

No. 1-09-1980

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 MC 56044
	)	
MICHAEL CORBETT,	)	Honorable
	)	Colleen Ann Hyland,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE CUNNINGHAM delivered the judgment of the court.  
Presiding Justice Quinn and Justice Harris concurred in the judgment.

**ORDER**

¶1 *Held:* The defendant's arguments regarding the trial court's alleged errors in instructing the jury and in admitting other-crimes evidence were forfeited for review on appeal, and the plain error doctrine does not apply to reach these forfeited issues. Further, defense counsel did not provide ineffective assistance of counsel at trial.

¶2 Following a jury trial in the circuit court of Cook County, the defendant, Michael Corbett, was convicted of telephone harassment (720 ILCS 135/1-1(2) (West 2008)), and sentenced to 180 days of imprisonment. On appeal, the defendant argues that his constitutional rights of due process and freedom of speech were violated at trial because: (1) the trial court erred in instructing the jury on Illinois Pattern Instructions, Criminal, No. 13.33F (4th ed. 2000) (hereinafter, IPI Criminal 4th

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No. 13.33F); (2) the trial court erroneously admitted other-crimes evidence and misinformed the jury on the limiting scope of the other-crimes evidence under Illinois Pattern Instructions, Criminal, No. 3.14 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.14); and (3) the trial court erred in failing to give a limiting instruction to the jury, *sua sponte*, regarding the defendant's refusal to submit a DNA sample. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶3

### BACKGROUND

¶4 On July 20, 2007, the defendant appeared at the Bridgeview Probation Office for a scheduled appointment with his probation officer, Mary McCarthy (Officer McCarthy). At that time, the defendant was on a mental health probation for his conviction of misdemeanor battery. During the meeting, Officer McCarthy requested that the defendant submit to a DNA test, based on her belief that the defendant had previously been convicted of a felony. The defendant refused to submit a DNA sample, after which he left the meeting. Thereafter, the defendant left the following voicemail message on Officer McCarthy's office telephone:

"Yeah, Mary McCarthy, this is Mike Corbett. This conversation is being recorded. It's approximately 11:00 o'clock. You've had approximately one hour to do your due diligence. I want to know if you have, in fact, found out that I pled guilty to a misdemeanor, not a felony. You may give me a call at (630) 667-6317 after you have done your due diligence, it would be appreciated. However, there's a \$10 fee for raising my blood pressure. A personal

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check will do. Also, if there is a warrant issued for my arrest because you have not done your due diligence, I will follow you out of the building. I will catch you. I will tie your hands up. I will drive you down to the Dirksen building and have you arrested for violating my civil rights. Do you understand?"

¶5 On July 25, 2007, the defendant was charged with the offense of telephone harassment, as a result of his July 20, 2007 voicemail message to Officer McCarthy. See 720 ILCS 135/1-1 (West 2008).

¶6 On December 11, 2008, prior to the start of trial, the parties stipulated that Officer McCarthy would be allowed to testify that the defendant was on probation at the time of the incident at issue and that she was his probation officer, but would not be permitted to testify about the specific offense—misdemeanor battery—for which the defendant was on probation.

¶7 At the start of the second day of trial, on December 12, 2008, the State moved to introduce evidence of the defendant's prior conviction of misdemeanor battery, through Officer McCarthy's testimony, on the grounds that it placed into context the circumstances surrounding the defendant's arrest and his motive for leaving the voicemail message on Officer McCarthy's telephone. Over defense counsel's objection, the trial court ruled that such other-crimes evidence was allowed for the relevant purpose that it showed why the defendant was scheduled to meet with Officer McCarthy and the circumstances surrounding his arrest in the instant case. Specifically, the trial court stated that Officer McCarthy would be permitted to testify that she mistakenly believed that the defendant was convicted of a felony, that the defendant was on probation for misdemeanor battery, but that the

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State was forbidden to introduce any evidence regarding the specific facts of the defendant's prior conviction of misdemeanor battery. Following the trial court's ruling, defense counsel moved for a mistrial, which the trial court then denied.

