Involuntary.

Even if this Court were to consider defendant's claim in spite of the undeveloped record, his conviction should be affirmed. In a criminal trial, the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 10 of the Illinois Constitution of 1970 bar the introduction of involuntary confessions obtained through coercive interrogation practices. *People v. Chapman*, 194 Ill. 2d 186, 208 (2000). To assess the admissibility of a particular confession, a court will ask whether the defendant's will was overborne, weighing all relevant factors, "including the defendant's 'age, intelligence, background, experience, education, mental capacity, and physical condition at the time of questioning,' along with the duration and legality of the detention." *Hughes*, 2015 IL 117242, ¶ 31 (quoting *People v. Murdock*, 2012 IL 112362, ¶ 30).

None of these factors weighs in favor of finding defendant's confession involuntary. Defendant was 25 years old — an adult — at the time of his arrest. R.KK12; C152. Defendant presented no evidence at the suppression hearing about his intelligence, background, education, or mental capacity. And the pre-sentence investigation report shows that defendant had no characteristics that made him particularly susceptible to coercion or incapable of intelligently waiving his rights. He reported that he had a

"normal childhood," and grew up in a two-parent household with two older siblings. C155. Defendant suffered no abuse or neglect and enjoyed a "normal and respectful relationship" with his parents. C155-56. He graduated from high school in 2005, got along with his peers and teachers, and reported no learning or behavioral issues. C156. After graduating, he found employment in various fields. C155-57. He did not belong to a gang and had law-abiding, supportive friends. C157. Nor did he have any history of physical or mental health problems. C158.

Defendant's claim that he did not have *extensive* experience with the criminal justice system because he had only "some minor cannabis-related arrests," Def. Br. 12, 23, misses the mark. Such experience is potentially relevant to whether he understood his *Miranda* rights. *See, e.g., People v. Garcia*, 165 Ill. 2d 409, 426 (1995) (holding that defendant's experience with justice system was evidence "that she understood that she still had the right to remain silent and to an attorney at the time of [questioning by police]"). But here, defendant has never argued that he did not understand that he had a right to request the assistance of counsel during an interrogation. Indeed, he repeatedly invoked that right — once in November 2010 when he arrived voluntarily at the police station for an interview, and again when he was arrested in November 2011.

Moreover, defendant's detention was proper and not unduly long. The circuit court found that police had probable cause to arrest defendant,

R.OO52, and he does not challenge that ruling on appeal. He points to no evidence that his detention was unnecessarily or unreasonably delayed after his arrest. *See also People v. Willis*, 215 Ill. 2d 517, 527-28, 535-38 (2005) (confession obtained after 73-hour detention not involuntary); *Chapman*, 194 Ill. 2d at 203-13 (refusing to suppress statement given after more than 24 hours in custody, even though police knew defendant's attorney had been trying to locate him).

Nor is there any evidence that police employed coercive interrogation tactics. Defendant does not allege that detectives used any force, made any promises, wielded any threats, or engaged in any form of deceit. He was provided with food, water, and contact lens solution, as needed. Without evidence of coercive conduct, defendant's claim must fail, because "coercive police activity is a necessary predicate" to finding a constitutional violation. *People v. Manning*, 182 Ill. 2d 193, 207-09 (1998) (citing *Colorado v. Connelly,* 479 U.S. 157 (1986)).

Defendant briefly discusses a handful of other circumstances, none of which support a finding of involuntariness. For starters, the Court should disregard defendant's argument that police arrested him with "guns drawn," Def. Br. 14, 24, since he expressly told the trial judge not to consider the circumstances of his arrest as evidence of coercion, *see* R.KK14 ("Judge, I didn't offer that [testimony about defendant's arrest] as coercion."). Nor is there reason to think that defendant felt pressure to confess because he was

handcuffed "[o]n some occasions" during his detention. R.KK44. Defendant never mentioned the handcuffs during his suppression hearing testimony; Detective Thompson was asked about them only briefly. *Id.* During the trial, Detective Gillespie gave additional testimony about the handcuffs, R.UU42-43, but defendant may not rely on trial evidence to overturn the suppression ruling, *People v. Brooks*, 187 Ill. 2d 91, 127-28 (1999). And no record evidence supports the argument that "nobody knew where [defendant] was." Def. Br. 19. Defendant never testified that he thought his family was looking for him. Instead, he testified that he wanted to make a phone call to ask his mother to call a lawyer. R.KK26-27. He was arrested as he left work, so his colleagues may have seen the arrest. R.KK12. The record is silent on this point.[2]

Defendant correctly observes that some degree of coercion is inherent in any form of custodial interrogation. Def. Br. 13. It is for this reason that the United States Supreme Court, in *Miranda* and subsequent decisions, "laid down concrete constitutional guidelines for law enforcement agencies and courts to follow." *Dickerson v. United States*, 530 U.S. 428, 435 (2000).