¶8 The trial court then asked the parties if there were any other issues that needed to be addressed before the jury was brought into the courtroom. At that time, defense counsel objected to the language of the State's limiting jury instruction under Illinois Pattern Instructions (IPI) 3.14, which pertained to other-crimes evidence. See IPI Criminal 4th No. 3.14. Specifically, he objected to the language in paragraph 3 of IPI 3.14, which read as follows: "[i]t is for you to determine whether the defendant was involved in that offense and, if so, what weight should be given to this evidence on the issue of [h]arassment of [t]elephone." The trial court then declined to depart from the language as written in the IPI, noting that, "[a]ccording to the committee comments, paragraph three made clear to the jury that the limited evidence, which is the subject of the instruction, is still to be weighed by the jury. They are free to accept it or reject it, as they see fit." The trial court also noted that IPI 3.14 would be given to the jury "purely for the purpose of the circumstances of the arrest and to clearly state the facts in this case."

¶9 Defense counsel also requested that a definition of the term "threat" be included in the jury instructions. The trial court noted that the IPI contained a jury instruction on the term "threat," but that it would revisit any of the parties' objections to the jury instructions at the end of the presentation of witness testimony—including whether the definition of the term "threat" as set forth in the IPI would be appropriate to provide to the jury.

¶10 At trial, Officer McCarthy testified as the State's sole witness. Officer McCarthy testified

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that on July 20, 2007, she was the defendant's probation officer and had a scheduled appointment to meet with him at the Bridgeview Probation Office. The defendant was on a "mental health probation" at that time. At the scheduled meeting, Officer McCarthy asked the defendant to submit to a DNA test, based on her mistaken belief that he had been convicted of a felony. Officer McCarthy noted that convicted felons were required to submit to DNA testing. She testified that she was under the mistaken belief that the defendant had been convicted of a felony because the case number assigned to the defendant's prior conviction indicated "CF," which stood for "criminal felony." Upon her request for a DNA sample, the defendant refused, informed Officer McCarthy that he was not convicted of a felony, "stood up very strongly," and "stormed out." Later that day, Officer McCarthy retrieved a voicemail message from the defendant. The State then played an audio cassette tape of the defendant's July 20, 2007 voicemail message to the jury. Officer McCarthy then testified that when she first heard the defendant's voicemail message, she felt threatened and she "felt that he meant exactly what he said" because her previous interactions with the defendant were "quite threatening." She observed that she was 5' 3" and that the defendant was approximately 5' 11" in height. Officer McCarthy then notified the deputy chief and the supervisor from her unit in the Bridgeview Probation Office regarding the defendant's voicemail message. She also filed a police report at the Bridgeview Police Department, and the Sheriff's Office was also notified of the incident. Officer McCarthy also requested that a sheriff escort her to her car as she left the building that day. As a result of the defendant's perceived threat, Officer McCarthy was no longer allowed to work at the Bridgeview Courthouse. Officer McCarthy testified that she subsequently learned that the defendant had in fact been convicted of a misdemeanor, rather than a felony.

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¶11 Following Officer McCarthy's testimony, the trial court instructed the jury on the limited purpose for which the jury may consider the defendant's other-crimes evidence under IPI 3.14:

"Ladies and gentleman, evidence has been received that the defendant has been involved in an offense other than that charged in the complaint. This evidence has been received on the issue of the circumstances surrounding the arrest of the defendant and may be considered by you for only that limited purpose. It is for you to determine whether the defendant was involved in that offense, and, if so, what weight should be given to this evidence on the issue of harassment by telephone."

Subsequently, the audio cassette tape of the defendant's voicemail message was admitted into evidence. The State then rested. The defense did not present any witness testimony and the defendant elected not to testify.

¶12 Outside the presence of the jury, the trial court then revisited the issue of jury instructions by asking if any party objected to the tendered jury instructions. Defense counsel then renewed his objection to paragraph three of IPI 3.14 pertaining to other-crimes evidence, which had already been given to the jury following Officer McCarthy's testimony. The trial court acknowledged that defense counsel had objected to the language of IPI 3.14 earlier during the start of trial that day, but ruled that it may be given to the jury over defense counsel's objection. Further, defense counsel, after consulting with the defendant, requested that the definition of "threat" under IPI 13.33F (IPI Criminal 4th No. 13.33F) be given to the jury. The trial court granted defense counsel's request to

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include IPI 13.33F, noting that the definition was "not all inclusive" because it did not contain "every possibility of threat," but that "[i]t [did] seem to be very in line" with what defense counsel had originally requested in non-IPI jury instructions. The parties then stipulated that only paragraphs 1, 2, 3, 4, 5 and 7 of IPI 13.33F should be given to the jury, and deleted the remaining paragraphs of IPI 13.33F because they were inapplicable to the facts of the case. Defense counsel also objected to a number of other proposed IPI jury instructions which are not before this court on appeal.

¶13 During closing arguments, the State asserted that "[t]his case revolves around the defendant who was on probation on a battery charge," and that the defendant's case number was originally listed as a felony. In rebuttal, the State again stated that the defendant was on probation for misdemeanor battery. Defense counsel did not object to these statements.

¶14 The trial court then instructed the jury, including the instructions contained in IPI 3.14 and IPI 13.33F. See IPI Criminal 4th No. 3.14; IPI Criminal 4th No. 13.33F.

¶15 In a sidebar conference, defense counsel made a motion for a mistrial, on the basis that the State mentioned during its closing arguments that the defendant was on probation for *battery*. In response, the State noted that the trial court had already ruled in pre-trial motions that the defendant's prior misdemeanor battery conviction could be presented for the limited purpose of placing into the context the surrounding circumstances of the defendant's arrest, motive, and dislike for Officer McCarthy. The trial court denied defense counsel's motion for a mistrial, noting that defense counsel failed to timely object to the State's reference to the defendant's battery conviction during closing arguments, and that nonetheless, it had already ruled during pre-trial proceedings that

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the State was allowed to elicit other-crimes evidence of the defendant's misdemeanor battery conviction from Officer McCarthy's testimony. The trial court further denied defense counsel's motion for a directed verdict.

¶16 Following deliberations, the jury found the defendant guilty of telephone harassment. After the verdict was announced, the defendant "stood up and began to bang his head repeatedly off defense table in front of the jury. He then began to scream out in front of the jury and use profanity in a manner of intimidating the jury. The jury was removed from the courtroom, and [the defendant] was then removed from the courtroom." Subsequently, the defendant was brought back again into the courtroom. Based on the defendant's misconduct, the trial court held the defendant in direct contempt of court, after which the defendant again used profanity and threatened the court. The trial court then held the defendant in direct contempt of court a second time, and ordered a behavioral clinical examination (BCX) to determine his fitness for sentencing.

¶17 On January 7, 2009, the defendant filed a motion for a new trial. In July 2009, a fitness hearing was held during which the trial court, based on the evaluations conducted by two psychiatrists, found the defendant fit for sentencing. On July 23, 2009, the trial court denied the defendant's motion for a new trial and sentenced the defendant to 180 days of imprisonment. The defendant's sentence was noted as "time considered served, time actually served." On that same day, July 23, 2009, the defendant filed a notice of appeal before this court.

¶18

#### ANALYSIS

¶19 We determine the following issues: (1) whether the trial court erred in instructing the jury on IPI 13.33F (IPI Criminal 4th No. 13.33F); (2) whether the trial court erroneously admitted other-

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crimes evidence and misinformed the jury on the limiting scope of the other-crimes evidence under IPI 3.14 (IPI Criminal 4th No. 3.14); and (3) whether the trial court erred in failing to give a limiting instruction to the jury, *sua sponte*, regarding the defendant's refusal to submit a DNA sample.

¶20 We first determine whether the trial court erred in instructing the jury on IPI 13.33F (IPI Criminal 4th No. 13.33F).

¶21 The defendant argues that the trial court erred in instructing the jury on the definition of "threat" under IPI 13.33F because it did not specifically distinguish between a "true threat" and constitutionally protected speech under the Constitution. Specifically, he contends that the factual question of whether the defendant intended to communicate a "true threat" or a constitutionally protected speech to Officer McCarthy was "wholly removed from the jury's consideration" because the jury was not given any guidance on the distinction between these two types of speeches. The defendant argues that had the jury been properly instructed, it could have found that his intent in calling Officer McCarthy was only to protest her request for his DNA sample, and that his remarks in the voicemail message were meant to be hyperbole, exaggeration or in jest, rather than "true threat." Further, he maintains that IPI 13.33F should not have been given to the jury because it was grossly overbroad, misleading and confusing to the jury, as well as inapplicable to the case at bar.

¶22 The State counters that the defendant has forfeited this issue for review on appeal and the plain error doctrine does not apply to circumvent forfeiture. The State contends that the trial court had no duty to instruct the jury, *sua sponte*, on the distinction between a "true threat" and constitutionally protected speech where the legislature drafted the telephone harassment statute in a way as to avoid criminalizing protected speech. The State also maintains that IPI 13.33F was not

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inapplicable to the facts of this case and points out that defense counsel had actually requested IPI 13.33F to be given to the jury at trial.