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[2] The record similarly does not support the factual description provided by Amici that "detectives left [defendant] alone" in an interrogation room "for more than 24 hours." Am. Br. 3. Defendant waited *less* than 24 hours before asking to speak with police again, and during that time, the detectives brought him food and drink, took him to the bathroom three or four times, and helped him resolve an issue with his contact lens. R.KK21-24; R.KK31-34 (testimony that defendant was arrested at 6:00 p.m. in Harwood Heights and brought back to the police station at Western and Belmont; defendant asked to speak to the detectives again at 5:00 p.m. the next day). And no testimony supports Amici's speculation that defendant suffered from a lack of sleep at the time he confessed. Am. Br. 3.

When police "adhere[ ] to the dictates of *Miranda*," "colorable" claims of involuntary confessions will be "rare." *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984). Defendant does not challenge the circuit court's determination that the detectives complied with *Miranda* and *Edwards*. *Edwards* contemplated and expressly sanctioned the procedure detectives used here: detectives immediately ceased all questioning when defendant requested counsel and returned to speak with him only after he initiated further conversation. In these circumstances, "nothing in the Fifth and Fourteenth Amendments would prohibit police from merely listening to his voluntary, volunteered statements and using them against him at the trial." *Edwards*, 451 U.S. at 485.

The mere fact of defendant's inability to make a phone call for approximately 24 hours also did not render his confession involuntary. This Court previously held that incommunicado detention for periods of six and eight hours did not require the suppression of a defendant's statement. *People v. Ramey*, 152 Ill. 2d 41, 57-59 (1992); *People v. Terrell*, 132 Ill.2d 178, 201 (1989). Other courts have approved even longer delays in permitting detainees to communicate with attorneys or family members. *People v. Wicks*, 236 Ill. App. 3d 97, 107 (3d Dist. 1992) (confession properly admitted, even assuming truth of defendant's allegation that he was held in custody, incommunicado for 14 hours); *In re Terrorist Bombings of U.S. Embassies in*

E. Africa, 552 F.3d 177, 212-15 (2d Cir. 2008) (confession not involuntary despite 14 days of incommunicado detention).

In *In re G.O.*, 191 Ill. 2d 37, 56 (2000), this Court upheld the admission of a 13-year-old defendant's confession, given after an overnight detention without a family member or attorney present. The Court rejected a proposed per se rule that minors have the opportunity to consult a parent, guardian, or attorney before any interrogation. *Id.* at 57. If police can lawfully prevent minors from having access to a friendly adult, there is no reason why defendant merits greater protection.

No record evidence supports defendant's argument that police delayed providing him with a phone call as a "tactic" made for the purpose of overcoming his will, or that defendant had any reason to believe that "reinitiation with police was his only means to secure a phone call." Def. Br. 16, 25. On the contrary, Detective Thompson testified that the normal procedure at the Area North police station was for detainees to be allowed phone calls after the booking process was complete, and defendant was not booked until after he gave his statement. R.KK39. No testimony was presented that police waited to complete the booking process until they obtained a confession, much less that they communicated such a threat to defendant. The circuit court found no "improper conduct on the part of the police," R.KK55, and that finding is not against the manifest weight of the evidence, *see People v. Richardson*, 234 Ill. 2d 233, 251 (2009) (findings of fact

and credibility determinations upheld unless manifestly erroneous).[3] Moreover, defendant never testified that he felt coerced by the lack of a phone call — a telling omission because to prevail on a coercion claim, the evidence would need to show that his confession was "causally related" to improper police conduct. *Connelly*, 479 U.S. at 163-64.