¶23 We agree with the State's contention that the defendant has forfeited this issue for review on appeal because defense counsel neither objected at trial nor presented it in the defendant's motion for a new trial. *People v. Herron*, 215 Ill. 2d 167, 175, 830 N.E.2d 467, 472-73 (2005) (a defendant who fails to either make a timely trial objection and include the issue in a posttrial motion forfeits the review of the issue). However, the plain error doctrine allows a reviewing court to consider unpreserved issues when either: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is so serious, regardless of the closeness of the evidence. *Id.* at 178-79, 830 N.E.2d at 475; *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007). The first step in a plain error analysis is to determine whether an error occurred at all. *People v. McLaurin*, 235 Ill. 2d 478, 489, 922 N.E.2d 344, 351-52 (2009); *People v. Hudson*, 228 Ill. 2d 181, 191, 886 N.E.2d 964, 971 (2008).

¶24 Under section 1-1 of the Harassing and Obscene Communications Act (Act), a person commits the offense of telephone harassment when he uses telephone communication for the purpose of "[m]aking a telephone call, whether or not conversation ensues, with intent to abuse, threaten or harass any person at the called number." 720 ILCS 135/1-1(2) (West 2008).

¶25 In the instant case, the trial court instructed the jury on the following relevant portions of the definition of "threat" under IPI 13.33F:

"The word 'threat' means a menace, however communicated,

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- (1) inflict physical harm on the person threatened or any other person or on property; or
- (2) subject any person to physical confinement or restraint; or
- (3) commit any criminal offense; or
- (4) accuse any person of a criminal offense; or
- (5) expose any person to hatred, contempt, or ridicule; or
- (6) reveal any information sought to be concealed by the person threatened." IPI Criminal 4th No. 13.33F.

¶26 We find that the trial court committed no error in instructing the jury on IPI 13.33F and in not instructing the jury, *sua sponte*, on the distinction between a "true threat" and constitutionally protected speech. First, as discussed, the record shows that defense counsel specifically requested that the trial court instruct the jury on the definition of "threat" under IPI 13.33F. The trial court granted defense counsel's request, noting that the definition was "not all inclusive" because it did not contain "every possibility of threat." The parties were then given the opportunity to delete certain portions of the definition under IPI 13.33F which were irrelevant to the facts of the case. However, the record shows that, during this discussion, defense counsel never suggested that an additional definition of the term "true threat" be included under the instruction.

¶27 Second, we reject the defendant's contention that the trial court should have instructed the jury, *sua sponte*, on the distinction between "true threat" and constitutionally protected speech. Absent substantial defects in the jury instructions, "[g]enerally, the trial court is under no obligation either to give jury instructions not requested by counsel or to rewrite instructions tendered by

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counsel." *People v. Alexander*, 408 Ill. App. 3d 994, 1001, 946 N.E.2d 469, 456 (2011), quoting *People v. Underwood*, 72 Ill. 2d 124, 129, 378 N.E.2d 513, 515 (1978). We find that, under the circumstances of this case, the trial court had no duty to instruct the jury, *sua sponte*, on an additional definition of "true threat" where defense counsel had been afforded ample opportunity to tender such a jury instruction to the trial court. Further, we find that the concerns raised by the defendant as a result of the failure to instruct the jury on the distinction between "true threat" and constitutionally protected speech are without merit. In drafting the statute at issue, the legislature was mindful of the concerns regarding infringement on protected speech, and, in order to avoid "overbreadth challenges," intended to make "the act of making the call itself the crime rather than criminalizing the caller's speech." See *People v. Jones*, 334 Ill. App. 3d 420, 423, 778 N.E.2d 234, 237 (2002). Thus, as the State correctly argues, it was unnecessary for the jury to be instructed on the distinction between "true threat" and constitutionally protected speech because the defendant was convicted of telephone harassment based on the jury's finding that the *act* of making the July 20, 2007 telephone call to Officer McCarthy was made with the intent to threaten her. Further, the jury, as the fact finder, could reasonably conclude whether the defendant intended to threaten Officer McCarthy by telephone, based on factors such as the tone of the defendant's voice on the voicemail message and the totality of the circumstances in this case. Accordingly, no substantial defects existed in IPI 13.33F as was presented to the jury in this case and the trial court had no duty to instruct the jury, *sua sponte*, on the definition of "true threat."

¶28 Nor do we accept the defendant's contention that IPI 13.33F was erroneously given to the jury because it was inapplicable to the offense of telephone harassment, on the basis that the

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committee notes under IPI 13.33F cite to section 15-5 of the Criminal Code—a statutory provision that defines the term "threat" as it relates to "Offenses Directed Against Property." See IPI, Committee Notes, Criminal 4th No. 13.33F; 720 ILCS 5/15-5 (West 2008). We find that the committee notes under IPI 13.33F do not limit the application of the definition of "threat" exclusively to sustain convictions committed under section 15-5 of the Criminal Code, and the defendant has failed to cite to any legal authority to support his contention that IPI 13.33F was inapplicable to the instant case. See IPI, Committee Notes, Criminal 4th No. 13.33F. Thus, the defendant has not shown that any error occurred at all. Therefore, the plain error doctrine does not apply to reach this forfeited issue.

¶29 We next determine whether the trial court erroneously admitted other-crimes evidence and misinformed the jury on the limiting scope of the other-crimes evidence under IPI 3.14.

¶30 The defendant argues that the trial court erred in admitting other-crimes evidence that he had originally been charged with a felony and ultimately convicted of misdemeanor battery. Specifically, he contends that this other-crimes evidence was irrelevant to establish the circumstances surrounding his arrest because his arrest was not at issue in the case at bar. He maintains that while the limited evidence that he was on probation for a misdemeanor offense was arguably admissible "insofar as it was intertwined with and integral to the incident at issue," the nature of the conviction itself—*battery*—was irrelevant to explain the circumstances in the instant case. The defendant further argues that the jury should not have been allowed to hear evidence that he was originally charged with a felony, because, in explaining the July 20, 2007 incident, Officer McCarthy could simply have testified that she had mistakenly believed that the defendant was

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convicted of a felony.

¶31 The State counters that the defendant has forfeited this issue for review on appeal and that the plain error doctrine is inapplicable to bypass forfeiture. The State posits that Officer McCarthy's testimony regarding her mistaken belief that the defendant had previously been convicted of a felony was properly admitted because it was intertwined with the offense charged. Moreover, the State points out that the probative value of Officer McCarthy's testimony was not substantially outweighed by any prejudice because she never specifically testified to the nature of the defendant's misdemeanor.

¶32 We agree with the State's contention that the defendant has forfeited this issue on appeal. Although the defendant objected to the admissibility of other-crimes evidence at trial, he failed to preserve this issue in his motion for a new trial. See *Herron*, 215 Ill. 2d at 175, 830 N.E.2d at 472-73. As discussed, in determining whether the plain error doctrine applies to reach the forfeited issue, we must first determine whether an error occurred at all. *Hudson*, 228 Ill. 2d at 191, 886 N.E.2d at 971.

¶33 Other-crimes evidence may not be admitted at trial for the purpose of demonstrating the defendant's propensity to commit crimes. *People v. Adkins*, 239 Ill. 2d 1, 22-23, 940 N.E.2d 11, 24 (2010). However, other-crimes evidence is admissible "if relevant for any purpose other than to show a defendant's propensity to commit crimes." *People v. Dabbs*, 239 Ill. 2d 277, 283, 940 N.E.2d 1088, 1093 (2010). Such evidence may also be admissible if it is "part of a continuing narrative of the event giving rise to the offense, or, in other words, intertwined with the offense charged." *People v. Thompson*, 359 Ill. App. 3d 947, 951, 835 N.E.2d 933, 936 (2005). "Even if relevant to

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a purpose other than showing the mere propensity to commit crime, evidence of other crimes may be excluded if its probative value is outweighed by its prejudicial effect." *Adkins*, 239 Ill. 2d at 23, 940 N.E.2d at 24. Admissibility of evidence at trial is a matter within the sound discretion of the trial court. *Id.*

¶34 In the case at bar, the record shows that over defense counsel's objection at the start of the second day of trial, the trial court ruled that evidence of the defendant's prior conviction of misdemeanor battery was allowed for the relevant purpose that it showed why the defendant was scheduled to meet with Officer McCarthy and the circumstances surrounding his arrest in the instant case. The trial court stated that Officer McCarthy would be permitted to testify that she mistakenly believed that the defendant was convicted of a felony, that the defendant was on probation for misdemeanor battery, but that the State was barred from introducing any evidence regarding the specific facts of the defendant's misdemeanor battery conviction.