Nor is there legal support for defendant's argument that he was deprived of "access to that most basic and universally accepted right to counsel." Def. Br. 16. To be sure, criminal defendants have a Sixth Amendment right to the assistance of counsel in a criminal proceeding. *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). But that right does not attach until "the initiation of adversary judicial proceedings — whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* No such proceedings had begun at the time of defendant's confession. *Miranda* established a separate "prophylactic right" to have counsel present during custodial interrogation. *McNeil*, 501 U.S. at 176. But *Miranda* does not require that an attorney be made available, only that "the interrogation must cease until an attorney is present." 384 U.S. at 474. As

[3] Defendant argues that the People should have introduced evidence to explain the "justification for this [phone-call] policy or [ ] why they could not book [defendant] more quickly and efficiently." Def. Br. 21-22. But defendant never alleged in the circuit court that the detectives purposely delayed his booking or employed the phone-call policy as a pretext. There was thus no reason for the People to inquire about these matters.

discussed, Detectives Thompson and Gillespie appropriately observed defendant's invocation of his *Miranda* rights.

Defendant cites *People v. McCauley*, 163 Ill. 2d 414, 445 (1994), for the proposition that if "an attorney [had] been at the police station asking to see [defendant], the police could not have legally precluded him from doing so." Def. Br. 19. But *McCauley* establishes no such rule. Instead, this Court held that "due process is violated when police interfere with a suspect's right to his attorney's assistance and presence by affirmatively preventing the suspect, *exposed to interrogation*, from receiving the immediately available assistance of an attorney hired or appointed to represent him." 163 Ill. 2d at 444 (emphasis added). As already explained, defendant was not "exposed to interrogation"; thus, he had no immediate due process right to consult with an attorney. The Court should also reject the suggestion from Amici that *McCauley* interpreted the Illinois Constitution to contain a far broader right to counsel than the United States Constitution. Am. Br. 17-19. In subsequent cases, this Court has confined *McCauley*'s holding to the facts of that case. *See, e.g.*, *Chapman*, 194 Ill. 2d at 213 (refusing to extend *McCauley* to the situation where an attorney "is not physically present at the police station"). And the Court has interpreted the state Constitution in consonance with the federal Constitution, absent express language indicating that the framers intended a different construction. *Relsolelo v. Fisk*, 198 Ill. 2d 142, 149 (2001). Amici point to no such language indicating that the

framers of the Illinois Constitution intended to create a right for arrestees to have immediate access to counsel even in the absence of interrogation.

Haynes v. State of Washington, 373 U.S. 503 (1963), on which defendant also relies, depended on two essential facts not present here. First, police officers made an "express threat of continued incommunicado detention" if Haynes refused to confess and "promise[d] communication with and access to family" if he relented. *Id.* at 514; *see also Janusiak v. Cooper*, 937 F.3d 880, 889 (7th Cir. 2019) (describing *Haynes* as a case about "improper threats"). Defendant's reliance on *Haynes* is defeated by his concession that the detectives in his case did not "explicitly" condition defendant's access to a phone call on his cooperation, and he points to no evidence of any implicit threats. Def. Br. 16. Second, unlike defendant, Haynes was subjected to continued interrogation despite his professed desire to speak with counsel. 373 U.S. at 507-09. *Haynes* was decided before *Miranda*, so the police in that case never informed him of his right to remain silent or to have a lawyer present during the interrogation. Defendant does not identify a single case — and the People are aware of none — where police complied with the *Miranda*/*Edwards* requirement that they stop questioning after the arrestee requests counsel and were, nonetheless, found to have coerced an unsolicited confession.

Defendant also relies heavily on his allegation that the detectives violated § 103-3(a), which requires that arrestees be permitted to

communicate with an attorney and a family member "within a reasonable time after arrival at the first place of custody." 725 ILCS 5/103-3(a). *See* Def. Br. 18-19 (arguing "statutory violation [ ] must weigh heavily against finding [defendant's] statement voluntary"). As an initial matter, defendant cannot establish any statutory violation in this case. The Illinois Administrative Code provides that communications authorized by § 103-3(a) should "generally" be permitted within the first hour after arrival at the police station. 20 Ill. Adm. Code 720.20(b)(1). But it is easy to imagine legitimate reasons why police may need to prevent a suspect in an ongoing murder investigation from communicating with associates. *Cf. People v. Cadwell*, 160 Ill. App. 3d 495, 498 (4th Dist. 1987) (reasonable to delay DUI suspect's consultation with attorney until after breath test). ASA Miller told defendant that police were still investigating the case and had not yet located Jackson. Peo. Exh. 38 at 11:12:00-11:12:10. Police could reasonably have wanted to prevent defendant from tipping off Jackson, influencing witnesses, or enlisting the aid of others in an effort to destroy or tamper with evidence. Defendant never asked Detective Thompson about these issues at the suppression hearing, so there is no record to explain why his access to a phone call was delayed, apart from testimony that such access was customarily provided after booking.