¶35 We find that the trial court did not err in admitting other-crimes evidence. Officer McCarthy's testimony that the defendant was convicted of a misdemeanor, but that she mistakenly believed that he had been convicted of a felony, was intertwined with the offense of telephone harassment because it placed into context the circumstances which led the defendant to leave the voicemail message at issue. Although Officer McCarthy explained the reasoning behind her mistake—namely, that she saw the criminal felony designation of "CF" on the case number assigned to his prior conviction—the probative value of such testimony was not outweighed by its prejudicial effect where the jury heard evidence from Officer McCarthy and the audio cassette tape of the voicemail message that the defendant had in fact been convicted of a misdemeanor. Moreover,

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although the scope of the trial court's pre-trial ruling permitted the admission of evidence that the defendant was on probation for *misdemeanor battery*, Officer McCarthy never testified to the nature of his conviction. Rather, she only testified that the defendant had been convicted of a misdemeanor. While the State remarked in its closing argument and rebuttal that the defendant was "on probation on a battery charge," we find that the trial court properly instructed the jury that closing arguments were not evidence and that "[a]ny statement or argument made by the attorneys which [was] not based on the evidence should be disregarded." Further, in weighing the probative value of the other-crimes evidence against its prejudicial value, the trial court properly barred the State from introducing any evidence regarding the specific facts of the defendant's misdemeanor battery conviction. There is nothing in the record to show that any evidence regarding the specific details of the defendant's misdemeanor battery conviction was introduced at trial. Thus, we find that the defendant has not established that any error occurred. Accordingly, the plain error doctrine does not apply to reach this forfeited issue.

¶36 Nevertheless, the defendant argues that the trial court committed error because it misinformed the jury on the limiting scope of the other-crimes evidence under IPI 3.14. He specifically states that the content of paragraph 3 of IPI 3.14 was erroneous because it was not given to the jury in accordance with the express directives of the committee notes.

¶37 The State argues that the defendant has forfeited review of this issue on appeal and that the plain error doctrine is inapplicable to circumvent forfeiture. The State maintains that no error occurred in the trial court's instructions to the jury under IPI 3.14, and that the defendant was not prejudiced by any alleged error.

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¶38 We find that the defendant has forfeited this issue for review on appeal. Defense counsel objected to paragraph 3 of IPI 3.14 at trial, but failed to raise this issue with any specificity in the written motion for a new trial. See 725 ILCS 5/116-1 (West 2008) ("motion for new trial shall specify the grounds therefor"); *Brown v. Decatur Memorial Hospital*, 83 Ill. 2d 344, 349, 415 N.E.2d 337, 339 (1980) (issue concerning jury instructions was forfeited when the defendant's posttrial motion lacked the specific grounds upon which the alleged errors were based); *Micklos v. Highsmith*, 149 Ill. App. 3d 779, 788, 500 N.E.2d 1154, 1160 (1986) (same). In the motion for a new trial, the defendant generically stated that "[t]he court erred in giving instructions on behalf of the State over the defendant's objection," without specifying the grounds on which he was objecting nor which specific jury instructions he opposed. Further, at the hearing on the motion for a new trial, the State objected by noting that the defendant's written motion for a new trial should be stricken for "lack of specificity." See generally *People v. Schrems*, 224 Ill. App. 3d 988, 994, 586 N.E.2d 1337, 1342 (1992) (oral posttrial motions may not preserve issues for review on appeal where the State objects to such oral motions). Thus, the defendant has forfeited this issue for review on appeal. As discussed, in determining whether the plain error doctrine applies to reach the forfeited issue, we must first determine whether an error occurred at all. *Hudson*, 228 Ill. 2d at 191, 886 N.E.2d at 971.

¶39 IPI 3.14 pertains to the admission of other-crimes evidence and provides as follows:

"3.14 Proof of Other Offenses or Conduct

[1] Evidence has been received that the defendant[s] [(has)

(have)] been involved in [(an offense) (offenses) (conduct)] other than

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[(*that*) (*those*)] charged in the [(*indictment*) (*information*) (*complaint*)].

[2] This evidence has been received on the issue[s] of the [(*defendant's*) (*defendants'*)] \*\*\* [(\_\_\_\_\_)] and may be considered by you only for that limited purpose.

[3] It is for you to determine [whether the defendant[s] [(*was*) (*were*)] involved in [(*that*) (*those*)] [(*offense*) (*offenses*) (*conduct*)] and, if so,] what weight should be given to this evidence on the issue[s] of \_\_\_\_\_." IPI Criminal 4th No. 3.14.

¶40 The committee notes under IPI 3.14 expressly state that the issue for which the other-crimes evidence was admitted "*must* be the same issue(s) in both paragraph [2] and paragraph [3]," and direct the court to "insert in the blank in paragraph [3] whatever issue(s) that appear in paragraph [2]." (Emphasis in original.) IPI, Committee Notes, Criminal 4th No. 3.14. Further, the committee notes provide that "[w]hen the defense concedes that the defendant performed the conduct or committed the offense that is the subject of this instruction, *the bracketed portion of paragraph [3] should not be given.*" (Emphasis in original.) IPI, Committee Notes, Criminal 4th No. 3.14.

¶41 At trial, the trial court instructed the jury under IPI 3.14 as follows:

"[E]vidence has been received that the defendant has been involved in an offense other than that charged in the complaint. This evidence has been received on *the issue of the circumstances surrounding the arrest of the defendant* and may be considered by

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you for only that limited purpose. It is for you to decide whether the defendant was involved in that offense, and, if so, what weight should be given to this evidence on *the issue of harassment by telephone.*" (Emphases added.)

¶42 We find error in the jury instruction given by the trial court under IPI 3.14 because the trial court failed to instruct the jury on the same "issue" under paragraphs 2 and 3, as required by the committee notes under IPI 3.14. Likewise, because the defendant does not dispute his prior misdemeanor battery conviction, the trial court should have omitted the bracketed material in paragraph 3 of IPI 3.14. Thus, the defendant has established that an error occurred.

¶43 However, despite the trial court's error, we find that the plain error doctrine does not apply to reach this forfeited issue. First, evidence of the defendant's guilt was overwhelming, which included an audio recording of the July 20, 2007 voicemail message at issue. In the voicemail message, the defendant asserted that he would follow Officer McCarthy out of the building, catch her, tie her hands, and take her to another location. Officer McCarthy also testified that upon her request for a DNA sample, the defendant refused, "stood up very strongly" and "stormed out." The jury, in listening to the audio recording, was also able to reasonably conclude by the tone of the defendant's voice and the content of his message that he intended to threaten Officer McCarthy at the time he telephoned her. Officer McCarthy also noted that she felt threatened when she heard the defendant's voicemail message because her previous interactions with the defendant were "quite threatening." Thus, we find that the defendant has not met his burden to show that the evidence in this case was closely balanced.

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¶44 Second, prior to deliberations, the jury had been instructed by the trial court, *inter alia*, on the elements necessary to sustain the charge of telephone harassment, the defendant's presumption of innocence, and the State's burden of proof. While paragraph [3] of IPI 3.14 did not conform to the requirements of its committee notes as discussed, the trial court instructed the jury twice on paragraph [2] of IPI 3.14, which expressly stated that the other-crimes evidence "had been received on the issue of the circumstances surrounding the arrest of the defendant and may be considered by you for only that limited purpose." The jury instructions, considered as a whole, "fully and fairly announce[d] the law applicable to the theories of the State and the defense." See *People v. Cook*, 2011 IL App (4th) 090875, ¶ 27. We find that regardless of the stated error in paragraph [3] of IPI 3.14, it could reasonably be concluded that the jury, after being properly instructed on the elements of the offense of telephone harassment, found the defendant guilty based on hearing the audio recording of the defendant's words and tone of voice in the July 20, 2007 voicemail message. It could not reasonably be concluded that the jury, upon being instructed by IPI 3.14 as a whole, convicted the defendant of telephone harassment by the improper reason that his misdemeanor battery conviction indicated a propensity to commit crimes. We decline to engage in such speculation. See *People v. Snowden*, \_\_\_ Ill. App. 3d \_\_\_, \_\_\_, \_\_\_, N.E.2d \_\_\_, \_\_\_ (2011), quoting *Herron*, 215 Ill. 2d at 187-88, 830 N.E.2d at 480 ("[j]ury instructions should not be misleading or confusing, but their correctness depends upon not whether or not defense counsel can imagine a problematic meaning, but whether ordinary persons acting as jurors would fail to understand them"). Accordingly, we find that the trial court's error was not so serious as to deprive the defendant of a substantial right or a fair trial. *Snowden*, \_\_\_ Ill. App. 3d at \_\_\_, \_\_\_ N.E.2d at

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\_\_\_ (a jury instruction only rises to the level of plain error only when it creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law). Therefore, the plain error doctrine does not apply to reach the forfeited issue.