And even if defendant could establish a violation of § 103-3(a), this Court held in *Ramey* that such a violation does not require suppression "as a

matter of law." 152 Ill. 2d at 58. Illinois courts, like the appellate court below, have held that a delay in providing a suspect with access to a phone call is merely one factor to be considered in the totality-of-the-circumstances analysis. *People v. Salamon*, 2020 IL App (1st) 160986-U, ¶ 61; *accord People v. Williams*, 2017 IL App (1st) 142733, ¶¶ 9-11, 26-30 (confession properly admitted despite repeated denials of request to make phone calls over eight hours).[4] In so holding, these courts have pointed to the absence of any suppression remedy in the statute itself. *Compare* 725 ILCS 5/103-3 (providing no suppression remedy), *with id.* § 103-2.1 (creating presumption of inadmissibility for certain unrecorded statements or statements by juveniles); *see also id.* 103-8 (providing that officers who violate § 103-3(a) are "guilty of official misconduct and may be punished in accordance with [statute]"). Moreover, exclusion is a "last resort," even for serious constitutional violations, because it "requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence and its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment." *People v. LeFlore*, 2015 IL 116799, ¶ 23.

[4] *People v. Sanchez*, 2018 IL App (1st) 143899, relied on by defendant, Def. Br. 18, does not announce a different rule. In addition to finding a violation of § 103-3(a), the *Sanchez* court held that the police made an illegal arrest of the defendant, violated § 103-2.1(d) by failing to record his interrogation, and made explicit threats that he would not be permitted to call his mother until he confessed. 2018 IL App (1st) 143899, ¶¶ 70-76. The combination of all these factors convinced the court that the defendant's confession should be suppressed because "we cannot distinguish this case from [*Haynes*]." *Id.* ¶ 74.

The rule should not be applied in a case like this one, where the evidence shows that detectives followed court precedent and police policy, for in such circumstances, exclusion has no "deterrent benefits" that could "outweigh its heavy costs." *Id.*

Both defendant and amici make much of the fact that Chicago Police Department policies have attracted criticism, legal challenges, and legislation in the General Assembly. Def. Br. 19-20; Am. Br. 5-10. They urge this Court to wade in by crafting constitutional limits on allegedly improper police conduct. But the fact that police policy remains the subject of intense public debate is all the more reason to leave such difficult questions to the political branches rather than establish a sweeping constitutional rule. *See G.O.*, 191 Ill. 2d at 57 ("policy question" about proper treatment of confessions "best left to the General Assembly and individual police departments"). This case is a particularly poor vehicle for deciding these questions where the parties have not developed a full record about the details of the procedures at the Area North police station or any potential justifications for the procedures. Nor has defendant even proposed a straightforward rule that would provide law enforcement with clear guidance. *Cf. Minnick v. Mississippi*, 498 U.S. 146, 154-55 (1990) (rejecting rule that police may reinitiate interrogation after an arrestee has consulted with counsel because it would give rise to difficult policy questions about the "scope" and "extent of consultation" required and

whether inquiry about such consultation "could interfere with the attorney-client privilege").

In sum, based on the limited record before the Court, police did not use coercive interrogation tactics; nor was defendant particularly vulnerable to coercion. Accordingly, his confession was not involuntary under the totality of the circumstances, and neither the United States nor the Illinois Constitution require that his confession be suppressed.