¶45 We next determine whether the trial court erred in failing to give a limiting instruction to the jury, *sua sponte*, regarding the defendant's refusal to submit a DNA sample.

¶46 The defendant argues that the trial court committed prejudicial error in failing to give a *sua sponte* limiting instruction to the jury that it may not infer the defendant's guilt simply because evidence was presented at trial that he refused to submit to Officer McCarthy's request for a DNA sample. Absent such a limiting instruction, he maintains, the jury could have determined to convict him "simply on the basis that he was a bad person and guilty of other specified crimes." The defendant posits that under this scenario, he would effectively be penalized for exercising his fourth amendment right against unreasonable search and seizure.

¶47 The State counters that the defendant has forfeited this issue for review on appeal and that the plain error doctrine is inapplicable to reach this forfeited issue. The State argues that the trial court had no *sua sponte* duty to instruct the jury that it could not consider the defendant's refusal to submit to DNA testing as a basis in determining his guilt or innocence on the offense of telephone harassment.

¶48 We find that the defendant has also forfeited this issue for review on appeal because he failed to tender a proposed limiting jury instruction at trial nor included this issue in the motion for a new trial. See *Herron*, 215 Ill. 2d at 175, 830 N.E.2d at 472-73.

¶49 As discussed, absent substantial defects in the jury instructions, a trial court is under no

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obligation to give jury instructions not requested by counsel. *Alexander*, 408 Ill. App. 3d at 1001, 946 N.E.2d at 456. Based on our review of the record, we cannot reasonably conclude that the jury found the defendant guilty of telephone harassment in the absence of a limiting instruction prohibiting the jury to use evidence of the defendant's refusal to submit to DNA testing as a factor in determining guilt. As discussed, the record shows that the jury was properly informed on all the elements necessary to sustain a conviction for telephone harassment, the jury heard evidence that the defendant refused DNA testing because he was not convicted of a felony, and the jury heard an audiotape of the voicemail message at issue—from which it could easily have inferred the defendant's guilt. Thus, the trial court had no *sua sponte* duty in this case to give a limiting jury instruction regarding the defendant's refusal to submit a DNA sample, and we decline to place such an onerous burden on the trial court given the lack of an objection by the defense. See *People v. Peoples*, 377 Ill. App. 3d 978, 987-88, 880 N.E.2d 598, 606 (2007). Therefore, the defendant has not established that an error occurred at all and the plain error doctrine is inapplicable to reach this forfeited issue. See *Hudson*, 228 Ill. 2d at 191, 886 N.E.2d at 971. Accordingly, because we find no plain errors or prejudice to the defendant's right to a fair trial, his contention that the cumulative errors in this case warrant reversal necessarily fails as well.

¶50 In the alternative, the defendant argues he was denied effective assistance of counsel because defense counsel failed to object and properly preserve the issues he raised on appeal.

¶51 To prevail on a claim of ineffective assistance of counsel, the defendant: (1) must prove that the attorney's performance fell below an objective standard of reasonableness so as to deprive him of the right to counsel under the sixth amendment (performance prong); and (2) that this substandard

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performance resulted in prejudice (prejudice prong). *Strickland v. Washington*, 466 U.S. 668, 687-94, 104 S. Ct. 2052, 2064-68 (1984). To prove prejudice, the defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *People v. King*, 316 Ill. App. 3d 901, 913, 738 N.E.2d 556, 566 (2000). A reasonable probability is one that sufficiently undermines confidence in the outcome. *Id.*, 738 N.E.2d at 566. The defendant must satisfy both prongs to prevail on his claim of ineffective assistance of counsel. However, a reviewing court may analyze the facts of the case under either prong first, and, if it deems that the standard for that prong is not satisfied, it need not consider the other prong. *People v. Irvine*, 379 Ill. App. 3d 116, 129-30, 882 N.E.2d 1124, 1136-37 (2008).

¶52 As discussed, the evidence of the defendant's guilt in this case was overwhelming, and thus, the defendant cannot show there was a reasonable probability that the outcome of the trial would have been different but for defense counsel's failure to make the alleged objections and preserve the issues for appellate review in the motion for a new trial. Thus, the defendant's claim for ineffective assistance of counsel must fail.

¶53 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶54 Affirmed.