III. Any Error in Admitting the Videorecorded Confession Was Harmless Given the Other Strong Evidence of Guilt.

This Court may also affirm defendant's conviction because any error in admitting his confession was harmless beyond a reasonable doubt. *See People v. Wrice*, 2012 IL 111860, ¶ 71 (harmless error review applies to confessions that are not physically coerced). The Court can be confident that defendant would not have been acquitted of murder, even if his videorecorded confession had been excluded. *See In re Rolandis G.*, 232 Ill. 2d 13, 43 (2008) (even where evidence of guilt not overwhelming, reviewing court may "focus on the error to determine whether it might have contributed to the conviction," or "determine whether the improperly admitted evidence was merely cumulative or duplicates properly admitted evidence").

In addition to the videorecorded confession, the jury heard Retama's testimony that defendant had confessed to him. Defendant told Retama that he feared "going down for murder" because he assisted Jackson in robbing a bar, and Jackson had beat the bar owner to death with a pipe. Defendant

knew that Jackson wanted to seek revenge following the altercation with Kelfino. And defendant also admitted punching Gonzalez. Retama's testimony was especially compelling because he and defendant had been friends for 15 years, negating any inference that Retama might be lying. *See People v. Mitchell*, 152 Ill. 2d 274, 328 (1992) (finding admission of confession to police harmless where People properly presented testimony of friend to whom defendant also confessed).

Retama's testimony was corroborated by Santos, who identified defendant as the driver of the car (with Jackson as the passenger) on the night of the murder. Like Retama, Santos had nothing to gain from implicating defendant. Contrary to defendant's argument, there was no evidence that Santos sought to shift blame from himself. Def. Br. 29-30. Police spoke to Santos shortly after the crime, and he gave a description of Jackson's accomplice that fit defendant. There was no testimony that police doubted Santos's explanation that he had declined the invitation to abet Jackson and the unnamed accomplice, nor that police pressured Santos to identify defendant.

And the physical evidence corroborated Retama's and Santos's accounts: Gonzalez died from being struck in the back of the head with a heavy, narrow object, like a pipe, and he sustained a separate injury to the front of the head, consistent with being punched. Cell phone records also

placed Jackson near O'Lanagan's around the time of the murder and connected Jackson to defendant.

Defendant focuses on some minor inconsistencies in the evidence, like the fact that Retama did not remember the name of the bar or that defendant had a crowbar, or whether defendant and Jackson ransacked the cash register. Def. Br. 27-28. But given the strong corroboration with Santos's testimony and the physical evidence, these inconsistencies could easily be chalked up to the fact that Retama's memory had faded over time or that defendant left out certain details in relating his account to Retama. Defendant also argues that Retama was unreliable because he testified that in November 2010, he waited several hours at the police station with defendant, rather than several minutes. Def. Br. 28. But although defendant testified at the suppression hearing that his meeting was only 15 to 20 minutes long, there was no evidence to that effect presented at trial. Presumably, if defendant had impeaching evidence to present, he would have done so.

Indeed, Retama and Santos were essentially unimpeached because defendant never denied that he committed the acts that made him legally responsible for Gonzalez's death. In closing, he told the jury that he had agreed to assist Jackson in burglarizing O'Lanagan's and that he witnessed Jackson murder Gonzalez. Defendant tried to avoid conviction by arguing that he was not accountable for Gonzalez's death because he was unaware

that Jackson was out for revenge and had intended only to participate in a burglary. But that argument was legally unavailing because under Illinois's "common-design rule," "if two or more persons engage in a common criminal design or agreement, any acts in the furtherance of that common design committed by one party are considered to be the acts of all parties to the design or agreement and all are equally responsible for the consequences of the further acts." *People v. Fernandez*, 2014 IL 115527, ¶ 13. The jury properly understood that defendant was responsible for Jackson's conduct, even if he never intended for Gonzalez to die. Nothing about the videorecorded confession would have altered the jury's calculus.

* * * *

This Court should affirm defendant's conviction because he failed to preserve his involuntary confession claim. Alternatively, this Court can affirm on the merits because the admission of defendant's confession did not violate his rights under the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 10 of the Illinois Constitution, and, in any event, any error in admitting the evidence was harmless beyond a reasonable doubt.

CONCLUSION

This Court should affirm the judgment of the appellate court.

February 11, 2021

Respectfully submitted,

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RULE 341(c) 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 containing 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, and the certificate of service is 36 pages.

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PROOF OF FILING AND SERVICE

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 February 11, 2021, the foregoing **Brief of Respondent-Appellee People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my email address to the email addresses below:

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

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